

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Laurens County
Frank R. Addy, Circuit Court Judge

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S.C. Supreme Court

DONALD WETHERALL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)

IN THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT
05-GS-30-166

STATE OF SOUTH CAROLINA)
PLAINTIFF,)

TRANSCRIPT OF RECORD

vs)

DONALD WEATHERALL,)
DEFENDANT.)

SEPTEMBER 12, 13, 14, 2006
LAURENS, SOUTH CAROLINA

B E F O R E: THE HONORABLE CORDELL MADDOX

APPEARANCES:

FOR THE PLAINTIFF

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FOR THE DEFENSE

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***JURY SELECTION - MONDAY, SEPTEMBER 11, 2006**

I HAD A SICK DAY ON THIS DAY. ANOTHER COURT REPORTER COVERED THE JURY QUALIFICATION AND SELECTION.

1 TUESDAY, SEPTEMBER 12, 2006

2 THE COURT: THANKS. SORRY TO MAKE Y'ALL WAIT. ALL RIGHT.
3 EVERYBODY READY?

4 MR. FLEMING: STATE'S READY, YOUR HONOR.

5 MR. HOWE: YES, YOUR HONOR.

6 THE COURT: WE HAVE ANY MOTIONS WE NEED TO DO BEFORE THE
7 JURY COMES IN? YES, SIR.

8 MR. HOWE: THANK YOU, YOUR HONOR. IF IT PLEASE THE COURT, FIRST
9 OF ALL, JUDGE, I'D ASK THAT WE COVER THE ISSUE OF THE JUROR.

10 THE COURT: RIGHT.

11 MR. HOWE: AND JUDGE, JUST THINKING ABOUT THAT, I DIDN'T RETURN
12 THE JUROR'S PHONE CALL. I DON'T WANT TO OFFEND ANYBODY, I AM JUST
13 WONDERING, YOUR HONOR, HAVING DISCUSSED THAT ISSUE, AND AGAIN, I
14 WILL PUT THIS ON THE RECORD. YESTERDAY MY OFFICE RECEIVED A PHONE
15 CALL FROM A JUROR, WHO I KNOW, AND I THINK MR. FLEMING INDICATES HE
16 KNOWS AS WELL —

17 THE COURT: RIGHT.

18 MR. HOWE: — WANTING TO KNOW IF I THOUGHT THAT THE CASE
19 WOULD BE PROCEEDING FRIDAY, BECAUSE THIS PARTICULAR JUROR HAD
20 SOME TICKETS TO SOMETHING AND WANTED TO KNOW IF THE JUROR
21 NEEDED TO GIVE HIS TICKETS UP. OBVIOUSLY, I DIDN'T RETURN THE PHONE
22 CALL. IN FACT, I WAS NOT IN THE OFFICE, I WAS AT HOME AWAY FROM THE
23 TELEPHONE PREPARING FOR THIS CASE AND I WANTED TO CALL THAT TO
24 THE ATTENTION OF THE COURT. I DIDN'T — I OBVIOUSLY DIDN'T RETURN THE
25 PHONE CALL. I'M JUST WONDERING JUDGE — I UNDERSTAND MR. FLEMING

1 DOESN'T OPPOSE KEEPING THIS JUROR ON AND I DON'T EITHER. AND I HAVE
2 DISCUSSED THIS WITH MY CLIENT. BUT, I'M JUST WONDERING, JUDGE, IF
3 THERE IS ANYTHING YOU NEED TO -- THAT WE NEED TO ADDRESS WITH THE
4 JUROR. I DON'T WANT TO FEEL LIKE I TATTLE-TAILED ON THE JUROR AND
5 TRIED TO GET HER IN TROUBLE, BUT AT THE SAME TIME -- I DON'T WANT TO
6 OFFEND THE JUROR, HAVING NOT RETURNED THE PHONE CALL--

7 THE COURT: SURE.

8 MR. HOWE: -- AND YOU KNOW WHAT I AM SAYING. AND IF THE COURT
9 -- JUDGE, IN YOUR WISDOM, IF YOU CAN FIGURE OUT A WAY TO HANDLE
10 THAT, I WOULD APPRECIATE IT. I WAS THINKING MAYBE JUST A BRIEF
11 DISCUSSION WITH THAT JUROR TO LET HER KNOW THAT I FELT OBLIGATED
12 TO DO THAT. I'M JUST WONDERING IF THAT NEEDS TO BE DONE.

13 THE COURT: LET ME TELL YOU, IF MR FLEMING DIDN'T OBJECT, I
14 WOULD HAVE KICKED HER. I MEAN, I THINK CONTACTING A LAWYER IS JUST
15 IMPROPER. THE PROBLEM I'VE GOT WITH SINGLING HER OUT, AND I THINK I
16 HAVE TO DO SOMETHING -- IS THEN IMMEDIATELY SHE'S TAINTED, I THINK.
17 ANYTIME YOU PULL ONE OUT -- I THINK YOU ALMOST HAVE TO DO IT BECAUSE
18 SHE HAS CONTACTED YOU DIRECTLY.

19 MR. HOWE: WELL JUDGE, JUST AGAIN, TALKING WITH MY CLIENT, I'M
20 GOING TO ASK ON MY MOTION THAT THIS JUROR NOT SERVE ON THIS CASE
21 AND WE GO TO THE FIRST ALTERNATE.

22 THE COURT: ARE YOU GOING TO OBJECT TO THAT?

23 MR. FLEMING: YES, SIR, WE WOULD. I MEAN, THERE'S NOTHING TO
24 SHOW THAT SHE IS TAINTED, IN ANY WAY, AT THIS POINT IN TIME. I MEAN,
25 JUST BECAUSE SHE NEVER RECEIVED A RETURN PHONE CALL FROM MR.

1 HOWE, I DON'T THINK THAT IS TAINTING THAT JUROR. I DON'T THINK SHE IS
2 GOING TO HOLD ANY GRUDGES AS A RESULT OF THAT.

3 THE COURT: WELL, LET ME TELL YOU WHAT I AM GOING TO DO - AND I
4 UNDERSTAND WHY Y'ALL WOULD WANT HER TO STAY. I AM GOING TO KICK
5 HER. I HAVE BENT OVER BACKWARDS TRYING TO MAKE SURE THERE'S NOT A
6 PROBLEM AND I SURE AS HECK DON'T WANT A PROBLEM BEFORE WE START.
7 IT REALLY KIND OF TICKS ME OFF THAT SHE CONTACTED YOU. TO BE
8 HONEST WITH YOU, I WATCHED HER YESTERDAY. SHE WAS IRRITATED THAT
9 SHE WAS ON THERE WHICH, AGAIN, TICKS ME OFF AND I THINK CONTACTING
10 A LAWYER ABOUT THE LENGTH OF THE TRIAL PUTS US ALL IN A BAD
11 SITUATION. SO, I UNDERSTAND YOUR OBJECTION, BUT I AM GOING TO KICK
12 HER AND PUT IN THE FIRST ALTERNATE. WHO WOULD THE FIRST ALTERNATE
13 BE?

14 CLERK OF COURT: WALTER T. SIMMONS.

15 THE COURT: WALTER SIMMONS?

16 CLERK OF COURT: WALTER T. SIMMONS.

17 THE COURT: WALTER T. SIMMONS.

18 CLERK OF COURT: YES.

19 THE COURT: MS. PEAY, WHAT'S HER LAST NAME?

20 CLERK OF COURT: P-E-A-Y.

21 THE COURT: P-E-A-Y. P?

22 CLERK OF COURT: YES.

23 THE COURT: ALL RIGHT, TELL YOU WHAT. WOULD YOU BRING MS.
24 PEAY IN HERE, PLEASE. DONNA PEAY.

25 (BAILIFF BRINGS MS. PEAY INTO THE COURTROOM.)

1 (BRIEF BENCH CONFERENCE OFF THE RECORD)

2 THE COURT: GOOD MORNING. HOW ARE YOU?

3 JUROR: FINE, THANKS.

4 THE COURT: MS. PEAY, LET ME TELL YOU SOMETHING. I UNDERSTAND
5 YOU MAY KNOW THE DEFENSE LAWYER AND ALSO THE SOLICITOR IN THIS
6 CASE.

7 JUROR: I AM ACQUAINTED WITH BOTH, YES.

8 THE COURT: OKAY. ALL RIGHT. WHAT I AM GOING TO DO, AND ALSO I
9 UNDERSTAND -- THE PROBLEM WAS, I THINK THERE WAS A PHONE CALL
10 MADE YESTERDAY ABOUT THE SCHEDULING OF THIS.

11 JUROR: OH, YEAH, GOSH, YEAH.

12 THE COURT: AND LISTEN THERE IS NOT A PROBLEM. WHAT WE'RE
13 DOING IS, WE ARE BENDING OVER BACKWARDS TO MAKE SURE THERE IS NOT
14 A PROBLEM.

15 JUROR: OH, YEAH, I APOLOGIZE. I HAD NO IDEA THAT WOULD BE
16 INAPPROPRIATE.

17 THE COURT: AND IT'S NOT. WHAT'S HAPPENED IS, THE ATTORNEYS
18 HAVE DONE THE RIGHT THING, THEY'VE JUST BROUGHT IT TO MY ATTENTION,
19 BECAUSE THAT'S THE KIND OF THING THAT NEEDS TO BE BROUGHT. WHAT
20 I'M GOING TO DO -- I UNDERSTAND THAT YOU HAVE SOMETHING FRIDAY.

21 JUROR: I DO. YES

22 THE COURT: OKAY. I AM GOING TO GO AHEAD AND LET YOU OFF THIS
23 JURY SO WE DON'T HAVE THAT PROBLEM, AND ALSO, JUST TO AVOID ANY
24 PROBLEM. THERE IS NO ALLEGATION THAT YOU HAVE DONE ANYTHING
25 WRONG. THE LAWYERS SORT OF FEEL BAD BECAUSE THEY ARE BRINGING

1 THIS UP, BUT THEY BOTH KNOW YOU, AND I THINK TO SOLVE ANY POTENTIAL
2 PROBLEM, THEN, WITH YOUR SCHEDULE, I AM GOING TO GO AHEAD AND LET
3 YOU OFF.

4 JUROR: I APOLOGIZE IF I HAVE CAUSED A PROBLEM.

5 THE COURT: YOU HAVE NOT. YOU HAVE NOT.

6 JUROR: OKAY. THANK YOU.

7 THE COURT: ALL RIGHT. THANKS.

8 MR. HOWE: THANK YOU, JUDGE.

9 THE COURT: THANK YOU. I WAS TRYING TO BE NICE.

10 THE COURT: YES, SIR.

11 MR. HOWE: THE NEXT ISSUE JUDGE, WOULD BE THE MOTION TO
12 DISMISS THAT'S BEEN FILED ON THIS CASE. I HAVE HANDED IT TO YOUR
13 CLERK, THE ORIGINAL OF THAT MOTION, AND JUDGE I WOULD LIKE TO BE
14 HEARD ON THAT. AND MR. WEATHERALL JUST INDICATED TO ME, WHEN I
15 WENT BACK TO SPEAK TO HIM EARLIER, THAT HE WOULD LIKE TO BE HEARD
16 ON THAT ISSUE AS WELL. I HAVE CAUTIONED HIM ABOUT NOT SAYING
17 ANYTHING IMPROPER, BUT HE WANTS TO BE HEARD ON THAT AS WELL. AND
18 IF THE COURT WOULD ALLOW THAT TO HAPPEN, I WOULD APPRECIATE IT.

19 THE COURT: ON WHAT ISSUE?

20 MR. HOWE: THIS IS ON THE MOTION TO DISMISS.

21 THE COURT: OKAY.

22 MR. HOWE: AND JUDGE I HAVE HANDED UP THAT MOTION, AND
23 BASICALLY, IF I COULD KIND OF SUMMARIZE WHERE WE ARE WITH THIS
24 THING. JUDGE, MR. WEATHERALL WAS ARRESTED ON JUNE 25, 2004. I
25 STRUCK THROUGH DECEMBER 7th BECAUSE THAT'S ACTUALLY, WHEN HE

1 ACTUALLY GOT BROUGHT TO LAURENS COUNTY. THE COURT'S AWARE,
2 THROUGH PRE-TRIAL DISCUSSIONS THAT HE WAS ACTUALLY ARRESTED ON A
3 LEWD ACT CHARGE IN MCCORMICK COUNTY ON JUNE THE 24th AND JUNE
4 25th, 2004 AND HE STAYED DOWN THERE UNTIL DECEMBER OF 2004. JUDGE,
5 AFTER -- HE'S BEEN IN JAIL CONTINUOUSLY SINCE JUNE OF 2004 AND THE
6 HEARING WAS HELD BEFORE JUDGE JOHNSON ON OCTOBER 27th OF 2005.
7 WE HAD MADE A MOTION FOR A SPEEDY TRIAL, WHICH THE COURT DENIED.
8 YOU'VE GOT A COPY OF JUDGE JOHNSON'S ORDER AND ONE OF THE ISSUES
9 ABOUT THE SPEEDY TRIAL WAS THAT -- AT THAT TIME THE STATE WAS
10 REPRESENTED BY ASSISTANT SOLICITOR FRANK YOUNG, I BELIEVE, AND MR.
11 YOUNG INDICATED TO THE COURT THAT THE ISSUE WAS WHETHER
12 MCCORMICK OR LAURENS, THE MCCORMICK CASE OR THE LAURENS CASE,
13 WOULD BE TRIED FIRST. INDICATIONS WERE -- THE MCCORMICK CASE WAS --
14 KIND OF THE PLAN WAS, TO TRY THAT FIRST. WELL, JUDGE JOHNSON
15 DENIED THE SPEEDY TRIAL MOTION IN ORDER THAT, ON OR BEFORE
16 NOVEMBER 18th OF 2005, THAT THE 8th CIRCUIT SOLICITORS OFFICE WOULD
17 NOTIFY ME AS TO WHETHER THE MCCORMICK CHARGE OR THE LAURENS
18 CHARGE WOULD BE DISPOSED OF FIRST, AND THAT WAS NOT DONE, QUITE
19 FRANKLY, YOUR HONOR, AND I THINK NO ONE WILL DISPUTE THE FACT THAT
20 THAT WAS NOT, IN FACT, DONE. WE WERE LATER BEFORE THE COURT IN
21 MARCH OF 2006 AND AT THAT TIME, YOUR HONOR, MY CLIENT CONSENTED
22 TO THE TAKING OF BLOOD, HAIR, AND BODILY FLUID SAMPLES FOR THE
23 PURPOSES OF DNA COMPARISONS AND IT WAS ALSO STATED AT THAT TIME
24 THAT THE CHILD, THE CHIEF PROSECUTION WITNESS IN THIS CASE, THE
25 CHILD, HAD BEEN DIAGNOSED TO HAVE HERPES SIMPLEX II AND IT WAS MY

1 UNDERSTANDING THAT MR. HAMMETT ACTUALLY FILED THAT MOTION AND
 2 STATED THAT WAS WHAT THEY WERE LOOKING FOR, AS I UNDERSTAND IT.
 3 THE DNA INFORMATION WAS FINALLY, YOUR HONOR, SECURED, IF YOU WILL.
 4 TESTS WERE ACTUALLY COMPLETED ON TWO ITEMS OF EVIDENCE THAT LAW
 5 ENFORCEMENT HAD IN ITS POSSESSION AND WE HAVE ATTACHED THE
 6 RESULTS OF THAT SLED DNA ATTEMPT TO DO DNA COMPARISON, DATED
 7 AUGUST 9, 2006, IT'S ATTACHED, AND INDICATED NO HAIR FOUND, NO SEMEN
 8 DETECTED ON THE TWO ITEMS THAT WERE TESTED. WELL, JUDGE WE FELT
 9 ALL ALONG FROM THE DEFENSIVE STANDPOINT, THAT WE WANTED THAT
 10 TESTING. AND WE DIDN'T HAVE ANY PROBLEM WITH THE HERPES TESTING
 11 AS WELL. WHAT HAPPENED, JUDGE, WAS THAT AS A RESULT OF THAT
 12 TESTING, I TALKED WITH MR. FLEMING AND THEN LEARNED FOR THE FIRST
 13 TIME, THAT THOSE ITEMS THAT WERE SEIZED AND TESTED, THE STATE IS
 14 NOW CONTENDING THAT THOSE WERE NOT, IN FACT, THE - ONE WAS A
 15 SLEEPING BAG, KIND OF A SLEEPING BAG/BLANKET-TYPE THING, SPONGE
 16 BOB WAS THE NAME OF IT, AND THAT THE PINK NIGHTSHIRT WERE NOT, IN
 17 FACT, APPARENTLY THE ITEMS, OR AT LEAST THE SPONGE BOB BLANKET
 18 WAS NOT SOMETHING THE CHILD HAD AT THE TIME OF THIS ALLEGED
 19 INCIDENT. AND WE LEARNED THAT FOR THE FIRST TIME. NOW, I REALIZE
 20 JUDGE, THAT A SPEEDY TRIAL MOTION - YOU HAVE TO FIGURE OUT SOME
 21 WAY - THAT THERE HAS GOT TO BE SOME KIND OF UNDUE PREJUDICE BY
 22 THE DELAY AND I UNDERSTAND THE CASE LAW SAYS JUST SIMPLY A LAPSE
 23 OF TIME WITHOUT SHOWING ANY KIND OF PREJUDICE IS NOT ANY GROUNDS
 24 FOR DUE DILIGENCE, AND THAT IS TO DISMISS THE CASE. I REALIZE,
 25 USUALLY WHAT HAPPENS, IN MY EXPERIENCE, IS THAT COURTS - IF THE

MO
Chair
of CV 11/15

1 STATE DOES NOT PROCEED WITH A SPEEDY TRIAL MOTION OR IF THE COURT
2 FEELS IT IS APPROPRIATE, LOTS OF TIMES BOND, THE MATTER OF BOND IS
3 ADDRESSED AND THAT OLD CODE SECTION THAT I HAVE CITED IN HERE
4 EVEN STATES ABOUT, YOU KNOW, THE DEFENDANT BEING RELEASED. WHEN
5 WE HAD THE ISSUE BEFORE JUDGE BARBER ON THE DNA, FOR THAT
6 CONSENT ORDER, HE – THERE HAS NEVER ACTUALLY BEEN A WRITTEN
7 ORDER ISSUED, BUT AS I RECALL, JUDGE BARBER SAID, "WELL IF THEY
8 DON'T TRY THE CASE WITHIN 120 DAYS, THEN HIS BOND WILL BE \$250,000.00,"
9 WHICH IS VIRTUALLY NO BOND FOR MR. WEATHERALL. SO IN THIS CASE,
10 JUDGE, THOUGH, I'M SAYING THAT THE ONLY APPROPRIATE RELIEF IS TO
11 DISMISS THE CASE, BECAUSE HERE IS THE PREJUDICE THAT I WOULD
12 CONTEND THAT MR. WEATHERALL HAS SUFFERED: JUNE 25 OF 2004, THE
13 STATE, PURSUANT TO A SEARCH WARRANT, WENT TO THE HOUSE WHERE
14 THE CHILD HAD BEEN LIVING, WHERE THE INCIDENT IS ALLEGED TO HAVE
15 HAPPENED AND SEIZED A BUNCH OF STUFF, CLOTHING ET CETERA, AND THE
16 SEARCH WARRANT, YOUR HONOR – WE CAN PROVIDE THE COURT WITH A
17 COPY OF THE SEARCH WARRANT IF IT IS NOT A PART OF THE PACKET ON MY
18 MOTION – THE STATE HAS HAD THAT STUFF, AND IN FACT, I UNDERSTAND IN
19 TALKING WITH MR. FLEMING THAT THEY'VE GOT IT BACK THERE AND NOW
20 THEY ARE STILL REVIEWING NEW ITEMS, IF YOU WILL, OR LOOKING AT
21 THINGS, ALTHOUGH THEY HAVE HAD IT SINCE JUNE 25 OF 2004. WELL JUDGE,
22 IF THE ITEMS IN QUESTION HAD BEEN PROPERLY LOOKED AT AND TESTED
23 WAY BACK THEN, BACK IN JUNE 2004, IF THAT HAD BEEN DONE, IT MAY VERY
24 WELL HAVE ACTUALLY ESTABLISHED THAT THERE WAS NO HAIR NOR SEMEN,
25 AS THE REPORT THE SLED AGENT – THAT THE SLED DNA EXPERT DID –

1 SHOWED, MAY VERY WELL SHOW THAT THERE WAS NOTHING AND NO
2 PHYSICAL EVIDENCE, MAY VERY WELL HAVE CLEARED MR. WEATHERALL
3 OUTRIGHT. NOW, HERE IS THE PROBLEM, IS THAT BECAUSE THIS CASE
4 WASN'T BEING PUSHED FOR TRIAL, THERE WAS NO URGENCY TO GET THESE
5 MATTERS TESTED, ALTHOUGH THEY'VE HAD IT, AGAIN, SINCE JUNE OF 04.
6 BECAUSE WE ALL, I MEAN, I THINK I CAN STATE TO THE COURT THAT IN MY
7 EXPERIENCE, MANY TIMES, UNTIL YOU GET A SOLICITOR WORKING ON THE
8 CASE, PREPARING IT FOR TRIAL, THINGS DON'T GET DONE. FOR INSTANCE,
9 WE DIDN'T GET THE DNA RESULTS THAT WE RECEIVED UNTIL AUGUST OF
10 2006, AFTER – AT THAT POINT IN TIME, MR FLEMING AND I KNEW THIS CASE
11 WAS GOING TO BE PRESENTED FOR TRIAL THIS TERM OF COURT AND I
12 WOULD CONTEND THAT THAT, IN AND OF ITSELF, IS PREJUDICIAL AND THERE
13 IS NO WAY YOU CAN TURN BACK THE CLOCK AND DO ANYTHING ABOUT THAT
14 APPARENTLY, THAT I KNOW OF, OTHER THAN TO DELAY THE TRIAL AND
15 START TESTING EVERYTHING ELSE. AND THERE AGAIN, JUDGE, THIS IS AN
16 UNUSUAL REMEDY, BUT YOU KNOW I CITED A CASE, STATE versus LEE,
17 WHICH WAS A PRE- INDICTMENT CASE, WHERE THE COURT OF APPEALS
18 CONCLUDED THAT A SPEEDY TRIAL MOTION WOULD HAVE BEEN PROPER..
19 AND ACTUALLY, AS I UNDERSTAND IT, I THINK THE RELIEF GRANTED IN THAT
20 CASE, ESSENTIALLY, WAS A DISMISSAL. AND THAT IS AN UNUSUAL – I
21 REALIZE THAT IS AN UNUSUAL STEP, BUT THERE IS AT LEAST SOME
22 PRECEDENT FOR DOING THIS IN A SITUATION, PRE- INDICTMENT, AND I
23 WOULD SUBMIT TO THE COURT THAT THIS IS AN APPROPRIATE CASE TO DO
24 IT POST-INDICTMENT. BECAUSE WE CAN'T UNDO WHAT'S BEEN DONE AND
25 THE DELAY, AGAIN, IN SUMMARIZING, IS SIMPLY, THAT IF NOBODY IS PUSHING

1 TO GET THE CASE READY, WE DON'T KNOW ALL THIS STUFF. THAT'S JUST
2 THE WAY IT IS IN THE LIFE OF -- THE SOLICITOR'S OFFICE IS VERY BUSY AND
3 THE DEFENSE, EVERYBODY. IF NOBODY IS PUSHING IT, IT IS NOT GOING TO
4 GET DONE AND IT DID NOT GET DONE UNTIL THE LAST MINUTE AND NOW WE
5 LEARN THIS. AND THE PROBLEM IS THAT MR. WEATHERALL, WHO IS ON TRIAL,
6 IS THE ONE WHO HAS SUFFERED FROM THAT. AND SO, THAT IS THE BASIS,
7 YOUR HONOR, FOR THE MOTION. THANK YOU FOR HEARING ME.

8 THE COURT: ALL RIGHT.

9 MR. HOWE: AND I DON'T KNOW IF YOU WANT TO HEAR FROM HIM, IF
10 YOU THINK THAT IS APPROPRIATE. I WOULD ASK THE COURT TO ALLOW HIM
11 TO SPEAK.

12 THE COURT: WELL AS LONG AS YOU HAVE TALKED TO HIM AND HE
13 UNDERSTANDS THAT WHAT HE SAYS IS ON THE RECORD.

14 MR. HOWE: YES, SIR.

15 THE COURT: ALL RIGHT, BRIEFLY. YES, SIR.

16 MR. WEATHERALL: YES, SIR. THANK YOU FOR HEARING ME FIRST OF
17 ALL, YOUR HONOR. I APPRECIATE EVERYTHING YOU SAID. AND JUST A FEW
18 THINGS I WANTED TO CLEAR UP, AS FOR MY CASE. I'VE BEEN GOING
19 THROUGH THIS FOR TWENTY-SIX MONTHS NOW. WHEN I FIRST GOT
20 ARRESTED AND I HAD THE CHARGES PRESSED AGAINST ME, I TOLD MY
21 ATTORNEY DOWN IN MCCORMICK COUNTY THAT I WAS GOING TO PLEAD NOT
22 GUILTY AND I WAS GOING TO ASK FOR A TRIAL. I ASKED HIM FOR A FAST AND
23 SPEEDY TRIAL THEN. OKAY, HE SAID THAT SOUTH CAROLINA DOESN'T HAVE
24 FAST AND SPEEDY TRIALS. SO, I JUST LET IT GO. I DON'T KNOW THE LAW. I
25 DON'T KNOW HOW THE LAW WORKS. SO, I WENT TO COURT. THEY OFFERED

1 ME THE FIRST TIME, EIGHT YEARS. OH, WELL —

2 THE COURT: YOU NEED TO BE REAL CAREFUL WHAT YOU SAY. YES?

3 MR. WEATHERALL: WELL, IN MCCORMICK THEY OFFERED ME A DEAL. I
4 REFUSED IT AND SAID I WANTED TO GO TO TRIAL. I WENT THROUGH TWO
5 COURT TERMS FROM JUNE TO DECEMBER AND IN DECEMBER THEY GOT
6 SOME MEDICAL REPORT BACK PROVING — WELL, I GUESS THAT IS FOR THE
7 TRIAL. BUT, THEY DIDN'T WANT TO DEAL WITH THE CASE. THEY SAID, WELL,
8 LAURENS HAS MORE EVIDENCE ON HIM, LET'S JUST SEND HIM UP TO
9 LAURENS AND LET LAURENS CONVICT HIM AND THEN BRING HIM BACK AND
10 CONVICT HIM AGAIN. I SAID, "THAT'S FINE, LET'S GO TO LAURENS AND I'LL
11 TAKE CARE OF LAURENS." SO, I COME UP HERE TO LAURENS IN DECEMBER. I
12 TALKED TO MR. HOWE. I TOLD HIM, "I AM NOT GUILTY, I WANT A TRIAL."
13 OKAY, I DIDN'T HEAR BACK, WELL — IN JANUARY OF 2005, WE WENT FOR A
14 PRELIMINARY HEARING. THE ONLY THING THAT WAS SAID WAS THAT NO
15 MAJOR EVIDENCE — OKAY, I SHOULDN'T DISCUSS THAT, HE SAYS. (TALKS TO
16 MR. HOWE) BUT ANYWAYS, IT WAS DELAYED FOR COURT. I DIDN'T HEAR
17 FROM MR. HOWE OR THE COURTS FROM JANUARY, FEBRUARY, MARCH — IN
18 MARCH, I WROTE MR. HOWE THREE LETTERS TRYING TO FIND OUT WHAT
19 WAS GOING ON. HE CALLED ME OVER, OVER HERE, AND HE ASKED ME WHAT
20 I WANTED. I SAID, "WELL, FIRST LET'S PUT IN FOR A FAST AND SPEEDY
21 TRIAL." HE TOLD ME, "I CAN'T DO THAT, BUT THEY ARE GOING TO DENY IT
22 ANYWAY." I SAID, "I DON'T CARE. I WANT YOU TO PUT IN FOR IT." YOU KNOW,
23 I KNOW MY CONSTITUTIONAL RIGHTS AND I'VE GOT A RIGHT TO A FAST AND
24 SPEEDY TRIAL. AND I SAID, "ANOTHER THING IS, I WANT TO PUT IN FOR
25 BOND," BECAUSE WHEN I GOT TO LAURENS, THEY DENIED MY BOND. WELL,

1 MR. HOWE DIDN'T WANT TO DO A FAST AND SPEEDY TRIAL AND HE DIDN'T
2 WANT TO DO MY BOND HEARING WITHOUT MY MOM BEING IN TOWN. WELL,
3 THE NEXT COURT TERM COMES AND MY MOM WAS STILL OUT OF TOWN. HE
4 CALLS ME OVER AND TELLS ME MY MOM IS STILL OUT OF TOWN AND HE
5 DIDN'T DO ANYTHING, HE DIDN'T PUT IN FOR MY BOND HEARING. HE DIDN'T
6 DO ANYTHING. WELL, FROM JUNE, JULY, AUGUST, SEPTEMBER, OCTOBER, I
7 DIDN'T HEAR NOTHING. HE DIDN'T CALL ME OVER. HE DIDN'T TALK TO ME. HE
8 DIDN'T DO ANYTHING. IN OCTOBER, I GOT THE ADDRESS OF THE CLERK OF
9 COURT. I PUT A MOTION IN, PRO BONO, ASKING TO RELIEVE MY COUNSEL
10 AND FOR A FAST AND SPEEDY TRIAL. ALL RIGHT, WHEN I HAD THAT HEARING,
11 THE JUDGE SAYS, "AS FOR RELIEVING COUNCIL, SINCE I AM PUTTING A TIME
12 LIMIT ON THIS, I AM GOING TO KEEP MR. HOWE ON AS YOUR ATTORNEY." HE
13 TELLS THE SOLICITOR, MR. YOUNG, HE ASKS MR. YOUNG, "HOW MUCH - ARE
14 YOU READY TO PROCEED WITH THIS CASE?" MR. YOUNG SAYS, "YES, I'VE
15 GOT ENOUGH EVIDENCE TO PROCEED WITH THIS CASE." MR. YOUNG SAYS,
16 "THE ONLY REASON I HAVEN'T IS I DON'T KNOW IF I HAVE THE JURISDICTION
17 TO TRY HIM FIRST OR IF MCCORMICK HAS GOT TO TRY HIM FIRST. AND SO,
18 THE JUDGE SAYS, "ALL RIGHT, HERE IS WHAT IS GOING TO HAPPEN. THIS
19 CASE NEEDS TO BE DISPOSED OF BY THE END OF THE YEAR." HE SAYS, "AS
20 FOR AS THE MCCORMICK CASE, THE SOLICITOR HAS GOT TO LET MR. HOWE
21 KNOW BY NOVEMBER 18th WHO IS GOING TO TRY ME FIRST. IF NOT, AT THE
22 TIME, MY COUNSEL CAN PUT IN MOTIONS - LIKE A BOND HEARING." WELL,
23 THE REST OF THAT COURT TERM - AND OCTOBER AND NOVEMBER COME
24 AND NOVEMBER 18th COME AND I DIDN'T HEAR ANYTHING. THE COURT TERM
25 IN DECEMBER WAS ONE WEEK AND I DIDN'T HEAR ANYTHING. FIRST COURT

1 TERM OF '06; AND I DIDN'T HEAR NOTHING. IN MARCH OF '06, HE FINALLY
2 CALLED ME OVER HERE . I TOLD HIM I WANTED TO PUT IN FOR A MOTION FOR
3 A DISMISSAL BECAUSE HE DELAYED THE COURT ORDER THAT MR. JOHNSON
4 DID. HE SAID, "WELL, NOW THAT THE VICTIM, THE CHILD, HAS HERPES AND
5 THEY WANT TO TEST YOU TO FIND OUT THE ORIGIN OF THE HERPES. I SAID,
6 "THAT AIN'T NO PROBLEM BECAUSE I KNOW I DIDN'T HAVE HERPES AND
7 THAT'S WHEN I CONSENTED TO GIVING THE BLOOD. BUT, AFTER MY BOND
8 HEARING, THE JUDGE SAYS, "BOND DENIED, BUT SINCE YOU HAVE BEEN IN
9 SIXTEEN -- 'HE SAID SIXTEEN MONTHS, BUT IT ACTUALLY HAD BEEN
10 TWENTY-ONE MONTHS'. HE ASKED MR. FLEMING, "HOW MUCH TIME DO YOU
11 NEED TO GET THIS CASE PREPARED FOR TRIAL?" HE SAYS, "ABOUT TWO
12 MONTHS." THE JUDGE SAYS, "ALL RIGHT, I AM GOING TO GIVE YOU FOUR
13 MONTHS OR ONE HUNDRED AND TWENTY DAYS TO GET THIS READY TO GO
14 TO TRIAL. IF IT IS NOT TRIED WITHIN ONE HUNDRED TWENTY DAYS, MR.
15 WEATHERALL IS GOING TO HAVE A BOND SET AT \$250,000.00." I CAN'T TOUCH
16 THAT KIND OF BOND. TODAY, I STILL DON'T HAVE MY BOND. MY BOND IS
17 STILL DENIED. I FEEL LIKE MY RIGHTS HAVE BEEN VIOLATED. I DON'T KNOW
18 IF MR. HOWE IS TRYING TO GET ME TO PLEAD TO TWELVE YEARS. I AM NOT
19 GOING TO PLEAD TO SOMETHING I DIDN'T DO. ALL RIGHT, I AM JUST ASKING
20 YOU, YOU KNOW THE LAW, YOU KNOW WHAT IS GOING ON. I SAID MY PIECE
21 AND NOW I'LL LEAVE IT AT THAT.

22 THE COURT: ALL RIGHT. ANYTHING FROM THE STATE?

23 MR. FLEMING: YES, SIR. YOUR HONOR, IF IT PLEASURES THE COURT, JUST
24 VERY QUICKLY. YOUR HONOR, FIRST, THE DEFENDANT DIDN'T FILE FOR A
25 MOTION FOR A SPEEDY TRIAL UNTIL OCTOBER OF 2005. THAT'S BEEN LESS

1 THAN A YEAR, YOUR HONOR. INITIALLY, FRANK YOUNG WAS THE ASSISTANT
2 SOLICITOR WORKING ON THIS CASE. HE STOPPED WORKING WITH THE
3 SOLICITOR'S OFFICE IN ABOUT NOVEMBER OF 2005. I DIDN'T GET HERE UNTIL
4 FEBRUARY OF 2005, YOUR HONOR, SO, NOBODY WAS WORKING ON MR
5 YOUNG'S CASES DURING THAT PERIOD OF TIME. IN THE ORDER GIVEN BY
6 JUDGE JOHNSON, HE BASICALLY DENIED THE MOTION FOR A SPEEDY TRIAL,
7 BUT HE DID SAY IN THE ORDER THAT IF THE CASE WAS NOT DISPOSED OF
8 PRIOR TO THE FIRST DAY OF THE TERM IN 2006, COUNSEL OF THE
9 DEFENDANT SHALL APPLY FOR BOND OR REDUCTION OF BOND. OKAY?
10 THAT CAME UP IN MARCH OF '06, YOUR HONOR. AT THAT POINT IN TIME,
11 JUDGE BARBER DID SET A BOND OF \$250,000.00, IF THE CASE WAS NOT TRIED
12 IN ONE HUNDRED TWENTY DAYS. IT WAS NOT TRIED WITHIN ONE HUNDRED
13 TWENTY DAYS BECAUSE WE HAD A MURDER TRIAL GOING ON IN JULY WHICH
14 TOOK UP THE WHOLE TERM OF COURT. THERE WAS NO COURT IN AUGUST,
15 YOU HONOR, HERE IN LAURENS COUNTY. AND THAT'S BASICALLY -- WE ARE
16 COMING INTO THIS CASE, THIS IS THE FIRST CASE IN SEPTEMBER AND
17 GETTING TO IT AT THIS POINT IN TIME. THE DEFENSE COUNSEL CITES THE
18 STATE *versus* LEE. OBVIOUSLY, AS HE POINTED OUT TO YOU, YOUR HONOR,
19 THAT'S A PRE-INDICTMENT DELAY THAT THE COURT IS TALKING ABOUT AND
20 THAT CASE IS OFF THE POINT AS TO WHAT WE HAVE HERE. I THINK WHAT
21 MORE CLOSELY RESEMBLES THE CASE AT BAR, YOUR HONOR, IS STATE
22 *versus* KENNEDY, IN WHICH OUR STATE SUPREME COURT STATED THAT THE
23 UNITED STATES SUPREME COURT HAS IDENTIFIED SEVERAL FACTORS IN
24 USING -- IN DETERMINING WHETHER THE DEFENDANT HAS BEEN DENIED THE
25 RIGHT TO A SPEEDY TRIAL THAT INCLUDES: THE LENGTH OF THE DELAY, THE

1 REASON THE GOVERNMENT USES TO EXPLAIN THE DELAY, WHEN AND HOW
2 THE DEFENDANT ASSERTED HIS SPEEDY TRIAL RIGHT, AND THE PREJUDICE
3 TO THE DEFENDANT. OKAY? OBVIOUSLY, YOUR HONOR, THE LENGTH OF
4 DELAY IS, YOU KNOW, IF YOU MEASURE IT FROM THE TIME WHEN HE WAS
5 ARRESTED UNTIL NOW YOU ARE LOOKING AT TWO YEARS, A LITTLE OVER
6 TWO YEARS. BUT IF YOU MEASURE IT FROM THE TIME HE WAS ACTUALLY
7 HERE IN LAURENS, IT HASN'T EVEN BEEN TWO YEARS YET. THE REASONS
8 THAT EXPLAIN THE DELAY, OBVIOUSLY IT'S -- OUR REASONING WOULD BE
9 THE BACKLOG OF THE COURT DOCKET, THE CHANGE IN PERSONNEL FROM
10 MR. YOUNG, AND THEN THERE WAS A TIME LIMIT IN THERE WHEN NOBODY
11 WAS HANDLING THOSE CASES UNTIL I CAME HERE IN FEBRUARY. AND THEN,
12 FROM FEBRUARY UP UNTIL NOW, I'VE HAD A MAJOR MURDER TRIAL I HAD TO
13 TRY IN JULY. THERE WAS NO COURT SCHEDULED HERE IN AUGUST. AND
14 NOW WE'RE GETTING TO THIS CASE, THE FIRST CASE IN HAND, YOUR HONOR.

15 THE COURT: OKAY. ALL RIGHT. I UNDERSTAND --

16 MR. FLEMING: IT'S BASICALLY -- ONLY A YEAR HAS PASSED SINCE THIS
17 MOTION FOR A SPEEDY TRIAL. AS WELL, YOUR HONOR, AS FAR AS
18 PREJUDICE IS CONCERNED, THERE HAS BEEN NO PREJUDICE. ACTUALLY,
19 HE'S -- THE EVIDENCE THAT HAS COME FORWARD SINCE THAT TIME HAS
20 BEEN MORE BENEFICIAL TO THE DEFENDANT THAN IT HAS THE STATE, YOUR
21 HONOR.

22 THE COURT: OKAY. ALL RIGHT. WELL, I UNDERSTAND YOUR MOTION.
23 EVERYBODY WANTS TO MOVE THESE CASES FORWARD, BUT THE PROBLEM
24 IS WITH THE BACK-LOAD AND THE COURT SCHEDULING AND ALSO SOME OF
25 THE PROBLEMS WITH JUDGES HERE BEING ILL. I'M GOING TO DENY YOUR

1 MOTION, BUT YOU ARE PROTECTED ON THE RECORD.

2 MR. HOWE: THANK YOU, JUDGE.

3 THE COURT: ALL RIGHT. ANYTHING ELSE BEFORE WE BRING THEM IN?

4 MR. FLEMING: NOTHING FROM THE STATE, YOUR HONOR.

5 THE COURT: YOUR CLIENT WANTS TO SAY SOMETHING. YOU HAD
6 BETTER TALK TO HIM.

7 MR. WEATHERALL: CAN I ADDRESS THE JURY?

8 THE COURT: WELL, THAT'S THE PROBLEM. I MEAN, LET ME TELL YOU --
9 YOU NEED TO DEAL THROUGH YOUR LAWYER. YOU TALK TO HIM AND THEN --

10 MR. WEATHERALL: I WANT A NEW LAWYER.

11 MR. HOWE: HE WANTS TO BE HEARD ON COUNSEL.

12 THE COURT: ALL RIGHT. YES, SIR.

13 MR. WEATHERALL: I DON'T PUT MY TRUST IN MR. HOWE TO
14 REPRESENT ME IN A PROPER MANNER. I MEAN, YOU KNOW THAT PART OF
15 MY MOTION WHEN I PUT IN FOR A SPEEDY TRIAL? I MEAN, YEAH, I WANTED
16 THIS CASE TO PROCEED, BUT I DON'T FEEL LIKE I WILL HAVE A FAIR TRIAL
17 WITH MR. HOWE. I MEAN, I JUST WANTED IT TO BE ON RECORD THAT I'VE
18 SAID IT. YOU CAN DENY IT, WHATEVER.

19 THE COURT: ALL RIGHT.

20 MR. HOWE: YOUR HONOR, I WILL DO WHATEVER THE COURT WISHES.

21 MR. WEATHERALL IS NOT HAPPY WITH ME. I MEAN, I DON'T KNOW THAT I CAN
22 -- I DON'T WANT TO DELAY THE CASE. I DON'T WANT TO SAY ANYTHING
23 IMPROPER. I HAVE BEEN A PUBLIC DEFENDER SINCE 1987. THIS HAS
24 HAPPENED TO ME BEFORE AND IT WILL PROBABLY HAPPEN TO ME AGAIN AND
25 I DON'T WANT TO UNDULY DELAY IT, BUT IF MR. WEATHERALL IS NOT HAPPY,

1 THEN I WOULD ASK YOU TO RELIEVE ME. I MEAN, I AM JUST NOT GOING TO....

2 THE COURT: Y'ALL COME BACK HERE. I WILL BE RIGHT BACK.

3 (IN CHAMBERS CONFERENCE OFF THE RECORD)

4 THE COURT: ALL RIGHT. JUST FOR THE RECORD, I HAD A
5 CONVERSATION IN THE BACK WITH THE ATTORNEY FOR THE STATE AND THE
6 ATTORNEY FOR MR. WEATHERALL. MR. WEATHERALL, I UNDERSTAND YOUR
7 PROBLEM. I WILL TELL YOU THIS, MR. HOWE IS A VERY EXPERIENCED
8 LAWYER. LOOKING THROUGH THE FILE I CAN'T SEE ANYTHING THAT HE HAS
9 DONE INCORRECTLY. THE DELAYS IN THIS TRIAL ARE BASICALLY A
10 SCHEDULING PROBLEM THAT HAVE NOTHING TO DO WITH YOUR
11 CONSTITUTIONAL RIGHTS OR WHETHER OR NOT WE WILL GET TO A TRIAL.
12 WE'RE GOING TO GET TO A TRIAL. I AM GOING TO DENY YOUR MOTION, BUT
13 YOU ARE PROTECTED ON THE RECORD. ANYTHING FURTHER BEFORE WE
14 BRING THEM IN?

15 MR. FLEMING: NOTHING FROM THE STATE, YOUR HONOR.

16 MR. HOWE: JUDGE WE WOULD ASK THAT THE WITNESSES BE
17 SEQUESTERED.

18 THE COURT: YES, I DO THAT ANYWAY. SO, ANYBODY THAT IS GOING
19 TO TESTIFY, THEY NEED TO BE OUTSIDE THE COURTROOM, ANYBODY FOR
20 THE STATE OR THE DEFENSE.

21 MR. HOWE: JUDGE, JUST FOR THE RECORD ON THAT, I THINK THE
22 REST OF THE WITNESSES THAT I HAVE ARE EITHER POLICE OFFICERS OR
23 TECHNICAL PEOPLE OR SOMETHING LIKE THAT. THEY ARE ALL ON CALL AND I
24 AM NOT EXPECTING ANY OF THEM TO WALK IN, BUT MAYBE IF WE COULD
25 JUST ASK THE BAILIFF TO MAKE SURE THEY LET EVERYBODY KNOW, IF THEY

1 ARE A POSSIBLE WITNESS. I HAVE HAD THAT TO HAPPEN ONE TIME.

2 THE COURT: YES, I WILL TAKE CARE OF THAT WHEN WE GET BACK IN.

3 MR. HOWE: THANK YOU.

4 BAILIFF: DO YOU WANT ME TO NOTIFY THEM?

5 THE COURT: YES. JUST TELL THEM THAT ANY BODY THAT IS A
6 WITNESS, POTENTIALLY, IN THIS CASE, NOT TO LET THEM IN.

7 MR. FLEMING: YOUR HONOR, FOR THE RECORD, BEFORE WE BRING
8 THE JURY OUT, BEFORE I BRING IN THE JUVENILE, COULD WE CLEAR THE
9 COURTROOM OF ANYBODY WHO DOES NOT HAVE ANYTHING TO DO WITH
10 THIS CASE?

11 THE COURT: YES. ONCE WE GET TO THAT POINT, I WOULD NORMALLY
12 CLEAR IT. HOW OLD IS THE CHILD?

13 MR. FLEMING: SHE IS SEVEN.

14 THE COURT: YEAH, I WILL CLEAR THE COURTROOM, EXCEPT FOR THE
15 DEFENDANT. HE HAS A RIGHT TO BE HERE. JUST LET ME KNOW, AND ALSO
16 LET ME KNOW BEFORE ANY OFFICERS MAY TESTIFY REGARDING ANYTHING
17 THAT MAY REQUIRE A JACKSON v DENNO HEARING.

18 MR. FLEMING: OKAY, JUDGE.

19 THE COURT: OKAY, BRING THEM IN.

20 BAILIFF: ALL PRESENT YOUR HONOR.

21 THE COURT: THANK YOU. YOU MAY HAVE A SEAT. LADIES AND
22 GENTLEMEN I AM WAITING FOR A DOCUMENT. LET ME JUST - WHILE I AM
23 DOING THAT AND BEFORE YOU ARE SWORN IN, I WANT TO TELL YOU THAT I
24 APOLOGIZE FOR THE DELAYS THIS MORNING. I AM GOING TO EXPLAIN THE
25 DELAYS TO YOU IN A FEW MINUTES. I CAN TELL YOU IT WON'T BE THE LAST

1 DELAY. IT WON'T BE THE FIRST TIME YOU HAVE TO SIT BACK THERE. I HOPE
2 YOU UNDERSTAND AND I WILL TELL YOU A LITTLE ABOUT THAT IN A MINUTE.
3 WHY DON'T YOU GO AHEAD AND SWEAR THEM IN.

4 (JURY DULY SWORN IN BY THE CLERK OF COURT)

5 THE COURT: IF YOU WILL GIVE ME JUST A MINUTE.

6 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, AGAIN, I REALLY AM
7 SORRY FOR THE DELAY. I WILL TELL YOU THAT MANY TIMES DURING THE
8 TRIAL OF A CASE, IN EITHER A CIVIL OR CRIMINAL CASE, THERE WILL BE
9 TIMES WHEN YOU WILL BE OUT OF THE COURTROOM AND I WILL TELL YOU A
10 LITTLE MORE ABOUT THAT IN A MINUTE. I WILL TELL YOU I AM SORRY EVERY
11 TIME. I CAN PROMISE YOU THAT WE ARE WORKING WHILE YOU ARE BACK
12 THERE, BUT I KNOW THAT DOES NOT MAKE IT ANY BETTER FOR YOU TO HAVE
13 TO SIT BACK THERE AND I APOLOGIZE AND I WILL APOLOGIZE EVERY TIME.

14 LADIES AND GENTLEMEN, WE ARE GETTING READY TO START THE
15 TRIAL OF THE STATE versus DONALD THOMAS WEATHERALL. MR.
16 WEATHERALL HAS BEEN INDICTED FOR CRIMINAL SEXUAL CONDUCT WITH A
17 MINOR AND COMMITTING OR ATTEMPTING A LEWD ACT ON A CHILD UNDER
18 SIXTEEN YEARS OF AGE. I AM READING FROM AN INDICTMENT WHICH IS
19 BASICALLY, LITERALLY, JUST A PIECE OF PAPER THAT WE USE TO START THE
20 PROCESS. THE FACT THAT THERE IS AN INDICTMENT THAT HAS BEEN ISSUED
21 IN THIS CASE ABSOLUTELY HAS NOTHING TO DO WITH THE EVIDENCE. IT IS
22 NOT EVIDENTIARY AND IT SHOULDN'T BE IMPACTING YOUR DISCUSSIONS OR
23 YOUR DELIBERATIONS IN ANY WAY WHATSOEVER. IN OUR SYSTEM, WE
24 START THE PROCESS THAT LEADS TO A TRIAL WITH AN INDICTMENT. YOU
25 WILL HAVE THAT BACK THERE WITH YOU BUT, AGAIN, THE DEFENDANT IN

1 THIS CASE HAS PLED NOT GUILTY AND THE STATE IS GOING TO HAVE THE
2 BURDEN OF PROVING THEIR CASE IN THIS INDICTMENT. IT IS LITERALLY JUST
3 A PIECE OF PAPER. I ALWAYS GET A LITTLE CONCERNED BECAUSE THESE
4 INDICTMENTS LOOK SORT OF OFFICIAL. I WILL TELL YOU OVER AND OVER
5 AGAIN THAT THIS IS NOT EVIDENCE. YOU NEED TO BE SURE THAT YOU
6 APPROACH IT THAT WAY, BECAUSE IT IS NOT EVIDENCE AND IT SHOULDN'T
7 BE CONSIDERED BY YOU.

8 NOW, LADIES AND GENTLEMEN, I WANT TO NOW GIVE YOU A LITTLE
9 PRELIMINARY CHARGE ON THE METHOD WE WILL GO ABOUT TRYING THIS
10 CASE. WHAT I AM GETTING READY TO TELL YOU IS NOT A CHARGE ON THE
11 LAW. WHAT WILL HAPPEN DURING THE COURSE OF THE TRIAL IS THAT, I AM
12 GOING TO TELL YOU A LITTLE BIT ABOUT HOW WE GO ABOUT THE TRIAL.
13 THEN YOU ARE GOING TO HEAR OPENING STATEMENTS FROM THE STATE
14 AND THE DEFENSE LAWYER. AFTER THE OPENING STATEMENTS YOU WILL
15 HEAR TESTIMONY AND YOU WILL SEE EVIDENCE INTRODUCED. YOU MAY
16 HAVE OTHER PIECES OF EVIDENCE MIGHT BE PUT INTO THE RECORD. AFTER
17 THE TESTIMONY HAS BEEN GIVEN BY BOTH PARTIES, THEN THE DEFENSE
18 LAWYER AND THE STATE WILL HAVE AN OPPORTUNITY TO GIVE YOU A
19 CLOSING ARGUMENT. AND THEN I WILL CHARGE YOU ON THE LAW IN THIS
20 CASE.

21 NOW, JUDGES THROUGHOUT THE NATION ARE CONCERNED ABOUT
22 THE EFFECT THAT TV HAS ON A TRIAL. AND I HAVE SEEN IT. I USUALLY TRY
23 SOMETHING ONCE A WEEK AND I WATCH JURORS AND I WILL TELL YOU NOW
24 THIS IS NOT C-S-I. AND THIS IS NOT TV. ON A TELEVISION SHOW, AT THE
25 BEGINNING OF THE HOUR, YOU HAVE SORT OF THE SET UP AND BY THE END

1 OF THE HOUR, YOU HAVE GOT THE SOLUTION TO IT. AND EVERY TRIAL ON TV
2 TAKES ABOUT FIVE MINUTES AND I GET CONCERNED, ALONG WITH OTHER
3 JUDGES, THAT JURORS GET CONDITIONED TO THE FACT THAT EVERYTHING
4 MOVES QUICKLY. I WILL TELL YOU THAT OUR SYSTEM IS VERY DELIBERATE
5 AND IT IS DELIBERATE BY DESIGN. THE MISCONCEPTIONS THAT YOU MAY
6 HAVE FROM TV AND COURT TV AND ALL THESE THINGS ARE BASICALLY JUST
7 ENTERTAINMENT ARE THAT THINGS SHOULD MOVE QUICKLY. I CAN TELL YOU
8 THAT THEY DO NOT MOVE QUICKLY, BUT THAT IS THE WAY IT IS SUPPOSED
9 TO BE DONE. OUR SYSTEM IS A TIME HONORED SYSTEM THAT WORKS AND I
10 AM PROUD OF THE SYSTEM. BUT I WILL TELL YOU THAT AS JURORS WHO
11 DON'T SIT HERE EVERY WEEK, YOU MAY GET FRUSTRATED AT THE TIMING OF
12 THINGS AND I WILL TELL YOU RIGHT NOW, AGAIN, I WILL APOLOGIZE AND
13 TELL YOU THINGS MAY MOVE SLOWER THAN YOU WISH, BUT THEY MOVE
14 SLOW FOR A REASON.

15 NOW, LADIES AND GENTLEMEN DURING THE COURSE OF THIS TRIAL
16 YOU AND I HAVE VERY DIFFERENT ROLES AND I WANT TO SORT OF SET OUT
17 THOSE ROLES. I AM THE JUDGE OF THE LAW. I HAVE TO DETERMINE WHAT
18 EVIDENCE IS ADMITTED. I HAVE TO RULE ON OBJECTIONS. I HAVE TO SIT
19 HERE ON MY COMPUTER AND PREPARE THE CHARGE ON THE LAW THAT I
20 GIVE YOU AT THE END IN THE COURSE OF THE TRIAL. IF, AT ANY POINT, YOU
21 THINK I HAVE AN OPINION AS TO THE TRUTH OR FALSITY OF A FACT OR
22 WHETHER OR NOT A WITNESS SHOULD BE BELIEVED, DISREGARD THAT. YOU
23 ARE THE JUDGE OF THE FACTS IN THIS CASE AND OUR ROLES NEVER CROSS.
24 I WILL JUDGE THE LAW AND YOU WILL JUDGE THE FACTS. AND I TELL YOU
25 THAT BECAUSE I AM HUMAN, THERE MAY BE SOME TIME WHEN I RAISE MY

1 VOICE, PROBABLY LIKELY. I MAY TURN RED. I MAY GIVE YOU SOME
2 IMPRESSION THAT I HAVE AN OPINION AS TO THE FACTS. DISREGARD IT,
3 BECAUSE YOU ARE THE ONLY PEOPLE IN THIS COURTROOM WHO HAVE TO
4 DETERMINE WHAT THE FACTS ARE AND YOU HAVE TO DO THAT BY LISTENING
5 TO THE TESTIMONY, FROM REVIEWING THE EVIDENCE, AND FROM ANY
6 OTHER OBSERVATION YOU MAKE FROM ANYTHING THAT I ADMIT INTO
7 EVIDENCE. YOU HAVE TO DETERMINE WHAT THE FACTS IN THIS CASE ARE.
8 AND THEN, AT THE END OF THE CASE, AFTER I HAVE CHARGED YOU ON THE
9 LAW, YOU HAVE TO APPLY THE LAW AS I GIVE IT TO YOU TO THE FACTS AS
10 YOU HAVE DETERMINED THEM TO BE. BUT OUR ROLES DO NOT CROSS AT
11 ANY TIME. I WILL HAVE NO OPINION THAT SHOULD BE REGARDED BY YOU IN
12 ANY WAY AS TO A FACT. AND LIKEWISE, YOU ARE GOING TO HAVE TO TAKE
13 THE LAW AS I GIVE IT TO YOU AT THE END OF THIS CASE AND ALSO TAKE THE
14 EVIDENCE THAT I ALLOW IN AS THE LAW. SO OUR ROLES CLEARLY WILL NOT
15 BE CROSSING. SOMETIMES THAT MAKES IT A LITTLE FRUSTRATING. I WILL
16 TELL YOU THAT MOST OF THE TIME WHEN OBJECTIONS ARE MADE BY
17 LAWYERS, I WILL LEAVE YOU IN THE COURTROOM. THERE WILL BE TIMES
18 WHEN I NEED TO SEND YOU OUT OF THE COURTROOM TO DETERMINE
19 WHETHER OR NOT SOMETHING SHOULD BE ADMITTED INTO EVIDENCE. I DO
20 THAT AS LITTLE AS POSSIBLE, BUT I SUSPECT IT WILL HAPPEN TEN OR
21 FIFTEEN TIMES DURING THE COURSE OF THIS TRIAL THAT I WILL ASK YOU TO
22 LEAVE. VERY LIKELY I WILL ASK YOU TO LEAVE. IT WILL TAKE TEN TO
23 FIFTEEN MINUTES WHILE WE PUT THINGS ON THE RECORD. I'LL BRING YOU
24 BACK IN, SOMETHING ELSE WILL BE OBJECTED TO AND I WILL HAVE TO SEND
25 YOU BACK OUT. YOU WILL GET YOUR EXERCISE THIS WEEK, I CAN PROMISE

1 YOU THAT. I WILL ALSO TELL YOU THAT INVARIABLY, WHEN YOU ARE
2 DEALING WITH PEOPLE, AND WHEN YOU ARE DEALING WITH ME, THAT IF I
3 TELL YOU IT IS GOING TO BE TEN MINUTES, IT MAY BE FIFTEEN OR TWENTY.
4 AGAIN, I PROMISE YOU WE ARE IN HERE WORKING, BUT THINGS JUST TAKE
5 MORE TIME THAN I LIKE, AND THAT THE LAWYERS LIKE, SO PLEASE BE
6 PATIENT WITH US AS BEST YOU CAN.

7 THE LAWYER'S JOB DURING THE COURSE OF THIS TRIAL IS TO
8 PROTECT THE STATE AND TO PROTECT THE DEFENDANT. THEIR JOB IS TO
9 OBJECT TO EVIDENCE, OR MAKE OBJECTIONS TO TESTIMONY OF EVIDENCE.
10 DON'T HOLD IT AGAINST THE LAWYERS IF THEY MAKE A MULTITUDE OF
11 OBJECTIONS. THAT'S THEIR JOB. IF YOU HAVE A PROBLEM WITH THE FACT
12 THAT YOU ARE SITTING BACK THERE A LONG TIME, BE MAD AT ME, NOT THE
13 LAWYERS, BECAUSE I AM THE ONE WHO ULTIMATELY HAS TO CONTROL IT
14 AND I WANT TO GIVE EVERYBODY A FAIR SHAKE.

15 NOW, LADIES AND GENTLEMEN, AS I SAID, THIS INDICTMENT, WHICH
16 WILL BE WRITTEN, IS JUST LITERALLY A PIECE OF PAPER. THE DEFENDANT
17 HAS PLED NOT GUILTY TO ALL THE CHARGES. AS A RESULT OF THAT, THE
18 STATE HAS THE BURDEN OF PROVING EACH ELEMENT OF THE CHARGES
19 BEYOND A REASONABLE DOUBT. AT THE END OF THE TRIAL I WILL TELL YOU
20 A LITTLE BIT ABOUT WHAT REASONABLE DOUBT IS. THE ATTORNEYS, IN
21 THEIR OPENING STATEMENT, MAY TELL YOU. BUT YOU NEED TO MAKE SURE
22 THAT YOU LISTEN TO ALL THE TESTIMONY FROM THE BEGINNING TO THE
23 END. THE STATE HAS A VERY HEAVY BURDEN IN THIS CASE. THIS IS THE
24 DEFENDANT'S ONE OPPORTUNITY FOR TRIAL. IF I MAKE A MISTAKE ON THE
25 LAW DURING THE COURSE OF THIS TRIAL, THE SUPREME COURT MAY

1 OVERTURN IT. BUT IF YOU MAKE A MISTAKE BACK THERE DELIBERATING ON
2 THE FACTS, THAT'S KEPT WITHIN THE ROOM, THERE IS NO RECORD OF IT AND
3 THERE IS VERY LITTLE THAT CAN BE DONE. AND I WILL TELL YOU THAT
4 HUMAN BEINGS LIKE TO REACH CONCLUSIONS.

5 YOU NEED TO KEEP YOUR MIND OPEN DURING THE ENTIRE TRIAL.
6 LIKEWISE, YOU DON'T NEED TO DISCUSS THIS CASE AND I AM ASKING YOU
7 AND ORDERING YOU NOT TO DISCUSS THE CASE IN ANY WAY WHATSOEVER
8 WHEN YOU ARE BACK THERE IN THE JURY ROOM. YOU CAN TALK ABOUT
9 ANYTHING YOU WANT, BUT DON'T TALK ABOUT THIS CASE, BECAUSE UNTIL I
10 SEND THE EVIDENCE BACK AND CHARGE YOU WITH THE LAW, YOU DON'T
11 KNOW ENOUGH TO RENDER A VERDICT AND ANYTHING YOU MAY SAY MAY
12 INFLUENCE SOMEONE ELSE. SO AGAIN, EVERY TIME I SEND YOU BACK I WILL
13 TELL YOU TO PLEASE DON'T DISCUSS THE CASE.

14 BECAUSE OF THE FACT THAT I HATE TO SIT, WE WILL TAKE BREAKS
15 EVERY HOUR-AND-A-HALF OR SO. IF IT LOOKS LIKE ITS APPARENT THAT THE
16 WITNESS WILL BE LONGER THAN WE EXPECT OR, IF WE WANT, WE MAY TAKE
17 AN EARLY BREAK. IF AT ANY TIME, DURING THE COURSE OF THIS TRIAL, YOU
18 NEED A BREAK FOR ANY REASON WHATSOEVER, I WON'T EVEN ASK YOU,
19 JUST RAISE YOUR HAND OR GET THE BAILIFF'S ATTENTION, GET MY
20 ATTENTION AND WE WILL IMMEDIATELY TAKE A BREAK. IT HAPPENS ALL THE
21 TIME AND IT IS NOT A PROBLEM FOR ME, SO JUST RAISE YOUR HAND. SO, WE
22 WILL TAKE BREAKS EVERY HOUR, HOUR-AND-A-HALF. WE WILL NOT GO VERY
23 LATE TONIGHT. I SUSPECT THIS TRIAL MAY LAST INTO THURSDAY OR
24 POSSIBLY FRIDAY. I DON'T KNOW. IT'S POSSIBLE THAT ONE NIGHT THIS
25 WEEK WE MAY GO A LITTLE LATE. LATE TO ME IS PROBABLY NOT THE SAME

1 THING TO YOU, BUT IF YOU HAVE A PROBLEM GOING LATE, LET THE
2 FOREMAN KNOW AND HE WILL SEND THAT OUT AND I WILL DO MY BEST TO
3 HELP YOU.

4 NOW, YOU'VE SEEN MR. SIMMONS – WHERE IS MR. SIMMONS? YOU ARE
5 NOW ON THE JURY. YOU ARE AN ALTERNATE. I'M REPLACING ONE JUROR
6 WITH YOU.

7 LADIES AND GENTLEMEN, THE LAWYERS ARE NOW GOING TO GIVE
8 THEIR OPENING STATEMENTS. I WANT TO CAUTION YOU THAT THEIR
9 OPENING STATEMENTS ARE NOT EVIDENCE. IT IS THEIR OPPORTUNITY TO
10 TELL YOU A LITTLE BIT ABOUT WHAT THEY INTEND TO PROVE IN THE COURSE
11 OF THIS TRIAL. AND THEN IMMEDIATELY THEREAFTER WE'LL MOVE INTO THE
12 TESTIMONY. ALL RIGHT. THANK YOU.

13 MR. FLEMING: IF IT PLEASE THE COURT YOUR HONOR.

14 THE COURT: YES, SIR.

15 MR. FLEMING: THANK YOU. GOOD MORNING, LADIES AND GENTLEMEN.
16 MY NAME IS RON FLEMING AND I AM THE ASSISTANT SOLICITOR HERE. I WILL
17 BE TRYING THIS CASE THIS WEEK. I WAS HIRED BY YOUR SOLICITOR, MR.
18 JERRY PEACE, TO PROSECUTE ALL THE VIOLENT CRIMES IN LAURENS
19 COUNTY. THAT IS WHAT I AM HERE TO DO. AND WE ARE HERE TODAY FOR
20 ONE OF THE MOST DESPICABLE, REPREHENSIBLE CRIMES THAT A PERSON
21 CAN COMMIT, AND THAT IS CRIMINAL SEXUAL CONDUCT ON A MINOR CHILD
22 LESS THAN ELEVEN YEARS OLD AND A LEWD ACT ON A MINOR CHILD. NOW,
23 BASICALLY, WHAT THAT IS, LADIES AND GENTLEMEN, IS – CRIMINAL SEXUAL
24 CONDUCT ON A MINOR CHILD IS A SEXUAL BATTERY WITH A CHILD WHO IS
25 LESS THAN ELEVEN YEARS OLD. AND THAT IS JUST SOME FORM OF SEXUAL

1 TOUCHING OR -- AND THE JUDGE WILL EXPLAIN THAT TO YOU AND THE LAW.
2 A LEWD ACT IS AN ATTEMPT OR A COMMISSION OF A LEWD OR LASCIVIOUS
3 ACT ON THE BODY PARTS OF A PERSON UNDER THE AGE OF SIXTEEN YEARS.
4 AND THE JUDGE, AGAIN, WILL INSTRUCT YOU ON WHAT THAT IS. AND WHAT
5 WE HAVE HERE IS THOSE TWO CHARGES AGAINST THAT MAN RIGHT THERE,
6 DONALD WEATHERALL. THE EVIDENCE THE STATE IS GOING TO PRODUCE TO
7 YOU WILL PROVE TO YOU BEYOND A REASONABLE DOUBT THAT HE
8 COMMITTED THESE ACTS. THE STATE WILL PROVIDE EVIDENCE TO YOU THAT
9 ON OR ABOUT JUNE, SOMEWHERE IN THE AREA OF JUNE OF 2004, DONALD
10 WEATHERALL DID COMMIT CRIMINAL SEXUAL CONDUCT ON A MINOR CHILD
11 WHO WAS LESS THAN ELEVEN YEARS OLD. WHO WAS ONLY FIVE YEARS OLD,
12 LADIES AND GENTLEMEN. FIVE YEARS OLD. WE WILL HAVE THE VICTIM
13 HERSELF GET UP ON THE STAND AND TELL YOU HOW SHE WAS SITTING ON
14 THE COUCH WATCHING CARTOONS ONE DAY IN HER NIGHTGOWN, AND
15 DONALD WEATHERALL CAME INTO THAT ROOM, IN THE DEN, SAT DOWN ON
16 THE COUCH AND MADE THAT CHILD TAKE HER PANTIES OFF, GOT UP ON TOP
17 OF HER AND INSERTED HIMSELF INTO A SMALL FIVE-YEAR-OLD LITTLE GIRL.
18 HE PULLED OUT AND EJACULATED ON HER STOMACH, THEN MADE HER WIPE
19 IT OFF WITH A BLANKET OF HERS. THE CHILD, LATER ON, TOLD THE
20 MOTHER. YOU WILL HEAR ABOUT THAT. YOU WILL HEAR EVIDENCE THAT
21 THE MOTHER CONFRONTED MR. WEATHERALL WITH THAT. YOU WILL ALSO
22 HEAR EVIDENCE THAT LATER ON MR. WEATHERALL WAS ARRESTED AND HE
23 WAS QUESTIONED ABOUT THIS. YOU WILL HEAR WHAT EVIDENCE IS
24 PRODUCED AS FAR AS THAT IS CONCERNED.

25 NOW, UNDER OUR SYSTEM, A MAN IS INNOCENT UNTIL HE IS PROVEN

1 GUILTY BEYOND A REASONABLE DOUBT AND THE JUDGE WILL INSTRUCT YOU
2 ON WHAT IS A REASONABLE DOUBT. I WILL TELL YOU JUST A LITTLE BIT
3 ABOUT THAT. THAT IS A DOUBT WHICH WILL MAKE A REASONABLE PERSON
4 HESITATE TO ACT. NOW THAT IS NOT A SHADOW OF A DOUBT, OR BEYOND
5 ALL DOUBT, IT IS JUST A DOUBT THAT WILL MAKE ANY REASONABLE PERSON
6 HESITATE TO ACT UPON SOMETHING. THE STATE HAS THE BURDEN OF
7 PROOF TO PROVE THIS CRIME TO YOU BEYOND A REASONABLE DOUBT.

8 NOW, LADIES AND GENTLEMEN THERE'S ALL KINDS OF EVIDENCE THAT
9 CAN BE PRESENTED IN A CASE BUT, BASICALLY THERE ARE TWO
10 CATEGORIES OF EVIDENCE. YOU HAVE DIRECT EVIDENCE AND YOU HAVE
11 CIRCUMSTANTIAL EVIDENCE THAT CAN BE ADMITTED IN A TRIAL. DIRECT
12 EVIDENCE IS WHERE YOU HAVE SOMETHING THAT SOMEBODY ACTUALLY
13 SAW OR A PIECE OF EVIDENCE THAT IS ACTUALLY A PIECE OF EVIDENCE
14 THAT YOU WILL BE ABLE TO SEE, NOT JUST TESTIMONY THAT WILL BE PUT IN.
15 THAT IS DIRECT EVIDENCE. CIRCUMSTANTIAL EVIDENCE IS EVIDENCE OF
16 THE TYPE WHERE, IF YOU GO TO BED ONE NIGHT, SAY AROUND EIGHT
17 O'CLOCK AND BEFORE YOU GO TO BED THERE IS NOTHING ON THE GROUND,
18 BUT YOU WAKE UP IN THE MORNING AND THERE IS SNOW ON THE GROUND.
19 CIRCUMSTANTIALLY, YOU KNOW THAT IT DIDN'T SNOW BEFORE YOU WENT
20 TO BED AND THERE WAS SNOW ON THE GROUND WHEN YOU GOT UP, SO IT
21 MUST HAVE SNOWED DURING THE NIGHT. THAT'S CIRCUMSTANTIAL
22 EVIDENCE. NOW IN THIS CASE YOU ARE NOT GOING TO SEE A LOT OF
23 DEMONSTRATIVE EVIDENCE THAT IS GOING TO BE PUT INTO THIS CASE,
24 LADIES AND GENTLEMEN. THERE WILL BE VERY LITTLE DEMONSTRATIVE
25 EVIDENCE WHICH YOU WILL HEAR. YOU WILL HEAR TESTIMONY FROM THE

1 LITTLE CHILD HERSELF OF WHAT SHE WAS MADE TO DO. YOU WILL HEAR
2 TESTIMONY FROM DOCTORS SHOWING THAT THERE WAS SOME TYPE OF
3 PHYSICAL ACT DONE TO THIS CHILD. AND YOU WILL HEAR FROM
4 COUNSELORS THAT INTERVIEWED THIS CHILD. YOU WILL HEAR FROM POLICE
5 OFFICERS, LADIES AND GENTLEMEN, WHO INTERVIEWED WITNESSES AND
6 THE DEFENDANT IN THIS CASE.

7 NOW, WHAT YOU NEED TO REALIZE LADIES AND GENTLEMEN, IS THAT
8 THIS LITTLE GIRL WAS ONLY FIVE-YEARS-OLD WHEN THIS HAPPENED TO HER.
9 FIVE-YEARS-OLD. A FIVE YEAR OLD CAN'T READ AND MANY FIVE-YEAR-OLDS
10 CAN'T EXPRESS THEMSELVES FULLY, HOW THEY NEED TO EXPRESS
11 THEMSELVES. YOU ARE DEALING WITH A BABY. A BABY. AND YOU NEED TO
12 TAKE THAT INTO CONSIDERATION AS YOU LISTEN TO THIS EVIDENCE. BUT
13 YOU WILL HEAR THE EVIDENCE IN THIS CASE, LADIES AND GENTLEMEN. WE
14 WILL PROVE BEYOND A REASONABLE DOUBT THAT THAT MAN, DONALD
15 WEATHERALL, COMMITTED A SEX CRIME AGAINST A FIVE-YEAR-OLD LITTLE
16 GIRL. THANK YOU FOR YOUR TIME. I LOOK FORWARD TO SPEAKING TO YOU
17 AGAIN WHEN THE TRIAL IS FINISHED.

18 MR. HOWE: MAY IT PLEASE THE COURT.

19 THE COURT: YES, SIR.

20 MR. HOWE: GOOD MORNING. LADIES AND GENTLEMEN, I AM CHIP
21 HOWE, PUBLIC DEFENDER, AND I REPRESENT DONALD WEATHERALL
22 SEATED OVER THERE, WHO HAS BEEN POINTED AT SEVERAL TIMES BY THE
23 SOLICITORS OFFICE, BY MR. FLEMING. YOU KNOW, IF IT WERE AS SIMPLE AS
24 WHAT MR. FLEMING SAYS, WE REALLY WOULDN'T BE HERE. WE COULD GO
25 ON ABOUT OUR BUSINESS. BUT IT IS NOT THAT WAY. AND I NOTICED THAT

1 WHEN HE WAS TALKING TO YOU AND HE WAS DESCRIBING WHAT HE WAS
2 ACCUSED OF SOME OF, YOU PROBABLY BECAME A LITTLE ANGRY. YOU
3 PROBABLY DID. AND THAT WOULD BE HUMAN NATURE. AND I SUBMIT TO YOU
4 ALSO, THAT IF YOU THINK ABOUT IT, SOMEBODY WHO HAS BEEN ACCUSED
5 WITH SOMETHING LIKE THIS AND DIDN'T DO IT, THAT ALSO WOULD MAKE ME
6 ANGRY AND THAT IS WHY WE ARE HERE. NOW, YOU KNOW, YESTERDAY WAS
7 SEPTEMBER 11th AND I THOUGHT ABOUT THIS. YOU KNOW, WITH WHAT IS
8 GOING ON IN THE WORLD AND WHAT IS GOING ON IN THE STATE WITH
9 PEOPLE BEING ACCUSED OF SEXUAL OFFENSES AGAINST MINORS, YOU
10 KNOW, I SUPPOSE YESTERDAY, IF I WAS REPRESENTING SOMEBODY
11 CHARGED WITH A TERRORIST ACT, THAT WOULD BE ABOUT THE ONLY THING
12 WORSE THAN HAVING TO COME IN HERE IN THIS SET OF CIRCUMSTANCES
13 AND REPRESENT MR. WEATHERALL IN TODAY'S CLIMATE, YOU KNOW. BUT IT
14 IS IMPORTANT THAT YOU, AS JURORS, AS FAIR-MINDED CITIZENS WHO WERE
15 SELECTED TO BE ON THIS JURY, THAT YOU UNDERSTAND THAT HE HAS JUST
16 BEEN ACCUSED OF THIS CRIME AT THIS POINT. AND WHILE I AM SURE THAT
17 YOUR PASSIONS MAY BE RUNNING HIGH AFTER WHAT YOU HEARD WHAT MR.
18 FLEMING SAID, I'M SURE THAT YOU FOLKS, AS FAIR-MINDED JURORS, WILL DO
19 WHAT THE JUDGE IS GOING TO ASK YOU TO DO AND WHAT YOU SAID YOU
20 WOULD DO AND THAT IS TO BE FAIR AND IMPARTIAL WHEN YOU HEAR THE
21 EVIDENCE IN THIS CASE AND DECIDE, AND NOT TO FAVOR ANYBODY EVEN
22 THOUGH YOU MAY HAVE FEELINGS ABOUT SOMETHING SUCH AS THIS.
23 YOU ARE GOING TO HEAR SOME UNCOMFORTABLE TESTIMONY. I WILL
24 BE HONEST WITH YOU. WHEN I AM SPEAKING TO THE YOUNG CHILD, I AM
25 PROBABLY GOING TO BE A LITTLE BIT UNCOMFORTABLE ABOUT WHAT TO

1. ASK, ABOUT HOW THIS IS ADDRESSED. BUT IT HAS GOT TO BE DONE AND
2. QUESTIONS HAVE TO BE ASKED, CERTAIN THINGS HAVE TO BE ASKED,
3. BECAUSE YOU'VE GOT TO DECIDE WHETHER OR NOT THE STATE CAN PROVE
4. TO YOUR SATISFACTION, EACH ONE OF YOUR SATISFACTION, BEYOND A
5. REASONABLE DOUBT THAT THIS REALLY HAPPENED.

6. YOU KNOW, MR. WEATHERALL COMES IN THIS COURTROOM PRESUMED
7. INNOCENT UNLESS AND UNTIL HE IS PROVEN GUILTY TO YOUR SATISFACTION
8. BEYOND A REASONABLE DOUBT AND ALL OF YOU AGREE. YOU KNOW,
9. SOMEBODY THAT'S CHARGED WITH THIS SITUATION, I SUPPOSE, YOU COULD
10. PICTURE YOUR FAVORITE ACTOR OR ACTRESS OR WHATEVER THE CASE MAY
11. BE AND PUT THEM OVER THERE IN MR. WEATHERALL'S SHOES, AND AFTER
12. YOU HAVE HEARD THAT SET OF FACTS, YOU PROBABLY ARE NOT GOING TO
13. LOOK TOO FAVORABLY ON THEM. AND I CAN ASSURE YOU MR. WEATHERALL
14. IS NOT A MOVIE STAR OR ANYTHING LIKE THAT AND HE PROBABLY COMES
15. INTO IT THAT WAY. THE BOTTOM LINE THOUGH IS FOLKS, IS I KNOW YOU
16. WILL DO WHAT YOU SAID YOU WOULD DO AND THAT IS, YOU WILL HEAR ALL
17. THE EVIDENCE. AND THAT IS WHAT WE WANT YOU TO DO. I AM NOT GOING
18. TO DISCUSS ALL THE EVIDENCE, BECAUSE YOU KNOW -- AND WHAT, IF
19. ANYTHING, WE INTEND TO PROVE, BECAUSE THE THING ABOUT IT, THE
20. DEFENSE, THE DEFENDANT DOES NOT HAVE TO PROVE ABSOLUTELY ONE
21. THING. WE DO NOT HAVE TO PROVE A THING. DEFENSE DOESN'T EVEN
22. HAVE TO OFFER ANY TESTIMONY. THE BURDEN IS ON THE STATE TO PROVE
23. EACH AND EVERY ELEMENT OF THE CHARGES TO YOUR SATISFACTION
24. BEYOND A REASONABLE DOUBT. WE DON'T HAVE TO PROVE ANYTHING. SO I
25. AM NOT GOING TO SIT HERE AND GIVE YOU A BLUEPRINT ABOUT WHAT WE

1 INTEND TO SHOW OR NOT SHOW AT THIS TIME. LET'S GET ON WITH THE
2 EVIDENCE IN THIS CASE AND YOU FOLKS CAN MAKE YOUR DECISION.

3 I DO SAY, YOU KNOW, AS I ANTICIPATE THE FIRST WITNESS YOU HEAR
4 IS THE CHILD. OKAY. THAT WILL BE JUST ONE WITNESS. OKAY. AND I KNOW
5 YOU ARE NOT GOING TO MAKE UP YOUR MIND AFTER YOU HEAR THE CHILD,
6 BECAUSE THERE IS GOING TO BE OTHER TESTIMONY IN THIS CASE, OTHER
7 THINGS FOR YOU TO CONSIDER. AND I AM ASKING YOU THAT YOU NOT – AND
8 I UNDERSTAND THAT WE ARE TALKING ABOUT A YOUNG CHILD – BUT I AM
9 ASKING YOU TO CONSIDER THE FOLLOWING; AND THAT IS THAT THIS CHILD
10 IS STILL A WITNESS AND WITNESSES, NO MATTER WHETHER OLD OR YOUNG,
11 YOU HAVE TO DECIDE WHETHER OR NOT SOMEBODY'S BELIEVABLE. AND I
12 DON'T BELIEVE THE JUDGE IS GOING TO TELL YOU – JUST LIKE SOME FOLKS
13 THINK THAT IF A POLICE OFFICER TESTIFIES, THEY ARE SUPPOSED TO BE
14 GIVEN MORE CREDIBILITY THAN A REGULAR PERSON. THAT'S NOT THE LAW.
15 THE JUDGE IS GOING TO TELL YOU THAT. THE JUDGE IS NOT GOING TO TELL
16 YOU JUST BECAUSE A CHILD TESTIFIES, JUST BECAUSE A CHILD TESTIFIES
17 THE CHILD IS SUPPOSED TO BE GIVEN ANY MORE BELIEVABILITY THAN AN
18 ADULT, BECAUSE THAT IS NOT THE LAW. ALL I CAN ASK YOU TO DO AT THIS
19 STAGE IS TO LISTEN TO ALL THE EVIDENCE, PUT ASIDE YOUR PASSIONS AND
20 FEELINGS ABOUT SOMETHING LIKE THIS, AND DECIDE THE CASE BASED ON
21 WHAT YOU HEAR IN THE COURTROOM, AND AFTER WHAT YOUR HONOR
22 TELLS YOU IS THE LAW AND YOU APPLY IT. AND I KNOW THAT MAY BE
23 DIFFICULT, BUT I KNOW Y'ALL CAN DO THAT. AND THAT IS ALL WE ASK. I
24 APPRECIATE IT VERY MUCH AND THANK YOU FOR YOUR TIME.

25 THE COURT: THANK YOU. YES, SIR. YOU CAN CALL YOUR FIRST

1 WITNESS.

2 MR. FLEMING: MAY WE APPROACH YOUR HONOR?

3 THE COURT: SURE. COME RIGHT OVER HERE.

4 (BENCH CONFERENCE OFF THE RECORD)

5 THE COURT: LADIES AND GENTLEMEN, I ACTUALLY NEED TO SEND YOU
6 OUT OF THE COURTROOM FOR – ACTUALLY, I REALIZE I JUST TOLD YOU THAT
7 WHEN I TELL YOU TEN MINUTES, IT'LL BE FIFTEEN. I'M SENDING YOU OUT FOR
8 ABOUT FIVE MINUTES MAX AND THEN WE WILL BRING YOU BACK IN AND
9 PLEASE DON'T DISCUSS THE CASE. ALL RIGHT?

10 (JURY OUT AT 11:19 AM)

11 THE COURT: ALL RIGHT. I UNDERSTAND THE FIRST TESTIMONY IS

12 GOING TO BE THE CHILD AS THE FIRST WITNESS.

13 MR. FLEMING: YES, SIR.

14 THE COURT: ALL RIGHT, WHAT I AM GOING TO DO IS CLEAR THE
15 COURTROOM OF EVERYONE EXCEPT THE DEFENDANT, PLEASE.

16 (BAILIFF CLEARS THE COURTROOM EXCEPT FOR
17 NECESSARY PERSONNEL)

18 THE COURT: OKAY. IS EVERYBODY READY?

19 MR. FLEMING: YES, SIR, YOUR HONOR.

20 MR. HOWE: YES, SIR.

21 THE COURT: BRING THE JURY BACK IN.

22 MR. FLEMING: YOUR HONOR, I WOULD – IS THERE SOME KIND OF
23 FORMAT WE ARE SUPPOSED TO ADDRESS THE CHILD BY? NOT HER LAST
24 NAME?

25 THE COURT: HOWEVER YOU WANT TO DO IT. YOU KNOW, THESE ARE

1 ALWAYS SORT OF DICEY SO, EITHER ONE OF YOU CAN CALL HER – WHAT DO
2 YOU WANT TO CALL HER?

3 MR. FLEMING: I DIDN'T KNOW WHETHER SHE WAS GOING TO HAVE TO
4 GIVE HER FULL NAME WHEN SHE IS SWORN OR...

5 THE COURT: ANY OBJECTION TO HER GIVING HER FULL NAME? I
6 MEAN, I OBVIOUSLY, WE ARE GOING TO HAVE TO SAFEGUARD HER
7 TESTIMONY. BUT I DON'T HAVE ANY PROBLEM NOW WITH PUTTING HER
8 NAME ON THE RECORD AND JUST CALLING HER BY HER FIRST NAME.

9 MR. FLEMING: OKAY.

10 THE COURT: WHAT'S HER NAME?

11 MR. FLEMING: Minor

12 THE COURT: ALL RIGHT. WHAT WE WILL DO WHEN WE SWEAR HER IN,
13 SHE CAN JUST SAY HER FIRST NAME, OKAY? ANY OBJECTION TO THAT?

14 MR. FLEMING: NO, SIR.

15 THE COURT: OKAY.

16 (JURY IN AT 11:23 AM)

17 BAILIFF: ALL PRESENT YOUR HONOR.

18 THE COURT: THANK YOU. YOU MAY BE SEATED. LADIES AND
19 GENTLEMEN, THAT MAY BE THE ONLY TIME THIS WEEK THAT I TELL YOU YOU
20 ARE GOING TO BE OUT FOR FIVE MINUTES AND YOU ARE REALLY OUT FOR
21 FIVE MINUTES. I APPRECIATE IT. ALL RIGHT. YOU MAY CALL YOUR FIRST
22 WITNESS.

23 MR. FLEMING: YOUR HONOR WE CALL Minor THE STAND.

24 THE COURT: HONEY – Minor – LET – OKAY, YOU CAN STAND RIGHT
25 THERE AND DO IT.

1 (AFTER BEING DULY SWORN BY THE CLERK OF COURT, Minor

2 TURNER TESTIFIED AS FOLLOWS:)

3 CLERK OF COURT: I JUST NEED YOUR FIRST NAME.

4 WITNESS: Minor

5 THE COURT: Minor LET ME TELL YOU SOMETHING. IF YOU HAVE A
6 QUESTION OR YOU WANT SOMETHING YOU JUST TELL ME TO STOP, OKAY?

7 WITNESS: OKAY. ALL RIGHT.

8 MR. FLEMING: IF IT PLEASE THE COURT, YOUR HONOR?

9 THE COURT: YES, SIR.

10 DIRECT EXAMINATION OF Minor BY MR. FLEMING:

11 Q HEY, HOW ARE YOU TODAY?

12 A GOOD.

13 Q NOW, YOUR NAME IS Minor RIGHT?

14 A (NODS HEAD)

15 Q ANSWER YES OR NO, OKAY?

16 A YES.

17 Q AND HOW OLD ARE YOU, Minor

18 A SEVEN.

19 Q SEVEN. I BELIEVE YOU HAVE A BIRTHDAY COMING UP. IS THAT RIGHT?

20 A YES.

21 Q THIS WEEK? IS YOUR BIRTHDAY THIS WEEK?

22 A HUH-UH.

23 Q IT'S NOT? WHEN IS IT? THE FOURTEENTH?

24 A YES, SIR.

25 Q OKAY. AND YOU WILL BE EIGHT THEN?

1 A YES, SIR.

2 Q OKAY. AND WHERE DO YOU LIVE RIGHT NOW?

3 A WITH MY GRANDMA.

4 Q AND WHERE DOES SHE LIVE?

5 A IN CROSS HILL.

6 Q IN CROSS HILL?

7 A (NODS HEAD)

8 Q OKAY. AND DO YOU GO TO SCHOOL?

9 A YES.

10 A YOU DO? AND WHERE DO YOU GO TO SCHOOL?

11 A JOANNA.

12 Q YOU GO TO JOANNA? WHAT GRADE ARE YOU IN?

13 A SECOND.

14 Q THE SECOND GRADE?

15 A (NODS HEAD).

16 Q OKAY. DO YOU LIKE SCHOOL?

17 A YES.

18 Q WELL, LET ME ASK YOU SOMETHING, ^{Minor} IF I WERE TO TELL YOU

19 THAT I WAS WEARING A PINK TIE, WOULD THAT BE THE TRUTH OR

20 WOULD THAT BE A LIE?

21 A A LIE.

22 Q AND IF I WAS TO TELL YOU I WAS WEARING A YELLOW SHIRT, WOULD

23 THAT BE THE TRUTH OR A LIE?

24 A A LIE.

25 Q IF I TOLD YOU I WAS WEARING A BLUE SHIRT, WOULD THAT BE THE

1 TRUTH OR WOULD THAT BE A LIE? IF I TOLD YOU I WAS WEARING A
2 BLUE SHIRT, WOULD THAT BE THE TRUTH OR WOULD THAT BE A LIE?

3 A TRUE.

4 Q OKAY. SO, YOU KNOW THE DIFFERENCE BETWEEN TELLING THE
5 TRUTH AND TELLING A LIE.

6 A YES, SIR.

7 Q NOW, WHERE DID YOU LIVE PRIOR TO LIVING WITH YOUR GRANDMA?
8 WHO DID YOU LIVE WITH?

9 A MY MAMA.

10 Q WITH YOUR MAMA?

11 A (NODS HEAD)

12 Q AND HOW OLD WERE YOU WHEN YOU LIVED WITH YOUR MAMA?

13 A FIVE.

14 Q YOU WERE FIVE? OKAY. AND WHEN YOU WERE LIVING WITH YOUR
15 MAMA, DO YOU REMEMBER A MAN WHO LIVED THERE SOMETIMES BY
16 THE NAME OF DON?

17 A YES, SIR.

18 Q DID HE STAY THERE A GOOD BIT?

19 A YES, SIR.

20 Q HE DID? WHEN YOU LIVED WITH YOUR MAMA WHERE DID Y'ALL LIVE?

21 A IN CROSS HILL.

22 Q IN CROSS HILL? WAS THERE A TIME THAT, WHEN YOU LIVED WITH
23 YOUR MOM AND SHE WOULD BE ASLEEP AND DON DO SOMETHING TO
24 YOU THAT HE WASN'T SUPPOSE TO DO?

25 MR. HOWE: YOUR HONOR, I OBJECT TO LEADING.

1 THE COURT: ALL RIGHT. I UNDERSTAND THAT HE IS LEADING. I AM
2 OVERRULING. I'LL ALLOW IT.

3 Q DID DON DO SOMETHING TO YOU HE WASN'T SUPPOSED TO DO?

4 A YES, SIR.

5 Q WHAT DID HE DO?

6 A HE... HE...

7 Q IT'S OKAY.

8 A HE STUCK HIS...UM...

9 Q IT'S OKAY, SWEETIE. HE DID WHAT? JUST LOOK AT ME AND TELL ME.

10 A HE STUCK HIS, UM, UM – HIS WEE WEE UP ME.

11 Q HE STUCK HIS WEE WEE UP YOU?

12 A (NODS HEAD)

13 MR. HOWE: YOUR HONOR, I DON'T WANT HIM TO BE REPEATING

14 TESTIMONY. I AM NOT SURE – AGAIN, I APOLOGIZE. MAY WE TAKE THIS UP,
15 JUDGE?

16 THE COURT: SURE. HOLD ON A MINUTE.

17 (BENCH CONFERENCE OFF THE RECORD)

18 THE COURT: ^{Minor} LET ME ASK YOU SOMETHING. IT IS HARD TO HEAR
19 IN HERE. SEE THAT MICROPHONE RIGHT THERE? IF YOU COULD SPEAK INTO
20 THE MICROPHONE SO WE CAN ALL HEAR. WE ARE ALL OLD AND CAN'T HEAR,
21 OKAY?

22 Q CAN I PULL IT DOWN FOR YOU A LITTLE BIT? THERE YOU GO.

23 OKAY. AND SO, WE WERE TALKING ABOUT DON DID SOMETHING TO
24 YOU THAT HE WASN'T SUPPOSED TO DO. WHAT DID HE DO TO YOU?

25 A HE STUCK HIS WEE WEE UP ON ME.

- 1 Q HE STUCK HIS WEE WEE UP ON YOU?
- 2 A (NODS HEAD)
- 3 Q AND WHEN YOU SAY THAT, DID HE STICK IT INSIDE YOU OR ON THE
- 4 OUTSIDE OF YOU?
- 5 A ON THE OUTSIDE.
- 6 Q AND WHERE WERE YOU AT WHEN THIS HAPPENED?
- 7 A I WAS LIVING WITH MY MAMA.
- 8 Q OKAY. AND YOU WERE LIVING WITH YOUR MAMA, BUT WHERE WERE
- 9 YOU AT IN THE HOUSE WHEN THAT HAPPENED?
- 10 A I WAS ON THE COUCH.
- 11 Q WHAT WERE YOU DOING?
- 12 A I WAS...
- 13 Q WHAT HAD YOU BEEN DOING?
- 14 A I WAS WATCHING TV.
- 15 Q WATCHING TV? WERE YOU WATCHING CARTOONS?
- 16 A (NODS HEAD)
- 17 Q HUH? YOU WERE WATCHING CARTOONS?
- 18 A (NODS HEAD)
- 19 Q OKAY. AND WHEN YOU WERE WATCHING CARTOONS ON THE COUCH
- 20 THERE, WHAT WERE YOU WEARING?
- 21 A MY NIGHTGOWN.
- 22 Q YOUR NIGHTGOWN? DID YOU HAVE ON ANYTHING ELSE?
- 23 A I HAD MY PANTIES ON.
- 24 Q NOW, DID HE MAKE YOU TAKE THE PANTIES OFF?
- 25 A YES.

1 Q AND THEN HE STUCK HIS WEE WEE ON YOU.

2 A YES.

3 Q WAS HE ON TOP OF YOU?

4 A (LOOKING DOWN)

5 Q IT'S OKAY, SWEETIE. LOOK UP HERE AT ME. WAS DONALD ON TOP OF
6 YOU?

7 A YES.

8 Q AND DID IT HURT?

9 A (LOOKING DOWN)

10 Q I KNOW YOU ARE SCARED, SWEETIE, AND IT IS OKAY. I'M RIGHT HERE.
11 DID IT HURT?

12 A YES.

13 Q AND WHAT ELSE HAPPENED AFTER HE DID THAT?

14 A (LOOKING DOWN)

15 Q IT'S OKAY. LOOK AT ME AND TELL ME WHAT ELSE HAPPENED AFTER HE
16 DID THAT.

17 A HE DID THAT WHITE STUFF.

18 Q HE DID THAT WHITE STUFF? WHERE AT? ON YOU?

19 A ON MY BELLY.

20 Q DID HE MAKE YOU WIPE IT OFF?

21 A NO, HE WIPED IT OFF WITH MY LOONEY TUNE BLANKET.

22 Q HE WIPED IT OFF WITH YOUR LOONEY TUNE BLANKET?

23 MR. HOWE: YOUR HONOR, I HAVE TO OBJECT TO THE LEADING —

24 THE COURT: I UNDERSTAND. I UNDERSTAND.

25 MR. HOWE: — TO THE LEADING THERE.

1 THE COURT: I UNDERSTAND. AND TO THE EXTENT THAT YOU CANNOT
2 DO IT, YOU NEED TO NOT DO IT. I UNDERSTAND YOUR OBJECTION.

3 MR. FLEMING: I WAS JUST REPEATING WHAT SHE SAID, YOUR HONOR.

4 THE COURT: YES. I WILL GIVE YOU SOME LEEWAY. I WILL GIVE YOU
5 BOTH SOME LEEWAY.

6 Q SO, ^{Minor} I WANT TO SHOW YOU SOMETHING. IS THAT THE BLANKET
7 HE WIPED IT OFF OF YOU WITH?

8 A YES.

9 Q IS THAT YOUR LOONEY TUNE BLANKET?

10 A (NODS HEAD)

11 Q YOU HAD IT FOR A LONG TIME?

12 A UH-HUH. (NODS HEAD)

13 Q YOUR HONOR, WE WOULD LIKE TO SUBMIT THIS AS STATE'S EXHIBIT #1.

14 THE COURT: ANY OBJECTIONS?

15 MR. HOWE: YES, JUDGE. HE HAS TO PUT IT INTO EVIDENCE?

16 THE COURT: YOU ENTERED IT IN EVIDENCE?

17 MR. HOWE: I WOULD OBJECT. THERE HAS NOT BEEN A PROPER
18 FOUNDATION.

19 MR. FLEMING: I THINK I PROVED THE PROPER FOUNDATION, YOUR
20 HONOR, WITH THE WITNESS' TESTIMONY.

21 THE COURT: BASICALLY, SHE HAS IDENTIFIED IT. LADIES AND
22 GENTLEMEN, LET ME DO THIS. I AM GOING TO SEND YOU OUT FOR JUST A
23 MINUTE. PLEASE, DON'T DISCUSS THE CASE.

24 (JURY OUT AT 11:30 AM)

25 THE COURT: I GUESS THE PROBLEM IS -- YOUR QUESTION IS WHETHER

1 OR NOT THAT IS THE ACTUAL BLANKET. IS THAT RIGHT?

2 MR. HOWE: AND I WOULD SUBMIT, YOUR HONOR, THAT THERE HAS
3 BEEN NO PROPER CHAIN OF CUSTODY; WHERE THAT BLANKET HAS BEEN,
4 WHAT HAPPENED TO IT, OR ANYTHING OF THAT NATURE, AND I WOULD
5 OBJECT TO THE INTRODUCTION OF THE BLANKET WITHOUT THAT.

6 THE COURT: IS SOMEONE COMING IN LATER IN REGARD TO THE CHAIN
7 OF CUSTODY?

8 MR. FLEMING: YES SIR. WE ARE GOING TO PROVIDE THAT.

9 THE COURT: ALL RIGHT. WHY DON'T WE DO THIS AT THIS POINT. I
10 WILL ALLOW YOU TO INTRODUCE IT AS AN EXHIBIT AND THEN AT A LATER
11 DATE, OR AT A LATER POINT, WE WILL INTRODUCE IT, ASSUMING THE CHAIN
12 OF CUSTODY IS MET. BUT SHE CAN IDENTIFY IT AS TO WHATEVER SHE
13 WANTS AND WE WILL DO IT AS EXHIBIT #1, FOR IDENTIFICATION PURPOSES
14 ONLY.

15 MR. HOWE: BUT I -- THANK YOU, BUT THE REASON FOR THE
16 OBJECTION, I THOUGHT HE WAS GOING AHEAD AND JUST TO GET IT INTO
17 EVIDENCE.

18 THE COURT: WELL, I THINK HE WAS, BUT I THINK WE WILL DO --

19 MR. HOWE: RIGHT.

20 THE COURT: --AND I'LL PUT IT IN FOR IDENTIFICATION PURPOSES AND
21 THEN WE WILL DEAL WITH THE CHAIN OF CUSTODY.

22 THE COURT: ^{Minor} WOULD YOU LIKE SOME WATER?

23 (JURY RETURNS AT 11:40 AM)

24 THE BAILIFF: ALL PRESENT, YOUR HONOR.

25 THE COURT: THANK YOU, LADIES AND GENTLEMEN. YOU CAN BE

1 SEATED. WHAT WE HAVE DONE IS TO MARK THE BLANKET FOR
2 IDENTIFICATION PURPOSES ONLY, BUT IT'S NOT INTRODUCED INTO EVIDENCE
3 YET, AS STATE'S EXHIBIT #1.

4 Q OKAY, SO, Minor WHEN YOU SAID DON PUT HIS WEE WEE ON YOU,
5 WHERE DID HE PUT IT ON YOU AT?

6 A ON MY MONKEY.

7 Q ON YOUR MONKEY? WHAT IS THAT. IS THAT YOUR PRIVATE PART?

8 A YES, SIR. MY PRIVATE PART.

9 Q OKAY. AND DID HE DO ANYTHING ELSE TO YOU?

10 A (SILENCE)

11 Q DID HE DO ANYTHING ELSE TO YOU?

12 A (SILENCE)

13 Q DID HE DO ANYTHING ELSE TO YOU, SWEETIE?

14 A NOT AFTER MY MAMA WOKE UP.

15 Q I'M SORRY, WHAT DID YOU SAY?

16 A NOT AFTER MY MAMA WOKE UP.

17 Q OKAY. NOT AFTER YOUR MAMA WOKE UP. DID YOU TELL YOUR
18 MOMMY?

19 A (SILENCE)

20 Q DID YOU TELL YOUR MOMMY?

21 A ONE TIME I DID AND ONE TIME I DIDN'T.

22 Q OKAY. AFTER THAT, DO YOU REMEMBER BEING IN A VAN WITH DON
23 AND YOUR MOM?

24 A YES, SIR.

25 Q AND WHERE WAS THAT AT?

1 MR. HOWE: MATTER FOR THE COURT, YOUR HONOR.

2 THE COURT: LADIES AND GENTLEMEN, I WILL HAVE TO SEND YOU OUT
3 AGAIN.

4 (JURY OUT AT 11:44 AM)

5 THE COURT: YES, SIR.

6 MR. HOWE: YOUR HONOR, I BELIEVE MR. FLEMING IS GETTING READY
7 TO GO INTO MCCORMICK —

8 THE COURT: ALL RIGHT.

9 MR. HOWE: — AND I THINK WE HAD A DISCUSSION ABOUT THAT,
10 ABOUT HOW THAT OUGHT TO BE ADDRESSED.

11 THE COURT: WELL, I AM ASSUMING THE KNOWLEDGE OF WHAT
12 HAPPENED THERE IS PRETTY LIMITED.

13 MR. FLEMING: YES, SIR. I MEAN, SHE CAN PRETTY MUCH TESTIFY AS
14 TO WHAT HAPPENED, BUT...

15 THE COURT: YOU MEAN PHYSICALLY.

16 MR. FLEMING: YES.

17 THE COURT: BUT NO —

18 MR. FLEMING: I WASN'T GOING TO GET INTO THAT, BUT IT WAS MY
19 UNDERSTANDING THAT WE JUST SAID WE WERE JUST GOING TO LIMIT IT TO
20 NOT PUTTING INTO EVIDENCE THAT HE WAS CHARGED WITH A CRIME.

21 THE COURT: RIGHT. WELL, WE WILL DEAL WITH THAT. I ASSUMED WE
22 WOULD DEAL WITH THAT BEFORE, YOU KNOW, WHEN THE INSPECTOR
23 COMES OUT HERE. I UNDERSTAND WHY YOU WOULD HAVE TO ASK THAT
24 QUESTION. I AM JUST REAL CONCERNED ABOUT WHAT MIGHT COME OUT,
25 BUT I.....

1 **MR. FLEMING:** I WILL KEEP IT TO A MINIMUM, YOUR HONOR.

2 **THE COURT:** YEAH. BEFORE WE GET INTO THE MCCORMICK ARREST
3 AND PROBABLE CAUSE FOR ARREST AND ALL THAT, I HAD ASSUMED THAT
4 WOULD COME IN WITH SOMEONE ELSE AND WE WILL HAVE TO HAVE AN
5 *IN CAMERA* HEARING ABOUT IT. I DON'T KNOW OF ANY WAY TO MAKE SURE
6 THAT SOMETHING DOESN'T POP OUT, BUT...

7 **MR. HOWE:** WELL, YOUR HONOR AND THAT BRINGS UP THE POINT.
8 AND THAT IS WHY I NEED TO OBJECT ON THE RECORD AND PRESERVE THIS
9 MATTER. I AM GOING TO OBJECT TO ANY TESTIMONY FROM THIS WITNESS,
10 AND IF I HAVE TO DO IT WITH EACH WITNESS I WILL DO IT, BUT ANY
11 TESTIMONY CONCERNING THE MCCORMICK CHARGE. I THINK, I WOULD
12 SUBMIT THAT IT IS IMPROPER UNDER LYLE, IT'S IMPROPER EVIDENCE AND
13 EVEN IF YOU WOULD SOMEHOW WOULD FIND THAT SOMEHOW THAT WOULD
14 BE ADMISSIBLE UNDER THE LYLE THEORY, AND I DON'T KNOW UNDER WHICH
15 ONE OF THOSE EXCEPTIONS IT FALLS UNDER, BUT EVEN IF YOU FIND THAT IT
16 IS, IT IS CERTAINLY PREJUDICIAL AND THE COURT, I THINK, STILL HAS TO
17 WEIGH WHETHER OR NOT THE ADMISSIBILITY OF THIS IS SOMETHING THAT
18 SHOULD BE ALLOWED TAKING INTO CONSIDERATION THE PREJUDICIAL
19 IMPACT OF WHAT THIS EVIDENCE WILL HAVE. AND I'D ALSO CONTEND THAT
20 THIS IS NOT RELEVANT TO THE LAURENS COUNTY CHARGE.

21 **THE COURT:** ALL RIGHT, LET ME DO THIS. Minor CAN YOUCAN
22 YOU TAKE HER OUT? I AM GOING TO LET YOU REST A LITTLE BIT, SO YOU
23 CAN WALK BACK THERE.

24 (Minor IS ESCORTED AWAY FROM THE WITNESS BOX BY THE
25 VICTIM'S ADVOCATE)

1 **MR. HOWE:** JUDGE, COULD YOU ASK ^{Minor} NOT TO TALK ABOUT THE
2 CASE WITH HER GRANDMOTHER?

3 **THE COURT:** YES. IN FACT, IS THERE SOME PLACE SHE COULD GO
4 WITHOUT GOING OUT THERE? AND DON'T TALK ABOUT ANYTHING.

5 **THE COURT:** ALL RIGHT. MR. FLEMING, LET ME ASK YOU SOMETHING.
6 WHAT DO YOU THINK SHE IS GOING TO SAY? I DID NOT THINK WE WOULD
7 GET INTO MCCORMICK. I'M NOT SURE YOU EVEN WANT TO GET INTO
8 MCCORMICK WITH HER, BUT WHAT DO YOU THINK SHE IS GOING TO SAY?

9 **MR. FLEMING:** IT DEPENDS ON WHAT I ASK HER, YOUR HONOR.

10 **THE COURT:** YEAH.

11 **MR. FLEMING:** SHE COULD DEFINITELY SAY SHE WAS IN THE VAN AND I
12 DON'T KNOW IF SHE COULD SAY THAT SHE WAS IN MCCORMICK COUNTY
13 BECAUSE SHE WAS FIVE.

14 **THE COURT:** THAT'S WHAT I WOULD THINK.

15 **MR. FLEMING:** SHE IS ONLY SEVEN NOW. I DON'T KNOW IF SHE KNOWS
16 THE DIFFERENCE BETWEEN COUNTIES, BUT SHE COULD SAY SHE WAS
17 DEFINITELY AT THIS PLACE AT A PARK AND SHE WAS IN THE VAN WITH THEM
18 AND POLICE OFFICERS CAME UP AND KNOCKED ON THE DOOR. SHE COULD
19 ALSO GO INTO THE FACT THAT, IF I ASKED HER, THAT HE WAS PREFORMING
20 SEXUAL ACTS ON HER AT THAT TIME.

21 **THE COURT:** YEAH. AND THAT'S WHAT I WANT TO AVOID. I THINK
22 THAT —

23 **MR. FLEMING:** AND I WASN'T GOING TO GET INTO THAT. I WAS JUST
24 GOING TO —

25 **THE COURT:** JUST LIMIT IT TO —

1 **MR. FLEMING:** — LIMIT IT TO, THAT SHE KNEW SHE WAS THERE AND
2 THE POLICE CAME.

3 **THE COURT:** I DON'T THINK THAT IS A PROBLEM, BUT IF SHE GETS INTO
4 IT, AND I DON'T THINK SHE WILL, BUT I DON'T WANT TO GET INTO WHAT
5 HAPPENED IN MCCORMICK, BECAUSE THAT IS A DICEY ISSUE. SO —

6 **MR. HOWE:** AND YOUR HONOR, JUST FOR THE RECORD. WE HAD PRE-
7 TRIAL DISCUSSIONS AND I WANT TO MAKE SURE I AM PROTECTED ON THE
8 RECORD. I OBJECT TO ANY TESTIMONY ABOUT MCCORMICK.

9 **THE COURT:** YES. WHAT I THOUGHT WE WOULD DO WAS, AFTER
10 SHE'S — WE WILL GO AHEAD AND CLEAR THAT UP AFTER SHE HAS TESTIFIED,
11 AFTER YOU ASK HER ABOUT MCCORMICK. WHAT ELSE ARE YOU GOING TO
12 ASK HER ABOUT THE VAN AND THE POLICE COMING? YOU ARE NOT GETTING
13 BACK INTO THAT AREA AGAIN, ARE YOU?

14 **MR. FLEMING:** NO, SIR.

15 **THE COURT:** OKAY.

16 **MR. FLEMING:** NO, SIR. I WASN'T GOING TO BRING UP ANYTHING, AS
17 FAR AS TO, YOU KNOW, WHAT HE DID AT THAT POINT IN TIME.

18 **THE COURT:** HOW WOULD THAT BE RELEVANT? I AM JUST THINKING
19 THROUGH IT. AND WHAT I AM TRYING TO DO IS TO AVOID HER POPPING OUT
20 WITH SOMETHING. CAN YOU GET TO WHERE YOU WANT TO GET WITHOUT
21 ASKING HER THAT QUESTION? MY EXPERIENCE WITH SEVEN-YEAR-OLDS IS,
22 THERE IS NO TELLING WHAT THEY ARE GOING TO SAY. IN OTHER WORDS,
23 ASSUMING THAT WE LET IT IN, YOU CAN GET THE FACT THEY WERE IN
24 MCCORMICK AND —

25 **MR. FLEMING:** I MEAN, I CAN GET IT IN WITHOUT HER TESTIMONY, BUT

1 THE FACT THAT SHE CAN SAY THAT IS...

2 THE COURT: IT JUST BECOMES VERY SLIPPERY ONCE WE LET HER --
3 SHE IS OBVIOUSLY AFRAID.

4 MR. FLEMING: I'LL TELL YOU WHAT, I WON'T EVEN GET INTO IT WITH
5 HER, YOUR HONOR. I'LL WAIT UNTIL THE MCCORMICK OFFICERS COME UP
6 TO TESTIFY AND YOU CAN RULE ON IT THEN.

7 THE COURT: YES. AND LET'S -- WE WILL RULE ON IT AT THAT POINT
8 AND HOPE SHE DOESN'T BLURT SOMETHING OUT. THAT IS MY CONCERN. I
9 HAVE HAD THAT HAPPEN BEFORE. OKAY. YOU CAN BRING HER BACK IN.

10 (VICTIM'S ADVOCATE BRINGS ^{Minor} BACK INTO THE
11 COURTROOM)

12 MR. HOWE: JUDGE, WOULD IT BE PROPER TO ASK ^{Minor} TO MAKE
13 SURE SHE HAS NOT DISCUSSED WITH THE SOLICITORS ADVOCATE, HOW TO
14 TESTIFY OR TO ANSWER QUESTIONS OR ANYTHING LIKE THAT?

15 THE COURT: YES, WE WILL ASK HER.

16 MR. HOWE: I WOULD LIKE TO ASK HER AND MAKE SURE THAT WAS
17 NOT DONE.

18 (^{Minor} RETURNS TO THE WITNESS STAND)

19 THE COURT: ^{Minor} I NEED TO ASK YOU A QUESTION. YOU DIDN'T TALK
20 ABOUT THIS CASE BACK THERE DID YOU? YOU DIDN'T TALK ABOUT ANYTHING
21 THAT YOU WERE SAYING?

22 A (SHAKES HEAD)

23 THE COURT: SHE IS NODDING, NO. NOBODY TOLD YOU BACK THERE
24 ANYTHING ABOUT THIS CASE DID THEY?

25 A HUH-UH. (SHAKES HEAD)

1 THE COURT: ALL RIGHT, THANK YOU. ALL RIGHT. YOU CAN BRING
2 THEM IN.

3 MR. HOWE: THANK YOU, JUDGE.

4 (JURY IN AT 11:52)

5 BAILIFF: ALL ACCOUNTED FOR, YOUR HONOR.

6 THE COURT: THANK YOU. YOU CAN CONTINUE.

7 MR. FLEMING: THANK YOU, YOUR HONOR.

8 Q HAVE YOU EVER SEEN THAT? WHO IS IN THOSE PHOTOGRAPHS?

9 A YES.

10 Q WHO IS IT?

11 A DON.

12 Q IN BOTH PICTURES?

13 A YES, SIR.

14 Q IS THAT THE MAN THAT GOT ON TOP OF YOU?

15 A YES SIR.

16 MR. FLEMING: YOUR HONOR, WE WOULD LIKE TO ADMIT THESE AS
17 STATE'S EXHIBIT #2.

18 MR. HOWE: NO OBJECTION.

19 THE COURT: WITHOUT OBJECTION.

20 MR. FLEMING: ACTUALLY TWO AND THREE, YOUR HONOR.

21 (WHEREUPON, TWO PHOTOGRAPHS ARE ENTERED
22 AS STATE'S EXHIBIT'S #2 AND #3.)

23 Q ANSWER ANY QUESTIONS MR. HOWE HAS FOR YOU.

24 MR. FLEMING: I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

25 THE COURT: THANK YOU.

1 **CROSS EXAMINATION OF** Minor

BY MR. HOWE:

2 Q HEY, Minor I NEED TO ASK YOU SOME QUESTIONS. OKAY?

3 A OKAY.

4 Q YOU WERE FIVE WHEN YOU LIVED WITH YOUR MAMA AT CROSS HILL,
5 RIGHT?

6 A RIGHT.

7 Q ALL RIGHT. AND YOU SAID -- WHEN IS YOUR BIRTHDAY?

8 A SEPTEMBER FOURTEENTH.

9 Q AND WHAT IS TODAY'S DATE?

10 Q I FORGOT.

11 A OK. NOW YOU LIVED THERE WITH YOUR MOM AND SHE HAD DIFFERENT
12 BOYFRIENDS, RIGHT?

13 A (NODS HEAD)

14 Q ISN'T THAT RIGHT?

15 A RIGHT.

16 Q RIGHT. OKAY. AND SOMETIMES SHE DID THINGS WITH THOSE
17 BOYFRIENDS, RIGHT?

18 A RIGHT.

19 Q AND YOU SAW SOME OF THAT DIDN'T YOU? SEX THINGS?

20 A (SHAKES HEAD)

21 Q SO YOU SAY YOU NEVER SAW ANYTHING?

22 A (SHAKES HEAD)

23 Q YOU NEVER LOOKED AND SAW ANY OF THAT KIND OF STUFF HAPPEN,

24 Minor

25 A (SHAKES HEAD) NEVER DID.

- 1 Q NEVER DID. NOW YOU TOLD MR. FLEMING HERE THAT YOU KNEW THE
2 DIFFERENCE BETWEEN THE TRUTH AND A LIE, RIGHT?
- 3 A RIGHT.
- 4 Q HAVE YOU EVER TOLD SOMETHING THAT WASN'T TRUE?
- 5 A (SILENCE)
- 6 Q NEVER HAVE?
- 7 A I TOLD A COUPLE OF LIES WHEN I WAS LIVING WITH MY GRANDMAMA.
- 8 Q ALL RIGHT. AND SOMETIMES WHEN YOU TELL LIES YOU GET INTO
9 TROUBLE AND SOMETIMES YOU DON'T. RIGHT?
- 10 A (NODS HEAD)
- 11 Q IS THAT RIGHT?
- 12 A MY GRANDMA LETS ME GET AWAY WITH IT SOMETIMES.
- 13 Q SO, SOMETIMES WHEN YOU DON'T TELL THE TRUTH, YOU DON'T GET
14 INTO TROUBLE, RIGHT?
- 15 A RIGHT.
- 16 Q NOW, THE DAY THAT YOU SAY THAT THIS HAPPENED, Y'ALL HAD BEEN
17 SOMEWHERE, HADN'T YOU?
- 18 A (NODS HEAD)
- 19 Q WHERE HAD YOU BEEN?
- 20 A WHEN I WAS LITTLE LIVING WITH MY MAMA WE STAYED AT HOME AND
21 THEN WE WENT TO CROSS HILL AND THEN WE WENT TO THE LAKE AND
22 STAYED OVERNIGHT AND THEN WE WENT TO DON'S MOTHER'S HOUSE.
- 23 Q OKAY. BUT YOU HAD ALSO BEEN UP IN PENNSYLVANIA SOMEWHERE,
24 HADN'T YOU?
- 25 A I DON'T REMEMBER.

1 Q YOU DON'T REMEMBER? COULD YOU HAVE GONE THERE? LET ME ASK
2 YOU, WHEN YOU SAY THIS HAPPENED, WAS IT DAYTIME OR NIGHTTIME?

3 A IT WAS LIKE IN THE MORNING WHEN I LIVED WITH MY MAMA AND WHEN
4 WE WENT TO THE LAKE, IT WAS AT NIGHT.

5 Q WELL, I AM SAYING WHEN YOU SAY THIS HAPPENED, DID IT HAPPEN IN
6 THE DAYTIME OR IN THE NIGHTTIME, Minor CAN YOU TELL US?

7 MR. FLEMING: YOUR HONOR, CAN WE APPROACH?

8 THE COURT: SURE.

9 (BENCH CONFERENCE OFF THE RECORD)

10 Q Minor DID YOU ALSO HAVE A SPONGE BOB SLEEPING BAG?

11 A I DON'T REMEMBER.

12 Q COULD OF HAD ONE?

13 A I DON'T REMEMBER.

14 Q OKAY. AND WHEN YOU SAY THIS HAPPENED, WERE YOU WEARING A
15 PINK NIGHTSHIRT?

16 A I DON'T REMEMBER.

17 Q BUT YOU ARE TELLING US THAT YOU DON'T REMEMBER WHETHER YOU
18 OWNED THAT AND YOU DON'T REMEMBER WHAT KIND OF NIGHTSHIRT
19 YOU WERE WEARING, BUT YOU SAY YOU REMEMBER THIS BLANKET?

20 A UH-HUH.

21 Q SO, YOU DON'T REALLY KNOW WHAT KIND OF NIGHTSHIRT YOU WERE
22 WEARING?

23 A HUH-UH. (NODS HEAD)

24 Q AND WHEN YOU SAY THIS HAPPENED, YOUR NIGHTSHIRT WAS ON?

25 A YES, SIR.

1 MR. HOWE: IF I CAN HAVE ONE MINUTE

2 THE COURT: SURE.

3 (MR. HOWE CONFERS WITH CLIENT)

4 MR. HOWE: NO FURTHER QUESTIONS, YOUR HONOR

5 THE COURT: ALL RIGHT. THANK YOU. RE-DIRECT?

6 MR. FLEMING: YES, ONE YOUR HONOR.

7 RE-DIRECT EXAMINATION OF Minor BY MR. FLEMING:

8 Q Minor EVERYTHING YOU HAVE TOLD ME TODAY HERE, AND TOLD THE
9 JUDGE, IS THAT THE TRUTH?

10 A YES, SIR.

11 MR. FLEMING: THAT'S ALL I HAVE YOUR HONOR.

12 THE COURT: THANK YOU. ANYTHING ELSE?

13 MR. HOWE: NO, SIR.

14 THE COURT: THANK YOU Minor YOU CAN STEP DOWN, THANK YOU.

15 MR. FLEMING: YOUR HONOR, MAY WE APPROACH RIGHT QUICK?

16 THE COURT: YES, SIR.

17 (BENCH CONFERENCE OFF THE RECORD)

18 MR. FLEMING: YOUR HONOR WE WOULD CALL CHARLOTTE EHNEY TO
19 THE STAND.

20 (AFTER BEING DULY SWORN BY THE CLERK OF COURT,
21 CHARLOTTE EHNEY TESTIFIED AS FOLLOWS:)

22 CLERK OF COURT: STATE YOUR FULL NAME PLEASE.

23 WITNESS: CHARLOTTE EHNEY.

24 CLERK OF COURT: COULD YOU SPELL YOUR LAST NAME FOR THE
25 COURT REPORTER.

1 WITNESS: E-H-N-E-Y.

2 MR. FLEMING: IF IT PLEASE THE COURT, YOUR HONOR.

3 THE COURT: YES, SIR.

4 MR. FLEMING: THANK YOU.

5 Q MS. EHNEY, I HOPE I AM PRONOUNCING THAT CORRECTLY. WHERE DO
6 YOU WORK?

7 A I WORK FOR THE CHILD'S PLACE PROGRAM UNDER THE SEXUAL
8 TRAUMA AND COUNSELING CENTER.

9 Q AND HOW LONG HAVE YOU WORKED THERE?

10 A I HAVE WORKED THERE FOR TWO YEARS AND NINE MONTHS AND I
11 WORKED THERE PREVIOUSLY FROM 1997 TO 2001, AS WELL.

12 Q AND WHAT ARE YOUR DUTIES THERE?

13 A I AM PROGRAM DIRECTOR FOR THE CHILD'S PLACE. CHILD'S PLACE IS A
14 CHILD ADVOCACY CENTER. I DIRECT ALL THE DAY TO DAY
15 OPERATIONAL ACTIVITIES FOR THE CHILD'S PLACE AS WELL AS
16 PROVIDING FORENSIC INTERVIEWS FOR THEM.

17 Q SO YOU DO FORENSIC INTERVIEWS FOR THE CHILD'S PLACE.

18 A I DO.

19 Q HOW LONG HAVE YOU BEEN DOING THAT?

20 A I STARTED DOING THOSE IN MARCH OF 2004.

21 Q AND OTHER – DID YOU HAVE TO GO TO ANY SPECIAL SCHOOL FOR
22 THAT?

23 A I DID. PREVIOUSLY, I HAD TO DO A 40-HOUR TRAINING COURSE IN
24 ORDER TO BE TRAINED IN THE PROTOCOL TO DO FORENSIC
25 INTERVIEWS.

1 Q AND WHEN YOU SAY FORENSIC INTERVIEWS, THESE ARE INTERVIEWS
2 WITH CHILDREN THAT HAVE POSSIBLY BEEN SEXUALLY MOLESTED?

3 A CORRECT. WE CONDUCT INTERVIEWS WITH CHILDREN WHO HAVE
4 OPEN INVESTIGATIONS FOR SEXUAL ABUSE OR SOMETIMES PHYSICAL
5 ABUSE CASES.

6 Q AND OTHER THAN THAT, WHAT KIND OF SCHOOLING DO YOU HAVE?

7 A I HAVE A BA DEGREE FROM THE UNIVERSITY OF SOUTH CAROLINA IN
8 POLITICAL SCIENCE AND I HAVE A JD FROM THE UNIVERSITY SCHOOL
9 OF LAW.

10 Q SO YOU ALSO WENT TO LAW SCHOOL AT CAROLINA.

11 A I DID.

12 Q AND DID YOU DO A FORENSIC INTERVIEW ON JUNE?

13 A YES, I DID. I DID A FORENSIC INTERVIEW ON JULY 7, OF 2004.

14 Q OKAY. AND BASED ON YOUR FORENSIC INTERVIEW, WHAT WERE
15 YOUR FINDINGS?

16 MR. HOWE: OBJECTION, YOUR HONOR. I DON'T THINK THERE HAS
17 BEEN A PROPER FOUNDATION LAID.

18 Q WELL, LET ME GO BACK. BEFORE YOU INTERVIEWED ^{Minor} WHAT DID
19 YOU DO WITH HER?

20 A OKAY. WE RECEIVED A REFERRAL FOR A FORENSIC INTERVIEW ON
21 JULY 6 FROM LAURENS DSS. ^{Minor} WAS BROUGHT INTO OUR FACILITY
22 ON JULY 7th. AT THAT TIME WE DID AN INTERVIEW WITH HER USING
23 THE RAPAC SOUTH CAROLINA PROTOCOL.

24 Q AND WHAT IS THAT PROTOCOL?

25 A IT IS KNOWN BY THE INITIALS R-A-P-A-C. IT IS THE PROTOCOL USED

1 WITH CHILDREN WHERE YOU BUILD A RAPPORT, YOU HAVE IDENTIFICATION,
2 YOU HAVE A TOUCHING INQUIRY, YOU HAVE THE SCENARIO AND THE
3 CLOSURE WITH THE CHILD.

4 Q AND ARE PART OF THOSE STEPS DETERMINING THE TRUTH – THE
5 TRUTHFULNESS OF THE CHILD WHETHER THEY KNOW THE
6 DIFFERENCE BETWEEN THE TRUTH AND A LIE?

7 A WE DO HAVE A SEGMENT WHERE WE DO THE TRUTH, LIES, RIGHT AND
8 WRONG INQUIRIES WITH THE CHILD. WE HAVE PICTURES THAT WE
9 SHOW THE CHILD SO THAT WE CAN DETERMINE WHETHER THEY KNOW
10 THE DIFFERENCE BETWEEN A TRUTH AND A LIE. WE ASK THEM
11 QUESTIONS ABOUT THE PICTURES AND THEY ARE GIVEN
12 OPPORTUNITIES TO ANSWER BASED ON THE PICTURES THAT WE SHOW
13 THEM. WE DID FOUR OF THOSE QUESTIONS WITH ^{Minor} SHE
14 ANSWERED ALL FOUR OF THEM CORRECTLY. WE ALSO HAVE
15 PICTURES THAT WE SET UP WHERE THEY CHOOSE THE DIFFERENCE
16 BETWEEN RIGHT OR WRONG, WHETHER THERE IS A CONSEQUENCE
17 FOR TELLING A LIE. AGAIN WE DID THOSE WITH ^{Minor} AND SHE GOT ALL
18 FOUR OF THOSE CORRECT.

19 Q SO, SHE WAS REFERRED TO YOU FROM LAURENS DSS. DID THEY –
20 WAS IT TOLD TO YOU WHY SHE WAS REFERRED TO YOU?

21 A AT THE TIME OF THE REFERRAL, I DID NOT HAVE THE REASON WHY ON
22 MY NOTES. AS FOR AS THE REASON FOR THE REFERRAL, I JUST KNOW
23 THERE WAS A REFERRAL FOR A FORENSIC INTERVIEW.

24 Q A FORENSIC INTERVIEW. SO, BASICALLY YOU TOOK THAT TO MEAN
25 THAT THERE WAS POSSIBLE SEXUAL ABUSE.

1 A CORRECT.

2 Q AND SO WHAT WAS THE FIRST THING YOU DID WHEN YOU DID THE
3 INTERVIEW WITH Minor

4 A MAY I REFER TO MY NOTES TO REFRESH MY MEMORY?

5 Q SURE. YES.

6 A FIRST THING I DID WITH Minor WAS THAT I BROUGHT HER INTO OUR
7 FORENSIC INTERVIEW ROOM AND I ORIENTED HER TO THE ROOM. I
8 EXPLAINED TO HER THAT THERE WAS A CAMERA THERE, THERE WAS A
9 MICROPHONE THERE, THAT THERE WERE PEOPLE WHO NEEDED TO
10 SEE FOR THEIR JOBS, SO THEY WOULD BE ABLE TO SEE WHEN I
11 INTERVIEWED PEOPLE. I EXPLAINED TO HER THAT THERE WERE RULES

12 IN THE INTERVIEW ROOM AND IN THAT ROOM WE DID NOT GUESS, SO IF
13 SHE DID NOT UNDERSTAND A QUESTION I ASKED, THAT SHE SHOULD
14 TELL ME I DON'T UNDERSTAND. THAT WE - IF I SAID SOMETHING AND I
15 SAID IT WRONG, THAT SHE SHOULD CORRECT ME AND THAT IN THAT
16 ROOM WE ONLY TALK ABOUT THINGS THAT WERE REAL AND TRUE AND
17 THAT REALLY HAPPENED. SHE SAID SHE UNDERSTOOD THOSE RULES.

18 Q OKAY. AND WHAT WAS THE NEXT THING YOU DID.

19 A AFTER THAT I ESTABLISHED A RAPPORT Minor BY DOING A
20 DRAWING OF HER FACE. AND THEN WE MOVED ON TO A FAMILY
21 CIRCLES EXERCISE IN WHICH SHE DREW DIAGRAMS OF HER FAMILY.
22 SHE TOLD ME THAT THE PEOPLE IN HER FAMILY WERE HER MAMA AND
23 HER MAMA'S NAME IS MICHELLE. HER BROTHER, HIS NAME IS SHAWN.
24 SHE HAS A BABY BROTHER THAT SHE CALLED TURTLE. HER DAD, WHO
25 SHE SAID WAS RON AND SHE IDENTIFIED JAMES, THAT SHE CALLED

1 LITTLE TURTLE, AS THE MEMBERS OF HER FAMILY.

2 Q AND, DID YOU -- WHAT DID YOU DO NEXT, THEN?

3 A NEXT, WE DID THE TRUTH, LIE, RIGHT AND WRONG TASK AND IT SAYS
4 THAT SHE HAD CORRECTLY ANSWERED ALL OF THOSE.

5 Q SO SHE CORRECTLY ANSWERED ALL OF THOSE. I MEAN HOW MANY
6 DID YOU GIVE HER TO DO?

7 A WE DID FOUR OF THE TRUTH VERSUS LIE TASKS AND SHE CORRECTLY
8 ANSWERED ALL FOUR OF THEM AND WE DID FOUR OF THE RIGHT
9 VERSUS WRONG TASKS AND SHE CORRECTLY ANSWERED ALL FOUR.

10 Q AND THEN WHAT DID YOU DO NEXT?

11 A AT THAT POINT, I EMPHASIZED TO ^{Minor} THAT SHE HAD SHOWN ME,
12 THAT SHE KNEW THE DIFFERENCE BETWEEN THE TRUTH AND A LIE
13 AND THAT IN THE INTERVIEW ROOM, WE ONLY TALKED ABOUT THE
14 THINGS THAT WERE REALLY TRUE AND THINGS THAT REALLY
15 HAPPENED AND ^{Minor} AGREED TO DO THAT.

16 Q AND THEN WHAT DID YOU DO AFTER THAT?

17 A WE DID THE ANATOMICAL IDENTIFICATION MATCH WHERE WE HAD
18 PICTURES OF A MALE AND FEMALE FIGURE AND SHE IDENTIFIED
19 DIFFERENT BODY PARTS ON EACH OF THE MALE/FEMALE FIGURES.

20 Q AND ARE THESE COPIES OF THOSE FIGURES THAT YOU DID WITH ^{Minor}
21 (SHOWS MS. EHNEY PAPERS)

22 A YES, THEY ARE.

23 A AND WHAT DID SHE -- AND WHAT DID SHE IDENTIFY AS HER VAGINA?
24 HER PRIVATE AREAS?

25 MR. HOWE: OBJECTION, YOUR HONOR. I AM GOING TO OBJECT AT THIS

1 TIME AS TO WHAT ^{Minor} TOLD THIS LADY.

2 MR. FLEMING: I AM SORRY, YOUR HONOR. IT HAS ALREADY BEEN
3 ESTABLISHED IN MY TESTIMONY, YOUR HONOR, WHAT SHE CALLED IT.

4 THE COURT: I WILL OVERRULE THAT. I WILL ALLOW THE QUESTION.

5 A ^{Minor} IDENTIFIED THAT PART AS THE MONKEY.

6 Q THE MONKEY. YOUR HONOR I WOULD LIKE TO GO AHEAD AND SUBMIT
7 THESE. ARE ALL THESE CORRECT AS TO WHAT SHE IDENTIFIED EACH
8 PART AS?

9 A THEY ARE CORRECT.

10 MR. FLEMING: YOUR HONOR, I WOULD LIKE TO MOVE THESE IN AS
11 STATE'S EXHIBITS #4 AND #5.

12 THE COURT: ANY OBJECTION?

13 MR. HOWE: NO, SIR.

14 THE COURT: WITHOUT OBJECTION.

15 (TWO ANATOMICAL DRAWINGS ENTERED AS STATE'S
16 EXHIBITS #4 AND #5.)

17 Q I THINK YOU STATED THAT WHEN YOU WERE GOING OVER THE RULES
18 WITH ^{Minor} TOO, IN THE ROOM THAT Y'ALL WERE IN THAT YOU TOLD
19 HER THAT THERE WAS A NO GUESSING RULE FOR THAT ROOM. IS THAT
20 CORRECT?

21 A THAT'S CORRECT.

22 Q SO, IF THERE WAS ANY QUESTIONS OR SHE DIDN'T UNDERSTAND, SHE
23 WAS TO ASK YOU.

24 A THAT IS CORRECT.

25 Q SHE WAS ONLY SUPPOSED TO TALK ABOUT THINGS THAT REALLY

1 HAPPENED. IS THAT CORRECT?

2 A THAT IS CORRECT.

3 Q AND IF YOU SAID SOMETHING THAT SHE SAID WAS NOT TRUE, SHE WAS
4 SUPPOSED TO CORRECT YOU.

5 A THAT IS CORRECT.

6 Q AFTER YOU DID THE ANATOMICAL DRAWINGS, WHAT DID YOU DO NEXT?

7 A AT THAT POINT ^{Minor} IF THERE WERE PLACES ON HER BODY

8 THAT NO ONE WAS SUPPOSED TO TOUCH AND ^{Minor} NAMED, THE

9 TITTIES, THE MONKEY, AND THE BUTT AS PLACES NO ONE —

10 MR. HOWE: YOUR HONOR, I OBJECT, AGAIN, TO — AND THAT WILL BE MY
11 CONTINUING OBJECTION AS TO WHAT ^{Minor} TOLD HER.

12 THE COURT: ALL RIGHT. OVERRULED. BUT, I HEAR YOUR OBJECTION. I
13 ASSUME YOU OBJECT TO ANYTHING THAT THE CHILD TOLD HER.

14 MR. HOWE: EXACTLY.

15 THE COURT: OKAY. ALL RIGHT. YOU CAN GO AHEAD.

16 A AND AT THAT POINT, ^{Minor} VOLUNTEERED TO ME THAT DON HAD
17 TOUCHED HER ON THE MONKEY.

18 Q SO SHE STATED TO YOU THAT DON TOUCHED HER ON HER MONKEY,
19 WHICH WAS HER VAGINA, IN HER WORDS.

20 A YES.

21 Q AND DID SHE SAY WHERE THAT HAD HAPPENED?

22 A CAN YOU REPEAT THAT QUESTION?

23 Q DID YOU ASK HER WHO DON WAS?

24 A I DID ASK HER WHO DON WAS AND SHE SAID THAT HE LIVED AT HER
25 HOME, AT HER MAMA'S HOME AT CROSS HILL.

1 Q OKAY. AND DID YOU ASK HER TO TELL YOU ABOUT THE TIME THAT DON
2 HAD TOUCHED HER?

3 A I DID. I HAD ASKED -- I ASKED HER TO TELL ME ABOUT THE TIME DON
4 HAD TOUCHED HER. SHE BEGAN BY TELLING ME ABOUT SOMETHING
5 THAT HAD HAPPENED AT THE BEACH. THERE WAS NO TOUCHING
6 INVOLVED IN WHAT SHE TOLD ME. AND SO I AGAIN ASKED HER TO TELL
7 ME ABOUT THE TIME DONALD HAD TOUCHED HER AND SHE GOT UPSET
8 AND SAID SHE HAD ALREADY TALKED ABOUT THE TIME DONALD
9 TOUCHED HER AND SHE WANTED TO GO HOME AND SHE WAS
10 WORRIED ABOUT HER ANIMALS. I EXPLAINED TO ^{Minor} THAT I WAS NOT
11 THERE WHEN THE TOUCHING HAPPENED AND THAT'S WHY I NEEDED
12 HER TO TELL ME WHAT HAPPENED, WHAT SHE SAW WITH HER OWN
13 EYES AND HER OWN EARS AND WITH THE PARTS OF HER OWN BODY.
14 SHE THEN BEGAN DESCRIBING THE PLACES THAT -- SHE SAID THAT
15 DON HAD TOUCHED HER AT JIM'S WATER. I ASKED HER TO TELL ME
16 ABOUT JIM'S WATER AND SHE TOLD ME THAT JIM WAS DON'S BROTHER.
17 JIM'S WATER WAS A PLACE WITH A POND. THERE WERE GEESE AT THE
18 POND. THERE WERE NO HOUSES AT JIM'S WATER AND DON HAD
19 TOUCHED HER MONKEY WITH HIS HAND WHEN THEY WERE AT JIM'S
20 WATER.

21 Q OKAY. DID SHE DISCLOSE TO YOU ANY TIMES THAT HAPPENED AT HER
22 HOUSE?

23 A SHE DID. ^{Minor} TOLD ME ABOUT A TIME WHEN DON TOUCHED HER
24 MOUTH WITH HIS TONGUE. AND I ASKED WHAT PART OF HER MOUTH
25 DON HAD TOUCHED AND SHE INDICATED HER TONGUE. AND SHE SAID

1 THAT THIS HAD HAPPENED AT HER HOME. I ASKED HER -- I ASKED ^{Minor}
2 IF DON'S TONGUE HAD TOUCHED ANOTHER PART OF HER AND SHE
3 SAID HE HAD TOUCHED HER TITTIES WITH IT.

4 Q IS THAT THE ONLY INSTANCE THAT SHE REPORTED TO YOU AT THAT
5 TIME OF TOUCHING BY DON AT HER HOME?

6 A THAT IS THE ONLY ONE SHE CLEARLY IDENTIFIED AS HAPPENING AT
7 HER HOME.

8 Q ALL RIGHT. AND HOW OLD WAS ^{Minor} AT THIS TIME, WHEN YOU DID
9 THIS INTERVIEW WITH HER?

10 A JUNE WAS FIVE YEARS OLD WHENEVER SHE CAME IN FOR THIS
11 INTERVIEW.

12 Q IS IT COMMON OR -- IS IT COMMON IN YOUR INTERVIEWS THAT AS --
13 MR. HOWE: OBJECTION.

14 THE COURT: YES, SIR?

15 MR. HOWE: OBJECTION. I WANT HER FOUNDATION, WHAT HER
16 QUALIFICATIONS ARE TO SAY WHAT IS COMMON IN HER INTERVIEWS AND I
17 WOULD OBJECT TO THAT AS BEING RELEVANT, AS WELL.

18 THE COURT: SUSTAINED.

19 MR. FLEMING: IN YOUR TRAINING AND IN YOUR CLASSES, IS IT WELL-
20 KNOWN THAT CHILDREN BECOME MORE OPEN --

21 MR. HOWE: SAME OBJECTION, YOUR HONOR.

22 THE COURT: WELL, HE CAN ASK THAT QUESTION IF SHE HAS AN
23 OPINION AS TO IT OR SHE CAN TESTIFY ABOUT HER TRAINING, JUST NOT
24 ABOUT WHAT THIS CHILD SAID.

25 MR. FLEMING: IS IT KNOWN IN YOUR TRAINING THAT CHILDREN BECOME

1 MORE OPEN AND GIVE MORE DETAILS AS THEY GET OLDER?

2 A IN A —

3 MR. HOWE: YOUR HONOR, AGAIN, I WANT TO OBJECT TO THAT AND I
4 WOULD PROBABLY —

5 THE COURT: I UNDERSTAND. OVERRULED. GO AHEAD.

6 A IN OUR TRAINING WE ARE TAUGHT THAT DISCLOSURE IS A PROCESS
7 NOT AN EVENT, THAT OVER TIME CHILDREN TEND TO GIVE MORE
8 INFORMATION ABOUT SEXUAL ABUSE INCIDENTS THAT OCCURRED TO
9 THEM.

10 Q WHAT WERE YOUR RECOMMENDATIONS PURSUANT TO YOUR
11 INTERVIEW?

12 MR. HOWE: OBJECTION TO RELEVANCY, YOUR HONOR.

13 THE COURT: WHAT WAS YOUR QUESTION AGAIN? I'M SORRY.

14 MR. FLEMING: WHAT WERE HER RECOMMENDATIONS PURSUANT TO
15 HER INTERVIEW WITH THE CHILD.

16 THE COURT: I WILL ALLOW THAT QUESTION..

17 A THE RECOMMENDATION I MADE AFTER THE INTERVIEW WAS THAT
18 THERE BE A FOLLOW THROUGH WITH A COLPOSCOPIC EXAMINATION
19 AND THAT EXAM BE SCHEDULED FOR JULY 14, 2004. AND I ALSO
20 RECOMMENDED A COUNSELING PROGRAM.

21 Q JUST FOR US LAYMEN, WHAT IS A COLPOSCOPIC EXAM?

22 A THE COLPOSCOPIC EXAM IS PART OF THE CHILD MALTREATMENT
23 EXAMINATION THAT IS DONE WHERE THERE IS CASES OF CHILD ABUSE,
24 THAT PASS THE 72-HOUR POINT WHEN THE ABUSE OCCURRED. WE
25 HAVE AT OUR FACILITY TWO PEDIATRICIANS THAT COME IN AND DO

1 THE COLPOSCOPIC EXAMS AS PART OF THE TREATMENT WITH THE
2 CHILDREN. THE COLPOSCOPE IS A PIECE OF METAL EQUIPMENT THAT
3 HAS AN ABILITY TO MAGNIFY AND ALSO IT HAS A BRIGHT LIGHT
4 SOURCE SO THAT THINGS YOU MIGHT NOT NOTICE WITH THE PLAIN
5 EYE CAN BE OBSERVED AND ALSO DOCUMENTED THROUGH
6 PHOTOGRAPHS.

7 Q THE COLPOSCOPIC EXAM IS DONE IN WHAT AREA OF THE BODY?

8 A IT IS DONE IN THE GENITAL AREA OF THE BODY.

9 Q AND YOU MADE A FINDING ON YOUR REPORT – OR YOU MADE A – YOU
10 CHECKED UNDER THE ALLEGATION OF THE CHILD DISCLOSURE OF
11 SEXUAL ABUSE. IS THAT CORRECT?

12 A THAT IS CORRECT.

13 Q HOW LONG DOES THIS INTERVIEW LAST, THAT YOU DO?

14 A I DID NOT HAVE A STARTING TIME IN THIS PARTICULAR INTERVIEW, BUT
15 IT CAN LAST ANYWHERE FROM 45 MINUTES TO AN HOUR AND 15
16 MINUTES DEPENDING ON THE CHILD AND THE ABILITY TO GO THROUGH
17 AND ANSWER THE QUESTIONS.

18 MR. FLEMING: I HAVE NO FURTHER QUESTIONS, YOUR HONOR .

19 PLEASE ANSWER ANY QUESTIONS MR. HOWE MAY HAVE.

20 THE COURT: YES, SIR.

21 CROSS EXAMINATION OF MS. EHNEY BY MR. HOWE:

22 MR. HOWE: THANK YOU.

23 Q MS. EHNEY, I HAVE NOT MET YOU. I REPRESENT MR. WEATHERALL.

24 YOU TESTIFIED THAT YOU WENT THROUGH A SERIES OF QUESTIONS
25 AND METHODS TO MAKE SURE THAT IN YOUR MIND, IN YOUR EYES,

1 THAT ^{Minor} KNEW THE DIFFERENCE BETWEEN TELLING THE TRUTH
2 AND TELLING A LIE. CORRECT?

3 A YES, SIR.

4 Q AND YOU ALSO TESTIFIED IN YOUR TRAINING THAT YOU WENT
5 THROUGH A PROCESS TO ESTABLISH RAPPORT WITH HER SO SHE
6 WOULD TALK WITH YOU. CORRECT?

7 A YES, SIR.

8 Q AND SHE DID, IN FACT, TALK TO YOU. CORRECT?

9 A YES, SIR.

10 Q NOW, YOU ALSO -- I HEARD YOUR TESTIMONY CONCERNING WHAT SHE
11 TOLD YOU, WHAT IS IN YOUR REPORT. BUT WHAT I DIDN'T HEAR YOU
12 RESPOND TO THE SOLICITORS QUESTIONS ABOUT WAS YOU ASKED
13 ^{Minor} WHEN YOU WERE TALKING TO HER ABOUT WHAT HAPPENED AT
14 THE HOUSE, YOU ASKED HER IF HE TOUCHED HER MONKEY AND
15 WHETHER OR NOT HER CLOTHES WERE ON, AND SHE SAID HER
16 CLOTHES WERE ON. CORRECT?

17 A YES, SIR.

18 Q AND SHE SAID TOUCHED, CORRECT?

19 A YES, SIR.

20 Q AND THAT IS WHAT -- THE GIST OF THE INTERVIEW IS, WHEN YOU WERE
21 TALKING TO HER ABOUT WHAT HAPPENED AT HER HOME, SHE SAID
22 THAT SHE WAS TOUCHED AND THAT HER CLOTHES WERE ON, IS WHAT
23 SHE TOLD YOU. CORRECT?

24 A YES, SIR.

25 Q I JUST WANTED TO GET THAT STRAIGHT. NOW, YOU INDICATED THAT

1 WHEN THIS INTERVIEW WAS DONE THERE WAS A CAMERA.

2 A YES. THERE WAS A CAMERA IN THE ROOM AND THERE WAS ALSO A
3 ONE-WAY GLASS FOR OBSERVATION PURPOSES AND THERE'S A
4 MICROPHONE TO RECORD THE CHILD.

5 Q AND WHAT IS THE PURPOSE FOR THE CAMERA?

6 A FOR OBSERVATION. WHENEVER WE DID THIS INTERVIEW, THE
7 PRIMARY METHOD OF OBSERVATION WAS THROUGH THE GLASS, THE
8 ONE-WAY GLASS. HOWEVER, THERE WAS A CAMERA MOUNTED SO
9 THAT IF THERE WERE MORE PEOPLE TO OBSERVE THAN THEY COULD
10 GET INTO THE ROOM THEY COULD GO AROUND TO A SEPARATE ROOM
11 TO SEE ON A CLOSED-CIRCUIT TV MONITOR.

12 Q THANK YOU. I JUST WANTED TO GET THAT STRAIGHT. THANK YOU
13 VERY MUCH. I DON'T HAVE ANY FURTHER QUESTIONS.

14 THE COURT: ANY RE-DIRECT?

15 MR. FLEMING: YES, SIR, YOUR HONOR. IF I MAY, IF IT PLEASE THE
16 COURT.

17 RE-DIRECT EXAMINATION OF MS. EHNEY BY MR. FLEMING:

18 Q MS. EHNEY, DURING YOUR INTERVIEW, DID YOU FEEL LIKE ^{Minor} WAS
19 GETTING TO A POINT WHERE SHE DID NOT WANT TO ANSWER
20 QUESTIONS ANYMORE?

21 MR. HOWE: OBJECTION. LEADING QUESTION YOUR HONOR.

22 THE COURT: SUSTAINED.

23 Q AS THE INTERVIEW WENT ON -- HOW DID YOU FEEL? WHAT WAS
24 ^{Minor} Demeanor?

25 A ^{Minor} INDICATED FRUSTRATION SEVERAL TIMES DURING THE

1 INTERVIEW. SHE HAD INDICATED HER ANIMALS, THAT SHE DID NOT
2 HAVE CONTACT WITH AT THAT POINT IN TIME. SHE ALSO STATED THAT
3 SHE HAD ALREADY TALKED ABOUT THE THINGS I WAS ASKING ABOUT,
4 AND SHE WANTED TO LEAVE THE ROOM. SHE WANTED TO GO HOME.
5 THESE WERE EXPRESSED THROUGHOUT THE INTERVIEW WITH ME.

6 Q AGAIN, DURING YOUR TRAINING, IT'S BECOME PREVALENT TO YOU OR
7 KNOWN TO YOU THAT CHILDREN AS THEY GET OLDER —

8 MR. HOWE: SAME OBJECTION AS BEFORE, YOUR HONOR.

9 THE COURT: ALL RIGHT. OVERRULED. YOU CAN ANSWER THAT.

10 Q THEY TEND TO GIVE MORE DETAIL?

11 A DURING TRAINING, WHAT IS TOLD TO US IS, IF THE CHILDREN ARE IN A
12 SUPPORTIVE ENVIRONMENT AT THE TIME, THEY USUALLY GIVE MORE
13 DETAILS OF THE ABUSE THAT HAPPENED TO THEM.

14 Q THANK YOU. NO FURTHER QUESTIONS.

15 **RE-CROSS EXAMINATION OF MS. EHNEY BY MR. HOWE:**

16 Q ISN'T IT ALSO TRUE, MA'AM, THAT A FIVE-YEAR-OLD MAY REMEMBER
17 THINGS ONE WAY WHEN THEY ARE FIVE AND REMEMBER THINGS
18 DIFFERENTLY WHEN THEY ARE SEVEN? ISN'T THAT TRUE?

19 A I — CAN YOU RESTATE YOUR QUESTION?

20 Q ISN'T IT TRUE THAT A FIVE-YEAR-OLD MAY REMEMBER THINGS WHEN
21 THEY'RE FIVE ONE WAY, AND WHEN THEY ARE SEVEN, A DIFFERENT
22 WAY. ISN'T THAT TRUE?

23 A PEOPLE REMEMBER THINGS, AND WITH TIME, WHEN THEY LOOK BACK
24 ON THEM, THEN THEIR MEMORIES MAY BE SLIGHTLY DIFFERENT.

25 Q AND ALSO — EVEN THOUGH SHE WAS TIRED, YOU CONTINUED WITH

1 THE INTERVIEW AND YOU ASKED HER ALL THESE QUESTIONS, AND OUT
2 OF ALL THOSE QUESTIONS SHE TOLD YOU -- SHE TOLD YOU -- THE
3 ONLY THING SHE TOLD YOU, IN FACT, WAS THAT HE HAD TOUCHED HER
4 ON HER MONKEY WITH HIS CLOTHES ON -- WITH HER CLOTHES ON.
5 ISN'T THAT WHAT SHE SAID?

6 A SHE GAVE ME SEVERAL INSTANCES OF TOUCHING.

7 Q IF YOU COULD ANSWER THE QUESTION YES OR NO. ISN'T THAT TRUE.
8 ISN'T THAT WHAT SHE SAID?

9 A SHE DID SAY THAT.

10 Q THANK YOU.

11 THE COURT: ALL RIGHT. THANK YOU, MA'AM. YOU CAN STEP DOWN.

12 WITNESS: MAY I BE DISMISSED, YOUR HONOR?

13 THE COURT: ANY OBJECTION TO HER BEING DISMISSED?

14 MR. HOWE: AS LONG AS YOUR HONOR, WE HAVE HER AVAILABLE FOR
15 RECALL, IF NECESSARY. BUT IT WOULDN'T BE TODAY, CERTAINLY.

16 THE COURT: RIGHT. WE'LL LET YOU KNOW. YOU ARE GOING TO BE
17 AROUND?

18 WITNESS: I CAN BE, IF THEY CAN CONTACT ME.

19 MR. FLEMING: THEN SHE IS EXCUSED, PENDING SHE IS CONTACTED TO
20 COME BACK?

21 THE COURT: DEPENDANT ON RECALL. THAT'S RIGHT. THANK YOU. WE
22 CAN TAKE A LUNCH BREAK NOW. LADIES AND GENTLEMEN, I AM GOING TO
23 LET YOU GO TO LUNCH. IF YOU WOULD BE BACK IN THE JURY ROOM BY 2:00
24 PM. THAT WILL GIVE YOU AN HOUR-AND-A-HALF AND WE WILL START AS
25 SOON AS WE CAN GET TO YOU. IF YOU WILL GET BACK HERE AT 2:00 PM, I

1 THINK WE WILL START PRETTY PROMPTLY. AGAIN, IF ANYONE CONTACTS
2 YOU OR DISCUSSES THIS CASE WITH YOU WHILE YOU ARE AT LUNCH, LET ME
3 KNOW AS SOON AS YOU GET BACK. AND DON'T BEGIN DISCUSSING THIS
4 CASE WITH ANYBODY. THANKS. HAVE A GOOD LUNCH.

5 (JURY OUT AT 12:34 PM)

6 THE COURT: ALL RIGHT. Y'ALL GO TO LUNCH AND WHEN WE GET BACK
7 WE WILL GET INTO THE MCCORMICK STUFF AND PUT THAT ON THE RECORD.

8 MR. FLEMING: THANK YOU, YOUR HONOR.

9 THE COURT: THANK YOU.

10 (COURT RESUMES AT 2:00 PM)

11 THE COURT: Y'ALL READY?

12 MR. FLEMING: YES, SIR, YOUR HONOR.

13 MR. HOWE: YES, SIR.

14 THE COURT: ARE THEY ALL HERE?

15 THE BAILIFF: ALL THE JURY IS HERE, YOUR HONOR.

16 MR. FLEMING: I WILL HAVE THE POLICE OFFICER ON THE STAND NEXT.
17 YOU WANT TO DO THE JACKSON v DENNO NOW OR...

18 THE COURT: YEAH. WE NEED TO DO THAT. ALL RIGHT. YOU CAN CALL
19 THE JACKSON v DENNO FIRST.

20 MR. FLEMING: VICKIE WHITE.

21 (AFTER BEING DULY SWORN BY THE JUDGE, LIEUTENANT
22 VICKIE WHITE TESTIFIES, WITH THE JURY OUT OF THE COURTROOM, AS
23 FOLLOWS:)

24 THE COURT: IF YOU WOULD, STATE YOUR FULL NAME FOR THE RECORD
25 AND SPELL YOUR LAST.

1 **WITNESS: VICTORIA WHITE. W-H-I-T-E.**

2 **MR. FLEMING: IF IT PLEASE THE COURT, YOUR HONOR.**

3 **THE COURT: YES, SIR.**

4 **PROFFERED TESTIMONY BY LIEUTENANT VICKIE WHITE BY MR. FLEMING:**

5 **Q MS. WHITE, WHERE DO YOU WORK?**

6 **A LAURENS COUNTY SHERIFF'S OFFICE.**

7 **Q HOW LONG HAVE YOU WORKED THERE?**

8 **A APPROXIMATELY TEN YEARS.**

9 **Q AND WHAT ARE YOUR DUTIES, YOUR JOB TITLE?**

10 **A I AM AN INVESTIGATOR.**

11 **Q OKAY. AND DID YOU HAVE A CHANCE TO INVESTIGATE THE CASE**

12 **AGAINST THE DEFENDANT DONALD WEATHERALL, CHARGING**

13 **CRIMINAL SEXUAL CONDUCT AGAINST A MINOR IN JUNE OF 2004?**

14 **A YES, I DID.**

15 **Q AND DID YOU LATER HAVE A CHANCE TO INTERVIEW MR. WEATHERALL?**

16 **A YES, I DID.**

17 **Q OKAY. AND WHERE DID THAT INTERVIEW TAKE PLACE?**

18 **A IN MCCORMICK, AT THE JAIL.**

19 **Q AND WHEN YOU WENT TO INTERVIEW MR. WEATHERALL, DID YOU**

20 **ADVISE HIM OF HIS MIRANDA RIGHTS?**

21 **A YES, I DID.**

22 **Q AND -- SO YOU ADVISED HIM THAT HE HAD A RIGHT TO REMAIN SILENT?**

23 **A YES, I DID.**

24 **Q AND ANYTHING THAT HE SAID COULD BE USED AGAINST HIM IN A**

25 **COURT?**

1 A YES, I DID.

2 Q AND YOU ADVISED HIM THAT HE HAD A RIGHT TO TALK TO A LAWYER
3 FOR ADVICE BEFORE YOU ASKED ANY QUESTIONS, OR WITH HIM,
4 DURING THE QUESTIONING?

5 A YES, I DID.

6 Q DID YOU ADVISE HIM THAT IF HE DID NOT HAVE ANY MONEY FOR A
7 LAWYER THAT THE COURT WOULD APPOINT SOMEONE TO REPRESENT
8 HIM WITHOUT COST IF HE WISHED?

9 A YES, I DID.

10 Q AND DID YOU ADVISE HIM -- IF HE DECIDED TO ANSWER QUESTIONS
11 NOW WITHOUT A LAWYER PRESENT THAT THE QUESTIONING WOULD
12 HAVE TO STOP -- THAT HE WOULD HAVE THE RIGHT TO STOP
13 ANSWERING QUESTIONS AT ANY TIME AND AT THAT TIME HE COULD
14 ASSERT THE RIGHT FOR AN ATTORNEY. DID YOU ADVISE HIM OF THAT?

15 A YES, I DID.

16 Q OKAY. DID YOU ADVISE HIM IN EACH OF THOSE RIGHTS THAT I JUST
17 SET FORTH?

18 A I DID.

19 Q AND IS THIS THE COPY OF THE ADVISEMENT RIGHTS, THE WAIVER
20 FORM THAT YOU PRESENTED TO MR. WEATHERALL?

21 A YES. THAT'S THE ORIGINAL.

22 Q IT IS THE ORIGINAL.

23 A YES, SIR.

24 Q OKAY. AND DID HE SIGN THAT?

25 A YES, HE DID.

1 Q AND DID HE WAIVE HIS RIGHTS AT THAT TIME?

2 A YES, HE DID.

3 Q AND HE WISHED TO SPEAK TO YOU WITHOUT AN ATTORNEY AT THAT
4 TIME?

5 A YES, HE DID.

6 Q YOUR HONOR I WOULD LIKE TO SUBMIT THIS AS STATE'S EXHIBIT #6.

7 THE COURT: ANY OBJECTION?

8 MR. HOWE: CAN I JUST LOOK AT IT?

9 THE COURT: SURE.

10 MR. HOWE: NO OBJECTION.

11 THE COURT: ALL RIGHT, WITHOUT OBJECTION.

12 (WHEREUPON, OFFICER'S REPORT ENTERED AS
13 EVIDENCE WITHOUT OBJECTION AS STATE'S EXHIBIT #6)

14 Q AND THEN AFTER YOU ADVISED MR. WEATHERALL OF HIS RIGHTS, DID
15 HE GIVE YOU A STATEMENT?

16 A HE TALKED WITH US.

17 Q HE TALKED WITH YOU.

18 A CORRECT.

19 Q ORALLY?

20 A CORRECT.

21 Q OKAY. ORALLY, WHAT DID HE TELL YOU? YOU CAN REFER TO YOUR
22 NOTES.

23 A DO YOU WANT ME TO REFER TO IT?

24 Q YOU CAN REFER TO IT OR TO THE NOTES OF THE STATEMENT THAT
25 YOU TOOK.

1 A HE STATED HE HAD BEEN LIVING WITH MICHELLE BARNETT ABOUT
2 TWO OR THREE MONTHS. SINCE SCHOOL HAS BEEN OUT, THE TWO
3 OLDER BOYS THAT MICHELLE HAS, HAVE BEEN LIVING WITH THEIR
4 FATHER AND THE TWO YOUNGER CHILDREN LIVED WITH MICHELLE
5 AND HIM. HE STATED THAT HE HAD TALKED TO A PASTOR, A BISHOP
6 OF THE L-D-S CHURCH IN GREENWOOD AND HE STATED MICHELLE
7 NEEDED TO TALK WITH SOMEBODY. HE SAID THAT ^{Minor} SAID THAT HE
8 WAS LICKING HER DOWN THERE. AND WHEN I ASKED HIM WHERE
9 DOWN THERE WAS, HE POINTED TO HIS CROTCH AREA. HE STATED
10 THAT HE THINKS HE HANDLED THIS THE WRONG WAY, MEANING THAT
11 HE SHOULD HAVE LEFT, HE SHOULDN'T HAVE STUCK AROUND. HE
12 STATES THAT HE AND MICHELLE WERE JUST DATING. THAT HE AND
13 MICHELLE HAD TOLD HIS MOTHER THAT THEY WERE MARRIED, BUT
14 THEY IN REALITY WERE NOT. HE STATED THAT JUNE WANTED TO
15 SLEEP ON HIS CHEST AND HE TOLD HER THAT THE ONLY WAY HE
16 WOULD DO THAT IS IF SHE WRAPPED UP IN A BLANKET. SHE DID. IT
17 WAS SOME SORT OF CAMOUFLAGE BLANKET AND THAT OCCURRED IN
18 MCCORMICK. HE STATED MICHELLE IS OPENLY SEXUAL AROUND
19 ^{Minor} ONE TIME MICHELLE WAS ON THE COMPUTER AND HE WAS IN
20 THE BATHROOM AND ^{Minor} CAME IN THE ROOM. MICHELLE DID NOT
21 STOP ^{Minor} FROM SEEING HIM IN THE BATHROOM. ^{Minor} WANTED HIM
22 TO RUB HER BREASTS AND IN BETWEEN HER LEGS. ON ONE OCCASION
23 MICHELLE GAVE HIM ORAL SEX GOING DOWN THE ROAD AND HE
24 PULLED INTO A GAS STATION. THE KIDS, ^{Minor} AND TURTLE, WHO IS
25 ^{Minor} LITTLE BROTHER, WERE IN THE BACK SEAT. ^{Minor} LEANED

1 OVER THE SEAT TO SEE WHAT WAS GOING ON. HE CONTINUES TO
2 STATE THAT HE HANDLED THIS THE WRONG WAY. WHEN ASKED IF HE
3 ADMITTED TO TOUCHING ^{Minor} IN HER PRIVATE AREA HE STATES HE
4 ADMITTED IT – HE DID ADMIT IT, AND THOUGHT IT WAS THE RIGHT
5 THING TO DO AT THE TIME BECAUSE MICHELLE AND MOM KEPT ASKING
6 HIM IF HE DID IT. DONALD TOLD THE PASTOR AND MICHELLE ABOUT –
7 THAT HE HAD TALKED TO THE PASTOR OR TALKED TO HIS MOTHER.
8 DONALD STATES THAT HE HAD BEEN TRYING TO GET IN TOUCH WITH
9 MICHELLE, BUT HADN'T BEEN ABLE TO. THE LAST TIME HE SAW HER
10 WAS ON FRIDAY BEFORE I INTERVIEWED HIM AND SHE HAD PICKED UP
11 HIS CHECK AND BROUGHT IT BY THE JAIL FOR HIM TO SIGN IT. HE DOES
12 NOT KNOW WHERE SHE IS, MAYBE WITH HER GIRLFRIEND SHEILA, HE
13 THINKS. HE STATES THAT HE THINKS ^{Minor} MAYBE SAID THAT HE
14 TOUCHED HER JUST TO GET ATTENTION, THAT SHE REALLY WANTS
15 ATTENTION. WHEN ASKED ABOUT THE HOUSE, HE STATES THAT HE
16 DOES MOST OF THE HOUSEWORK. MICHELLE COOKS AND THEY EAT
17 OUT A LOT. WHEN ASKED WHEN HE MOVED IN WITH MICHELLE, HE
18 STATES MAYBE APRIL THE 24th. HE STATES THAT HE BROUGHT HIS
19 NIECE A PRESENT FOR HER BIRTHDAY BEFORE HE MOVED IN AND
20 THAT WAS APRIL 10th. ABOUT WHEN THEY MET, DONALD STATES
21 THAT HE MET HER A WEEK BEFORE HE MOVED IN. HE WAS WORKING
22 FOR HIS BROTHER, KEVIN, AND SO WAS RONNIE TURNER. SHE AND
23 RONNIE AND HE WERE SUPPOSED TO HAVE A THREESOME, BUT THAT
24 DIDN'T HAPPEN. HE STATES THAT HE HAS LIVED IN WATERLOO SINCE
25 FEBRUARY. HE WAS LIVING IN HIS BROTHER'S HOUSE AND THEN HE

1 WENT BACK TO HIS MOM'S ON THE WEEK-END AND THEN HE MOVED IN
2 WITH MICHELLE IN APRIL. HE THINKS Minor TOLD MICHELLE ABOUT
3 TWO WEEKS AGO LAST WEDNESDAY AND THIS STATEMENT WAS TAKEN
4 FROM HIM ON JUNE THE 28th. HE STATES THAT Minor TOLD MICHELLE
5 ABOUT TWO WEEKS AGO LAST WEDNESDAY AND MICHELLE WAS
6 CONFUSED AND UPSET. HIS MOM AND THE PASTOR BOTH TOLD
7 MICHELLE TO TELL SOMEONE ABOUT THE INCIDENT THAT HAPPENED IN
8 LAURENS, BUT SHE DIDN'T. WHEN I ASKED IF HE KNEW ABOUT
9 MICHELLE'S BACKGROUND, HE SAYS HE THINKS SHE HAS DRUG
10 CHARGES AND HER EX'S PROBLEMS WITH DSS. HE KNEW IT WOULD
11 BOTHER MICHELLE IF HE TOLD HER THAT Minor WANTED HIM TO TOUCH
12 HER IN THIS WAY. FATHER WANTED TO HAVE SEX WITH JUNE --
13 WITH Minor IN A ROOM. HE WOULD PUT Minor ON THE FOOT OF THE
14 BED WHEN HE AND HIS GIRLFRIEND WOULD HAVE SEX. Minor FATHER
15 WAS RONNIE. WHEN DONALD WOULD SPEND MORE TIME WITH Minor
16 MICHELLE WAS JEALOUS. SHE WAS ALSO JEALOUS OF A MAN NAMED
17 SAMMY WHO WORKED FOR SCC IN MAINTENANCE. DONALD SAYS HE
18 FELL IN LOVE MORE WITH THE KIDS RATHER THAN WITH MICHELLE.
19 RONNIE TOLD Minor THAT HE DIDN'T WANT ANYTHING TO DO WITH HER
20 OR MICHELLE. IT WAS AFTER THIS THAT Minor STARTED ASKING HIM
21 TO TOUCH HER AND THE INCIDENT THAT Minor SAYS HAPPENED ON THE
22 COUCH. HE STATES THAT Minor ALSO ASKED HIM TO TOUCH HER ONE
23 TIME WHEN THEY WERE IN MCCORMICK. HE SAID THAT ONE TIME Minor
24 LEANED OVER THE SEAT IN THE VAN AND PUT HER HANDS ON HIS
25 STOMACH AND TRIED TO PUT THEM IN HIS PANTS. MICHELLE WAS

1 WORKING ON A BUSINESS DEGREE THROUGH PHOENIX AND SHE
2 SOMETIMES GOES INTO A CHAT ROOM AND TALKS WITH GUYS ABOUT
3 MASTURBATING. HE ADMITS THAT HE AND MICHELLE WROTE THE
4 LETTER IN EVIDENCE THAT I HAD RECEIVED FROM THE JAIL. MICHELLE
5 THREATENED TO PUT HIM IN JAIL AFTER ^{Minor} TOLD WHAT HE DID IF HE
6 LEFT. SHE WAS HOLDING THE DISCLOSURE OVER HIS HEAD TO KEEP
7 HIM THERE. REGARDING THE INCIDENT THAT CAUSED HIM TO BE ON
8 THE SEXUAL OFFENDER REGISTRY, HE STATED THAT IN 1990, WHEN HE
9 WAS SEVENTEEN YEARS OLD, THE COUPLE NEXT DOOR HAD A
10 TWENTY-ONE-YEAR OLD DAUGHTER WHO HAD A MINOR FOURTEEN-
11 YEAR-OLD. THE ATTORNEY HE HAD, ROBERT HALL, SUGGESTED HE
12 COULDN'T GET OUT OF IT AND HE PROBABLY WOULD BE FOUND GUILTY
13 IF THE CASE WENT TO TRIAL AND SO HE PLED IN GREENVILLE. HE
14 SAYS HE HAS NO KIDS AND MICHELLE'S KIDS WERE WHAT ATTRACTED
15 HIM TO HER. MICHELLE IS SUPPOSED TO HAVE SURGERY ON
16 HEMORRHOIDS THE FIRST DAY OF JULY. THE KIDS ARE SUPPOSED TO
17 STAY WITH HER FRIEND SHEILA. HE TALKED SOME ABOUT MICHELLE
18 BEING MOLESTED BY HER GRANDFATHER.

19 Q OKAY. AND THAT WAS THE ENTIRE STATEMENT?

20 A YES, SIR.

21 Q THE ENTIRE ORAL INTERVIEW THAT YOU HAD WITH HIM?

22 A CORRECT.

23 Q YOU STATED THAT HE ADMITTED TO WRITING A LETTER. IS THIS THE
24 LETTER THAT HE ADMITTED TO WRITING?

25 A THAT'S CORRECT.

1 **MR. FLEMING: YOUR HONOR, WE WOULD LIKE TO PUT THIS IN AS**
2 **STATE'S EXHIBIT #7.**

3 **THE COURT: ANY OBJECTIONS?**

4 **MR. HOWE: I WOULD LIKE TO SEE IT. NO OBJECTIONS.**

5 **THE COURT: ALL RIGHT. WITHOUT OBJECTION.**

6 **MR. HOWE: EXHIBIT ONLY, JUDGE, IS THAT CORRECT?**

7 **THE COURT: WAS IT AS EXHIBIT ONLY?**

8 **MR. HOWE: YES, SIR.**

9 **THE COURT: IS THAT WHAT YOU ARE INTRODUCING IT AS?**

10 **MR. FLEMING: YES, AT THIS POINT IN TIME.**

11 **THE COURT: SURE. FOR EXHIBIT ONLY.**

12 **(POLICE STATEMENT ENTERED AS STATE'S EXHIBIT**
13 **#7 AS EXHIBIT ONLY)**

14 **Q AT ANY POINT IN TIME IN THE INTERVIEW, DID MR. WEATHERALL ASK**
15 **THAT THE INTERVIEW BE STOPPED AND ASK FOR AN ATTORNEY?**

16 **A HE DID NOT.**

17 **Q THE ENTIRE INTERVIEW WITH MR. WEATHERALL, BY HIM, WAS GIVEN**
18 **FREELY WITHOUT ANY KIND OF PRESSURE OR DURESS?**

19 **A NO PRESSURE OR DURESS. HE WAS WILLINGLY TALKING TO ME.**

20 **Q I HAVE NO FURTHER QUESTIONS, YOUR HONOR.**

21 **CROSS EXAMINATION OF LIEUTENANT WHITE BY MR. HOWE:**

22 **MR. HOWE: IF I CAN HAVE A MOMENT, JUDGE? (CONFERS WITH**
23 **CLIENT)**

24 **THE COURT: YES, SIR.**

25 **MR. HOWE: I DON'T HAVE ANY QUESTIONS, JUDGE.**

1 THE COURT: ALL RIGHT. LET ME ASK ONE. I MAY HAVE
2 MISUNDERSTOOD. DID HE ADMIT DOING THIS, OR DID HE ADMIT TELLING
3 SOMEONE HE WAS GOING TO DO THIS -- OR HE DIDN'T DO IT?

4 WITNESS: WHEN ASKED IF HE ADMITTED TO TOUCHING JUNE ON HER
5 PRIVATE AREA, HE STATES THAT HE ADMITTED IT AND THOUGHT IT TO BE
6 THE RIGHT THING TO DO AT THE TIME BECAUSE MICHELLE AND MOM KEEP
7 ASKING HIM WHY HE -- NOT WHY HE DID IT, BUT IF HE DID IT.

8 THE COURT: SO, BASICALLY HE ADMITTED TO ADMITTING IT?

9 WITNESS: YES, SIR.

10 THE COURT: ALL RIGHT. THANK YOU. YES SIR, ANY NEW -- DO YOU
11 WANT TO MAKE A MOTION TO EXCLUDE IT?

12 MR. HOWE: NO MOTION ON THE JACKSON V DENNO, JUDGE. AS YOU
13 CAN SEE WHERE THIS IS HEADING, THERE ARE THINGS IN THAT STATEMENT
14 THAT WE ARE GOING TO HAVE A HARD TIME DEALING WITH. THE MENTION OF
15 THE REGISTRY.....

16 THE COURT: YEAH, WE CAN'T MENTION THE REGISTRY. AND LET ME
17 TELL YOU, THE PROBLEM WITH THE MCCORMICK STUFF, AND I LOOKED AT IT
18 AT LUNCH AND I ASKED MY CLERK TO PULL SOME CASES ON IT, IT IS OBVIOUS
19 PROBATIVE. THE QUESTION IS, I DON'T KNOW, I CAN'T FIND AN EXCEPTION
20 UNDER LYLE. BECAUSE IT IS ARGUABLY A PART OF THE RELATIONSHIP WITH
21 THIS CHILD. MY PROBLEM IS THAT IT -- I CAN'T FIND AN EXCEPTION UNDER
22 THE CASES WHERE IT WOULD COME IN. IT ALSO IS, LIKE I SAID, A PRETTY
23 SLIPPERY SLOPE THAT YOU ARE GETTING INTO. SO IF Y'ALL CAN POINT ME
24 SOMEWHERE I WOULD APPRECIATE IT.

25 MR. FLEMING: I WOULD THINK IT COULD COME IN UNDER COMMON

1 SCHEME OF PLAN. OR, YOU KNOW, JUST UNDER *RES GESTAE*. IT WOULD
2 COME IN....

3 THE COURT: WHAT IS THE POLICE OFFICER GOING TO SAY THAT HE
4 SAW? JUST HER SITTING ON HIS LAP?

5 MR. FLEMING: YES, SIR.

6 THE COURT: AND THAT WAS THE BASIS FOR THE CHARGE IN
7 MCCORMICK?

8 MR. FLEMING: WELL, THAT AND THEY KNEW THAT THE BASIS OF THE
9 CHARGES IN MCCORMICK WAS THAT THEY THOUGHT HE WAS, THEY KNEW HE
10 WAS A CONVICTED SEXUAL OFFENDER. THEY GOT THE CHILD OUT AND SHE
11 ADMITTED TO THE OFFICERS THAT HE HAD TOUCHED HER IMPROPERLY
12 THERE IN MCCORMICK. THAT'S WHY EARLIER WHEN WE WERE TALKING AND
13 MR. HOWE WAS ASKING HER, SHE SAID IT HAPPENED AT HOME IN THE
14 DAY TIME, AND AT NIGHT IT HAD HAPPENED IN THE VAN.

15 THE COURT: WHAT IS YOUR POSITION ON THE COMMON SCHEME OF
16 PLAN? MY CONCERN IS THAT IT'S -- YOU KNOW, ALL THE CASE LAW
17 BASICALLY SAYS IT MUST BE EXCLUDED IF IT IS SUBSTANTIALLY -- IF THE
18 PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF
19 UNFAIR PREJUDICE. AND OBVIOUSLY IN SOMETHING LIKE THIS YOU ALMOST
20 HAVE TO BEND OVER BACKWARDS TO MAKE SURE THAT SOMETHING LIKE
21 THAT DOESN'T COME IN.

22 MR. HOWE: JUDGE, YOU KNOW, I HAVE BEEN TO SEMINARS AND I HAVE
23 HEARD LYLE ADDRESSED FROM EVERY WAY POSSIBLE. I STILL DON'T
24 UNDERSTAND THE RULES OF THE COURT AND I GUESS I STILL DON'T
25 UNDERSTAND LYLE. MY POSITION IS THAT IT'S NOT A COMMON SCHEME OF

1 PLAN JUST MERELY BECAUSE THE ALLOCATION IS THAT MY CLIENT DID
2 SOMETHING IN MCCORMICK COUNTY WITH THE SAME PERSON, AND EVEN IF
3 IT IS – WHEN YOU START GETTING INTO THAT, IT BECOMES SO PREJUDICIAL
4 THAT THE JURY – HOW CAN THEY FOCUS ON WHAT WE ARE TALKING ABOUT
5 HERE IN LAURENS? YOU KNOW, I MEAN THE JURY CAN'T DO THAT. AND IN
6 ANY EVENT, THAT TESTIMONY FROM THE OFFICERS DOWN THERE WOULD
7 HAVE TO BE HEARSAY BASED ON WHAT THE CHILD TOLD THEM. IF THEY ARE
8 GOING TO TESTIFY ON WHAT THE CHILD TOLD THEM

9 THE COURT: LET'S GO OFF THE RECORD HERE. LET ME SHOW Y'ALL A
10 CASE BACK HERE. I WILL BE RIGHT BACK.

11 THE COURT: (SPEAKING TO WITNESS) YOU CAN STEP DOWN. WE WILL
12 PUT YOU OUT THERE AND CALL YOU BACK IN JUST A MINUTE.

13 (BRIEF BENCH CONFERENCE IN CHAMBERS)

14 THE COURT: OKAY. ANYTHING FURTHER BEFORE WE GO FORWARD
15 WITH THIS WITNESS?

16 MR. FLEMING: ARE YOU GOING TO MAKE A RULING ON THE RECORD,
17 YOUR HONOR?

18 THE COURT: YES. ON THE WHOLE THING WE WERE TALKING ABOUT
19 BACK HERE?

20 MR. FLEMING: YES, SIR.

21 THE COURT: ALL RIGHT. FIRST, THERE IS NO MOTION REGARDING HER.
22 IS THAT CORRECT?

23 MR. HOWE: NOT REGARDING WHETHER OR NOT HER TESTIMONY
24 CONCERNING THAT STATEMENT IS ADMISSIBLE AT THIS STAGE, JUDGE.

25 THE COURT: ALL RIGHT. WELL, AND TO GO AHEAD AND JUMP AHEAD,

1 MAYBE TO HER AND POSSIBLY TO ANYONE FURTHER, I HAVE LOOKED AT THE
2 ISSUE OF THE MCCORMICK ARREST. I HAVE ALSO HAD MY LAW CLERK PULL
3 UP SOME CASES AND SHE DID A GOOD JOB PULLING EVERYTHING UP AND
4 ALSO COMPARING IT TO RULE 403. WHAT I AM GOING TO DO IS, I WILL ALLOW
5 TESTIMONY ABOUT THE ARREST THERE, BUT NO TESTIMONY ABOUT WHAT
6 TRANSPIRED AFTER THE ARREST. SO, THE OFFICER CAN TESTIFY THAT HE
7 DROVE UP, THAT HE SAW THE CHILD ON THE LAP AND THEN THAT GAVE HIM
8 REASON TO ARREST AND THAT IS IT. DON'T GO ANY FURTHER. I DON'T THINK
9 THAT IS PREJUDICIAL AT ALL TO THE JURY, BECAUSE THEY ARE GOING TO
10 UNDERSTAND THAT THERE IS NOT ANYTHING WRONG WITH SITTING ON
11 SOMEONE'S LAP. THAT CAUSED THEM TO TAKE ACTION. THAT IS MY
12 UNDERSTANDING OF WHAT HAPPENED. IS THAT CORRECT? THEY WALK UP --
13 THEY DROVE UP AND SHE'S IN HE VAN?

14 **MR. FLEMING:** YES, SIR.

15 **THE COURT:** NOW, I THINK THE SEXUAL LIST -- NONE OF THAT CAN
16 COME IN. IT IS JUST TOO PREJUDICIAL, QUITE FRANKLY. I UNDERSTAND YOU
17 DON'T WANT ANY OF THE TESTIMONY ABOUT SITTING ON THE LAP, BUT IT
18 SEEMS REAL ODD IF THE TESTIMONY IS THAT HE DROVE UP AND SAW A VAN
19 AND ARRESTED THE MAN. I DON'T KNOW IF THAT MAKES ANY SENSE AT ALL.

20 **MR. HOWE:** OF COURSE, I REALIZE THAT MR. FLEMING PROBABLY
21 DOES NOT WANT TO DO IT THIS WAY, BUT I DON'T KNOW WHY WE COULDN'T
22 STIPULATE THAT THE MAN WAS ARRESTED. CLEARLY, HE WAS ARRESTED
23 AND WE WOULD STIPULATE THAT HE WAS ARRES -- THAT HE WAS LAWFULLY
24 ARRESTED. NOBODY IS GOING TO DISPUTE THAT.

25 **THE COURT:** WELL, I WANT YOU TO THINK ABOUT THAT, BECAUSE

1 THAT IS NOT COMING UP WITH THIS LADY, RIGHT? WELL, THINK ABOUT IT.

2 MR. FLEMING: SHE JUST INTERVIEWED HIM, AND ONCE IN MCCORMICK.

3 THE COURT: YEAH. NOW AS FAR AS THE -- I DIDN'T HEAR ANYTHING IN
4 THAT STATEMENT THAT WAS OVERTLY ABOUT MCCORMICK. IF I MISSED IT,
5 LET ME KNOW. IT WAS HARD FOR ME TO UNDERSTAND EXACTLY WHAT HE
6 WAS SAYING. AND THE PROBLEM IS, AS I SAID BACK THERE, IS THE MORE
7 PROBATIVE SOMETHING IS, THE MORE PREJUDICIAL IT IS. AND THAT'S AFTER
8 LOOKING AT THE LINE OF CASES. IT APPEARS TO ME THAT IN THE NEWER
9 CASES THEY ARE ASKING US TO ERR ON THE SIDE OF NOT ALLOWING
10 PREJUDICIAL TESTIMONY. IT MAY CHANGE NEXT WEEK. IS THERE
11 SOMETHING IN THAT STATEMENT THAT REFERS TO MCCORMICK?

12 MR. HOWE: THERE IS. JUDGE, THERE IS MENTION OF MCCORMICK.
13 IN THE STATEMENT, THERE IS MENTION OF MCCORMICK. AND THEN THERE IS
14 CERTAINLY MENTION OF THE SEX OFFENDER REGISTRY IN THE CASE HE
15 PLED TO IN 1990, WHICH SHOULDN'T COME IN.

16 THE COURT: RIGHT. THAT'S -- EVERYBODY AGREES THAT IS PRIOR TO
17 THE TEN YEARS, SO THAT CAN'T COME IN AND WE WILL JUST HAVE TO
18 REDACT THAT FIRST PORTION OF IT. AND I WILL INSTRUCT HER.

19 MR. HOWE: I DON'T THINK THERE...

20 THE COURT: I JUST DIDN'T HEAR ANYTHING ABOUT MCCORMICK. I
21 JUST HEARD THE SEXUAL OFFENDER REGISTRY.

22 MR. FLEMING: UP ON TOP OF THE PAGE, ON PAGE THREE. HE -- IT'S
23 TYPED, THAT HE SAID ^{Minor} ALSO ASKED HIM TO TOUGH HER ONE TIME WHEN
24 THEY WERE IN MCCORMICK.

25 MR. HOWE: IT IS ALSO MENTIONED ON THE FIRST PAGE. IT STATES

1 THAT^{Minor} WANTED TO SLEEP ON HIS CHEST AND HE TOLD HER THE ONLY
2 WAY HE WOULD DO THAT WAS IF SHE WRAPPED UP IN A BLANKET, AND DID.
3 IT WAS A CAMOUFLAGE BLANKET. THIS WAS IN MCCORMICK.

4 THE COURT: I DON'T SEE HOW THAT COMES IN. I DON'T SEE HOW IT
5 CAN. SO, WE JUST NEED TO REDACT THAT PORTION. ALL RIGHT.

6 MR. FLEMING: YES, SIR. CAN WE TAKE A MINUTE?

7 THE COURT: I AM GOING TO EXPLAIN TO THEM THAT I HAD THAT OTHER
8 HEARING OUT HERE. YEAH, TAKE YOUR TIME.

9 THE COURT: OKAY. THERE WAS ONE OF THE JURORS – WHAT WAS
10 HER NAME?

11 THE BAILIFF: MS. REID, MS. EDNA REID.

12 THE COURT: SHE WENT TO EAT AND I THINK ^{Minor} THE CHILD,
13 MAY HAVE SAT BEHIND HER. SHE HEARD ONE WORD, DUNN'S CASE, I AM
14 NOT SURE. SHE TURNED AROUND AND LOOKED, REALIZED IT WAS THE CHILD
15 AND SHE GOT UP AND MOVED. SHE SAID SHE HEARD NOTHING SUBSTANTIVE.
16 SHE IS NOT COMPLETELY SURE THAT IT WAS THE CHILD, BUT I TOLD HER
17 THAT WAS NOT A PROBLEM. NOW, I WILL BE HAPPY TO QUESTION HER ON
18 THE RECORD. SHE IS REAL NICE. SHE IS THE OLDER LADY SITTING HERE.
19 SHE SAT OVER HERE ON THE BACK LEFT, BUT SHE IS VERY NICE, SAID SHE
20 DIDN'T HEAR ANYTHING, BUT SHE FELT THAT SHE SHOULD TELL ME. SO, DO
21 Y'ALL WANT ME TO QUESTION HER ON THE RECORD?

22 MR. FLEMING: NOTHING FROM THE STATE, YOUR HONOR.

23 MR. HOWE: NO, SIR.

24 THE COURT: OKAY. BRING THEM IN.

25 (JURY IN AT 3:05)

1 THE BAILIFF: ALL PRESENT, YOUR HONOR.

2 THE COURT: THANK YOU. LADIES AND GENTLEMEN, SINCE YOU ARE
3 GIVING OF YOUR TIME I WANT TO TELL YOU, I AM PROUD TO BE HERE FROM
4 ANDERSON AND ONE OF THE PROBLEMS I HAVE, IS MY SECRETARY IN
5 ANDERSON IS SCHEDULING THINGS HERE. I HAD A 2:15 PM MOTION ON
6 ANOTHER CASE THAT HAS NOTHING TO DO WITH THIS CASE, THAT KEPT ME
7 BACK THERE LONGER THAN I EXPECTED. ALSO, WHILE YOU WERE GONE, WE
8 HAVE HANDLED SOME MOTIONS AND MATTERS THAT WILL ALLOW THIS
9 AFTERNOON TO PROCEED A LITTLE BIT FASTER. I AM SORRY YOU HAD TO
10 SIT. THAT WAS NOT OUR INTENTION, BUT AS I SAID, IF YOU ARE GOING TO
11 GET MAD AT ANYONE, YOU HAVE TO GET MAD AT ME. I AM THE ONE BACK
12 THERE. OKAY. THANK YOU, AND BY THE WAY, IF YOU HAVE A PROBLEM JUST
13 SIT THERE AND ONE SMALL PROBLEM THAT WAS NOT A PROBLEM, THAT'S
14 THE WAY TO HANDLE IT. JUST LET THE BAILIFF KNOW AND I WILL TAKE CARE
15 OF IT. ALL RIGHT YOU CAN CALL YOUR NEXT WITNESS.

16 MR. FLEMING: THANK YOU YOUR HONOR. WE CALL LIEUTENANT VICKIE
17 WHITE TO THE STAND.

18 (AFTER BEING DULY SWORN IN BY THE JUDGE, LIEUTENANT
19 VICKIE WHITE TESTIFIED IN THE PRESENCE OF THE JURY AS FOLLOWS:)

20 THE COURT: IF YOU WOULD STATE YOUR FULL NAME FOR THE RECORD
21 AND SPELL YOUR LAST.

22 WITNESS: VICTORIA WHITE. W-H-I-T-E.

23 MR. FLEMING: MAY IT PLEASE THE COURT YOUR HONOR?

24 THE COURT: YES, SIR.

25 MR. FLEMING: THANK YOU.

1 **DIRECT EXAMINATION OF LIEUTENANT VICKIE WHITE BY MR. FLEMING:**

2 Q MS. WHITE, WHERE DO YOU WORK?

3 A LAURENS COUNTY SHERIFF'S OFFICE

4 Q HOW LONG HAVE YOU WORKED THERE?

5 A APPROXIMATELY TEN YEARS.

6 Q WHAT DO YOU DO WITH THE SHERIFF'S OFFICE?

7 A I AM AN INVESTIGATOR.

8 Q AND WHAT TYPES OF CASES DO YOU MAINLY INVESTIGATE?

9 A SEX CRIMES.

10 Q AND ON JUNE 23rd, 2004, DID YOU HAVE A CHANCE TO BEGIN

11 INVESTIGATIONS ON A CASE CONCERNING THE DEFENDANT, DONALD

12 WEATHERALL?

13 A YES, SIR.

14 Q AND COULD YOU TELL THE JURY ABOUT THAT?

15 A I RECEIVED A CALL THAT A CHILD, AGE SIX-YEARS-OLD, HAD BEEN
16 TOUCHED BY MR. WEATHERALL.

17 Q AND WHERE WAS THE INCIDENT LOCATION WHERE THAT OCCURRED?

18 A AT 11604, HIGHWAY 39, CROSS HILL.

19 Q IS THAT IN LAURENS COUNTY?

20 A THAT IS.

21 Q AND DID YOU GO TO THAT ADDRESS ON JUNE 23rd?

22 (WITNESS REFERS TO NOTES)

23 A I AM THINKING I WENT TO THAT ADDRESS ON THE 24th.

24 Q OKAY. SO YOU WENT TO THE ADDRESS ON THE 24th.

25 A I WENT ON THURSDAY MORNING. I RECEIVED A CALL ON WEDNESDAY

1 NIGHT AT MY HOME. I WENT ON THURSDAY MORNING.

2 Q AND WAS ANYONE AT HOME WHEN YOU WENT THERE ON JUNE THE
3 24th?

4 A NO.

5 Q DID YOU GO BACK?

6 A I DID.

7 Q WHEN DID YOU GO BACK?

8 A I WENT BACK, I WENT THAT MORNING, THAT THURSDAY MORNING. NO
9 ONE WAS HOME AND I WENT BACK THURSDAY AFTERNOON, CLOSE TO
10 FIVE O'CLOCK, AND NO ONE WAS AT HOME.

11 Q AND DID YOU LATER FIND OUT THE WHEREABOUTS TO THE
12 DEFENDANT, DONALD WEATHERALL?

13 A I'M SORRY, WOULD YOU REPEAT THAT?

14 Q DID YOU LATER FIND OUT WHERE MR. WEATHERALL WAS AT?

15 A I DID.

16 Q AND WHERE WAS HE AT?

17 A HE WAS INCARCERATED.

18 Q WHERE AT?

19 MR. HOWE: YOUR HONOR, I OBJECT.

20 THE COURT: LADIES AND GENTLEMEN I AM GOING TO SEND YOU OUT
21 FOR ABOUT FIVE MINUTES AND I WILL BRING YOU BACK IN. PLEASE DO NOT
22 DISCUSS THE CASE.

23 (JURY OUT AT 3:11)

24 THE COURT: YES, SIR.

25 MR. HOWE: YOUR HONOR, I WOULD OBJECT TO ANY TESTIMONY FROM

1 THIS WITNESS ABOUT THE CIRCUMSTANCES OF HIS BEING INCARCERATED IN
2 MCCORMICK. I THINK THAT IS IMPROPER. I THINK THE COURT HAS RULED ON
3 THAT AND I AM GOING TO OBJECT TO THAT. IT'S -- AND LEAVING IT THAT WAY
4 MAKES THEM THINK HE WAS IN PRISON. I AM TRYING TO THINK OF ALL THE
5 REASONS I WOULD OBJECT. THAT'S SOMETHING WE WENT OVER.

6 THE COURT: YES, SIR.

7 MR. FLEMING: I THOUGHT YOU SAID WE COULD GO INTO THE ARREST
8 IN MCCORMICK, YOU HONOR, WE JUST COULDN'T GO INTO THE
9 CIRCUMSTANCES SURROUNDING IT.

10 THE COURT: NO. HE COULD GO INTO THE CIRCUMSTANCES
11 SURROUNDING THE ACTUAL ARREST BUT NOT -- WHAT WAS HE IN JAIL FOR?
12 THE LEWD ACT IN MCCORMICK?

13 THE WITNESS: YES, SIR.

14 THE COURT: THAT'S WHAT HE CAN'T GO INTO.

15 MR. FLEMING: YES, THAT'S WHAT I THOUGHT. WE CAN GO INTO THE
16 ARREST. THAT HE WAS UNDER ARREST, HE WAS INCARCERATED, BUT WE
17 COULDN'T GO INTO THE FACTS SURROUNDING THAT. I THOUGHT THAT WAS
18 WHAT WE ESTABLISHED.

19 THE COURT: IT'S A FINE LINE. I AM GOING TO ALLOW HER -- IF THAT IS
20 ALL SHE IS TESTIFYING TO.

21 MR. FLEMING: YES, THAT'S RIGHT.

22 THE COURT: BUT NOTHING ABOUT MCCORMICK.

23 MR. FLEMING: NOTHING ABOUT THE FACTS.

24 THE COURT: OR THE CHARGE.

25 MR. FLEMING: YES. BUT SHE CAN STATE THAT WAS WHERE SHE WENT

1 TO INTERVIEW HIM AT.

2 THE COURT: THE PROBLEM IS, IF SHE SAYS MCCORMICK, THEY WILL
3 WONDER WHY SHE'S -- SHE 'S BASICALLY SAID SHE WENT TO INTERVIEW HIM
4 WHILE HE WAS INCARCERATED.

5 MR. FLEMING: OKAY.

6 THE COURT: YES, THAT WOULD BE IT. OKAY, BRING THEM BACK IN.

7 (JURY IN AT 3:13 PM)

8 THE BAILIFF: ALL PRESENT, YOUR HONOR.

9 THE COURT: THANK YOU, LADIES AND GENTLEMEN. ALL RIGHT YOU
10 CAN CONTINUE.

11 MR. FLEMING: THANK YOU, YOUR HONOR. LIEUTENANT, WHILE MR.
12 WEATHERALL, THE DEFENDANT, WAS INCARCERATED DID YOU HAVE A
13 CHANCE TO GO AND INTERVIEW HIM?

14 A I DID.

15 Q OKAY. AND WHEN YOU WENT TO INTERVIEW HIM, DID YOU ADVISE HIM
16 OF HIS MIRANDA RIGHTS?

17 A YES, I DID.

18 Q SO, YOU TOLD HIM, YOU ADVISED HIM HE HAD THE RIGHT TO REMAIN
19 SILENT.

20 A YES, I DID.

21 Q YOU ADVISED HIM THAT ANYTHING HE SAID COULD BE USED IN COURT.

22 A YES, SIR.

23 Q AND YOU ADVISED HIM THAT HE HAD A RIGHT TO AN ATTORNEY
24 BEFORE QUESTIONING.

25 A YES, SIR.

1 Q AND TO HAVE A LAWYER DURING QUESTIONING.

2 A YES, SIR.

3 Q AND DID YOU ADVISE HIM OF THAT?

4 A YES, SIR.

5 Q AND DID YOU ADVISE HIM THAT IF HE DID NOT HAVE MONEY FOR AN
6 ATTORNEY, THAT THE COURT WOULD APPOINT ONE FOR HIM AT NO
7 COST.

8 A I DID.

9 Q AND DID YOU ADVISE HIM THAT IF HE DECIDED TO ANSWER
10 QUESTIONS, THAT HE HAD THE RIGHT TO STOP THE QUESTIONING AT
11 ANY TIME AND UNTIL HE COULD TALK TO A LAWYER?

12 A YES, SIR.

13 Q AND IS THIS A COPY OF THE ADVISEMENT OF RIGHTS FORM, WAIVER OF
14 RIGHTS, SIGNED BY THE DEFENDANT, MR. WEATHERALL?

15 A YES, SIR.

16 Q AND DID MR. WEATHERALL WAIVE HIS RIGHTS?

17 A YES, SIR.

18 Q DID HE ACKNOWLEDGE ON THIS FORM THAT HE WANTED TO TALK TO
19 YOU WITHOUT AN ATTORNEY?

20 A HE DID.

21 MR. FLEMING: YOUR HONOR, WE WOULD LIKE TO SUBMIT THIS AS
22 STATES EXHIBIT #6 INTO EVIDENCE.

23 THE COURT: ANY OBJECTIONS?

24 MR. HOWE: NO OBJECTIONS.

25 THE COURT: WITHOUT OBJECTION.

1 (WHEREUPON, WAIVER OF MIRANDA RIGHTS
2 ENTERED INTO EVIDENCE AS STATE'S EXHIBIT #6)

3 Q SO, MR. WEATHERALL WAIVED ALL HIS RIGHTS WHEN YOU WENT TO
4 TALK TO HIM. IS THAT CORRECT?

5 A YES, SIR.

6 Q OKAY. AND IN YOUR INTERVIEW, DID YOU QUESTION HIM ABOUT THE
7 REPORTED INCIDENT?

8 A YES, SIR.

9 Q OKAY. AND IS THIS A COPY OF WHAT YOU TOOK DOWN AS THE
10 STATEMENT, THE ORAL STATEMENT THAT HE GAVE?

11 A YES, SIR.

12 Q AND ON THAT, WELL, JUST - IF YOU COULD, JUST WHAT DID MR.
13 WEATHERALL STATE TO YOU IN THAT INTERVIEW?

14 A MR. WEATHERALL STATES THAT HE HAS BEEN LIVING WITH MICHELLE
15 BARNETT FOR TWO OR THREE MONTHS. SINCE THEN, HE HAS BEEN
16 OUT - SINCE SCHOOL HAS BEEN OUT, TWO OLDER BOYS ARE LIVING
17 WITH THEIR FATHER. TWO YOUNGER CHILDREN LIVED WITH HIM AND
18 MICHELLE. HE STATES THAT THEY TALKED WITH HIS PASTOR, THE
19 BISHOP OF THE L-D-S CHURCH. HE STATES MICHELLE NEEDED TO TALK
20 TO SOMEONE.

21 Q WELL, LET ME STOP YOU RIGHT THERE REAL QUICK. MICHELLE
22 BARNETT IS WHO?

23 A MOTHER.

24 Q THAT IS THE LITTLE GIRL WHO TESTIFIED EARLIER TODAY, THAT'S HER
25 MOTHER.

1 A YES, SIR.

2 Q YOU CAN GO AHEAD AND PROCEED.

3 A Minor SAID THAT HE WAS LICKING HER DOWN THERE. DONALD STATES
4 THAT HE THINKS HE HANDLED THIS THE WRONG WAY. THAT HE
5 SHOULD HAVE LEFT. HE SHOULDN'T HAVE STUCK AROUND. HE STATES
6 THEY WERE JUST DATING. HE TOLD HIS MOM THAT THEY WERE
7 MARRIED BUT THEY AREN'T. MICHELLE WAS OPENLY SEXUAL AROUND
8 Minor ONE TIME WHILE MICHELLE WAS ON THE COMPUTER, HE WAS IN
9 THE BATHROOM AND Minor CAME IN THE ROOM. MICHELLE DID NOT
10 STOP HER FROM SEEING HIM. Minor WANTED HIM TO RUB HER
11 BREASTS AND BETWEEN HER LEGS. ON ONE OCCASION MICHELLE
12 GAVE HIM ORAL SEX GOING DOWN THE ROAD AND HE PULLED INTO A
13 GAS STATION. THE KIDS Minor AND TURTLE, WERE IN THE BACK. Minor
14 LEANED OVER TO SEE WHAT WAS GOING ON. DONALD CONTINUES TO
15 STATE THAT HE HANDLED THIS THE WRONG WAY. WHEN ASKED IF HE
16 ADMITTED TOUCHING Minor IN HER PRIVATE AREAS HE STATES HE DID
17 ADMIT IT AND THOUGHT IT WOULD BE THE RIGHT THING TO DO AT THE
18 TIME BECAUSE MICHELLE AND HIS MOM KEPT ASKING HIM IF HE DID IT.
19 DONALD TOLD THE PASTOR AND MICHELLE. DONALD STATES HE HAS
20 BEEN TRYING TO GET IN TOUCH WITH MICHELLE, BUT HAS NOT BEEN
21 ABLE TO. THE LAST TIME HE SAW HER WAS ON FRIDAY WHEN SHE
22 PICKED UP HIS CHECK AND BROUGHT IT BY THE JAIL FOR HIM TO SIGN
23 IT. HE DOES NOT KNOW WHERE SHE IS, MAYBE WITH HER GIRLFRIEND
24 SHEILA. HE STATES THAT HE THINKS Minor MAYBE SAID HE TOUCHED
25 HER JUST TO GET ATTENTION. SHE REALLY WANTS ATTENTION. WHEN

1 ASKED ABOUT THE HOUSE, HE STATES THAT HE DOES MOST OF THE
2 HOUSEWORK AND MICHELLE COOKS AND THEY EAT OUT A LOT. WHEN
3 ASKED WHEN HE MOVED IN WITH MICHELLE HE STATES MAYBE APRIL
4 24th. HE SAID HE HAD BROUGHT HIS NIECE A BIRTHDAY PRESENT – A
5 PRESENT FOR HER BIRTHDAY BEFORE HE MOVED IN AND THAT WAS ON
6 APRIL 10th. ABOUT WHEN THEY MET, DONALD STATES THEY MET THE
7 WEEK BEFORE HE MOVED IN. HE WAS WORKING FOR HIS BROTHER
8 KEVIN AND SO WAS RONNIE TURNER. SHE AND RONNIE AND HE WERE
9 SUPPOSED TO HAVE A THREESOME BUT THAT DIDN'T HAPPEN. HE
10 STATES THAT HE HAS LIVED IN WATERLOO SINCE FEBRUARY. HE WAS
11 LIVING IN HIS BROTHER'S HOUSE AND WENT BACK TO HIS MOM'S ON
12 THE WEEK-END. HE MOVED IN WITH MICHELLE IN APRIL. HE THINKS
13 Minor TOLD MICHELLE ABOUT TWO WEEKS AGO LAST WEDNESDAY.
14 MICHELLE WAS CONFUSED AND UPSET. HIS MOTHER AND PASTOR
15 BOTH TOLD MICHELLE TO TELL SOMEONE ABOUT THE INCIDENT THAT
16 HAPPENED IN LAURENS, BUT SHE DIDN'T. WHEN ASKED IF HE KNEW
17 ABOUT MICHELLE'S BACKGROUND HE SAYS HE THINKS SHE HAS DRUG
18 CHARGES AND HER EX'S PROBLEMS WITH DSS. HE KNEW IT WAS
19 BOTHERING MICHELLE THAT HE TOLD HER Minor WANTED HER TO
20 TOUCH HER IN THIS WAY. Minor FATHER WANTED TO HAVE SEX WITH
21 Minor IN THE ROOM. HE WOULD PUT Minor ON THE FOOT OF HIS BED
22 WHILE HE AND HIS GIRLFRIEND WOULD HAVE SEX. Minor FATHER IS
23 RONNIE. WHEN DONALD WOULD SPEND MORE TIME WITH Minor
24 MICHELLE WAS JEALOUS. SHE WAS ALSO JEALOUS OF A MAN NAMED
25 SAMUEL WHO WORKS FOR SCC AS MAINTENANCE. DONALD STATES HE

1 FELL IN LOVE MORE WITH THE KIDS RATHER THAN WITH MICHELLE.
2 RONNIE TOLD Minor HE DID NOT WANT ANYTHING TO DO WITH HER OR
3 MICHELLE. IT WAS AFTER THIS THAT Minor STARTED ASKING HIM TO
4 TOUCH HER AND THE INCIDENT THAT Minor SAYS HAPPENED ON THE
5 COUCH. HE SAYS THAT ONE TIME Minor LEANED OVER THE SEAT IN THE
6 VAN AND PUT HIS HANDS ON HER, EXCUSE ME, HE SAID THAT ONE TIME
7 Minor LEANED OVER THE SEAT IN THE VAN AND PUT HER HANDS ON HIS
8 STOMACH AND TRIED TO PUT THEM IN HIS PANTS. MICHELLE IS
9 WORKING ON A BUSINESS DEGREE THROUGH PHOENIX AND SHE
10 SOMETIMES GOES INTO CHAT ROOMS AND TALKS TO GUYS ABOUT
11 MASTURBATING. HE ADMITS THAT HE AND MICHELLE WROTE THE
12 LETTER IN EVIDENCE. MICHELLE THREATENED TO PUT HIM IN JAIL.
13 AF Minor TOLD HER WHAT HE DID, HE LEFT. SHE WAS HOLDING THE
14 EXPOSURE OVER HIS HEAD TO KEEP HIM THERE. HE SAYS HE HAS NO
15 KIDS AND MICHELLE'S KIDS ARE WHAT ATTRACTED HIM TO HER.
16 MICHELLE WAS SUPPOSED TO HAVE SURGERY FOR HEMORRHOIDS ON
17 THE FIRST OF JULY. THE KIDS ARE SUPPOSED TO STAY WITH HER
18 FRIEND SHEILA. HE TALKED SOME ABOUT MICHELLE BEING MOLESTED
19 BY HER GRANDFATHER.
20 Q OK. THAT IS THE ENTIRE STATEMENT TAKEN BY MR. WEATHERALL. IS
21 THAT CORRECT?
22 A CORRECT. EXCEPT FOR THE PORTIONS TAKEN OUT.
23 MR. FLEMING: YOUR HONOR, WE WOULD LIKE TO SUBMIT THIS AS A
24 STATE'S EXHIBIT.
25 THE COURT: YES, SIR.

1 **MR. HOWE: MAY WE SPEAK, PLEASE?**

2 **(BENCH CONFERENCE OFF THE RECORD)**

3 **THE COURT: LADIES AND GENTLEMEN, I WANT TO EXPLAIN SOMETHING**
4 **TO YOU. THERE WAS A STATEMENT MADE. THE QUESTION WAS, "WAS THAT**
5 **THE FULL STATEMENT OF THE DEFENDANT?" AND THE ANSWER WAS, "IT IS,**
6 **EXCEPT FOR PORTIONS THAT WERE TAKEN OUT." THE REASON I WANT TO**
7 **TELL YOU THAT IS, THERE WERE PORTIONS OF THAT STATEMENT THAT DON'T**
8 **HAVE ANYTHING TO DO WITH THIS CASE THAT I HAVE REMOVED. I DON'T**
9 **WANT YOU TO BE CONFUSED ABOUT THAT. WE JUST BLACKED THEM OUT,**
10 **BASICALLY. ALL RIGHT? JUST SO YOU FULLY UNDERSTAND. ALL RIGHT. ANY**
11 **FURTHER QUESTIONS FOR THIS WITNESS?**

12 **MR. FLEMING: YES. WE WOULD LIKE TO MOVE THIS IS IN AS**
13 **STATE'S EXHIBIT #8.**

14 **THE COURT: ANY OBJECTIONS?**

15 **MR. HOWE: NO OBJECTION.**

16 **THE COURT: WITHOUT OBJECTION.**

17 **(WHEREUPON, DEFENDANT'S STATEMENT IS ENTERED INTO**
18 **EVIDENCE AS STATE'S EXHIBIT #8)**

19 **CONTINUING DIRECT EXAMINATION OF LIEUTENANT WHITE BY MR. FLEMING:**

20 **Q IN YOUR INTERVIEW WITH MR. WEATHERALL, LIEUTENANT WHITE, YOU**
21 **STATED OR – YOU SAID THAT HE STATED THAT HE ADMITS THAT HE**
22 **WROTE – THAT HE AND MICHELLE WROTE THE LETTER IN EVIDENCE. IS**
23 **THIS THE LETTER THAT YOU ARE TALKING ABOUT?**

24 **A YES, SIR.**

25 **Q COULD YOU READ WHAT HE WROTE, DONALD WEATHERALL WROTE.**

- 1 A MICHELLE, WHAT HAPPENED? HOW DID THEY HEAR ABOUT THIS SHIT?
2 ARE YOU THE ONE WHO TOLD THEM? I THOUGHT WE WERE GOING TO
3 WORK THROUGH THIS. I AM GOING TO JAIL FOR THE REST OF MY LIFE--
4 AM I GOING TO JAIL FOR THE REST OF MY LIFE? I CAN'T CALL FROM IN
5 HERE. CAN YOU GET COLLECT CALLS?
- 6 Q AFTER THIS INTERVIEW DETECTIVE WHITE, WHAT DID YOU DO THEN?
- 7 A I DON'T UNDERSTAND.
- 8 Q WHAT DID YOU DO NEXT, AS FAR AS THE CASE IS CONCERNED?
- 9 A I BELIEVE I OBTAINED A WARRANT FOR MR. WEATHERALL.
- 10 Q DID YOU MEET WITH ANYBODY FROM THE CHILD'S PLACE?
- 11 A I DID. THAT WAS AN INTERVIEW THAT HAD BEEN SCHEDULED ALREADY.
- 12 Q WERE YOU IN ATTENDANCE AT THIS INTERVIEW?
- 13 A I WAS.
- 14 Q AND WAS YOUR WARRANTS BASED ON THAT INTERVIEW AS WELL?
- 15 A THAT'S CORRECT.
- 16 Q AND WHO PERFORMED THAT INTERVIEW AT THE CHILD'S PLACE?
- 17 A I BELIEVE IT WAS CHARLOTTE EHNEY.
- 18 Q OK. DO YOU RECALL -- WERE YOU ACTUALLY PRESENT WHEN THE
19 CHILD WAS INTERVIEWED BY MS. EHNEY?
- 20 A I WAS NOT IN THE SAME ROOM. THEY INTERVIEWED THE CHILD
21 PRIVATELY. THERE IS AN OBSERVATION ROOM AND I WAS IN THERE
22 WITH SOME OTHER PEOPLE.
- 23 Q AND WHILE YOU WERE WATCHING THAT, DID THE CHILD SAY ANYTHING
24 ABOUT THE DEFENDANT TOUCHING HER INAPPROPRIATELY?
- 25 A I WILL HAVE TO REFER TO THE INTERVIEW. (LOOKS THROUGH HER

1 NOTES)

2 MR. HOWE: MAY I ASK WHOSE INTERVIEW YOU ARE REFERRING TO?

3 WITNESS: CHARLOTTE EHNEY INTERVIEWING Minor

4 MR. HOWE: THEN I AM GOING TO OBJECT TO WHAT THIS WITNESS HAS
5 TESTIFIED TO ON WHAT MS. EHNEY PUT IN HER REPORT.

6 THE COURT: YES. SUSTAINED. I THINK -- I DON'T THINK THAT WAS
7 YOUR QUESTION ANYWAY, BUT IF YOU CAN RESTATE IT. I THOUGHT YOU
8 ASKED WHAT SHE SAID IN HER PRESENCE.

9 MR. FLEMING: YES. SHE WAS IN HER PRESENCE. SHE -- IT WAS MY
10 UNDERSTANDING WAS THE WITNESS WAS OUTSIDE WATCHING THE
11 INTERVIEW THROUGH A WINDOW.

12 THE COURT: WITH SOUND.

13 THE WITNESS: YES, SIR.

14 THE COURT: OKAY. YOU WERE OUTSIDE, YOU COULD HEAR THE
15 INTERVIEW, IS THAT CORRECT?

16 THE WITNESS: YES, SIR.

17 THE COURT: AND YOU COULD SEE?

18 THE WITNESS: YES, SIR.

19 THE COURT: THEN SHE CAN TESTIFY TO WHAT SHE HEARD.

20 MR. HOWE: BUT SHE STARTED -- THE RESPONSE TO THAT BY SAYING
21 I'M GOING REFER TO MS. EHNEY'S NOTES.

22 THE COURT: SHE CAN'T REFER. YOU CAN'T REFER TO THOSE NOTES.
23 YOU CAN REFER TO YOUR OWN NOTES BUT NOT SOMEONE ELSE'S.

24 THE WITNESS: OKAY.

25 MR. HOWE: AND JUDGE, I HAVEN'T SEEN THOSE NOTES. I HAVE NO

1 IDEA WHAT IS IN THEM. YOU ARE GOING TO TESTIFY TO THEM?

2 THE COURT: WHAT WE WILL DO, I WILL LET YOU LOOK AT THEM

3 BEFORE YOU CROSS EXAMINE.

4 MR. HOWE: THANK YOU.

5 THE COURT: ALL RIGHT. YOU CAN ANSWER.

6 Q MY QUESTION TO YOU, LIEUTENANT WHITE WAS, IS WHILE YOU WERE
7 WATCHING THE INTERVIEW OF THE CHILD, WAS THERE AN ADMISSION
8 OR WAS THERE A STATEMENT MADE THAT DONALD WEATHERALL
9 TOUCHED HER INAPPROPRIATELY?

10 A YES, THERE WAS . . .

11 Q WHAT WAS STATED PURSUANT TO YOUR NOTES?

12 A THEY WERE -- THAT DONALD -- THAT DON TOUCHED ME ON THE
13 MONKEY. THEY WERE GOING OVER THE ANATOMY OF THE MALE AND
14 FEMALE AND WHEN SHE GOT TO HER MOUTH -- WHEN SHE GOT TO THE
15 MOUTH ON THE DRAWING SHE STATED THAT HE HAD PUT HIS TONGUE
16 IN HER MOUTH, ON HER MONKEY AND HE TOUCHED HER THERE ON HER
17 BUTT, THAT HE TOUCHED HER ON THE BUTT.

18 Q OKAY. DID YOU FOLLOW-UP WITH ANY OTHER EXAMINATIONS OF HER
19 AFTER THAT?

20 A I BELIEVE THERE WAS A MEDICAL ALSO DONE.

21 Q SO, WERE YOU PART OF GETTING THAT MEDICAL SCHEDULED OR...

22 A IT WAS ALREADY SCHEDULED.

23 Q OKAY. LIEUTENANT, YOU LATER WENT AND SERVED A SEARCH
24 WARRANT ON THE HOME AT 11604, HIGHWAY 39, IN CROSS HILL?

25 A WE SERVED THAT SEARCH WARRANT ON FRIDAY AFTER THAT

1 THURSDAY.

2 Q OKAY. AND WHEN YOU WENT INTO THE HOME, WHAT WAS YOUR
3 IMPRESSION OF THE HOME?

4 A IT WAS A MESS. TOTAL.

5 Q WHEN YOU SAY A MESS, WHAT DO YOU MEAN BY THAT?

6 A IT WAS CLUTTERED. THERE WERE CLOTHES EVERYWHERE, OLD
7 DISHES THAT HADN'T BEEN WASHED, IT WAS HARD TO WALK AROUND
8 ON THE FLOOR WITHOUT WALKING ON CLOTHES AND TOYS.

9 Q DID YOU TAKE PHOTOGRAPHS?

10 A I DID.

11 Q DO YOU HAVE THOSE?

12 A I THINK -- YES, SIR.

13 (MR. FLEMING LOOKS THROUGH PHOTOGRAPHS)

14 Q DO THOSE PHOTOS OF THE HOUSE ACCURATELY REFLECT WHAT YOU
15 SAW?

16 A YES, SIR.

17 (MR. HOWE VIEWS THE PHOTOGRAPHS.)

18 MR. FLEMING: YOUR HONOR, I WOULD LIKE TO ENTER THESE.

19 THE COURT: ANY OBJECTION?

20 MR. HOWE: NO OBJECTION, YOUR HONOR.

21 THE COURT: WITHOUT OBJECTION.

22 (WHEREUPON, PHOTOGRAPHS ARE ENTERED INTO

23 EVIDENCE AS STATE'S EXHIBITS # 9,10,11, AND 12)

24 Q LIEUTENANT, WHEN YOU WERE AT THE HOUSE AND EXECUTED THE
25 SEARCH WARRANT, WAS THERE -- WHAT DID, IF ANYTHING, DID YOU

1 TAKE INTO EVIDENCE AT THAT POINT IN TIME?

2 A WE TOOK ANY ITEMS THAT – DO YOU WANT ME TO READ EVERYTHING
3 THAT WE TOOK?

4 Q WELL, YES YOU CAN, OR THE ITEMS YOU WERE LOOKING FOR, WHAT
5 DID YOU BASE THAT OFF OF?

6 A BASED ON IT BEING A SEXUAL ASSAULT INVESTIGATION, WE WERE
7 LOOKING FOR ANYTHING THAT WOULD HAVE TO DO WITH A SEXUAL
8 ASSAULT.

9 Q AND WHAT DID YOU ACTUALLY GET THAT EVENING?

10 A TOOK A BABY BLANKET; WHITE, BLUE, GREEN AND PINK WITH SNAPS. A
11 BABY BLANKET; BLUE PLAID WITH PINK AND YELLOW STRIPES WITH A
12 FRINGE. A WHITE SMALL TOWEL, A SMALL BLUE TOWEL, MAT, PALE
13 YELLOW SMALL TOWEL. A PAIR OF LITTLE GIRL'S PANTIES; THEY WERE
14 WHITE IN COLOR. PAIR OF LITTLE GIRL SHORTS THAT WERE PURPLE.
15 TWO LIFESTYLE CONDOMS. A SHEET OF PAPER WITH COBURG MERLE.
16 A SHEET OF PAPER WITH THE TWO NOTES, DON AND MICHELLE. A
17 PALE PINK BLANKET, STAINED, FROM THE VICTIM CHILD'S BED. A BLUE
18 BLANKET WITH SCOOBY DOO FROM THE VICTIM CHILD'S BED. WHITE
19 FITTED SHEETS WITH SCOOBY DOO FIGURES WITH STAINS FROM
20 VICTIM CHILD'S BED. WHITE BLANKET WITH LITTLE MERMAID FIGURES
21 FROM VICTIM CHILD'S BED. WHITE FITTED SHEET WITH PINK AND BLUE
22 FLOWERS FROM ROOM NEXT TO VICTIM CHILD'S ROOM.

23 Q LET ME STOP YOU RIGHT QUICK. ARE YOU READING FROM THE
24 RETURN?

25 A NO, SIR. I AM READING FROM THE EVIDENCE SHEET.

1 Q FROM THE EVIDENCE SHEET?

2 A YES, SIR. YOU WANT ME TO READ FROM THE...

3 Q FROM THE RETURN.

4 A CERTAINLY. (LOOKS FOR PAPER)

5 Q WELL, LET ME ASK YOU THIS, LIEUTENANT WHITE WITHOUT YOU
6 HAVING TO GO THROUGH THAT, DID YOU GET EVERYTHING IN THE
7 HOUSE? DID Y'ALL TAKE EVERYTHING IN THE HOUSE IN EVIDENCE?

8 A NO, SIR.

9 Q WERE THERE CLOTHES LEFT THERE THAT WAS NOT TAKEN IN
10 EVIDENCE?

11 A YES, SIR.

12 Q WAS THERE BLANKETS THERE THAT WAS NOT TAKEN INTO EVIDENCE?

13 A YES, SIR.

14 Q WAS THERE LITTLE GIRLS CLOTHES THAT WAS NOT TAKEN INTO
15 EVIDENCE?

16 A YES, SIR.

17 Q WHY WASN'T EVERYTHING TAKEN INTO EVIDENCE?

18 A THERE WAS JUST TOO MUCH THERE FOR US TO HAVE TAKEN. IT WAS
19 JUST SO CLUTTERED.

20 Q LATER ON, DID YOU RECEIVE OTHER EVIDENCE IN THIS CASE THAT
21 CAME FROM THAT HOUSE?

22 A YES, SIR.

23 Q WHO DID YOU RECEIVE IT FROM?

24 A MIKE FRANKLIN.

25 Q AND WHO IS THAT?

1 A MICHELLE'S FATHER.

2 Q AND WHAT WAS CONTAINED IN THAT?

3 MR. HOWE: YOUR HONOR I AM GOING TO OBJECT. I DON'T KNOW THAT
4 THIS SHOULD COME IN FROM HER RIGHT NOW, BUT WITHOUT PROPER
5 FOUNDATION, SHE'S TESTIFYING SHE RECEIVED IT FROM SOMEBODY.

6 THE COURT: SHE IS JUST READING FROM THE RETURN. ISN'T THAT
7 RIGHT?

8 MR. HOWE: NO, SIR. THIS IS SOMETHING DIFFERENT.

9 MR. FLEMING: THIS IS SOMETHING DIFFERENT.

10 MR. HOWE: THIS IS NOT PART OF THE SEARCH WARRANT. HE IS GOING
11 INTO ANOTHER AREA - OR SHE IS.

12 THE COURT: ALL RIGHT. RE-PHRASE YOUR QUESTION, IF YOU WOULD.
13 WHAT IS SHE READING FROM?

14 MR. FLEMING: THIS IS OTHER EVIDENCE THAT WAS TAKEN IN LATER
15 ON --

16 THE COURT: FROM THE OTHER INDIVIDUAL?

17 MR. FLEMING: FROM THE HOUSE. YES, SIR.

18 THE COURT: SHE CAN TESTIFY TO THAT. I MEAN, IT IS JUST A LIST. IS
19 THAT RIGHT? IT IS A LIST OF EVIDENCE THAT SHE RECEIVED FROM
20 MICHELLE'S SON? IS THAT RIGHT?

21 MR. FLEMING: HER FATHER.

22 THE COURT: FATHER. I'LL OVERRULE IT. I WILL ALLOW THAT.

23 Q WHAT WAS IT LATER ON THAT YOU RECEIVED INTO EVIDENCE?

24 A I RECEIVED A YELLOW DOLLAR GENERAL STORE BAG THAT CONTAINED
25 A SHRINK WRAP - SOME ITEMS THAT HAD BEEN SHRINK WRAPPED

1 THAT HAD SOME CARD WRITTEN ON.

2 Q WHAT DID THE CARD SAY?

3 MR. HOWE: OBJECTION. I NEED TO TAKE THAT UP, IF WE CAN, JUDGE.

4 THE COURT: LADIES AND GENTLEMEN, I AM GOING TO SEND YOU OUT
5 FOR A FEW MINUTES. DO WE HAVE ANY SMOKERS OVER THERE WHO MIGHT
6 BE CLIMBING THE WALLS . THAT'S WHAT ALWAYS WORRIES ME. HAVE YOU
7 GOT SOMEONE WHO CAN LET THEM GO OUT AND SMOKE WE WILL TAKE A
8 FIFTEEN MINUTE BREAK. DON'T DISCUSS THE CASE.

9 (JURY OUT AT 3:43 PM)

10 THE COURT: ALL RIGHT, MA'AM, YOU CAN STEP DOWN. WE ARE GOING
11 TO TAKE A BREAK . I AM ASSUMING THIS IS THE CARD THAT SAYS THIS WAS
12 THE CLOTHES THAT WERE BEING WORN THAT DAY?

13 MR. FLEMING: AND WHAT THE DEFENDANT DID TO THE...

14 THE COURT: AND WHO WROTE THAT CARD?

15 MR. FLEMING: THE MOTHER.

16 THE COURT: AND YOUR OBJECTION IS WHAT?

17 MR. HOWE: HEARSAY. IT IS HEARSAY. IT'S THE MOTHER SAYING WHAT
18 THE CHILD TOLD THE MOTHER. AND I GUESS THE TESTIMONY IS GOING TO
19 BE THE MOTHER WROTE IT ON A CARD THAT SOMEHOW ENDED UP IN THE
20 HANDS OF THE CHILD'S GRANDFATHER WHO THEN GOES TO THE SHERIFF'S
21 DEPARTMENT. AND IT'S HERESY. IT'S HEARSAY -- EVEN THOUGH IT IS NOT
22 JUST VERBAL EXPRESSION, IT IS WHAT THE MOTHER SAYS THAT THE CHILD
23 SAID AND THEN SHE WROTE IT DOWN. THAT DOESN'T MAKE IT NON-HERESY.
24 JUST BECAUSE SHE REDUCED IT TO WRITING.

25 THE COURT: WHAT DOES IT ACTUALLY SAY?

1 **MR. HOWE:** I DON'T HAVE MY COPY HANDY, YOUR HONOR. CAN THE
2 STATE...

3 **MR. FLEMING:** BEAR WITH ME YOUR HONOR, WHILE I LOOK FOR IT.

4 **THE COURT:** SURE. IT SEEMS LIKE HERESY TO ME, BECAUSE IT IS
5 OBVIOUSLY BEING PRODUCED TO PROVE THE TRUTH OF THE MATTER
6 ASSERTED, BUT —

7 **MR. FLEMING:** IT STATES — THE DATE IS JUNE 19, 2004, TIME IS 6:45.
8 BELONGS TO ^{Minor} CHERISE TURNER, CONTAINING ONE SPONGE BOB
9 SLEEPING BAG. AND IT SAYS, "ON THIS DAY, MY GIRL TOLD ME THAT DONALD
10 THOMAS WEATHERALL LICKED HER — IT'S GOT PUSSY AND THAT IS
11 SCRATCHED THROUGH AND THEN HAS "CAT" WRITTEN ABOVE IT — "HE
12 KISSED HER WITH HIS TONGUE AND HE ALSO PLACED HIS DICK ON HER CAT
13 AND CAME ON HER BELLY. HIS WORDS TO HER WAS 'I AM GOING TO HAVE AN
14 ORGASM.' AND THEN IT SAYS HE ALSO LICKED HER CAT AND HE ALSO
15 RUBBED HER CAT AND SHE SAYS HE PUT HIS FINGER IN HER CAT."

16 **THE COURT:** I THINK THAT IS HERESY. I DON'T KNOW OF ANY
17 EXCEPTION THAT WOULD COME IN. THE ONLY PERSON WHO COULD TESTIFY
18 TO THAT WOULD BE THE MOTHER OR SOMEONE THAT WITNESSED HER.....

19 **MR. FLEMING:** I AM NOT TRYING TO PUT IT IN EVIDENCE YOUR HONOR.
20 I AM JUST TRYING TO GET HER TO TESTIFY TO WHAT SHE SAW INTO
21 EVIDENCE.

22 **THE COURT:** YEAH, I THINK SHE CAN TESTIFY TO WHAT WAS IN THE
23 BAG, BUT NOT WHAT THE NOTE SAID. THAT WOULD BE BACK-DOORING IT
24 PRETTY GOOD. IF YOU JUST WANTED HER TO TESTIFY AS TO WHAT THE
25 NOTE SAID.

1 **MR. FLEMING:** I'M ASKING HER WHAT WAS IN THE BAG AND WHAT THE
2 NOTE SAID AS WELL.

3 **THE COURT:** YEAH. JUST THE BAG. THAT'S PRETTY GOOD THOUGH. I
4 MEAN, IF YOU GET THE NOTE IN, IF SHE TESTIFIES TO WHAT THE NOTE SAYS
5 JUST TO JUSTIFY WHAT THE NOTE IS, THEN THAT WOULD PRETTY MUCH
6 DEFEAT THE HERESY RULE, WOULDN'T IT?

7 **MR. FLEMING:** I AM NOT TRYING TO ADMIT THE NOTE INTO EVIDENCE,
8 YOUR HONOR. I AM JUST TRYING TO – I AM ASKING LIEUTENANT WHITE
9 WHAT SHE SAW IN THAT EVIDENCE BAG AND WHAT SHE READ.

10 **THE COURT:** OKAY. YEAH. JUST THE STUFF, NOT THE NOTE. ALL
11 RIGHT, WE WILL TAKE A BREAK, LET THEM STRETCH THEIR LEGS.

12 **THE COURT:** ALL RIGHT YOU CAN COME BACK UP. (SPEAKING TO
13 LIEUTENANT WHITE)

14 **THE COURT:** ALL RIGHT. YOU CAN BRING THEM IN.

15 (JURY IN AT 3:59 PM)

16 **THE BAILIFF:** ALL PRESENT YOUR HONOR.

17 **THE COURT:** THANK YOU. THANK YOU VERY MUCH. ALL RIGHT, YOU
18 CAN CONTINUE.

19 **MR. FLEMING CONTINUES DIRECT EXAMINATION OF LIEUTENANT WHITE)**

20 **Q** LIEUTENANT WHITE, WERE YOU LATER GIVEN THIS SLEEPING BAG, I'M
21 SORRY, I MEAN THIS BLANKET HERE?

22 **A** YES, I WAS.

23 **Q** OKAY. WHERE DID YOU RECEIVE THAT BLANKET FROM?

24 **A** FROM MELISSA AND FROM DSS.

25 **Q** FROM DSS?

1 A YES, SIR.

2 Q LIEUTENANT WHITE, DID YOU HAVE A CHANCE TO INTERVIEW CATHY
3 FULLERTON?

4 A KATY FULLERTON?

5 Q KATY FULLERTON?

6 A YES, SIR.

7 Q IN THIS CASE?

8 A YES, SIR.

9 Q AND WHO IS THAT?

10 A THAT IS DONALD WEATHERALL'S MOTHER.

11 Q DONALD WEATHERALL'S MOTHER.

12 A YES.

13 Q I HAVE NO FURTHER QUESTIONS YOUR HONOR.

14 THE COURT: ALL RIGHT, YES, SIR.

15 MR. HOWE: THANK YOU.

16 **CROSS EXAMINATION OF LIEUTENANT WHITE BY MR. HOWE:**

17 Q OFFICER WHITE, LET ME ASK YOU, AS FAR AS THE STATEMENT THAT
18 YOU SAY THAT DONALD WEATHERALL GAVE YOU. WHAT I WAS
19 PROVIDED WAS A NICE NEAT TYPED VERSION OF WHAT YOU SAY MR.
20 WEATHERALL SAID TO YOU. IS THAT A FAIR STATEMENT?

21 A YES, SIR.

22 Q NOW, AND YOU READ THAT STATEMENT, READ PARTS OF THAT TO THE
23 JURY, I BELIEVE. IS THAT CORRECT?

24 A YES, SIR.

25 Q NOW, MR. WEATHERALL, DONALD, TOLD YOU, HE ACTUALLY - LET ME

1 RE-PHRASE THAT. HE ACTUALLY NEVER TOLD YOU THAT HE DID THIS.
2 HE TOLD YOU THAT HE HAD ADMITTED THIS TO MICHELLE BARNETT
3 AND TO HIS MOTHER. THAT'S EXACTLY WHAT HE SAID. ISN'T THAT
4 CORRECT?

5 A YES, SIR.

6 Q HE NEVER ADMITTED IT TO YOU. CORRECT?

7 A WHATEVER IS IN THOSE NOTES.

8 Q YES. ALL RIGHT. AND HE TOLD YOU THAT HE DID THAT AND IT WAS
9 BECAUSE - HE TOLD YOU HE FELT LIKE IT WAS THE RIGHT THING TO
10 DO BECAUSE THEY KEPT ASKING HIM IF HE DID IT. CORRECT?

11 A CORRECT.

12 Q NOW, HE ALSO TOLD YOU, ACCORDING TO YOUR NOTES, THIS
13 STATEMENT, THAT JUNE MAYBE HAD ACCUSED HIM OF THIS TO GET
14 ATTENTION. CORRECT?

15 A THAT IS WHAT HE SAID.

16 Q ALL RIGHT. NOW, HE ALSO TOLD YOU THAT MICHELLE THREATENED TO
17 PUT HIM IN JAIL IF HE LEFT HER. CORRECT?

18 A CORRECT.

19 Q ALL RIGHT. NOW, IF - HE TOLD YOU A LOT OF THINGS AND YOU NOTED
20 THAT BUT, ISN'T IT - LET ME ASK YOU ABOUT THIS STATEMENT THAT
21 YOU'VE TAKEN. IF MR. WEATHERALL, IF DONALD WEATHERALL WERE
22 TO DISPUTE SOME OF THE THINGS THAT YOU SAID THAT HE SAID OVER
23 TWO YEARS AGO, IF HE WERE TO DISPUTE THOSE, THERE WOULDN'T
24 BE ANY KIND OF RECORD OF WHAT HE SAID TO YOU BECAUSE YOU DID
25 NOT RECORD THIS STATEMENT, TAPE RECORD IT.

1 A NO, SIR.

2 Q YOU DIDN'T VIDEO IT.

3 A NO, SIR.

4 Q IN FACT, WHAT YOU HAVE TESTIFIED TO, YOU DIDN'T EVEN SHOW IT TO
5 HIM AND SAY, "NOW, I WANT YOU TO READ THIS OVER AND SIGN THIS
6 DOWN HERE AT THE BOTTOM SAYING THIS IS WHAT I SAID WHEN I
7 GAVE THAT STATEMENT." YOU DIDN'T EVEN DO THAT DID YOU?

8 A I DIDN'T ASK HIM TO DO THAT.

9 Q ALL RIGHT. LET ME JUST ASK YOU, YOU'VE RECEIVED SOME LAW
10 ENFORCEMENT TRAINING, I TRUST.

11 A YES, SIR.

12 Q IF YOU ARE GOING TO TAKE A STATEMENT FROM SOMEBODY — DID
13 THEY NOT TRAIN YOU TO AT LEAST HAVE THE PERSON WHO IS GIVING
14 THE STATEMENT, GIVE THEM AN OPPORTUNITY TO READ IT AND SIGN IT
15 AND MAKE SURE IT IS CORRECT?

16 A IT'S NOT WORD FOR WORD WHAT HE SAID. IT IS NOT SOMETHING HE
17 WOULD HAVE SIGNED.

18 Q I AM ASKING YOU AGAIN. DID THEY NOT TRAIN YOU, IF YOU ARE GOING
19 TO TAKE A STATEMENT FROM SOMEBODY, SO YOU COULD BE
20 ACCURATE, SO TWO YEARS LATER A JURY OR A COURT IS HEARING BY
21 YOU ON YOUR RECOLLECTION OF WHAT HAD BEEN SAID, DON'T THEY
22 TRAIN YOU TO AT LEAST SHOW IT TO THE PERSON AND SAY, "NOW
23 MR. HOWE DID YOU SAY THIS? I AM GOING TO LET YOU READ IT AND
24 SIGN IT AND MAKE SURE THAT IT IS ACCURATE", SO THAT TWO YEARS
25 FROM NOW MR. HOWE DOESN'T COME IN AND SAY, "WELL, I DIDN'T

1 EXACTLY SAY IT LIKE THAT BUT I DON'T HAVE ANY WAY OF DISPUTING
2 IT, BECAUSE THAT IS WHAT MS. WHITE WROTE DOWN THEN." DON'T
3 THEY TRAIN YOU THAT WAY?

4 A THEY DO.

5 Q OKAY. WELL, DON'T THEY -- I MEAN, WOULDN'T IT HAVE BEEN VERY
6 EASY MS. WHITE, TO SAY, "OKAY, MR. WEATHERALL LET'S WRITE DOWN
7 WHAT YOU SAID. IN FACT YOU CAN WRITE IT IN YOUR OWN WORDS
8 AND I WANT YOU TO READ IT OVER AND SIGN IT BECAUSE YOU HAVE
9 ALREADY INDICATED THAT YOU ARE WILLING TO TALK TO ME. YOU ARE
10 FREELY AND VOLUNTARILY TALKING TO ME SO LET'S BE FAIR AND LET
11 YOU READ IT OVER AND SIGN IT." WOULDN'T THAT BE FAIR?

12 A IT WOULD.

13 Q BUT YOU DID NOT DO IT.

14 A I ASKED HIM IF HE WANTED TO WRITE A STATEMENT AND HE TOLD ME
15 NO.

16 Q YOU ASKED HIM IF HE'D WRITE A STATEMENT AND HE SAID, "NO." DID
17 YOU SHOW HIM THIS AND ASK HIM IF IT WAS ACCURATE AND ASK HIM
18 TO SIGN IT?

19 A I DID NOT HAVE THE CAPABILITY OF TYPING THESE NOTES AT THAT
20 TIME. ALL I HAD WAS MY HANDWRITTEN NOTES.

21 Q OKAY. SO, THE ONLY WAY THEN, IF THERE IS ANY DISAGREEMENT AS
22 TO WHAT WAS SAID TWO YEARS AGO FROM WHAT YOU TYPED DOWN,
23 IT WOULD HAVE TO COME, I GUESS, FROM MR. WEATHERALL.

24 A THERE WERE OTHERS IN THE ROOM.

25 Q THERE WERE OTHERS IN THE ROOM.

- 1 A YES.
- 2 Q ALL RIGHT. NOW, ABOUT THE SEARCH WARRANT THAT WAS OBTAINED.
- 3 THAT WAS APPARENTLY -- YOU HAVE THE ORIGINAL SEARCH WARRANT
- 4 WITH YOU?
- 5 A I DON'T HAVE THE ORIGINAL, NO, SIR. THE JUDGE HAS THE ORIGINAL.
- 6 Q OKAY. THE JUDGE WOULD HAVE THE ORIGINAL. I AM LOOKING AT THE
- 7 COPY. AND THAT WAS APPLIED FOR BY YOU ON JUNE 25, 2004.
- 8 CORRECT?
- 9 A CORRECT.
- 10 Q ALL RIGHT. AND YOU INDICATED THAT WAS DONE BECAUSE Y'ALL
- 11 WERE LOOKING FOR EVIDENCE IN THIS CASE. CORRECT?
- 12 A CORRECT.
- 13 Q AND IT WOULD BE FAIR TO SAY THAT YOU WERE LOOKING FOR
- 14 EVIDENCE IN THIS CASE THAT COULD ASSIST IN CONVICTING MR.
- 15 WEATHERALL OF THIS CRIME. CORRECT?
- 16 A I WAS LOOKING FOR EVIDENCE TO INVESTIGATE A SEX CRIME.
- 17 Q RIGHT. AND TO CONVICT MR. WEATHERALL, IS THAT A FAIR
- 18 STATEMENT?
- 19 A IF HE WAS THE PERPETRATOR, YES, SIR.
- 20 Q NOW, YOU TESTIFIED THAT THERE WERE -- AND WE SAW SOME
- 21 PHOTOGRAPHS AND ALL -- THAT THERE WAS A LOT OF ITEMS IN THE
- 22 HOUSE. IT WAS A HOUSE.
- 23 A IT WAS A DOUBLE-WIDE TRAILER.
- 24 Q WELL, A DOUBLE-WIDE TRAILER. A HOME WITH BLANKETS AND
- 25 CLOTHING AND OTHER ITEMS LIKE THAT. AND ONE OF THE THINGS

1 THAT YOU WOULD HAVE BEEN LOOKING FOR, IS A FAIR STATEMENT, IS
2 WOULD BE EVIDENCE OF BODILY FLUIDS, FOR INSTANCE, SEMEN ON
3 CLOTHING OR BLANKETS. IS THAT A FAIR STATEMENT?

4 A YES, SIR.

5 Q ALL RIGHT. NOW, I HAVE HEARD YOU TESTIFY, AND BY THE WAY, DO
6 YOU HAVE THAT, NOT THE RETURN FROM THE SEARCH WARRANT --
7 AND SO THE JURY WILL KNOW, THE RETURN FROM THE SEARCH
8 WARRANT IS WHEN YOU CARRY OUT A SEARCH WARRANT, THEN YOU
9 GO IN THERE AND INVENTORY EVERYTHING, AND THEN --

10 MR. FLEMING: YOUR HONOR, I OBJECT. HE IS TESTIFYING.

11 THE COURT: OKAY. YES, SUSTAINED.

12 Q TELL US THEN WHAT A RETURN IS, HOW THAT WORKS.

13 A THE RETURN IS THE ITEMS THAT WE TOOK FROM THE PLACE THAT WE
14 WERE SEARCHING.

15 Q AND Y'ALL TAKE THAT BACK TO THE JUDGE AND SAY, "JUDGE, YOU
16 GAVE US A SEARCH WARRANT TO GO AND SEARCH THIS HOME AND
17 THIS IS WHAT WE FOUND."

18 A CORRECT.

19 Q NOW, THE OTHER THING THAT YOU WERE READING FROM, THAT WE
20 WEREN'T SURE OF, WAS A EVIDENCE DOCUMENT. CAN I SEE THAT?

21 A (WITNESS LOOKS FOR DOCUMENTS) THESE ARE THE NOTES, AND THE
22 TWO I WAS READING FROM. DO YOU WANT ALL OF THEM?

23 Q PLEASE. I WOULD LIKE TO SEE THEM, IF I COULD. NOW, IF I CAN HAVE
24 JUST A MINUTE, YOUR HONOR, TO TALK TO MR. FLEMING.

25 (MR. HOWE SHOWS PAPER TO MR. FLEMING.)

1 Q ARE THE ITEMS THAT ARE ON THESE EVIDENCE RECORDS ALL OF THE
2 ITEMS THAT ARE ON THE RETURN?

3 A NO, SIR.

4 Q COULD YOU TELL ME WHY THAT WOULD BE?

5 A THE ITEMS THAT ARE ON THE RETURN ARE ITEMS WE TOOK ON THE
6 SEARCH WARRANT. THERE WERE SOME OTHER ITEMS THAT MICHELLE
7 BARNETT TOOK BACK TO HER HOUSE —

8 Q NO. NO. I UNDERSTAND THAT. BUT I AM SAYING THAT THE ITEMS THAT
9 ARE ON THESE EVIDENCE SHEETS, ALL THE ITEMS ON THE RETURN
10 SHEETS SHOULD MATCH THOSE.

11 A CORRECT.

12 Q OKAY. THAT IS WHAT I WANTED TO KNOW. THANK YOU. WE ARE GOING
13 TO TALK ABOUT THE OTHER TIME IN A MINUTE. NOW, I BELIEVE I
14 HEARD YOU TESTIFY THAT IN YOUR RESPONSE TO MR. FLEMING'S
15 QUESTION, HE ASKED YOU WHETHER OR NOT THERE WERE OTHER
16 CLOTHES AND BLANKETS AND GIRLS CLOTHES THAT Y'ALL DIDN'T EVEN
17 TAKE INTO EVIDENCE. IS THAT CORRECT?

18 A YES, SIR.

19 Q OKAY. IF YOU ARE LOOKING FOR EVIDENCE OF A CRIME, COULD YOU
20 PLEASE TELL THIS JURY WHY YOU DECIDED TO GET SOME ITEMS AND
21 WHY YOU DECIDED NOT TO GET OTHER ITEMS IF YOU WERE LOOKING
22 FOR EVIDENCE.

23 A THE MAJORITY OF THE EVIDENCE THAT WE TOOK WAS FROM ^{Minor}
24 ROOM. WE DIDN'T KNOW EXACTLY WHICH ROOM THE INCIDENT TOOK
25 PLACE IN AND WE TOOK STAINED ITEMS, THERE WERE ITEMS IN THE

1 WASHING MACHINE, THERE WERE DISHES IN THE SINK, THERE WERE
2 DIFFERENT PEOPLE'S CLOTHES ALL OVER THE HOUSE. IT WAS A MESS.

3 Q ALL RIGHT. THEN, WELL, ARE YOU ABSOLUTELY SURE THAT YOU GOT
4 ALL OF THE CHILD'S CLOTHES OR ALL OF THE BLANKETS THAT YOU
5 NEEDED TO GET FOR THE PURPOSES OF LOOKING AT THIS EVIDENCE,
6 OR HAVING SOMEBODY WHO KNEW WHAT THEY WERE DOING WITH IT,
7 TO LOOK AT THE EVIDENCE.?

8 A NO, SIR.

9 Q OKAY. NOW, IT'S A FAIR STATEMENT -- IS IT TRUE THAT LATER ON --
10 WELL, LET ME ASK YOU THIS, DID THE BLANKET THAT'S BEEN
11 REFERRED TO HERE, WOULD YOU AGREE THAT THAT CONTAINS PINK,
12 BLUE, GREEN, YELLOW AND EVEN WHITE.

13 A CORRECT.

14 Q OKAY. AND ON THE RETURN, I BELIEVE THERE WAS MENTION OF A
15 PINK, GREEN, YELLOW, BLUE BLANKET.

16 A CORRECT.

17 Q LET ME GIVE THESE BACK TO YOU. (HANDS WITNESS PAPERS)
18 AND YOUR TESTIMONY WAS, THE BLANKET THAT YOU REFERRED TO,
19 STATE'S EXHIBIT #1, YOU SAID THAT YOU GOT THAT FROM MELISSA
20 EPTING WITH THE DEPARTMENT OF SOCIAL SERVICES. IS THAT RIGHT?

21 A THAT IS CORRECT.

22 Q AND YOU GOT THAT WHEN?

23 A I GOT THAT LATER.

24 Q WHEN LATER. RECENTLY?

25 A NOT RECENTLY. IT WAS -- (LOOKING THROUGH HER NOTES) I HAD A

1 COPY OF THE EVIDENCE SHEET RIGHT HERE.

2 Q WELL, CAN I ASK YOU WHILE YOU ARE LOOKING? IF YOU CAN LOOK
3 AND IF YOU CAN'T, YOU LET ME KNOW, BUT IF YOU CAN LOOK AND
4 ANSWER THE QUESTION SO WE CAN SPEED ALONG. WHEN DID YOU
5 LET MR. FLEMING KNOW YOU HAD THAT BLANKET IN EVIDENCE? THAT
6 BLANKET THERE.

7 A THAT BLANKET?

8 Q YES.

9 A PROBABLY WITHIN THE LAST MONTH OR SO.

10 Q OKAY. NOW, AND THAT'S OKAY, YOU DID LET HIM KNOW IN THE LAST
11 MONTH OR SO. LET ME ASK YOU, NOW YOU HAD – YOU WERE
12 INVOLVED IN HAVING A SPONGE BOB SLEEPING BAG AND A PINK NIGHT
13 SHIRT SENT DOWN TO SLED FOR TESTING, CORRECT?

14 A CORRECT.

15 Q WHERE MR. WEATHERALL HAD CONSENTED TO GIVING HIS DNA AND
16 Y'ALL WERE GOING TO TEST THAT SPONGE BOB BLANKET AND THE
17 PINK NIGHT SHIRT TO LOOK FOR HAIR OR SEMEN. CORRECT?

18 A THAT IS CORRECT.

19 Q OKAY. AND YOU AGREE THAT THE RESULTS OF THAT CAME, AT LEAST
20 WHAT I SEE, IT WAS ADDRESSED TO YOU. CORRECT?

21 A I DIDN'T GET THAT.

22 Q YOU DIDN'T GET THAT AND IT IS ADDRESSED TO YOU?

23 A NO, SIR. I DIDN'T GET ONE OF THOSE,

24 Q FROM SLED. YOU HAVEN'T SEEN THAT AT ALL?

25 A NO, SIR.

1 Q WOULD YOU LOOK AT IT AND TAKE A MINUTE – YOU ARE FAMILIAR
2 WITH THOSE TYPES OF DOCUMENTS. IS THAT CORRECT?

3 A YES, SIR.

4 Q AND THAT DOCUMENT FROM SLED SHOWS THAT A SPONGE —

5 MR. FLEMING: I WILL OBJECT TO THAT. IF HE IS GOING INTO WHAT THE
6 DOCUMENT SHOWS, THAT COMES FROM SLED.

7 MR. HOWE: ALL RIGHT.

8 THE COURT: ALL RIGHT. SUSTAINED.

9 MR. HOWE: THAT'S FINE.

10 Q WHAT IS THE DATE OF THAT DOCUMENT?

11 A AUGUST 9, 2006.

12 Q AUGUST 9, 2006.

13 A YES, SIR.

14 Q ABOUT A MONTH OR SO AGO?

15 A YES, SIR.

16 Q WELL, LET ME ASK YOU, IS LAURENS COUNTY SHERIFFS OFFICE
17 P.O. BOX 68, LAURENS?

18 A YES, SIR.

19 Q OKAY. AND I BELIEVE YOU ARE FAMILIAR WITH THAT SPONGE BOB
20 SLEEPING BAG AND THAT CAME INTO EVIDENCE A GOOD WHILE AGO.
21 IS THAT CORRECT?

22 A CORRECT.

23 Q AND THE PINK NIGHT SHIRT.

24 A YES, SIR.

25 Q AND THIS OTHER BLANKET WHICH IS NOT A SPONGE BOB, YOU SAY

1 YOU'VE HAD IT - YOU ARE STILL LOOKING TO SEE WHEN YOU GOT IT?

2 A I DON'T KNOW WHEN I GOT IT.

3 Q OKAY. BUT YOU LET MR. FLEMING KNOW ABOUT A MONTH AGO.

4 A YES, SIR.

5 A AND ACCORDING TO THAT RETURN ON THE SEARCH WARRANT, THERE
6 WERE OTHER BLANKETS AND CHILDREN'S CLOTHES. CORRECT?

7 A CORRECT.

8 Q BUT OUT OF THAT, THE ONLY THING THAT'S WELL - DID YOU SEND
9 ANYTHING OFF FOR TESTING?

10 A THE ITEMS, THE SPONGE BOB SLEEPING BAG AND THE PINK NIGHT
11 SHIRT.

12 Q SO YOU HAVE NOT, YOU JUST HAVE NOT SEEN THE RESULTS OF WHAT
13 SLED CAME BACK WITH ON THE DNA.

14 A I HAVEN'T. I DON'T FIND A COPY OF IT IN MY FILE.

15 Q AND YOU ARE NOT FAMILIAR WITH IT AT ALL. NOBODY HAS TOLD YOU
16 AT ALL?

17 A AS TO WHETHER THERE WAS ANYTHING ON THOSE?

18 Q YEAH.

19 A THERE WASN'T ANYTHING ON THOSE.

20 Q I MEAN, YOU DID KNOW THAT. I UNDERSTAND, YOU HAVEN'T SEEN THE
21 REPORT, BUT YOU DO KNOW THE RESULTS.

22 MR. FLEMING: I OBJECT. TESTIFYING TO HEARSAY.

23 THE COURT: SUSTAINED.

24 MR. HOWE: I BELIEVE THAT IS ALL THE QUESTIONS I HAVE, JUDGE.

25 THE COURT: ANY RE-DIRECT?

1 MR. FLEMING: YES SIR, YOUR HONOR.

2 RE-DIRECT EXAMINATION OF LIEUTENANT WHITE BY MR. FLEMING:

3 Q WHEN YOU WERE TAKING THE STATEMENT FROM MR. WEATHERALL,
4 LIEUTENANT, YOU OFFERED FOR HIM TO -- YOU OFFERED HIM A
5 CHANCE TO WRITE A WRITTEN STATEMENT, DID YOU NOT?

6 A YES, SIR.

7 Q AND WHAT DID HE SAY?

8 A HE DECLINED TO DO THAT.

9 Q SO, HE DECLINED TO WRITE A WRITTEN STATEMENT.

10 A CORRECT.

11 Q SO YOU MADE OUT THE STATEMENT THAT YOU GAVE TO THIS COURT
12 BASED ON YOUR NOTES THAT YOU TOOK DURING YOUR ORAL
13 INTERVIEW WITH MR. WEATHERALL THAT DAY. IS THAT CORRECT?

14 A BASED ON THE SUMMARY OF MY NOTES.

15 Q AND HE NEVER DID DENY SEXUALLY ASSAULTING ^{Minor} THAT
16 DAY EITHER, DID HE?

17 A NO.

18 Q THE RECORD OF EVERYTHING THAT YOU TOOK -- OR WHEN YOU WENT
19 TO SERVE THE SEARCH WARRANT THAT DAY -- WHEN YOU WENT TO
20 SEARCH, DID YOU KNOW WHAT ROOM THE ASSAULT TOOK PLACE IN?

21 A NO, SIR.

22 Q DID YOU KNOW WHAT THE VICTIM WAS WEARING THE DAY THE
23 ASSAULT TOOK PLACE?

24 A NO, SIR.

25 Q DID YOU KNOW WHAT BED CLOTHING MAY HAVE BEEN INVOLVED THE

1 DAY THE ASSAULT TOOK PLACE?

2 A NO, SIR.

3 Q SO, YOU WERE JUST GATHERING EVIDENCE ON A RANDOM BASIS,
4 HOPING TO FIND SOMETHING.

5 A CORRECT.

6 Q AND LATER ON, THE SPONGE BOB SQUARE PANTS AND THE SLEEPING
7 BAG AND THE NIGHTGOWN CAME TO YOUR ATTENTION. HOW?

8 A MIKE FRANKLIN, MICHELLE BARNETT'S FATHER.

9 Q OKAY. AND WAS IT WRAPPED UP?

10 A IT WAS WRAPPED. I HAD BEEN TOLD THERE WAS SOME EVIDENCE
11 SOME PLACE. I DIDN'T KNOW - SOMETHING WAS SHRINK WRAPPED. I
12 WAS TOLD BY ANOTHER OFFICER.

13 Q OKAY.

14 A WE DIDN'T FIND IT THE NIGHT WE DID THE SEARCH WARRANT.

15 Q ALL RIGHT. AND LATER ON, HOW DID THIS COME INTO YOUR
16 POSSESSION?

17 A MELISSA EPTING FROM DSS GAVE IT TO ME.

18 Q OKAY. AND IS THIS SUPPOSEDLY A BLANKET THAT WAS USED DURING
19 THE ASSAULT?

20 MR. HOWE: OBJECTION, YOUR HONOR. UNLESS SHE HAS PERSONAL
21 KNOWLEDGE.

22 THE COURT: UNLESS YOU HAVE PERSONAL KNOWLEDGE, YOU CAN'T
23 ANSWER IT.

24 Q YOU DON'T HAVE ANY PERSONAL KNOWLEDGE?

25 A NO, SIR.

1 Q OKAY.

2 A IT WAS TAKEN FROM MELISSA BY MARY FRANKLIN AND ^{Minor}

3 Q OKAY. DID YOU INTERVIEW THE GRANDMOTHER ABOUT THIS BLANKET,
4 MARY FRANKLIN?

5 A I TALKED WITH HER ON OCCASION ABOUT THE BLANKET. YES, SIR.

6 Q IS THERE ANYTHING IN THE STATEMENT THAT YOU GAVE THIS COURT
7 THAT THE DEFENDANT GAVE - IS THERE ANYTHING THAT YOU PUT
8 DOWN THAT WAS NOT IN YOUR NOTES?

9 A NO, SIR.

10 Q DID YOU NOT SAY THAT, IN THE STATEMENT THAT HE GAVE, THAT NOT
11 ONLY DID HE, HE NEVER DID DENY DOING THIS, HE WAS TRYING TO
12 PUT THE BLAME OFF ON ^{Minor} THE JUVENILE?

13 A CORRECT.

14 MR. HOWE: YOUR HONOR, I OBJECT TO THAT. I DON'T THINK SHE CAN
15 TESTIFY TO WHAT HIS INTENTIONS WERE.

16 THE COURT: SHE CAN'T TESTIFY TO HIS INTENTIONS. SUSTAINED.

17 MR. FLEMING: NOTHING FURTHER YOUR HONOR.

18 MR. HOWE: QUICK FOLLOW-UP, JUDGE.

19 THE COURT: ALL RIGHT.

20 RE-CROSS EXAMINATION OF LIEUTENANT WHITE BY MR. HOWE:

21 Q OFFICER WHITE, I HEARD YOU TESTIFY THAT EVERYTHING HE TOLD
22 YOU WAS IN YOUR NOTES. I THOUGHT YOU TESTIFIED EARLIER THAT
23 WHAT YOU WROTE DOWN WAS A SUMMARY OR YOUR SUMMARY OF
24 WHAT HE SAID. ISN'T THAT WHAT YOU SAID?

25 A CORRECT.

1 Q ALL RIGHT. AND YOU TESTIFIED THAT YOU DIDN'T -- IN EXPLAINING
2 WHY YOU DECIDED TO GET SOME ITEMS AND NOT OTHER, YOU
3 TESTIFIED THAT YOU DIDN'T KNOW WHICH ONE WAS ^{Minor} ROOM
4 WHEN YOU WENT IN THERE. IS THAT CORRECT?

5 A I DIDN'T SAY THAT.

6 Q OKAY.

7 A I SAID I DID NOT KNOW WHERE THE INCIDENT TOOK PLACE.

8 Q RIGHT. SO YOU DID KNOW WHICH ONE WAS HER ROOM.

9 A I WAS TOLD BY MICHELLE.

10 Q OKAY. I WANTED TO GET THAT STRAIGHT. THANK YOU.

11 THE COURT: ALL RIGHT. THANK YOU MA'AM. YOU CAN STEP DOWN.

12 MR. FLEMING: YOUR HONOR, MAY I TAKE A BRIEF RECESS?

13 THE COURT: YES. I'LL GIVE YOU TEN MINUTES. TEN MINUTES TO
14 STRETCH YOUR LEGS. PLEASE DON'T DISCUSS THE CASE.

15 (JURY OUT AT 4:27 PM)

16 MR. FLEMING: JUDGE, LIEUTENANT WHITE NEEDS TO BE EXCUSED IF
17 THERE IS NO OBJECTION.

18 THE COURT: ANY OBJECTION?

19 MR. HOWE: NO, SIR.

20 THE COURT: WITHOUT OBJECTION. ALL RIGHT, BRING THE JURY IN.

21 (JURY IN AT 4:39 PM)

22 THE COURT: ALL RIGHT. THANK YOU, LADIES AND GENTLEMEN. YOU
23 CAN CALL YOUR NEXT WITNESS.

24 MR. FLEMING: THANK YOU, YOUR HONOR. THE STATE WOULD CALL
25 DR. LYLE PRITCHARD TO THE STAND.

1 (AFTER BEING DULY SWORN BY THE CLERK OF COURT, DR.
2 PRITCHARD TESTIFIED AS FOLLOWS.)

3 CLERK OF COURT: STATE YOUR FULL NAME.

4 WITNESS: LYLE LESENNE PRITCHARD.

5 CLERK OF COURT: WOULD YOU SPELL YOUR LAST NAME, DR.
6 PRITCHARD?

7 WITNESS: P-R-I-T-C-H-A-R-D.

8 MR. FLEMING: IF IT PLEASE THE COURT, YOUR HONOR?

9 THE COURT: YES, SIR.

10 MR. FLEMING: THANK YOU.

11 DIRECT EXAMINATION OF DR. PRITCHARD BY MR. FLEMING:

12 Q DR. PRITCHARD, DID YOU HAVE A CHANCE TO EXAMINE A JUVENILE
13 FEMALE BY THE NAME OF ^{Minor}

14 A I DID.

15 Q YOU DID. AND COULD YOU TELL THE COURT WHAT DID YOUR
16 EXAMINATION EXIST OF.

17 A I DID A FULL EXAM, HEAD TO TOE, AND THAT INCLUDED A COMPLETE
18 PRE-PUBERTAL GENITAL EXAM.

19 Q AND WHEN YOU SAY, PRE-PUBERTAL EXAM, WHAT DO YOU MEAN BY
20 THAT?

21 A SHE WAS ABOUT WAS ABOUT FIVE AND NINE MONTHS WHEN I
22 EXAMINED HER, SO SHE HAD NO SIGNS OF PUBERTY YET. AND SO, IN
23 THOSE CHILDREN, WE DON'T DO A SPECULUM EXAM, WHERE WE
24 ACTUALLY LOOK AT THE VAGINA, WE JUST LOOK AT THE EXTERNAL
25 GENITALIA.

- 1 Q DID YOU DO THAT?
- 2 A I DID. I USED A COLPOSCOPE, WHICH IS KIND OF A MICROSCOPE, AND
3 SO, IT ENLARGES EVERYTHING.
- 4 Q OKAY. AND IN YOUR EXAMINATION WITH THE COLPOSCOPE, WHAT DID
5 YOU FIND?
- 6 A BASICALLY, SHE HAD A COMPLETELY NORMAL PHYSICAL EXAM ON, I
7 EXAMINED THE GENITALIA, THE HYMEN, THE TISSUE SURROUNDING
8 THE OPENING OF THE VAGINA AND SHE DID HAVE, WHAT WE CALL, A
9 LITTLE CLEFT IN THE HYMEN. THAT'S SORT OF A LITTLE SLIT IN THAT
10 CIRCULAR TISSUE AROUND THE OPENING OF THE VAGINA.
- 11 Q AND IS THAT INDICATIVE OF SEXUAL TRAUMA?
- 12 A IT IS. WE CONSIDER IT SUSPICIOUS FOR SEXUAL TRAUMA IN THAT, IF
13 THERE IS A PENETRATION OF THE VAGINA THAT CAN CAUSE A CLEFT.
14 THERE OTHER THINGS THAT CAN CAUSE A CLEFT AS WELL, SUCH A
15 TRAUMA OR EVEN A CONGENITAL LESION, AND SO WE DON'T CONSIDER
16 IT DIAGNOSTIC, WE JUST CONSIDER IT SUSPICIOUS.
- 17 Q SO, BASED ON WHAT YOU SAW AND WHAT YOU FOUND IN YOUR
18 EXAMINATION, IT WAS SUSPICIOUS OF SEXUAL TRAUMA?
- 19 A SUSPICIOUS, BUT NOT DIAGNOSTIC.
- 20 Q AND ARE THERE ANY OTHER TESTS THAT YOU RAN?
- 21 A YES, WE RAN ALL THE TESTS FOR SEXUALLY TRANSMITTED DISEASES
22 AND SHE WAS NEGATIVE FOR ALL OF THOSE.
- 23 Q OKAY. SO, YOU'RE SAYING THAT WHAT YOU FOUND, THERE WAS A
24 CLEFT AND WHAT YOU STATED WAS, THERE WAS A SPLIT IN THE
25 HYMEN.

1 A A SLIGHT SPLIT THAT CAN GO ALL THE WAY THROUGH THE HYMEN AND
2 SO IT WASN'T TRANSECTING ALL THE WAY THROUGH THE HYMEN, JUST
3 A LITTLE DIVOT AND AGAIN, THAT'S NOT BEEN SHOWN TO BE
4 CONCLUSIVELY CAUSED BY ANY TYPE OF PENETRATION.

5 Q AND YOU STATED, I GUESS, IN YOUR REPORT -- WHERE WAS THAT
6 LOCATED AT?

7 A IF YOU THINK ABOUT THE HYMEN AND THE TISSUE SURROUNDING THE
8 VAGINA, IF IT WAS A CLOCK, IT WAS ABOUT 6:00.

9 Q WAS THERE EVIDENCE OF ANY OTHER KIND OF TRAUMA --

10 A NO.

11 Q -- TO HER?

12 A NO.

13 MR. FLEMING: NO FURTHER QUESTIONS, YOUR HONOR.

14 THE COURT: ALL RIGHT. YES, SIR.

15 **CROSS EXAMINATION OF DR. PRITCHARD BY MR. HOWE:**

16 Q DR. PRITCHARD, TRIP HOWE, WE SPOKE ON THE PHONE, I THINK, LAST
17 WEEK.

18 A YES.

19 Q AND I UNDERSTAND WHAT YOU TESTIFIED TO, YOU SAID THAT YOU
20 CHECKED HER FOR SEXUALLY TRANSMITTED DISEASES.

21 A UH-HUH.

22 Q DID IT INCLUDE HERPES?

23 A NO, IT DID NOT INCLUDE HERPES.

24 Q NOW, IN LOOKING AT THE WAY THAT YOU CHARGED SOMETHING LIKE
25 THIS, AND I'M PROBABLY SAYING THE WRONG WORD, THAT'S ALL I CAN

1 COME UP WITH NOW, I APOLOGIZE, YOU INDICATED SUSPICIOUS. I
2 THINK THE NEXT STEP UP IS CONSISTENT AND THEN THE FINAL STEP IS
3 DIAGNOSTIC. CORRECT?

4 A THAT'S RIGHT.

5 Q AND SO, IT WAS NEITHER CONSISTENT, WHICH IS BEYOND SUSPICIOUS

6 -

7 A RIGHT.

8 Q - OR FURTHER, DIAGNOSTIC.

9 A RIGHT.

10 Q DIAGNOSTIC IS WHEN YOU'RE PRETTY CLINICALLY SURE. IS THAT
11 CORRECT?

12 A THE ONLY KNOWN CAUSE WOULD BE SOMETHING PENETRATING THE
13 VAGINA AND SO, AGAIN, THIS IS JUST SUSPICIOUS.

14 Q SO, THERE'S NO WAY YOU COULD SAY BEYOND A REASONABLE DOUBT
15 THAT THIS CLEFT THAT YOU SAW WAS CAUSED BY A SEXUAL ASSAULT.

16 A I CANNOT SAY THAT.

17 Q THANK YOU. THAT'S ALL THE QUESTIONS I HAVE.

18 THE COURT: ANY FOLLOW-UP? RE-DIRECT?

19 MR. FLEMING: YES, SIR, YOUR HONOR.

20 **RE-DIRECT EXAMINATION OF DOCTOR PRITCHARD BY MR. FLEMING:**

21 Q DR. PRITCHARD, HOW LONG HAVE YOU BEEN WORKING -- OR
22 ACTUALLY, WHERE DO YOU WORK?

23 A I AM A PEDIATRICIAN AT THE MONTGOMERY FAMILY MEDICINE IN
24 GREENWOOD AND I ALSO SPEND TIME AT CHILD'S PLACE, WHICH IS
25 WHERE THE EXAM WAS DONE. IT'S THE CENTER FOR CHILDREN WHO

1 ARE SUSPECTED VICTIMS OF CHILD ABUSE.

2 Q HOW LONG HAVE YOU BEEN A LICENSED PHYSICIAN?

3 A FIFTEEN YEARS - SIXTEEN YEARS.

4 Q AND GETTING TO HERPES, IS THERE OTHER WAYS, OTHER THAN
5 SEXUALLY TRANSMITTED, THAT HERPES CAN BE TRANSMITTED?

6 A THERE ARE TWO MAJOR TYPES OF HERPES, TYPE I AND TYPE II. TYPE I
7 IS THE SORES THAT PEOPLE GET IN THEIR MOUTHS, CHILDREN,
8 PARTICULARLY, GET IN THEIR MOUTHS IS TYPE I HERPES. PRETTY
9 MUCH EVERYONE HAS IT, IT'S SPREAD USUALLY BY SOME KIND OF
10 ORAL CONTACT. TYPE II HERPES IS USUALLY THOUGHT OF BEING
11 SEXUALLY TRANSMITTED. IT IS PRIMARILY FOUND IN THE SEXUAL
12 AREA, THE MAJORITY OF THE LESIONS IN THE GENITAL AREA ARE TYPE
13 II, BUT THAT IS NOT ONE HUNDRED PERCENT. SO, YOU CAN GET TYPE II
14 HERPES ON THE MOUTH, AND WE USUALLY THINK OF TYPE II HERPES
15 AS PRIMARILY BEING SPREAD BY GENITAL CONTACT, BUT THERE
16 CERTAINLY CAN BE OTHER WAYS.

17 Q I UNDERSTAND THAT YOU SAID THAT - WHEN YOU MARKED
18 SUSPICIOUS, THAT YOU COULD NOT SAY BEYOND A REASONABLE
19 DOUBT THAT SEXUAL TRAUMA CAUSED THE CLEFT ON THIS LITTLE
20 GIRL'S HYMEN, BUT YOU ALSO DIDN'T KNOW ABOUT THE HISTOLOGY OF
21 EVERYTHING THAT WENT ON BEFORE THIS, DO YOU?

22 A THE HISTORY?

23 Q YES. THE HISTORY.

24 A NO, I DON'T.

25 Q SO, IF THERE WAS SOMETHING TO INDICATE A HISTORY OF SEXUAL

1 ABUSE, WOULD THAT CHANGE YOUR ANSWER?

2 A PRETTY MUCH ALL THE CHILDREN I SEE ARE, ARE – THERE IS SOME
3 SUSPICION OF SEXUAL ABUSE, AND BASICALLY, YOU KNOW, FROM A
4 SCIENCE POINT OF VIEW, ON LARGE STUDIES, CHILDREN WHO ARE
5 KNOWN TO HAVE PENILE PENETRATION OF THE VAGINA ARE MORE
6 LIKELY TO HAVE SOME KIND OF A BREAK IN THE HYMEN, BUT CHILDREN
7 WHO ARE KNOWN NOT TO HAVE ANY KIND OF PENETRATION, MAY
8 ALSO HAVE THESE CLEFTS. SO IT'S THOUGHT THAT IT CAN BE CAUSED
9 BY OTHER THINGS BESIDES JUST PENETRATION, SUCH AS TRAUMA OR
10 EVEN CHILDREN CAN BE CONGENITALLY BORN WITH CLEFTS IN THE
11 HYMEN.

12 Q BUT SEXUAL PENETRATION IS A WAY THAT THEY COULD GET THIS
13 CLEFT IN THE HYMEN?

14 A THAT'S CORRECT.

15 Q THANK YOU. NO FURTHER QUESTIONS.

16 THE COURT: ANY OTHER QUESTIONS?

17 RE-CROSS EXAMINATION OF DOCTOR PRITCHARD BY MR. HOWE:

18 Q BUT AGAIN, TO FOLLOW UP, THERE IS NO WAY YOU CAN SAY BEYOND A
19 REASONABLE DOUBT, THAT'S WHAT CAUSED THIS.

20 A NO. AS I SAID, IT CAN BE FOUND IN CHILDREN WHO HAVE HAD NO
21 PENETRATION AND THEY CAN HAVE THESE CLEFTS AS WELL.

22 Q AND HERPES SIMPLEX II, IS GENERALLY IN THE GENITAL AREA.

23 A IT'S USUALLY GENITAL.

24 Q THE STUDIES, WOULD YOU AGREE THAT THE STUDIES SHOW THAT THE
25 VAST MAJORITY OF THE TIME THAT IS CAUSED BY SEXUAL ACTIVITY?.

1 A YES. I MEAN, THAT IS, PRIMARILY, A SEXUALLY SPREAD TRANSMISSION.

2 Q THANK YOU. THAT'S ALL THE QUESTIONS I HAVE.

3 THE COURT: THANK YOU DOCTOR. WE APPRECIATE IT. MAY SHE BE
4 EXCUSED?

5 MR. FLEMING: YES, SIR, YOUR HONOR.

6 MR. HOWE: YES, SIR, YOUR HONOR.

7 THE COURT: OKAY. THANK YOU VERY MUCH.

8 MR. FLEMING: YOUR HONOR, THAT'S ALL I HAVE FOR TODAY.

9 THE COURT: OKAY. LET ME ASK Y'ALL SOMETHING UP HERE ABOUT
10 TOMORROW.

11 (BENCH CONFERENCE OFF THE RECORD)

12 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, I AM GOING TO LET
13 YOU GO FOR TODAY. I'LL TELL YOU, FOR TOMORROW MORNING, RATHER
14 THAN HAVE YOU COME IN AND WAIT, I HAVE A COUPLE OF THINGS I HAVE TO
15 DO AND WE WILL START AT 11:30. I THINK THAT WILL PREVENT YOU FROM
16 COMING OUT WHILE I DO THESE OTHER THINGS. I DON'T KNOW, BUT WE
17 MIGHT HAVE TO GO A LITTLE LATE. IT'S WEDNESDAY NIGHT. DOES ANYBODY
18 HAVE A PROBLEM? I KNOW WEDNESDAY NIGHT IS A CHURCH NIGHT FOR A
19 LOT OF PEOPLE. BY LATE I MEAN 6:00 PM. IF THAT CAUSES A PROBLEM
20 TOMORROW, JUST LET THE FOREMAN KNOW. I'LL SEE YOU HERE
21 TOMORROW AT 11:30 AND WE WILL GET STARTED. WE WILL TAKE OUR
22 NORMAL LUNCH BREAK, BECAUSE WE HAVE SOME WITNESSES COMING IN
23 THE AFTERNOON SO WE WILL TRY TO GET IN AN HOUR AND A HALF. ALL
24 RIGHT. THANK YOU VERY MUCH. DON'T TALK ABOUT THE CASE.

25 (JURY DISMISSED AT 4:56 PM)

1 THE COURT: ALL RIGHT. I WILL SEE Y'ALL TOMORROW MORNING. I'LL
2 BE HERE AT 11:30 AM.

3 (COURT RESUMES AT 11:30 AM)

4 THE COURT: ALL RIGHT. ANY MOTIONS ON BEHALF OF THE
5 DEFENDANT?

6 MR. HOWE: YES, YOUR HONOR.

7 THE COURT: ALL RIGHT.

8 MR. HOWE: IF IT WOULD PLEASE THE COURT, YOUR HONOR. I WOULD
9 MOVE FOR A DIRECTED VERDICT ON THE CHARGE OF CRIMINAL SEXUAL
10 CONDUCT WITH A MINOR. YOUR HONOR, I WOULD ASK THE COURT TO TAKE
11 INTO CONSIDERATION THE FOLLOWING: FIRST OF ALL, YOUR HONOR, THE
12 COURT IS AWARE THAT THE DEFINITION OF SEXUAL BATTERY, UNDER THE
13 APPROPRIATE CODE SECTION -- AND IT IS MY UNDERSTANDING THAT THE
14 STATE HAS TO OFFER EVIDENCE OF PENETRATION, HOWEVER SLIGHT, I
15 UNDERSTAND THAT IS PART OF IT, BUT IT HAS TO OFFER EVIDENCE OF THAT.
16 YOUR HONOR, THE ONLY EVIDENCE THAT COULD EVEN BE POSSIBLY
17 CONSIDERED ON THAT ISSUE WOULD HAVE TO COME FROM THE CHILD, ^{Minor}
18 YOU HEARD THE TESTIMONY, YOU ALLOWED THE TESTIMONY OF THE LADY,
19 MS. EHNEY, FROM THE CHILD'S PLACE, TO TESTIFY AS TO WHAT THE CHILD
20 TOLD HER. ~~AND HER TESTIMONY WAS THAT THERE WAS TOUCHING AND~~
21 ~~THAT IS ALL SHE SAID.~~ SHE DID NOT TESTIFY TO ANY OTHER FORM OF
22 SEXUAL BATTERY. THEN, WE HAD THE TESTIMONY OF THE CHILD. NOW
23 WHAT YOU HAD, JUDGE, AND IF THE COURT NEEDS TO REVIEW THE
24 TESTIMONY, I WAS TRYING TO LISTEN VERY CAREFULLY AND I KNOW THE
25 COURT WAS TRYING TO LISTEN VERY CAREFULLY, AND MR. FLEMING WAS

1 ASKING HER SPECIFICALLY , AND I THINK THE TERM THAT WAS USED WAS,
2 "HIS WEE WEE ON HER MONKEY," I THINK IT WAS CALLED. THOSE WERE THE
3 TERMS THAT WERE USED. AND, AND, HE ASKED HER SPECIFICALLY, IF HE
4 PUT IT IN OR OUT AND SHE SAID OUT. THAT'S WHAT SHE SAID. AND I
5 WOULD SUBMIT THAT BASED ON THAT, JUDGE - AND THAT'S COMING
6 FROM THE CHILD HERSELF. ~~THERE IS NO COMPETENT EVIDENCE~~
7 ~~WHATSOEVER, TO LET THE SEXUAL BATTERY ISSUE, THE CSS, GO TO THE~~
8 ~~JURY BASED ON THAT. NOW MR. FLEMING MAY ARGUE THAT, WELL, THE~~
9 DOCTOR, DR. PRITCHARD NOTED A SUSPICIOUS, A SUSPICIOUS CLEFT AT
10 SIX O'CLOCK. BUT YOU HEARD HER TESTIMONY. THERE IS NO WAY
11 WITH ANY REASONABLE MEDICAL CERTAINTY, THERE IS NO WAY THAT SHE
12 COULD TESTIFY THAT THAT WAS - THAT WAS WHAT WAS CAUSED BY SEXUAL
13 BATTERY. JUDGE, I JUST DON'T SEE HOW THAT'S, BASED ON HER OWN
14 TESTIMONY, I DON'T SEE HOW THAT IS COMPETENT EVIDENCE, ANYTHING TO
15 LET IT GO TO THE JURY AND I DON'T EVEN THINK IT GOES TO THE WEIGHT OF
16 IT BECAUSE SHE COULDN'T TESTIFY THAT IT WAS, IN EFFECT, THE CAUSE.
17 AND, AND I GUESS THE ARGUMENT WOULD BE, WELL, THAT GOES TO THE
18 WEIGHT BUT THAT, BUT SHE SAID...SHE SAID SHE COULDN'T SAY IT AT ALL.
19 AND I WOULD SUBMIT THAT IF SHE HAD SAID THAT IT WAS UP TO THE NEXT
20 LEVEL, I THINK THAT THE NEXT WAS CONSISTENT OR DIAGNOSTIC, WHICH
21 IS THE HIGHEST LEVEL, AND YOU KNOW WE CROSS EXAMINED HER ON THAT,
22 THEN I DON'T GUESS I'D HAVE AN ARGUMENT. BUT BASED ON WHAT SHE
23 TESTIFIED TO, I CAN'T, I MEAN, IT DOES NOT APPEAR THAT THERE IS ANY
24 COMPETENT EVIDENCE, ANYTHING THAT WOULD ALLOW THE JURY TO
25 CONSIDER THE ISSUE OF SEXUAL BATTERY. AND THAT IS THE BASIS, YOUR

1 HONOR, FOR MY MOTION. NOW AS A PART OF THAT, JUDGE, I
2 OF COURSE, OBJECTED TO THE TESTIMONY OF MS. EHNEY ALTOGETHER
3 AS TO WHAT THE CHILD TOLD HER, AND I THINK I AM PROTECTED ON THE
4 RECORD ON THAT.

5 THE COURT: YOU ARE.

6 MR. HOWE: BUT YOU KNOW, REALISTICALLY, SHE DIDN'T -- ON THIS
7 PARTICULAR ISSUE, SHE DIDN'T DO ANYTHING BUT HELP. BECAUSE SHE DID
8 NOT TESTIFY THAT THE CHILD TOLD HER ANYTHING ABOUT ANY
9 PENETRATION AND THE CHILD DID NOT SAY IT, I SUBMIT, BASED ON THE
10 TESTIMONY THAT YOU HEARD. NOW MR. FLEMING IS GOING TO SAY THAT HE
11 -- HE IS GOING TO ARGUE THAT, WELL, SHE SAID, "HURT." UNLESS I AM
12 MISSING SOMETHING, UNLESS I'M MISSING SOMETHING, AND I GUESS WE
13 WILL HAVE TO REVIEW THE RECORD CAREFULLY. I DON'T KNOW THAT SHE
14 SAID WHAT HURT, WHERE IT HURT, OR ANYTHING OF THAT NATURE. MAYBE I
15 WAS -- IT WAS DIFFICULT LISTENING TO THE CHILD, I WILL HAVE TO ADMIT.
16 BUT I -- EVEN THAT, IF SHE SAID ON THE OUTSIDE, I SUBMIT THAT IS NOT
17 BATTERY. BECAUSE IT IS NOT ANY INTRUSION, HOWEVER SLIGHT. AND SHE
18 NEVER TESTIFIED TO ANY DIGITAL OR ANY OTHER SEXUAL BATTERY, AND SO,
19 YOUR HONOR, RESPECTFULLY, I MOVE -- I AM ASKING THE COURT ON BEHALF
20 OF MY CLIENT TO DIRECT A VERDICT ON THE CRIMINAL SEXUAL CONDUCT
21 WITH A MINOR FOR THOSE REASONS.

22 THE COURT: ALL RIGHT. YES, SIR.

23 MR. FLEMING: YOUR HONOR, JUST ONE THING TO REMIND THE COURT
24 WHEN YOU ARE LOOKING AT THE DIRECTIVE OF A MAJOR VERDICT, IT IS MY
25 UNDERSTANDING OF CASE LAW YOU HAVE TO LOOK AT THE EVIDENCE THAT

1 REFLECTS MOST FAVORABLE TO THE STATE. WHAT WE HAVE HERE, THE
2 GIRL, THE MINOR CHILD, DID SAY THAT THE DEFENDANT DID PUT HIS WEE
3 WEE ON HER MONKEY IS WHAT I HAVE IN MY NOTES AND YOU DO HAVE THE
4 TESTIMONY OF DR. PRITCHARD THERE WAS A CLEFT ON THE HYMEN WHICH
5 IS INDICATIVE OF SEXUAL BATTERY. SHE DID SAY SHE COULD NOT SAY FOR
6 SURE IT WAS SEXUAL BATTERY, BUT IT WAS INDICATIVE OF SEXUAL
7 BATTERY. PLUS YOU HAVE THE TESTIMONY OF THE CHILD. SHE SAID IT DID
8 HURT WHEN HE DID THAT TO HER. BASED ON THAT AND TAKING ALL OF THAT
9 IN ACCOUNT MOST FAVORABLE TO THE STATE, I THINK WE HAVE MET THE
10 BURDEN OF PROOF FOR THE CHARGE OF CRIMINAL SEXUAL CONDUCT
11 AGAINST A MINOR, YOUR HONOR, UNDER THE AGE OF ELEVEN IN THE FIRST
12 DEGREE. IN ANY EVENT, IF THAT WERE THE CASE WE STILL GET ATTEMPTED
13 CRIMINAL SEXUAL CONDUCT UNDER §16 3 656.

14 THE COURT: SO YOUR POSITION IS THAT THE DIRECTIVE ON THE
15 CRIMINAL SEXUAL CONDUCT IS STILL A LEWD ACT, IS FLOATING AROUND
16 THAT.

17 MR. FLEMING: YES, SIR. THERE IS CLEARLY EVIDENCE OF LEWD ACTS
18 BASED ON THE TESTIMONY AND I UNDERSTAND THE COURT'S ANALYSIS AT
19 THIS TIME.

20 MR. HOWE: WHAT YOU ARE LOOKING FOR I JUST, YOU KNOW, AGAIN, I
21 DON'T MEAN TO REPEAT MY ARGUMENT OTHER TO RESPOND THAT I DON'T
22 THINK MR. WEATHERALL IS INDICTED FOR INTENT. THERE WAS AN
23 ALLEGATION OF CRIMINAL SEXUAL CONDUCT AND NOT AN INDICTMENT ON
24 INTENT. I DON'T SEE HOW YOU CAN HAVE IT BOTH WAYS. THAT IS SORT OF
25 JUMPING THE GUN.

1 THE COURT: WHAT I AM GOING TO DO, I'LL TELL YOU, I AM GOING TO
2 LISTEN TO HER TESTIMONY AGAIN. I DO THINK A LOT OF THIS GOES TO THE
3 WEIGHT TO BE HONEST WITH YOU, BUT I AM GOING TO BE SURE. I AM GOING
4 TO LISTEN TO THE TESTIMONY DURING THE BREAK. IF YOU WANT TO BE
5 BACK HERE AT 2:00 PM TO 2:15 PM, I WILL LET YOU KNOW. I WILL BE
6 PREPARED THIS AFTERNOON. DON'T DELAY ANYTHING.

7 MR. HOWE: JUDGE, CAN WE GO AHEAD AND ADDRESS THE ISSUE OF
8 IMPEACHABLE OFFENSES? CAN WE DO THAT NOW?

9 THE COURT: YES.

10 MR. HOWE: I NEED TO DO THAT SO THAT I CAN BE PLANNING WITH MR.
11 WEATHERALL ON THAT ISSUE.

12 THE COURT: SURE.

13 MR. HOWE: AND FOR THE RECORD, I UNDERSTAND, WE'LL LET MR.
14 FLEMING ADDRESS WHAT HE CONSIDERS IMPEACHABLE AND WHATEVER
15 EVIDENCE HE HAS OF THAT AND I'D ASK THE COURT TO RULE ON THAT AND I
16 WOULD ASK TO BE HEARD AT THE APPROPRIATE TIME FOR THAT SO I GUESS
17 I CAN TURN OVER TO HIM.

18 THE COURT: ALL RIGHT. YES.

19 MR. FLEMING: YOUR HONOR IT HAS COME TO OUR ATTENTION THAT IN
20 2001, MR. WEATHERALL WAS CHARGED WITH FAILING TO REGISTER AS A SEX
21 OFFENDER AND THAT UNDER THE LAW OF THE STATE AND CODE LAW OF
22 SOUTH CAROLINA THAT IS AN IMPEACHABLE OFFENSE AND WE COULD
23 IMPEACH HIM FOR IT IF HE WERE TO GET ON THE STAND AND TESTIFY.

24 THE COURT: ALL RIGHT. IS THERE ANYTHING ELSE ANYONE KNOWS
25 ABOUT? THAT OTHER CHARGE WAS OBVIOUSLY MORE THAN 10 YEARS AGO,

1 SO I DONT THINK THAT WOULD BE AN IMPEACHABLE OFFENSE. SO YOU ARE
2 SAYING THE FAILURE TO REGISTER IN 2001.

3 MR. FLEMING: YES SIR, YOUR HONOR.

4 THE COURT: ALL RIGHT.

5 MR. HOWE: I THINK THAT'S AN IMPEACHABLE OFFENSE. YOUR HONOR.
6 IF I CAN HAVE ONE MINUTE TO REFER TO THAT PARTICULAR RULE HAVING TO
7 DO WITH IMPEACHMENT.

8 THE COURT: SURE.

9 (MR. HOWE LOOKS THROUGH BOOK)

10 MR. HOWE: YOUR HONOR, RULE 609 ADDRESSES EVIDENCE OF
11 IMPEACHMENT. REFERRING TO RULE 609-82, ANY EVIDENCE ANY WITNESS
12 CONVICTED OF A CRIME SHOULD BE ADMITTED IF IT INVOLVES DISHONESTY
13 OR FALSE STATEMENT REGARDLESS OF THE PUNISHMENT. OTHER THAN
14 THAT A CRIME PUNISHABLE BY IN AN EXCESS OF ONE YEAR. I'M DRAWING A
15 BLANK AS TO WHAT FAILURE TO REGISTER CARRIES AS A FIRST OFFENSE.

16 THE COURT: 90 DAYS.

17 MR. HOWE: 90 DAYS. SO IT IS OUT ON THAT. ITS OUT ON THAT BUT
18 THE PROBLEM IS IT IS AS CORE. IS THE FAILURE TO... I DONT KNOW HOW TO
19 PUT IT..TO BE HONEST WITH THE SYSTEM YOU HAVE TO REQUIRE YOU
20 REGISTER IF YOU MOVE. I THINK THAT IS REALLY WHAT IS AT THE CORE.
21 IT'S THE FAILURE TO BE HONEST WITH THE SYSTEM TO TELL THEM THAT YOU
22 HAVE MOVED. JUDGE, MY ARGUMENT WOULD BE THAT THE FAILURE AND
23 NOT NECESSARILY AN OVERT ACT OF DISHONESTY. IT'S A FAILURE AND THAT
24 IN OF ITSELF DOES NOT MAKE IT AN ACT OF DISHONESTY. I'M TRYING TO
25 THINK OF ALL THE EXAMPLES OF DISHONESTY THAT TYPICALLY WOULD FALL,

1 FOR INSTANCE SHOPLIFTING. REMOVING GOODS FROM A STORE, PETTY
2 LARCENY INVOLVING INTENTIONAL ACTS, ANY KIND OF LARCENY, ANYTHING
3 OF THAT NATURE. THIS IS A FAILURE TO REGISTER AND I WOULD SUBMIT
4 THAT IT DOES NOT.... IT SHOULD NOT BE ALLOWED. I NEED TO ASK MY
5 CLIENT SOME QUESTIONS.

6 THE COURT: SURE.

7 MR. HOWE: YOUR HONOR, THE OTHER ARGUMENT I WOULD MAKE AT
8 THIS TIME IS THIS: I'M GOING TO ASK THAT THE STATE IS GOING TO HAVE TO
9 FURNISH THE PROOF OF THIS. AS I UNDERSTAND IT MY CLIENT TELLS ME HE
10 WAS NOT REPRESENTED BY COUNSEL AT THAT TIME HE DOES NOT THINK. I
11 WOULD LIKE TO FIND OUT THAT TO BE ABLE TO ARGUE THAT ONE OF THE
12 ARGUMENTS WOULD BE THAT UN-COUNSELED PLEAS, WHERE IT WAS MADE
13 UNDER THE CIRCUMSTANCE AND ALL THAT, I THINK THE COURT WOULD HAVE
14 TO INQUIRE TO THAT. I UNDERSTAND THAT IF IT IS A 90-DAY SENTENCE THEN
15 IT WOULD BE ADDRESSED BY THE CIRCUIT COURT.

16 THE COURT: YES. I AGREE IT WOULD NORMALLY BE WHERE THE
17 JURISDICTION WOULD BE.

18 MR. HOWE: HE WAS NOT REPRESENTED. HE THINKS, I DON'T KNOW...

19 THE COURT: WHERE WAS IT?

20 MR. FLEMING: IN MCCORMICK COUNTY. YOUR HONOR, WHY WOULD
21 THAT HAVE ANYTHING TO DO WITH THAT MATTER IF HE PLED GUILTY TO IT?
22 THAT'S A PLEA OF GUILT AND IT IS ON HIS RECORD. I WOULD ALSO POINT
23 OUT TO THE COURT THAT UNDER THE CASE LAW THAT EVIDENCE OF HIT-
24 AND-RUN IS EVIDENCE THAT YOU CAN BRING UP AND IS IMPEACHABLE
25 EVIDENCE. THAT'S NOT AN OVERT ACT. YOU CAN HIT SOMEONE AND NOT

1 REALIZE IT BUT YOU CAN'T HAVE BEEN CHARGED WITH THAT. THAT IS AN
2 IMPEACHABLE CRIME.

3 THE COURT: YOU HAVE BEEN CHARGED WITH IT?

4 MR. HOWE: NO, I THINK THAT IS AN IMPEACHABLE CRIME AND I THINK
5 THAT WHETHER HE WAS REPRESENTED THAT WOULD GO TOWARD FUTURE
6 SENTENCING IF THERE WAS AN INCREASE IN THE CHARGE. IN THAT CASE
7 IT'S PRETTY CLEAR BUT I DON'T KNOW OF ANY REASON WHY A GUILTY PLEA
8 WITHOUT AN ATTORNEY WOULD NOT BE... WOULD NOT ALLOW IT TO BE USED
9 AS AN IMPEACHABLE OFFENSE. WE ARE ALL SORT OF IN THE DARK AND WE
10 NEED TO FIND THAT OUT. YOU KNOW JUDGE, THE OTHER ARGUMENT I
11 WOULD MAKE I UNDERSTAND THE COURT RULE ON THE ISSUE OF WHETHER
12 OR NOT IT INVOLVED DISHONESTY. THE OTHER ARGUMENT I WOULD MAKE IS
13 THE STATEMENT IS SIMPLY TOO PREJUDICIAL AND I WOULD ASK THE COURT
14 TO CONSIDER THAT ANALYSIS. WE OBVIOUSLY KNOW WHAT MR.
15 WEATHERALL IS BEING TRIED FOR AND WE KNOW THE PLEA. IF HE TESTIFIES
16 AND THE JURY HEARS THAT THERE IS NO WAY YOU COULD UN-RING THAT
17 BELL. AND I WOULD SUBMIT THAT'S GOING TO BE BASICALLY A NOD TO THE
18 JURY EVEN THOUGH I KNOW YOU WILL INSTRUCT THEM ON THE CREDIBILITY
19 ON WHAT THE BASIS OF THAT IS. IT IS JUST SO CLOSELY CONNECTED THAT
20 IT CAN'T BE ANYTHING BUT PREJUDICIAL.

21 THE COURT: OKAY.

22 MR. HOWE: AND IT JUST GOES TO THE ISSUE OF CREDIBILITY ANYWAY.
23 THAT'S THE ONLY PURPOSE TO GET IT IN BUT THAT'S ASKING THE JURY TO
24 REALLY REALLY JUMP --

25 THE COURT: YES, I UNDERSTAND. I WELL, AS TO SOMETHING ELSE I

1 THINK THAT COMES IN I UNDERSTAND YOUR ARGUMENT, BUT UNDER THE
2 LAW I BELIEVE IT DOES COME IN. AND WHILE Y'ALL ARE GONE I WILL LISTEN
3 TO THAT TESTIMONY BUT I WOULD BE PREPARED TO GO FORWARD. I AM
4 DEPENDING ON THAT AND I WANT TO BE SURE I AM RIGHT. OK, I WILL SEE
5 Y'ALL ABOUT 2:15 PM OR SO.

6 MR. HOWE: THANK YOU YOUR HONOR.

7 MR. FLEMING: THANK YOU.

8 (JURY IN AT 12:01 PM)

9 MR. FLEMING: THE STATE RESTS, YOUR HONOR.

10 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, YOU'VE HEARD ALL
11 THE TESTIMONY THAT YOU'RE GOING TO HEAR FROM THE STATE IN THIS
12 CASE UNFORTUNATELY, AND THIS WAS NOT COMPLETELY PLANNED. WE
13 NEED SOME TIME TO ARGUE VARIOUS MOTIONS AND THEN WE HAVE A
14 SCHEDULING ISSUE WITH ONE OF THE WITNESSES THIS AFTERNOON. SO,
15 DESPITE YOUR BEING HERE 30 MINUTES AND SITTING BACK THERE, I'M GOING
16 TO HAVE TO SEND YOU OUT UNTIL ABOUT 2:15 PM. I COULD MAKE YOU SIT
17 AND WE COULD WAIT ON THIS GUY, BUT I'M NOT GOING TO DO THAT TO YOU.
18 I'M SORRY YOU HAD TO COME IN THIS MORNING. IF WE HAD KNOWN THE
19 SCHEDULING ISSUE, IT'S NOBODY'S FAULT HERE, IT'S JUST THAT IS THE WAY
20 THESE THINGS GO. BUT, IF YOU'LL BE BACK AROUND 2:15 PM TODAY, THEN
21 WE'LL START AT 2:30 PM. AND WHILE YOU'RE GONE, WE'RE GOING TO ARGUE
22 VARIOUS ISSUES AND SO WE'LL BE READY TO GO AT 2:30 PM. I WILL TELL
23 YOU, I THINK WE'RE GOING TO FINISH THE TESTIMONY EITHER LATE THIS
24 AFTERNOON OR TOMORROW. SO, I SUSPECTS WE'LL GET THE CASE TO YOU
25 SOMETIME TOMORROW RATHER THAN FRIDAY. SO, THANK YOU FOR COMING

1 IN THIS MORNING. HAVE A GOOD LUNCH AND I'LL SEE YOU BETWEEN 2:15 PM
2 AND 2:30 PM. THANK YOU. DON'T TALK ABOUT THE CASE.

3 (JURY OUT AT 12:06 PM)

4 (COURT RESUMES AT 2:26 PM)

5 THE COURT: AFTER YOU LEFT, MY LAW CLERK, THE COURT REPORTER
6 AND I LISTENED TO THE TESTIMONY OF MS. EHNEY AND OF Minor AND
7 UNLESS Y'ALL CAN POINT SOMETHING OUT THAT'S DIFFERENT -- ALSO, DR.
8 PRITCHARD, WE DIDN'T LISTEN TO THAT TESTIMONY, BUT I HAD NOTES
9 SPECIFICALLY -- I DON'T THINK THAT THERE'S ANY -- THERE'S BEEN NO
10 TESTIMONY OF ANY BATTERY THAT I CAN FIND. JUNE SAY, "ON THE
11 OUTSIDE", MS. EHNEY SAYS THAT THERE WAS TOUCHING ON THE OUTSIDE
12 AND DR. PRITCHARD SAYS THAT THERE'S A POSSIBILITY THAT THE CLEFT
13 MIGHT BE A RESULT OF SEXUAL ACTIVITY, BUT ALSO, IT MIGHT JUST HAVE
14 BEEN PRESENT. SO, I DON'T THINK THE CSC IS THERE. THE QUESTION THEN
15 RECOMES WHETHER ATTEMPTED CSC IS A LESSER INCLUDED OFFENSE.
16 Y'ALL GOT ANY INFORMATION ON THAT?

17 MR. FLEMING: YOUR HONOR, THAT IS A LESSER INCLUDED OFFENSE. I
18 HAVE CASE LAW ON THAT.

19 THE COURT: THAT'S MY THEORY, BUT I WANTED TO GIVE YOU A
20 CHANCE TO ARGUE THAT IF YOU WANT. SO, I'M GOING TO DIRECT A VERDICT
21 ON THE CSC, LEAVE THE LEWD ACT AND I THINK THAT I WOULD CHARGE
22 ATTEMPTED, UNLESS YOU HAVE SOMETHING THAT SAYS OTHERWISE.
23 THERE'S ACTUALLY A CASE THAT IS PRETTY MUCH ON POINT, WHICH IS
24 STATE *versus* JOHNSON, WHICH IS ALMOST THE EXACT SAME SITUATION
25 HERE. A 1999 CASE THAT MARC WESTBROOK HEARD THAT WENT TO THE

1 SUPREME COURT, BASICALLY DETERMINED THE BATTERY ISSUE. THERE HAS
2 TO BE SOME PENETRATION.

3 MR. HOWE: JUDGE, THE NAME OF THAT CASE AND SITE WAS?

4 THE COURT: STATE versus IVAN NORMAN JOHNSON. IT WAS REVERSED
5 ON OTHER GROUNDS, BUT A VERY SIMILAR SITUATION IN WHICH THE TRIAL
6 JUDGE DID NOT GRANT A DIRECTED VERDICT AND THE ISSUE WAS WHETHER
7 OR NOT THERE HAD BEEN ANY PENETRATION. THE TESTIMONY IS PRETTY
8 CLOSE TO WHAT THIS IS. AND IN THAT CASE, THERE IS ONE CHILD, THE CSC
9 WAS ALLOWED TO GO TO THE JURY AND SHOULD HAVE BEEN BECAUSE
10 THERE HAD BEEN DIGITAL PENETRATION AND THE JUDGE REFUSED TO
11 GRANT A DIRECTED VERDICT ON THE OTHER ONE WHEN THERE WAS
12 TESTIMONY THAT SOMETHING HURT, BUT NO TESTIMONY OF PENETRATION.
13 AND IN THAT CASE THERE HAD ALSO BEEN A PHYSICAL EXAM THAT SHOWED
14 NO SIGNS OF SEXUAL BATTERY, SO -- WE LISTENED PRETTY GOOD. IN FACT,
15 WE LISTENED TO ALL OF IT DURING LUNCH. BUT, THE LEWD ACT STAYS AND I
16 WOULD CHARGE THE ATTEMPTED CSC. BECAUSE I THINK IT INCLUDES ALL
17 OF THE OFFENSES, INCLUDING THE LESSER INCLUDED UNLESS Y'ALL HAVE,
18 AGAIN, UNLESS YOU HAVE A CASE THAT SAYS DIFFERENTLY.

19 MR. HOWE: YOUR HONOR, I DON'T HAVE ANY CASES THAT I CAN CITE
20 AT THIS POINT IN TIME TO DISPUTE THAT, BUT COULD --

21 THE COURT: WE'LL HAVE UNTIL TOMORROW. WE'RE NOT GOING TO
22 CHARGE UNTIL TOMORROW.

23 MR. HOWE: IF WE'RE NOT GOING TO CHARGE UNTIL TOMORROW, CAN I
24 RESERVE THE RIGHT TO ARGUE THAT AT THE APPROPRIATE TIME AND BE
25 PROTECTED ON THE RECORD.

1 THE COURT: YES. I'M NOT MAKING A FINAL DECISION ON THE CHARGE,
2 OBVIOUSLY. I'VE GOT IT DONE, OR MY LAW CLERK HAS, BUT I WOULD BE
3 INCLINED TO CHARGE ATTEMPTED AND THE LEWD ACT.

4 MR. HOWE: OKAY.

5 THE COURT: ALL RIGHT. WHAT DO WE HAVE, DO YOU HAVE
6 EVERYBODY HERE THAT YOU NEED OR...

7 MR. HOWE: JUDGE, I'VE GOT ONE WITNESS READY AND ONE THAT
8 WOULD COME, LOGICALLY RIGHT BEHIND HER WHO'S PICKING UP HER
9 CHILDREN AT 2:30 PM, WHO'S GOING TO BE HERE SHORTLY THEREAFTER.
10 IT'S A NURSE FROM THE JAIL AND ONE -- AND THEN I'VE GOT SEVERAL OTHER
11 WITNESSES AND WE'RE TRYING TO DECIDE WHETHER OR NOT TO PUT UP
12 THE DEFENDANT.

13 MR. FLEMING: YOUR HONOR, I HAVE A MOTION THAT I WOULD LIKE TO
14 MAKE PRIOR TO THE WITNESS, EITHER OF THE WITNESSES TESTIFYING.

15 THE COURT: SURE.

16 MR. FLEMING: YOUR HONOR, IT'S MY UNDERSTANDING THAT MR. HOWE
17 IS GOING TO TRY TO INTRODUCE EVIDENCE INTO THE TRIAL ABOUT THE
18 JUVENILE VICTIM HAVING HERPES SIMPLEX II. I WOULD MOVE THAT IS NOT
19 RELEVANT TO THE EVENT WHICH HAPPENED IN 2004. THE CHILD WAS NOT
20 DIAGNOSED WITH HERPES UNTIL 2006, WHICH IS TWO YEARS APART FROM
21 EACH OTHER, YOUR HONOR. I DON'T THINK THAT MAKES WHETHER OR NOT
22 ATTEMPTED CRIMINAL SEXUAL CONDUCT OR LEWD ACT, I DON'T THINK THAT
23 MAKES IT MORE PROBITIVE. AND I THINK THAT'S IRRELEVANT AND
24 SHOULDN'T COME IN.

25 THE COURT: HOW IS THAT RELEVANT IF THE DIAGNOSIS IS TWO YEARS

1 LATER?

2 MR. HOWE: YOUR HONOR, BECAUSE IT IS MY UNDERSTANDING THAT
3 THE PHYSICIAN CAN TESTIFY THAT YOU CAN'T TELL WHEN SOMEBODY
4 ACTUALLY CONTRACTS IT. IT'S JUST WHEN THE DIAGNOSIS WAS MADE AND I
5 UNDERSTAND THE PHYSICIAN CAN TESTIFY THAT IT COULD HAVE BEEN
6 CONTRACTED EVEN TWO YEARS PRIOR TO THAT AND IT WOULD SEEM TO ME
7 THAT WOULD BE RELEVANT TO THE ISSUE BECAUSE THE FOLLOW-UP
8 WITNESS TO THAT, QUITE HONESTLY JUDGE, IS THE JAIL NURSE WHO'S
9 GOING TO TESTIFY THAT ON MOTION OF THE PROSECUTION, THE REQUEST
10 THAT MR. WEATHERALL PROVIDE THE BLOOD, HAIR AND SALIVA. PART OF
11 THE REASON FOR THAT WAS THE STATE MADE THE MOTION THAT THE CHILD
12 HAD BEEN DIAGNOSED WITH HERPES AND THAT AT THE REQUEST OF MR.
13 FLEMING AND MYSELF THE CHILD -- EXCUSE ME -- MR. WEATHERALL WAS
14 THEN TESTED AND THE JAIL NURSE IS PREPARED TO TESTIFY THAT HE DOES
15 NOT HAVE IT. AND I THINK THE PHYSICAL CAN TESTIFY, FROM WHAT I
16 UNDERSTAND, YOU CAN'T TELL WHEN SOMEBODY GOT IT. IT COULD CARRY
17 FOR A PERIOD OF TIME AND I THINK THAT WOULD BE RELEVANT TO THE
18 ISSUE OF WHETHER OR NOT THERE WAS ATTEMPTED CSC, BECAUSE --

19 THE COURT: HERE'S THE PROBLEM I'VE GOT. I MEAN, YOU HAVE ALL
20 THESE IN MALPRACTICE CASES, IF YOU'VE GOT A -- IF YOU HAD A DOCTOR'S
21 REPORT FROM AROUND THE TIME OR JUST PRIOR TO IT THAT SHOWED SHE
22 DIDN'T HAVE HERPES AND THEN HAD ONE IN 2006 AND SHE DID, I COULD
23 UNDERSTAND HOW THAT WOULD BE RELEVANT, BUT THE TRUTH OF THE
24 MATTER IS, AND I HAVE NO IDEA HOW AND IT'S KIND OF UNBELIEVABLE TO
25 THINK ABOUT, SHE COULD HAVE GOTTEN THE HERPES ANYTIME FROM 2004

1 TO 2006 AND THAT CREATES SOME ISSUES FOR THE JURY THAT THEY'RE
2 GOING TO HAVE TO SURMISE HOW SHE GOT IT. I MEAN, THAT TWO-YEAR LAG
3 IS THE PROBLEM, I THINK. I MEAN, I UNDERSTAND WHY, BUT —

4 MR. FLEMING: I DON'T SEE HOW, IN ANY EVENT, THAT MAKES THE
5 ISSUE OF WHETHER OR NOT A CSC OR A LEWD ACT WAS CONDUCTED MORE
6 PROBITIVE, YOUR HONOR, OR LESS PROBITIVE.

7 THE COURT: WELL, IF I INDICATE THE CSC, I COULD UNDERSTAND IT,
8 BUT THE LEWD ACT, OBVIOUSLY, DOESN'T NECESSARILY MEAN YOU WOULD
9 TRANSMIT THAT DISEASE WITH A LEWD ACT. I THINK, I ASSUME, FROM A
10 LAYMAN'S STANDPOINT, YOU WOULD HAVE A HIGHER CHANCE OF
11 TRANSMITTING IT WITH A CSC AND THAT'S GONE. I'VE GOT A REAL PROBLEM
12 WITH THAT TESTIMONY.

13 MR. HOWE: COULD I PROFFER THAT TESTIMONY?

14 THE COURT: YOU COULD PROFFER IT, YES, TO PROTECT YOURSELF ON
15 THE RECORD. YES. THAT'S WHAT I WOULD DO.

16 MR. HOWE: YES, SIR.

17 MR. FLEMING: YOU'RE GOING TO ALLOW HIM TO CALL A WITNESS, BUT
18 I'M GOING TO OBJECT TO THAT AND YOU'RE NOT GOING TO LET IT IN — THE
19 JURY IS GOING TO WANT TO KNOW —

20 THE COURT: NO. NO. NO. I'M GOING TO LET HIM PROFFER IT NOW AND
21 I'M TELLING —

22 MR. FLEMING: OH, OKAY.

23 THE COURT: I'M GOING TO LET HIM PROFFER IT OUTSIDE THE — TO
24 PROTECT THE RECORD.

25 MR. FLEMING: THANK YOU. I'M SORRY.

1 THE COURT: YOU WANT TO DO THAT NOW?

2 MR. HOWE: YES, SIR. AND SHE'S HERE.

3 THE COURT: OKAY.

4 (AFTER BEING DULY SWORN BY THE CLERK OF COURT,

5 SALLY BURGESS TESTIFIED AS FOLLOWS:)

6 CLERK OF COURT: PLEASE STATE YOUR FULL NAME.

7 WITNESS: SALLY BURGESS.

8 MR. HOWE: JUDGE, ARE WE STILL REFERRING TO ^{Minor} ONLY AS ^{Minor}

9 BUT FOR THE PURPOSES OF THIS, SO THE DOCTOR WILL KNOW WE ARE

10 TALKING ABOUT ^{Minor}

11 THE COURT: RIGHT.

12 PROFFERED DIRECT EXAMINATION OF SALLY BURGESS BY MR. HOWE:

13 Q GIVE US YOUR NAME, PLEASE.

14 A SALLY BURGESS.

15 Q YOU ARE DOCTOR BURGESS, IS THAT CORRECT?

16 A YES.

17 Q ALL RIGHT. THAT'S WHAT I'D LIKE TO CALL YOU. DR. BURGESS, WOULD
18 YOU TELL ME WHAT TYPE OF DOCTOR YOU ARE.

19 A PEDIATRICIAN.

20 Q OKAY. AND WHERE IS YOUR PRACTICE?

21 A RIGHT BEHIND LAURENS HOSPITAL.

22 Q OKAY. AND HOW LONG HAVE YOU HAD YOUR PRACTICE IN THAT FIELD
23 IN LAURENS COUNTY?

24 A A LITTLE OVER FOUR YEARS.

25 Q AND ANY -- IF YOU COULD JUST BRIEFLY TELL ME, WHAT IS YOUR

1 TRAINING AND QUALIFICATIONS ARE TO BECOME A PEDIATRICIAN.

2 A I WENT TO MED SCHOOL AND RESIDENCY.

3 Q TELL US WHERE.

4 A I WENT TO MUSC AND DID MY RESIDENCY IN CHARLESTON, WEST
5 VIRGINIA.

6 Q HOW LONG HAVE YOU BEEN LICENSED TO BE A PEDIATRICIAN?

7 A A LITTLE OVER FOUR YEARS.

8 Q NOW, AS A PEDIATRICIAN, HAVE YOU HAD THE OCCASION TO BE THE
9 DOCTOR FOR A MINOR BY THE NAME OF Minor

10 A YES, SIR.

11 Q AND I ASKED YOU TO BRING THE RECORDS. IS THAT CORRECT?

12 A YES, SIR.

13 Q THAT'S WHAT WE ARE GOING TO REFER TO HER AS -- THE COURT
14 WOULD PREFER NOT TO USE HER LAST NAME SO, I'LL JUST CALL HER

15 Minor

16 A OKAY.

17 Q ALL RIGHT. I'LL ASK YOU, CAN YOU LOOK AT THE RECORDS AND SEE
18 APPROXIMATELY WHEN YOU FIRST STARTED TREATING HER.

19 A THE FIRST TIME I SAW HER IN OUR OFFICE WAS AUGUST 26th OF '04.

20 Q OKAY. AND COULD YOU TELL ME IF THERE WAS EVER A POINT IN TIME
21 DURING YOUR TREATMENT OF -- WELL, LET ME ASK YOU, ARE YOU
22 STILL HER PEDIATRICIAN?

23 A I THINK SO. SHE LAST CAME TO OUR CLINIC SEPTEMBER 1st. LAST
24 TIME I SAW HER WAS AUGUST 18th OF THIS YEAR.

25 Q OF THIS YEAR. OKAY. AND DID YOU HAVE AN OCCASION BACK IN 2004

1 TO TREAT^{Minor} FOR ANY GENITAL-TYPE CONDITION?

2 A YES.

3 Q AND WHAT WAS THAT?

4 A THE FIRST TIME I SAW HER ON THE 26th, SHE CAME IN, SHE HAD AN
5 ECZEMA AND SHE WAS ITCHING AND HER MOM GAVE ME A LITTLE BIT
6 OF HISTORY OF WHAT HAD BEEN GOING ON AND SHE WANTED ME TO
7 CHECK OUT HER ABDOMINAL AREA AND I DIAGNOSED HER WITH
8 VAGINITIS.

9 Q OKAY. AND TELL -- DOES VAGINITIS, COULD THAT, IN YOUR
10 EXPERIENCE BE AN INDICATOR THAT SHE COULD POSSIBLY HAVE
11 HERPES?

12 A WELL, IT COULD BE, BECAUSE THE PRIMARY INFECTION OF HERPES
13 CAN BE ANYWHERE FROM ASYMPTOMATIC TO FULL BLOWN PUSTULES
14 SO SHE COULD HAVE ITCHING AND REDNESS AS HER PRIMARY CASE,
15 YES.

16 Q DID YOU LATER HAVE ANY TESTS CONDUCTED TO DETERMINE
17 WHETHER SHE HAD ANY FORM OF HERPES?

18 A YES. I DIDN'T DO ANY THE FIRST TIME BECAUSE I WAS TOLD THAT
19 CULTURES HAD BEEN DONE BY DSS. THEN, SHE HAD COME BACK
20 THREE OR FOUR TIMES FOR -- SHE HAD PUSTULES DOWN THERE AND
21 THE FIRST TIME I SAW THEM, I CULTURED THEM AND THEY TESTED
22 POSITIVE FOR HERPES.

23 Q AND WHEN WAS THAT?

24 A MARCH 1st OF '06.

25 Q OKAY. AND COULD YOU TELL THE COURT WHICH TYPE OF HERPES

1 WE'RE TALKING ABOUT.

2 A TYPE TWO.

3 Q OKAY, AND IS THAT THE ONE THAT IS IN THE GENITAL AREA?

4 A FOR THE MOST PART, YES.

5 Q NOW, IS THERE ANY WAY THAT YOU WOULD BE ABLE TO TESTIFY AS TO
6 WHEN ONE COULD CONTRACT HERPES?

7 A NO. NO, BECAUSE LIKE I SAID, THE PRIMARY OUTBREAK COULD BE
8 ASYMPTOMATIC AND IT COULD BE LATENT IN NERVE CELLS FOR YEARS
9 AND SO YOU NEVER KNOW. YOU CAN'T TELL WHEN, YOU JUST HAVE TO
10 GO BY -- THE BEST YOU CAN DO IS GO BY, CLINICALLY, WHEN A
11 PERSON STARTS TO HAVE PROBLEMS, BUT YOU CAN'T TELL FOR SURE.

12 Q AND ACCORDING TO YOUR RECORDS, THAT HAPPENED IN '04?

13 A RIGHT. WELL, THAT'S THE FIRST TIME I HAD SEEN IT BEFORE. I DIDN'T
14 KNOW IF SHE HAD HAD ANY PROBLEMS, BECAUSE SHE -- THE FIRST
15 TIME SHE CAME TO OUR CLINIC WAS IN '04 ALSO, AND SO I DON'T KNOW
16 ANYTHING BEFORE THAT.

17 Q RIGHT. I UNDERSTAND. THAT'S ALL THE QUESTIONS I HAVE. WOULD
18 YOU ANSWER ANY QUESTIONS THAT MR. FLEMING FROM THE
19 SOLICITOR'S OFFICE OR THE COURT MAY HAVE OF YOU.

20 MR. FLEMING: MAY IT PLEASE THE COURT, YOUR HONOR.

21 THE COURT: YES, SIR.

22 PROFFERED - CROSS EXAMINATION OF SALLY BURGESS BY MR. FLEMING:

23 Q DOCTOR, WHAT IS VAGINITIS, IN LAYMEN'S TERMS?

24 A IT'S KIND OF A CATCH-ALL TERM FOR IRRITATION OF THE VAGINA, THE
25 VAGINAL AREA.

1 Q IN '04, WHEN YOU DIAGNOSED HER WITH VAGINITIS, YOU DON'T KNOW
2 IF SHE HAD HERPES OR NOT, DO YOU?

3 A NO, I DON'T.

4 Q OKAY. THE FIRST TIME THAT YOU KNOW THAT SHE HAD HERPES WAS
5 IN 2006. IS THAT CORRECT?

6 A CORRECT.

7 Q OKAY. AND THERE ARE MANY WAYS TO GET HERPES, IS THERE NOT?

8 A YES.

9 Q OTHER THAN INTERCOURSE OR SEXUALLY TRANSMITTED. IS THAT
10 CORRECT?

11 A YES.

12 MR. FLEMING: NO FURTHER QUESTIONS, YOUR HONOR.

13 THE COURT: ALL RIGHT. DOCTOR, JUST SO I'VE GOT THIS RIGHT, SHE
14 HAD VAGINITIS IN 2004, YOU TREATED HER FOR THAT?

15 WITNESS: YES, SIR.

16 THE COURT: AND YOU DIDN'T TREAT HER FOR ANY OTHER SYMPTOMS
17 UNTIL 2006?

18 WITNESS: CAN I CHECK MY RECORDS REAL QUICK?

19 THE COURT: SURE. SURE.

20 WITNESS: LIKE I SAID, YOUR PRIMARY INFECTION CAN BE DORMANT
21 FOR YEARS AND SO THAT WOULDN'T BE AN INDICATION OF HERPES IF THAT
22 IS WHAT IT WAS THE FIRST TIME.

23 THE COURT: THERE'S NO WAY TO TELL THAT.

24 WITNESS: CORRECT. THE FIRST TIME I TESTED HER -- SEE, I THOUGHT
25 THAT DSS HAD TESTED HER FOR EVERYTHING, BUT APPARENTLY THEY

1 HADN'T. THE FIRST TIME I TESTED HER WAS MAY OF '06 AND SHE TESTED
2 POSITIVE.

3 THE COURT: ALL RIGHT. THANK YOU. ANY FURTHER QUESTIONS?

4 MR. FLEMING: NO, YOUR HONOR.

5 THE COURT: THANK YOU, DOCTOR. YOU CAN STEP DOWN.

6 MR. HOWE: YOU WANT HER TO WAIT OUT THERE WHILE YOU MAKE
7 YOUR RULING?

8 THE COURT: YES, I GUESS. SURE. ALL RIGHT, ANYTHING FURTHER ON
9 THAT BEFORE I RULE?

10 MR. FLEMING: NOTHING FURTHER FROM THE STATE, YOUR HONOR.

11 MR. HOWE: NO, SIR.

12 THE COURT: ALL RIGHT. WELL, OBVIOUSLY THAT GIVES ME SOME
13 PAUSE THAT SHE HAD SOME PROBLEM, BUT THE DOCTOR'S TESTIMONY IS
14 THAT THEY DON'T KNOW WHAT IT WAS AND SO I DON'T -- I'LL STAY WITH MY
15 RULING, BUT YOU'RE PROTECTED FOR THE RECORD AND THAT IS, NO
16 TESTIMONY ABOUT THE HERPES AS FAR AS WHEN SHE CONCEIVED IT -- I
17 GUESS NO TESTIMONY AT ALL. ARE YOU -- OF HER MEDICAL CONDITION?

18 MR. HOWE: SHE WOULD BE MY ONLY WITNESS ON THAT ISSUE
19 CONCERNING THE CHILD. AND JUDGE, JUST SO I CAN PROTECT THE
20 RECORD, AS I TOLD YOU, THE FOLLOW-UP OF THIS WOULD BE THE JAIL
21 NURSE WHO WOULD TESTIFY THAT HE DOESN'T HAVE IT -- IT'S ONLY LOGICAL
22 IF YOU ADMIT THE FIRST AND I'D LIKE TO AT LEAST, JUST TO MAKE THE
23 RECORD PROPERLY, INTRODUCE THAT EVIDENCE.

24 THE COURT: I UNDERSTAND. YES. YOU CAN DO THAT NOW.

25 MR. HOWE: ALL RIGHT. I HOPE SHE'S HERE.

1 THE COURT: IF SHE'S NOT, WE'LL DO IT WHEN SHE GETS HERE.

2 MR. HOWE: OKAY. AND SO, BASED ON YOUR RULING, I'M GOING TO —

3 THE COURT: YES, YOU CAN RELEASE HER. (DR. BURGESS)

4 MR. HOWE: THANK YOU. I GUESS WE'LL HAVE TO ADDRESS ANOTHER
5 ISSUE NOW. (WITNESS HAS NOT ARRIVED)

6 THE COURT: OKAY.

7 MR. HOWE: JUDGE, MY NEXT WITNESS WOULD BE THE CHILD'S
8 GRANDFATHER, MIKE FRANKLIN. TESTIMONY FROM VICKIE WHITE WAS THAT
9 HE DELIVERED TO LAW ENFORCEMENT A SPONGE BOB BLANKET AND
10 NIGHTSHIRT AND THAT WAS WHAT WAS LATER SENT TO SLED FOR POSSIBLE
11 DNA ANALYSIS AND I WANT TO CALL HIM FOR THAT PURPOSE. NOW,
12 INCLUDED IN THAT WAS THE NOTE THAT THE CHILD'S MOTHER SUPPOSEDLY
13 WROTE AND THAT I OBJECTED TO YESTERDAY AND YOU RULED THAT TO BE
14 HEARSAY AND I'D ASK THE COURT TO ISSUE A RULING NOW EXCLUDING THAT
15 NOTE OR ANY REFERENCE TO THE NOTE, WHAT WAS SAID ON THAT NOTE,
16 BECAUSE IT'S HEARSAY, EXCLUDING ANY TESTIMONY CONCERNING THAT
17 BECAUSE, I THINK, THE COURT HAS ALREADY RULED ON THAT AND THAT
18 WOULDNT COME IN. IT'S STILL GOING TO BE HEARSAY REGARDLESS OF
19 WHAT —

20 THE COURT: THE NOTE WAS WRITTEN BY THE MOTHER, RIGHT?

21 MR. HOWE: RIGHT. WRITTEN BY THE MOTHER WHERE THE MOTHER
22 SAYS WHAT THE CHILD SAID AT SOME POINT IN TIME.

23 THE COURT: IT'S DOUBLE HEARSAY.

24 MR. HOWE: YES. AND I KNOW MR. FLEMING WOULD ATTEMPT TO
25 ELICIT ON CROSS EXAMINATION FROM FRANKLIN, OR FOR THAT MATTER,

1 FROM THE SLED ANALYST, TESTIMONY ABOUT THE NOTE AND I WOULD
2 OBJECT TO THAT, ANY REFERENCE TO IT, ANY REFERENCE CERTAINLY TO
3 WHAT IT SAID AND I'M ASKING FOR THE COURT TO RULE ON THAT NOW WHILE
4 WE DON'T HAVE THE JURY IN HERE SO WE CAN GO AHEAD AND GET THAT
5 MATTER -- I INTEND SIMPLY TO INTRODUCE OR TO HAVE THE -- TO ESTABLISH
6 THAT THIS BLANKET AND THE NIGHTGOWN WAS TAKEN BY THE
7 GRANDFATHER AND DELIVERED TO LAW ENFORCEMENT, AS VICKIE WHITE
8 SAID, SENT TO SLED FOR DNA ANALYSIS.

9 THE COURT: YES, SIR.

10 MR. FLEMING: YOUR HONOR, WHAT MR. HOWE IS TRYING TO DO IS
11 HAVE HIS CAKE AND EAT IT, TOO. THE NOTE WAS INCLUDED WITH ALL THOSE
12 ITEMS WRAPPED IN CELLOPHANE. NOW, IF HE'S TRYING TO INTRODUCE ONE
13 PARTICULAR PIECE, ALL OF IT WAS TOGETHER, YOU KNOW, AND IF HE'S
14 TRYING TO GET ONE PIECE IN, I DON'T SEE WHY ALL OF IT CAN'T COME IN,
15 BECAUSE IT WAS ALL TOGETHER.

16 THE COURT: THE PROBLEM IS GOING TO BE, AND THIS IS SORT OF THE
17 PROBLEM WE'VE HAD WITH A COUPLE OF OTHER THINGS, I THINK YOU COULD
18 ASK HIM IF THERE WAS A NOTE ATTACHED TO IT, YOU JUST CAN'T READ
19 WHAT'S IN IT. AND THAT'S A SORT OF DISASTER FOR THEM, BUT I DON'T
20 THINK YOU CAN GET INTO THE CONTENT, IT'S STILL WRITTEN BY THE
21 MOTHER, EVEN THOUGH IT WAS DELIVERED BY THE GRANDFATHER, THAT
22 RIGHT?

23 MR. FLEMING: THE GRANDFATHER PICKED THE PACKAGE UP, HAD THE
24 NOTE IN IT, I MEAN, HE -- ALL HE COULD TESTIFY TO IS WHAT WAS WRITTEN
25 ON THE NOTE.

1 THE COURT: THAT'S STILL THE HEARSAY. I KNOW YOU WANT THAT
2 NOTE IN BAD, BUT THAT'S HEARSAY UNLESS THE MAMA – THE MAMA IS THE
3 ONLY ONE WHO COULD TESTIFY ABOUT THAT NOTE. SO, DON'T ASK THAT
4 QUESTION. IS THE MAMA GOING TO TESTIFY?

5 MR. FLEMING: WE DON'T KNOW.

6 THE COURT: ALL RIGHT. I WON'T MAKE YOU TELL ME NOW. IS THAT IT?

7 MR. HOWE: YES, SIR. AND SINCE THIS WITNESS, JUDGE, IS NOT, HOW
8 SHOULD I PUT IT – I WOULD ASK THE WITNESS TO DECLARE A COURT'S
9 WITNESS AND ASK THE COURT TO INSTRUCT THIS WITNESS NOT TO BLURT
10 ANYTHING OUT ABOUT THAT.

11 THE COURT: ABOUT THE NOTE?

12 MR. HOWE: ABOUT THE NOTE.

13 THE COURT: OKAY.

14 MR. HOWE: OUTSIDE THE PRESENCE OF THE JURY, JUST SUBJECT TO
15 THE COURT'S RULING JUST SO WE DON'T DO ANYTHING IMPROPER.

16 THE COURT: WHAT'S HIS NAME?

17 MR. HOWE: MIKE FRANKLIN.

18 THE COURT: WELL, AT THIS POINT, I WON'T CLAIM HIM A COURT'S
19 WITNESS, BUT I WILL INSTRUCT HIM TO ANSWER ONLY THE QUESTION, NOT
20 TO BLURT OUT ANYTHING THAT IS NOT ASKED. I'LL MAKE SURE HE
21 UNDERSTANDS THAT.

22 MR. HOWE: AND JUDGE, I'M GOING TO PUT – PURPOSES OF DOING THIS
23 JUST TO MAKE THINGS SIMPLE, I'M GOING TO, IF I MAY, PUT IT, TAKE IT
24 OUTSIDE THE BOX.

25 THE COURT: ALL RIGHT. YOU CAN BRING THEM IN.

1 (JURY IN AT 2:58 PM)

2 THE COURT: THANK YOU, LADIES AND GENTLEMEN, AGAIN, I
3 APOLOGIZE FOR HAVING TO MAKE YOU SIT BACK THERE, BUT WE'VE BEEN
4 HANDLING SOME MATTERS THAT, HOPEFULLY, WE'VE TAKEN CARE OF AND
5 WON'T HAVE TO DO THIS AFTERNOON. ALL RIGHT. YOU CAN CALL YOUR
6 NEXT WITNESS.

7 MR. HOWE: THANK YOU, YOUR HONOR. WE CALL MIKE FRANKLIN.

8 (AFTER BEING DULY SWORN BY THE CLERK OF
9 COURT, MR. FRANKLIN TESTIFIED AS FOLLOWS)

10 CLERK OF COURT: STATE YOUR FULL NAME.

11 WITNESS: MICHAEL FRANKLIN.

12 THE COURT: MR. FRANKLIN, BE SURE THAT YOU ONLY ANSWER THE
13 QUESTIONS THAT ARE ASKED, OKAY.

14 WITNESS: YES, SIR.

15 THE COURT: ALL RIGHT. THANK YOU.

16 MR. HOWE: THANK YOU, JUDGE.

17 DIRECT EXAMINATION OF MR. FRANKLIN BY MR. HOWE:

18 Q YOU'RE MIKE FRANKLIN, RIGHT?

19 A YES, SIR. I AM.

20 Q MR. FRANKLIN, I THINK I CALLED YOU A LITTLE BIT EARLIER AND ASKED
21 YOU TO COME BACK UP HERE. IS THAT RIGHT?

22 A YES, SIR.

23 Q ALL RIGHT. THANK YOU. NOW, YOU ARE ^{Minor} GRANDFATHER. IS
24 THAT RIGHT?

25 A YES, SIR. I AM.

1 Q ALL RIGHT. NOW, I'M GOING TO ASK YOU -- I'M GOING TO SHOW YOU
2 TWO ITEMS HERE AND ASK YOU IF YOU RECOGNIZE THESE.

3 A YES, SIR. I DO.

4 Q OKAY. AND ONE OF THEM IS A BLANKET. CORRECT?

5 A YES, SIR.

6 Q AND ONE OF THEM IS A NIGHTSHIRT. IS THAT CORRECT?

7 A YES, SIR. IT IS.

8 Q AND DID YOU AT SOME POINT IN TIME GET THESE ITEMS?

9 A YES, SIR. I DID.

10 Q AND WHERE DID YOU GET THEM FROM?

11 A I GOT THEM OUT OF THE HOUSE WHERE THEY WAS -- THEY WERE HID
12 IN THE HOUSE AND I FOUND THEM IN THE HOUSE

13 Q IN THE HOUSE. OKAY.

14 A YES, SIR.

15 Q HID IN THE HOUSE AND THE HOUSE YOU'RE TALKING ABOUT WOULD BE
16 THE HOUSE THAT MICHELLE AND ^{Minor} WERE LIVING IN?

17 A YES, SIR.

18 Q OKAY. AND YOU GOT THESE ITEMS AND YOU TOOK THEM TO WHERE?

19 A I GOT A HOLD OF VICKIE WHITE AND WHEN I PULLED THEM OUT, I
20 TURNED AROUND AND HANDED THEM STRAIGHT TO HER.

21 Q OKAY. TO VICKIE WHITE.

22 A YES, SIR.

23 Q AND THERE'S NO DOUBT THOSE ARE THE ONES YOU TURNED IN.

24 A YES, SIR.

25 MR. HOWE: ALL RIGHT. THAT'S ALL THE QUESTIONS I HAVE OF THIS

1 WITNESS.

2 THE COURT: ALL RIGHT. YES, SIR.

3 MR. FLEMING: THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT.

4 THE COURT: YES, SIR.

5 CROSS EXAMINATION OF MR. FRANKLIN BY MR. FLEMING:

6 Q MR. FRANKLIN.

7 A YES, SIR.

8 Q DO YOU KNOW IF THIS NIGHTSHIRT AND THIS SLEEPING BAG WERE
9 USED OR WORN BY ^{Minor} DONALD WEATHERALL SEXUALLY
10 MOLESTED HER?

11 A I DID NOT SEE THE NIGHTGOWN ON AND SO —

12 Q YOU WEREN'T THERE AND SO YOU DON'T KNOW WHAT SHE WAS
13 WEARING OR WHAT SHE WAS LAYING ON. DO YOU?

14 A NO, SIR. I DO NOT. I WAS NOT THERE AT THE HOUSE.

15 Q THANK YOU. NO FURTHER QUESTIONS.

16 MR. HOWE: NO RE-DIRECT.

17 THE COURT: THANK YOU, SIR. YOU'RE EXCUSED.

18 MR. HOWE: THANK YOU, MR. FRANKLIN.

19 WITNESS: THAT'S IT?

20 MR. HOWE: YES, SIR. WE CALL PATTY RUFF.

21 (AFTER BEING DULY SWORN BY THE CLERK OF COURT,
22 PATTY ROOF TESTIFIED AS FOLLOWS:)

23 CLERK OF COURT: STATE YOUR FULL NAME, PLEASE.

24 WITNESS: PATTY BROWNING RUFF. R-U-F-F.

25 DIRECT EXAMINATION OF PATTY RUFF BY MR. HOWE:

1 Q MS. RUFF, TELL US WHERE YOU ARE EMPLOYED.

2 A I AM EMPLOYED BY THE SOUTH CAROLINA LAW ENFORCEMENT

3 DIVISION, WHICH IS COMMONLY KNOWN AS SLED.

4 Q AND WHAT DO YOU DO WITH THEM?

5 A I AM A FORENSIC EVIDENCE TECHNICIAN.

6 Q WHAT DOES A FORENSIC EVIDENCE TECHNICIAN DO?

7 A I AM RESPONSIBLE FOR PROCESSING EVIDENCE FOR THE DNA

8 DEPARTMENT AND THE TRACE DEPARTMENT. I COLLECT EVIDENCE

9 SUCH AS: BODY FLUIDS, WHICH MAY BE SEMEN, BLOOD, PERSPIRATION,

10 SKIN CELLS. FOR THE TRACE DEPARTMENT, I COLLECT HAIR AND

11 FIBERS AND DEBRIS.

12 Q OKAY. WHAT ARE YOUR -- WHAT IS YOUR EDUCATIONAL LEVEL?

13 A I HAVE AN ASSOCIATE DEGREE FROM THE UNIVERSITY OF SOUTH

14 CAROLINA. I WAS TRAINED BY DNA ANALYSTS WHO ALL HAVE BEEN

15 QUALIFIED AS EXPERTS IN THE COURT OF LAW. I HAVE TRAINED AT

16 THE FBI CRIME LAB IN WASHINGTON, DC. I HAVE PROCESSED OVER A

17 THOUSAND CASES AND I HAVE TESTIFIED APPROXIMATELY FIFTY OR

18 SIXTY TIMES.

19 Q AND YOU HAVE TESTIFIED AS AN EXPERT IN WHAT AREA?

20 A IN EVIDENCE PROCESSING.

21 Q OKAY.

22 MR. HOWE: I -- YOUR HONOR, I ASK THAT SHE BE DECLARED TO BE AN

23 EXPERT IN EVIDENCE PROCESSING.

24 THE COURT: ANY OBJECTION?

25 MR. FLEMING: NO OBJECTION.

1 THE COURT: WITHOUT OBJECTION.

2 Q MS. RUFF, YOUR PARTICULAR AREA IN EVIDENCE PROCESSING IS
3 HAVING TO DO WITH DNA, CORRECT?

4 A DNA AND TRACE EVIDENCE.

5 Q OKAY. AND YOU ARE NOT ACTUALLY THE PERSON THAT DOES THE
6 DNA, THE ACTUAL TESTING. IS THAT RIGHT?

7 A THAT IS CORRECT. I DO THE PRESUMPTIVE TEST, WHICH MEANS THAT
8 IT'S A POSSIBILITY THAT IT MAY BE SEMEN OR BLOOD AND THEN I'LL
9 SEND THE SAMPLE TO THE DNA DEPARTMENT WHERE THEY WILL DO
10 FURTHER TESTING AND THE ACTUAL COMPARISONS.

11 Q ALL RIGHT. SO, IF IT DOESN'T GET BY YOU, THEN IT DOESN'T GO TO
12 THE ACTUAL DNA DEPARTMENT. IS THAT A FAIR STATEMENT?

13 A THAT IS CORRECT.

14 Q AND THAT'S WHAT YOU'VE BEEN TRAINED TO DO.

15 A THAT IS CORRECT.

16 Q COULD YOU TELL ME IF YOU HAVE HAD AN OCCASION TO DO ANYTHING
17 CONCERNING THIS PARTICULAR CASE WHERE THE SUBJECT IS DONALD
18 WEATHERALL AND THE VICTIM IS ^{Minor} AND THE COURT HAS – WE ARE
19 TRYING TO AVOID USING HER LAST NAME – AND I ASKED YOU TO BRING
20 THOSE RECORDS, AND HAVE YOU BEEN INVOLVED IN THAT MATTER?

21 A YES, I HAVE.

22 Q OKAY. COULD YOU LOOK THROUGH YOUR NOTES AND TELL US WHEN
23 YOU BECAME INVOLVED.

24 A I TOOK CUSTODY OF A SPONGE BOB SLEEPING BAG AND A PINK
25 NIGHTSHIRT ON AUGUST THE 9th, 2006.

1 Q OKAY. AND I'LL SHOW YOU THESE TWO ITEMS AND TELL ME IF THEY
2 ARE FAMILIAR TO YOU.

3 A YES, THEY ARE. I RECOGNIZE -- THESE ARE MY MARKINGS THAT I
4 MAKE. THESE AREAS THAT I CIRCLED, I PUT UNDER AN ALTERNATE
5 LIGHT SOURCE, SEMEN WILL FLORESE UNDER AN ALTERNATE LIGHT
6 SOURCE. SO WILL OTHER THINGS SUCH AS PERSPIRATION, SALIVA,
7 CLOTHES DETERGENT, FOOD, AND OTHER THINGS. AND THEN I DO A
8 CHEMICAL TEST. SO, ALL THESE MARKINGS ARE MINE.

9 Q WE'RE GOING TO COVER THAT IN JUST A SECOND.

10 MR. HOWE: YOUR HONOR, IF I COULD ASK THESE BE MARKED AS
11 DEFENDANT'S EXHIBITS #1 AND #2.

12 THE COURT: EXHIBITS. ALL RIGHT. ANY OBJECTION?

13 MR. FLEMING: NO, SIR.

14 THE COURT: ALL RIGHT. WITHOUT OBJECTION.

15 (WHEREAS, THE SPONGE BOB SLEEPING BAG AND PINK
16 NIGHTSHIRT ARE ENTERED INTO EVIDENCE WITHOUT OBJECTION AS
17 DEFENDANT'S EXHIBITS #1 AND #2.)

18 Q REFERRING TO EXHIBITS #1 AND #2, YOU ACTUALLY DID TESTING ON
19 THESE.

20 A THAT IS CORRECT.

21 Q OKAY. AND TELL THE JURY, AGAIN, EXACTLY WHAT YOU DID AND WHAT
22 YOU WERE LOOKING FOR.

23 A THE FIRST THING I DID ON THIS, SINCE THERE WAS A REQUEST FOR
24 PUBIC HAIR OR SEMEN. I DO A VISUAL EXAM FOR HAIRS AND DID A
25 SCRAPING PROCEDURE ON CLEAN WHITE PAPER. ANYTHING THAT

1 WOULD FALL OFF, I WOULD COLLECT. THE WAY THAT I SCRAPE IS WITH
2 A SPATULA. IN THIS CASE, I DID NOT FIND ANY HAIRS ON THIS CASE.
3 THE NEXT THING, LOOKING FOR SEMEN, I PUT IT UNDER AN ALTERNATE
4 LIGHT SOURCE, WHICH IS KIND OF LIKE A FLORESCENT BULB, A BLACK
5 LIGHT, AND CERTAIN THINGS WILL FLORESE OTHER THAN SEMEN. SO,
6 WHAT WE WILL DO IS, AREAS THAT DO FLORESE, WE CIRCLE.
7 BECAUSE WE'RE ACTUALLY IN A ROOM THAT'S DARK AND HAS A
8 SPECIAL LENSE LIGHT AND I HAVE GLASSES ON. I'LL CIRCLE THOSE
9 AREAS THAT THE LIGHTS ON AND I'LL DO A CHEMICAL TEST WHICH IS
10 CALLED, ACID PHOSPHATE SPOT TEST, WHICH WE CALL APS. AND
11 WHAT THAT IS, THERE IS ACTUALLY A CHEMICAL IN SEMEN CALLED
12 ACID PHOSPHATASE AND THEN WE ADD TO IT. AND SO WHAT I DO, THE
13 AREAS THAT I'VE CIRCLED, I'LL TOUCH THEM WITH A SWAB THAT HAD
14 BEEN DAMPENED WITH SALINE. THE NEXT STEP WOULD BE, PUT A
15 DROP OF APS ON THAT. IF IT TURNS LIKE A BRIGHT FUCHSIA COLOR,
16 THEN THAT MEANS IT IS A POSITIVE TEST. IT DOES NOT NECESSARILY
17 MEAN IT'S A POSITIVE FOR SEMEN, BUT IT MEANS THAT THERE IS A
18 POSSIBILITY THAT IT'S SEMEN. IF IT DOES NOT COME UP TO ANY
19 COLOR WHATSOEVER, THEN THAT MEANS IT'S NEGATIVE.

20 Q IN THIS PARTICULAR CASE, TESTING BOTH OF THE ITEMS WE'VE
21 REFERRED TO, DEFENSE EXHIBIT'S #1 AND #2, WAS ANYTHING POSITIVE
22 THAT WOULD MAKE YOU TAKE IT FURTHER AND SEND IT TO THE DNA
23 DEPARTMENT.

24 A NO, SIR. THERE WASN'T.

25 Q ALL RIGHT. AND DID YOU ACTUALLY MAKE A REPORT OF YOUR

1 FINDINGS?

2 A YES, I DID.

3 Q OKAY. AND DO YOU HAVE THAT REPORT?

4 A YES, I DO.

5 Q OKAY. MAY I SEE IT?

6 (WITNESS HANDS PAPER TO MR. HOWE)

7 MR. HOWE: YOUR HONOR, WE WOULD ASK THAT THIS BE INTRODUCED
8 INTO EVIDENCE AS DEFENDANT'S —

9 MR. FLEMING: YOUR HONOR —

10 THE COURT: ANY OBJECTION?

11 MR. FLEMING: YES, SIR, YOUR HONOR. I WOULD OBJECT THAT THIS
12 BOLSTERS HER TESTIMONY. SHE HAS ALREADY TESTIFIED TO THE RESULTS
13 OF THAT AND SO IT WOULD BOLSTER HER TESTIMONY.

14 THE COURT: MA'AM, DID YOU PREPARE THIS REPORT?

15 WITNESS: YES, I DID.

16 THE COURT: ALL RIGHT. OVERRULED. I'LL ALLOW IT.

17 (MS. RUFF'S REPORT IS ENTERED INTO EVIDENCE AS
18 DEFENSE EXHIBIT #3.)

19 Q AND, IF YOU COULD TELL ME, THE DATE OF THAT REPORT AND WHO
20 YOU SENT THAT REPORT TO.

21 A THE REPORT IS DATED AUGUST 9, 2006, AND THE REPORT WAS SENT
22 TO LIEUTENANT VICTORIA M. WHITE.

23 Q AND SHE IS EMPLOYED, ACCORDING TO THAT...

24 A LAURENS COUNTY SHERIFF'S DEPARTMENT.

25 Q THANK YOU. NOW, ON THIS PARTICULAR CASE, WERE YOU ASKED TO

1 TEST ANY OTHER ITEMS OR ARTICLES OF CLOTHING OR ANY OTHER
2 BLANKETS?

3 A NO, SIR. I WAS NOT.

4 Q I'M SHOWING YOU, STATE'S EXHIBIT #1, AND ASK YOU IF YOU HAVE
5 EVER SEEN THAT BEFORE.

6 A NO, SIR. I HAVE NOT.

7 Q AND YOU DIDN'T TEST IT.

8 A NO. I DID NOT.

9 Q OKAY. IN YOUR TRAINING AND EXPERIENCE, MS. RUFF, WOULD YOU
10 TELL THE JURY HOW LONG DNA EVIDENCE, SUCH AS HAIR AND SEMEN,
11 HOW LONG COULD THAT POSSIBLY REMAIN ON AN ARTICLE OF
12 CLOTHING OR A BLANKET, FOR INSTANCE.

13 A WELL, WE'VE HAD CASES, FROM MY EXPERIENCE – FOR EXAMPLE, I'M
14 WORKING ON A CASE NOW THAT IS TWENTY YEARS OLD AND WE CAN
15 STILL GET DNA FROM IT. AS LONG AS IT HAS BEEN PRESERVED IN A
16 CERTAIN MANNER – OF COURSE, IF IT'S ALLOWED TO BE OUT IN THE
17 WEATHER AND THINGS OF THAT NATURE, THEN OF COURSE, THE DNA
18 COULD BE DECOMPOSED, BUT IF IT'S IN A ROOM WHERE THE
19 TEMPERATURE IS CONTROLLED AND IN AN ENVIRONMENT LIKE THAT, IT
20 CAN LAST A VERY LONG TIME.

21 Q OKAY. AND SO, USING STATE'S EXHIBIT #1, AS AN EXAMPLE, ASSUMING
22 IT HAD BEEN PROPERLY PRESERVED, NOT OUT IN THE WEATHER FOR
23 INSTANCE, IF THERE WERE DNA SUCH AS HAIR OR SEMEN STILL ON
24 THIS PARTICULAR BLANKET, IF GIVEN THE OPPORTUNITY, YOU COULD
25 VERY WELL FIND IT.

1 A THAT'S A POSSIBILITY.

2 Q YOU DON'T KNOW, BECAUSE YOU HAVEN'T HAD THAT OPPORTUNITY.

3 A RIGHT.

4 Q THAT'S ALL THE QUESTIONS I HAVE. WOULD YOU ANSWER ANY
5 QUESTIONS MR. FLEMING OR THE COURT MAY HAVE.

6 MR. FLEMING: MAY IT PLEASE THE COURT, YOUR HONOR.

7 THE COURT: YES, SIR.

8 **CROSS EXAMINATION OF MS. RUFF BY MR. FLEMING:**

9 Q MS. RUFF, YOU TESTED THESE TWO ITEMS HERE AS YOU TESTIFIED.
10 CORRECT?

11 A THAT'S CORRECT.

12 Q YOU DON'T HAVE ANY PERSONAL KNOWLEDGE OF WHETHER THESE
13 ITEMS WERE EITHER WORN OR BEING USED BY THE FEMALE VICTIM AT
14 THE TIME THE DEFENDANT SEXUALLY MOLESTED HER, DO YOU?

15 A NO. I DO NOT.

16 Q THE -- THIS BLANKET HERE, LET ME ASK YOU A QUESTION ABOUT THAT.
17 YOU DIDN'T TEST IT, IF THIS BLANKET, IF NO BODY KNEW ABOUT THIS
18 BLANKET AND IT WAS WASHED IN THE WASHING MACHINE --

19 MR. HOWE: OBJECTION, YOUR HONOR. THAT CALLS FOR
20 SPECULATION.

21 THE COURT: SHE'S AN EXPERT. I'LL ALLOW HER TO ANSWER THAT.

22 Q IF IT WAS WASHED IN A WASHING MACHINE, WOULD IT DO YOU ANY
23 GOOD TO TEST IT?

24 A DEPENDING, OF COURSE, ON HOW IT WAS WASHED AND DETERGENT
25 WAS USED AND THINGS LIKE THAT.

1 Q IF DETERGENT WAS USED AND IT WAS WASHED IN A WASHING
2 MACHINE, WOULD IT DO ANY GOOD FOR YOU TO TEST IT?

3 A MOST LIKELY NOT.

4 MR. FLEMING: NO FURTHER QUESTIONS, YOUR HONOR.

5 THE COURT: ANY FOLLOW-UP?

6 MR. HOWE: NO, SIR. I DON'T HAVE ANY, JUDGE.

7 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

8 MR. HOWE: WITH PERMISSION, CAN SHE BE EXCUSED?

9 THE COURT: ALL RIGHT, WITHOUT OBJECTION. THANK YOU. YES, SIR.

10 MR. HOWE: YOUR HONOR, COULD I TAKE A SHORT BREAK?

11 THE COURT: SURE. LADIES AND GENTLEMEN, I'M GOING TO GIVE YOU
12 A FIFTEEN-MINUTE BREAK WHILE WE LINE UP SOMEONE ELSE. PLEASE DON'T
13 DISCUSS THE CASE. THANK YOU.

14 (JURY OUT AT 3:16 PM)

15 THE COURT: OKAY. Y'ALL TAKE A MINUTE. YOU ARE WAITING ON A
16 WITNESS?

17 MR. HOWE: WE'RE DISCUSSING SOMETHING RIGHT NOW.

18 THE COURT: ALL RIGHT. THANK YOU.

19 MR. FLEMING: I MAY HAVE WAITED TOO LATE, BUT IT IS MY
20 UNDERSTANDING THAT MR. HOWE INTRODUCED THE REPORT INTO
21 EVIDENCE. THAT REPORT IS BASED ON THOSE TWO ITEMS. HE HAS NOT
22 PROVEN THE CHAIN OF CUSTODY ON THOSE TWO ITEMS, SO THEREFORE,
23 THE REPORT, I DON'T SEE HOW HE CAN GET THAT INTO EVIDENCE AS WELL
24 BECAUSE THE ITEMS THE REPORT IS BASED ON, THE CHAIN OF CUSTODY
25 HAS NOT BEEN PROVEN.

1 THE COURT: THAT WOULD GO TO THE WEIGHT ON THESE TWO THINGS
2 BECAUSE BASICALLY, THE TESTIMONY WAS THAT THE GRANDFATHER
3 BROUGHT THEM IN AND THEN SHE IDENTIFIED THEM. I UNDERSTAND YOUR
4 OBJECTION TO IT, BUT SINCE IT'S A DEFENSE EXHIBIT, SHE'S AN EXPERT, SHE
5 IDENTIFIED THEM, IDENTIFIED THE TESTING OF THEM AND ISSUED A REPORT,
6 I'M GOING TO ALLOW IT. I ASSUME THAT REPORT SAYS THERE IS NO DNA.

7 MR. FLEMING: YES, SIR.

8 THE COURT: OKAY. NO, YOU HAVEN'T WAITED TOO LATE. I THINK THEY
9 CAME IN AFTER SHE IDENTIFIED THEM.

10 MR. FLEMING: OKAY.

11 THE COURT: ALL RIGHT. THANKS.

12 (COURT RESUMES AFTER A BRIEF BREAK)

13 THE COURT: OKAY. YOU'VE GOT YOUR LADY HERE AND YOU WANT TO
14 PROFFER THAT?

15 MR. HOWE: I DO, JUDGE.

16 (AFTER BEING DULY SWORN BY THE CLERK OF COURT,
17 TONYA HUGHES TESTIFIED AS FOLLOWS:)

18 CLERK OF COURT: PLEASE STATE YOUR FULL NAME.

19 WITNESS: TONYA RENEE HUGHES.

20 PROFFERED - DIRECT EXAMINATION OF TONYA HUGHES BY MR. HOWE:

21 Q MS. HUGHES, WHO ARE YOU EMPLOYED BY?

22 A SOUTHEASTERN INSURANCE GROUP.

23 Q AND THEY ACTUALLY PROVIDE MEDICAL SERVICES, NURSING
24 SERVICES, AT THE LAURENS COUNTY DETENTION CENTER?

25 A THAT'S CORRECT.

1 Q AND IN THAT CAPACITY, WERE YOU ASKED BY -- PURSUANT TO COURT
2 ORDER TO DO HERPES TESTING ON DONALD WEATHERALL?

3 A YES, I WAS.

4 Q AND DID YOU ACTUALLY TAKE THE STEPS NECESSARY TO GET HIM
5 TESTED FOR HERPES?

6 A I DID. YES.

7 Q OKAY. AND THOSE -- YOU DIDN'T ACTUALLY DO IT, THOSE WERE SENT
8 OFF.

9 A THAT'S CORRECT.

10 Q AND WHO DID -- CAN YOU LOOK AT YOUR NOTES, THE ACTUAL TEST
11 AND TELL ME WHO THAT WENT TO.

12 A QUEST DIAGNOSTICS.

13 MR. HOWE: AND JUDGE, FOR THE RECORD, WE HAD ALREADY
14 STIPULATED THAT RATHER THAN BRINGING IN QUEST, IF THIS CASE --

15 THE COURT: ALL RIGHT.

16 Q AND, COULD YOU TELL, DO YOU, IN FACT, HAVE THOSE RESULTS, AND
17 BROUGHT THEM WITH YOU?

18 A YES, I DID.

19 Q DID YOU PROVIDE THOSE TO BOTH MR. RON FLEMING AND MYSELF.

20 A YES, I DID.

21 Q ALL RIGHT. AND COULD YOU LET ME SEE THE RESULTS PLEASE?

22 COULD YOU TAKE THEM OUT? I'D LIKE TO MAKE THEM A DEFENSE

23 EXHIBIT. AND WHILE YOU'RE LOOKING, DOES -- DID MR. WEATHERALL,

24 IN FACT, HAVE HERPES SIMPLEX ONE OR HERPES SIMPLEX TWO?

25 A NOT BY THESE RECORDS. NO.

1 **MR. HOWE:** YOUR HONOR, WE WOULD ASK THAT THIS BE JUST ONE
2 DOCUMENT MARKED AS A DEFENSE EXHIBIT.

3 **THE COURT:** ALL RIGHT. ANY OBJECTION?

4 **MR. FLEMING:** NOT AS AN EXHIBIT.

5 **THE COURT:** YOU MARKING IT AS AN EXHIBIT OR YOU WANT TO
6 INTRODUCE IT?

7 **MR. HOWE:** WELL, I'M ASKING THAT IT BE INTRODUCED, BUT, YOU
8 KNOW, IN HER TESTIMONY, BUT SUBJECT TO THE COURT'S RULING. THAT'S
9 WHAT WOULD BE REQUESTED, THAT IT ACTUALLY BE INTRODUCED.

10 **THE COURT:** YES, AS PART OF THE EXHIBIT. ASK HER TO IDENTIFY IT
11 FIRST.

12 **MR. HOWE:** ALL RIGHT.

13 **Q** **ARE THESE IN FACT THE RECORDS THAT YOU RECEIVED?**

14 **A** **YES, SIR. THEY ARE.**

15 **MR. HOWE:** YOUR HONOR, I WOULD BE ASKING FOR THESE TO BE
16 INTRODUCED INTO EVIDENCE AS DEFENSE EXHIBIT.

17 **THE COURT:** ALL RIGHT. ANY OBJECTION TO THAT?

18 **MR. FLEMING:** OBJECTION TO RELEVANCE.

19 **THE COURT:** ALL RIGHT. OVERRULED. I'LL ALLOW YOU TO INTRODUCE
20 IT.

21 (WHEREAS, TEST RESULTS ARE ENTERED INTO EVIDENCE
22 AS DEFENSE EXHIBIT #4 - PROFFERED)

23 **Q** **ANSWER ANY QUESTIONS THAT MR. FLEMING OR THE COURT MAY**
24 **HAVE.**

25 **A** **YES, SIR.**

1 THE COURT: ANY QUESTIONS?

2 MR. FLEMING: NO, SIR, YOUR HONOR. I'M A LITTLE VAGUE ON YOUR
3 RULING. IS THAT INTRODUCED INTO EVIDENCE?

4 THE COURT: YES. THEY ARE HER RECORDS, THEY ARE IDENTIFIED AS
5 HER BUSINESS RECORDS. THIS IS JUST FOR THE PROFFERED TESTIMONY.

6 MR. FLEMING: OH. OKAY. YES, SIR.

7 THE COURT: ALL RIGHT. THANK YOU. YOU MAY STEP DOWN.

8 WITNESS: OKAY.

9 MR. HOWE: JUDGE, WE WOULD ASK THAT SHE BE EXCUSED.

10 THE COURT: NO OBJECTION?

11 MR. FLEMING: NO OBJECTION.

12 THE COURT: ALL RIGHT. ONE THING WE NEED TO MAKE SURE IS THAT
13 ANY EVIDENCE ENTERED INTO THE PROFFERED TESTIMONY DOESN'T GO
14 BACK.

15 MR. HOWE: YES, SIR.

16 MR. FLEMING: YES, SIR.

17 THE COURT: OKAY. YOU WANT TO GO AHEAD AND PUT ON THE
18 RECORD THE WAIVER OF THE FIFTH AMENDMENT?

19 MR. HOWE: PLEASE.

20 THE COURT: HAVE YOU EXPLAINED THAT TO HIM?

21 MR. HOWE: I HAVE, YOUR HONOR.

22 THE COURT: IF YOU WOULD, SIR, COME ON UP AND I'M GOING TO HAVE
23 YOU -- SWEAR YOU IN OVER HERE, PLEASE.

24 (MR. WEATHERALL DULY SWORN BY THE CLERK OF COURT)

25 THE COURT: ALL RIGHT. IF YOU WOULD, GIVE US YOUR NAME FOR THE

1 RECORD.

2 DEFENDANT: DONALD THOMAS WEATHERALL.

3 THE COURT: MR. WEATHERALL, I NEED TO EXPLAIN AT THIS POINT IN
4 THE TRIAL WHAT YOUR RIGHTS ARE. I KNOW YOUR ATTORNEY HAS TOLD ME
5 THAT YOU HAVE DECIDED NOT TO TESTIFY, BUT I HAVE TO TELL YOU THAT
6 YOU HAVE CERTAIN RIGHTS REGARDING YOUR TESTIMONY WHETHER YOU
7 DECIDE TO OR NOT. AGAIN, EVEN THOUGH YOU MAY HAVE DECIDED, I NEED
8 TO PUT ON THE RECORD WHAT THEY ARE. IF YOU HAVE A QUESTION ABOUT
9 ANYTHING, PLEASE STOP ME.

10 YOU HAVE A RIGHT TO CLAIM THE PROTECTIONS OF THE FIFTH
11 AMENDMENT OF THE CONSTITUTION WHICH SAYS, IN PART, NO PERSON
12 SHALL BE COMPELLED IN A CRIMINAL CASE TO BE A WITNESS AGAINST
13 THEMSELF. IF YOU DECIDE TO TESTIFY OR NOT TO TESTIFY, IT HAS TO BE
14 YOUR DECISION ONLY. YOU CAN TALK WITH YOUR LAWYER, YOU CAN TALK
15 TO YOUR FAMILY, YOU CAN DO ANYTHING THAT YOU WANT, BUT IT HAS TO BE
16 FREELY, VOLUNTARILY AND KNOWINGLY MADE. IF YOU DECIDE NOT TO
17 TESTIFY, THEN I'M GOING TO INSTRUCT THE JURY THAT THEY CANNOT DRAW
18 ANY INFERENCE FROM THAT, THEY CAN'T DRAW ANY CONCLUSIONS FROM
19 THE FACT THAT YOU DIDN'T TESTIFY, AND ALSO, THAT THEY CANNOT EVEN
20 CONSIDER THE FACT THAT YOU DIDN'T TESTIFY. ON THE OTHER HAND, IF
21 YOU DO TESTIFY, YOU WILL BE SUBJECT TO THE IMPEACHMENT UNDER THE
22 LAWS OF THE STATE OF SOUTH CAROLINA. BUT, THE DECISION HAS TO BE
23 YOURS AND IT HAS TO BE YOURS ONLY.

24 SO, HAVE YOU DECIDED WHETHER OR NOT YOU'RE GOING TO TESTIFY?

25 DEFENDANT: YES, I HAVE.

1 THE COURT: AND WHAT ARE YOU GOING TO DO?

2 DEFENDANT: I'M NOT GOING TO TESTIFY.

3 THE COURT: AND THAT'S YOUR DECISION?

4 DEFENDANT: THAT'S MY DECISION.

5 THE COURT: HAVE YOU TALKED TO YOUR LAWYER ABOUT IT?

6 DEFENDANT: YES, SIR.

7 THE COURT: AND YOU UNDERSTAND YOUR FIFTH AMENDMENT
8 RIGHTS?

9 DEFENDANT: YES, SIR.

10 THE COURT: OKAY. THANK YOU. YOU CAN STEP DOWN. ALL RIGHT.
11 I'M GOING TO BRING THEM BACK IN AND THEN YOU'RE RESTING?

12 MR. HOWE: YES, SIR.

13 THE COURT: ALL RIGHT. START AT 10:00 AM TOMORROW MORNING
14 WITH ARGUE AND CHARGE?

15 MR. FLEMING: YES, SIR.

16 MR. HOWE: YES, SIR.

17 THE COURT: BRING THEM BACK IN.

18 (JURY RETURNS AT 3:42 PM)

19 THE BAILIFF: ALL PRESENT, YOUR HONOR.

20 THE COURT: THANK YOU. YOU MAY BE SEATED. CALL YOUR NEXT
21 WITNESS.

22 MR. HOWE: YOUR HONOR, THE DEFENSE RESTS.

23 THE COURT: ANY REBUTTAL?

24 MR. FLEMING: NO REBUTTAL.

25 THE COURT: LADIES AND GENTLEMEN, YOU'VE HEARD ALL THE

1 TESTIMONY YOU ARE GOING TO HEAR IN THIS CASE. WE HAVE NOW
2 REACHED THE POINT IN THE TRIAL WHERE THE ATTORNEYS HAVE THE
3 OPPORTUNITY TO GIVE THEIR CLOSING ARGUMENTS AND THEN I AM GOING
4 TO CHARGE YOU ON THE LAW IN THIS CASE. WE ARE NOT GOING TO START
5 THAT THIS AFTERNOON BECAUSE THAT WILL TAKE A GOOD WHILE FOR THE
6 ARGUE AND CHARGE TO TAKE PLACE. WE WILL START AT 10:00 AM
7 TOMORROW MORNING. YOU WON'T HEAR ANY MORE TESTIMONY, BUT
8 TOMORROW MORNING AT 10:00 AM THE ATTORNEYS FOR BOTH THE STATE
9 AND THE DEFENDANT WILL HAVE AN OPPORTUNITY TO GIVE THEIR CLOSING
10 ARGUMENTS AND I WILL TELL YOU THEN, BUT I'M GOING TO TELL YOU NOW, IT
11 IS NOT EVIDENCE. AFTER THAT I HAVE TO READ TO YOU A FAIRLY LONG
12 COMPILATION OF THE LAW IN THIS CASE. I'M SORRY I HAVE TO READ IT, BUT
13 THAT'S SOMETHING THAT I HAVE TO DO MAINLY BECAUSE IT IS VERY
14 IMPORTANT THAT YOU UNDERSTAND THAT THE LAW THAT I GIVE TO YOU
15 TOMORROW IS THE LAW THAT YOU APPLY TO THE FACTS IN THIS CASE. SO, I
16 APOLOGIZE UP FRONT THAT I HAVE TO READ IT TO YOU, BUT I WILL READ IT
17 TOMORROW. I SUSPECT THAT THE ARGUMENTS AND THE CHARGE WILL
18 TAKE US THROUGH LUNCH. I ALSO EXPECT THAT WE WILL GET THIS CASE TO
19 YOU FOR DELIBERATIONS AROUND LUNCH TIME AND WE WILL ORDER LUNCH
20 FOR YOU. ONCE YOU GET THE CASE, YOU'LL BE BACK THERE UNTIL YOU
21 TELL ME OTHERWISE. SO, AS I'VE TOLD YOU EVERY DAY THIS WEEK, DON'T
22 TALK ABOUT THE CASE, DON'T READ ANYTHING - I HAVEN'T SEEN ANYTHING
23 IN THE PAPER AND I'VE BEEN LOOKING, BUT DON'T READ ANYTHING, DON'T
24 LISTEN TO ANYTHING. I APOLOGIZE FOR THE AMOUNT OF DELAYS TODAY.
25 THEY WERE NECESSARY AND THAT IS ALL I CAN TELL YOU. SO, HAVE A GOOD

1 NIGHT, BE READY TO BEGIN TOMORROW MORNING AND BEGIN YOUR
2 DELIBERATIONS. ANYBODY CONTACTS YOU, LET ME KNOW TOMORROW
3 MORNING. SEE YOU AT 10:00 AM.

4 (JURY OUT AT 3:44 PM)

5 THE COURT: OKAY. ANY MOTIONS OR ANYTHING ELSE BEFORE WE
6 BREAK FOR THE DAY?

7 MR. FLEMING: NOTHING FROM THE STATE, YOUR HONOR.

8 MR. HOWE: YES. I'D LIKE TO RENEW THE MOTION THAT I MADE AT THE
9 CLOSE OF THE STATE'S CASE.

10 THE COURT: FOR THE RECORD, YOU'RE PROTECTED AND THAT
11 MOTION IS DENIED. WE'LL START TOMORROW AT 10:00 AM. I WILL HAVE THIS
12 CHARGE FOR YOU TOMORROW MORNING. I'VE GOT TO MAKE SOME
13 CHANGES.

14 MR. FLEMING: THANK YOU, YOUR HONOR.

15 MR. HOWE: AND JUDGE, YOU'RE GOING TO GIVE US AN OPPORTUNITY
16 IF THERE IS ANY AUTHORITY ON WHETHER OR NOT THE ATTEMPT COMES IN.

17 THE COURT: YES. I'VE LOOKED. I DON'T THINK YOU'RE GOING TO FIND
18 ANYTHING, BUT SURE, I'LL BE HAPPY TO LISTEN TO IT. SEE YOU TOMORROW
19 MORNING.

20 MR. FLEMING: THANK YOU, JUDGE.

21 MR. HOWE: THANK YOU.

22 (COURT RESUMES AT 10:00 AM)

23 THE COURT: WE'VE HAD A CHANCE TO PRETTY EXHAUSTIVELY GO
24 OVER THE CHARGE. LET ME PUT ON THE RECORD WHAT I'M GOING TO DO
25 AND THEN YOU CAN PUT ON THE RECORD ANY OBJECTIONS. THE PROBLEM

1 I'VE BEEN HAVING, AND THE PROBLEM THAT -- THERE'S A LOGICAL PROBLEM,
2 IT SEEMS TO ME, WITH HAVING CRIMINAL SEXUAL CONDUCT OUT OF THE
3 CASE. WE ARE CHARGING ATTEMPTED CRIMINAL SEXUAL CONDUCT
4 BECAUSE THE ELEMENTS OF SEXUAL CONDUCT MAY NOT BE THERE. SO,
5 WHAT I'M GOING TO DO IS, I'M GOING TO CHARGE MY NORMAL CHARGE
6 INCLUDING BOTH REASONABLE DOUBT CHARGES. IN ADDITION TO THAT I'M
7 GOING TO CHARGE THE STATUTORY ASSAULT WITH ATTEMPT TO COMMIT
8 CRIMINAL SEXUAL CONDUCT. BASICALLY, IT'S GOING TO BE THE FIRST
9 DEGREE CRIMINAL SEXUAL CONDUCT CHARGE WITH FIRST DEGREE CRIMINAL
10 CONDUCT STRICKEN, AND IT WILL BE ASSAULT WITH INTENT TO COMMIT. I
11 THINK THAT IS THE SAME THING AS ATTEMPTED, BASED UPON MY REVIEW OF
12 CASES. I WAS LOOKING AT IT LAST NIGHT, ALTHOUGH IT'S HARD TO TELL
13 WITH SOME OF THE CASES. AND THEN I'M ALSO GOING TO CHARGE AS A
14 LESSER INCLUDED, THE ASSAULT AND BATTERY OF A HIGH AND
15 AGGRAVATED NATURE WHICH INCLUDES ALL OF THE ELEMENTS OF ASSAULT
16 TO ATTEMPT CRIMINAL SEXUAL CONDUCT EXCEPT PENETRATION. AND THEN
17 I'LL CHARGE LEWD ACT, WHICH IS PRETTY STRAIGHTFORWARD. AND WHEN I
18 GET TO THE ASSAULT WITH INTENT TO COMMIT, I'M GOING TO CHARGE A
19 BLACK LETTER CASE LAW ON ASSAULT, WHICH IS BASICALLY, IT'S WHEN A
20 PERSON UNLAWFULLY ATTEMPTS OR INFLECTS A VIOLENT INJURY AGAINST
21 ANOTHER PERSON AND HAS THE PRESENT ABILITY TO COMPLETE THE
22 INJURY. I THINK THAT SOLVES THE PROBLEM AS FAR AS I'M CONCERNED. I
23 UNDERSTAND Y'ALL MIGHT OBJECT TO IT, AND NOW IS YOUR TIME.
24 ALTHOUGH, I'LL LET YOU OBJECT AFTER I DO IT, TOO. SO, I UNDERSTAND
25 THE DEFENSE WOULD LIKE ME TO CHARGE SOMETHING ELSE.

1 MR. HOWE: CORRECT, YOUR HONOR.

2 THE COURT: YOU'D LIKE ME TO CHARGE – WELL, YOU WOULD LIKE ME
3 NOT TO CHARGE THE ASSAULT WITH INTENT TO COMMIT.

4 MR. HOWE: THAT'S CORRECT. YOUR HONOR. I WOULD ARGUE THAT
5 THERE IS NO COMPETENT EVIDENCE THAT HAS BEEN INTRODUCED IN THIS
6 CASE TO ESTABLISH THERE WAS AN ASSAULT AND AS I SEE NOW, THE KEY
7 WORD WOULD BE THE INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT,
8 FIRST DEGREE, BASED ON THE ONLY TESTIMONY IN THIS CASE BEING FROM
9 THE MINOR, THE CHILD, WHERE SHE TESTIFIED THAT HE PUT HIS WEE-WEE
10 ON MY MONKEY. THERE WAS NO TESTIMONY AS I HEARD FROM HER THAT
11 THERE WAS AN ATTEMPT AND THAT – WE STILL HAVE TO USE ATTEMPT TO
12 ARGUE THIS, BUT THERE WAS AN ATTEMPT TO ACTUALLY COMMIT A SEXUAL
13 BATTERY, IN THAT THERE WAS NO EFFORT TO DO THAT AND THERE WAS NO
14 COMPETENT TESTIMONY THAT THAT ATTEMPT WAS MADE AND THAT IS THE
15 BASIS, YOUR HONOR, FOR MY OBJECTION TO YOUR CHARGING ASSAULT
16 WITH INTENT TO COMMIT CSC FIRST DEGREE BASED ON THE EVIDENCE THAT
17 WAS BEFORE THE COURT. ESPECIALLY WHEN YOU COUPLE THAT WITH THE
18 EVIDENCE OF THE CORROBORATING WITNESS, IF YOU WILL, MS. EHNEY, WHO
19 TESTIFIED TO JUST PURE TOUCHING. TO ME JUDGE, THERE WOULD HAVE TO
20 BE SOME EVIDENCE, TESTIMONY, THAT HE WAS ATTEMPTING TO PENETRATE
21 AND THERE WAS NO TESTIMONY TO THAT. AND THAT IS MY ARGUMENT AS
22 TO WHY, EVEN THOUGH I UNDERSTAND THE CASE LAW SAYS THAT THIS IS, IN
23 FACT, A LESSER INCLUDED CHARGE IN THIS CASE. THERE WAS NO
24 TESTIMONY OF AN ATTEMPT OR AN EFFORT TO DO THAT. AND THAT IS WHY,
25 YOUR HONOR, I WOULD ARGUE THAT IT WOULD NOT BE APPROPRIATE TO

1 ALLOW THE JURY TO CONSIDER THAT AND, TO BE QUITE FRANK WITH THE
2 COURT, I'M HAVING A HARD TIME FIGURING OUT WHEN -- AND I UNDERSTAND
3 IN OUR CHARGE CONFERENCE YOU INDICATED HOW YOU WOULD EXPLAIN TO
4 THE JURY THAT YOU HAD A DIRECTED VERDICT, NOT GUILTY ON THE
5 CRIMINAL SEXUAL CONDUCT, BUT WHEN THIS IS, THIS IS CHARGED, THE
6 ASSAULT, IT JUST SEEMS LIKE TO ME, KIND OF IMPROPERLY SINGLES THAT
7 OUT IN THIS PARTICULAR CASE. AND AGAIN, BUT MY ARGUMENT,
8 SPECIFICALLY IS -- AND THE COURT, I UNDERSTAND JUDGE, YOU'RE GOING
9 TO ATTEMPT TO CLEAN THAT UP AS BEST YOU CAN AND EXPLAIN THAT IN A
10 WAY THAT WILL BE AS VANILLA AS POSSIBLE --

11 THE COURT: YES.

12 MR. HOWE: -- BUT AGAIN, MY ARGUMENT IS THAT THE FACTS OF THE
13 CASE, BASED ON THE -- THE EVIDENCE THAT'S BEFORE THIS COURT, DOES
14 NOT ESTABLISH THE BASIS FOR LETTING IT GO TO THE JURY ON THAT. AND
15 THAT IS THE BASIS FOR MY ARGUMENT ON THAT ISSUE, JUDGE. THANK YOU.

16 THE COURT: WELL, AS I SAID, I THINK THAT THERE IS A PROBLEM,
17 LOGICALLY WITH THE STATUTE, BUT I THINK IT'S CLEANED UP WITH
18 CHARGING THE ASSAULT WITH INTENT. OKAY. WHAT I'LL DO IS, AFTER I
19 MAKE THE CHARGE, I'LL GIVE YOU THE RIGHT TO PUT IT ON THE RECORD
20 AGAIN.

21 MR. HOWE: YES, SIR. AND JUDGE, I APOLOGIZE, IF I COULD ADD ONE
22 MORE BASIS FOR THAT, I WOULD ALSO ARGUE THAT THE STATE HAD THE
23 OPPORTUNITY TO ACTUALLY INDICT FOR ASSAULT WITH INTENT AND THAT
24 WASN'T INDICTED. NOW, I UNDERSTAND THAT THE COURT -- THAT YOUR
25 RULING WOULD BE THAT THE COURT DOES, IN FACT, HAVE THE AUTHORITY

1 TO CHARGE A LESSER INCLUDED, YOU KNOW, AND IN THIS CASE, THE
2 LESSER INCLUDED IS A STATUTORY - IS §16-3-656, I GUESS, ALTHOUGH THAT
3 SPEAKS TO THE PENALTY. YOU KNOW, IT SEEMED LIKE TO ME THAT THE
4 STATE SHOULD HAVE INDICTED ON THAT AND IT HASN'T BEEN INDICTED ON
5 THAT AND I UNDERSTAND YOUR POSITION, JUDGE, YOU HAVE THAT
6 AUTHORITY, BUT I WANT TO MAKE THAT AS PART OF MY ARGUMENT AS WELL
7 FOR THE RECORD, JUDGE.

8 THE COURT: YES, I UNDERSTAND. OKAY. ANYTHING FURTHER BEFORE
9 WE ARGUE?

10 MR. FLEMING: NOTHING FROM THE STATE, YOUR HONOR.

11 THE COURT: I'M GOING TO TELL THEM RIGHT NOW I'VE DIRECTED A
12 VERDICT ON THE ASSAULT AND BATTERY SO THAT YOUR ARGUMENTS MAKE
13 SENSE, THAT THEY WILL HAVE TO DEAL WITH ASSAULT WITH INTENT AND I'LL
14 TELL THEM IN MY CHARGE WITH INTENT TO COMMIT, I'LL TELL THEM, I'LL
15 EXPLAIN THE LAW TO THEM.

16 MR. HOWE: THANK YOU. JUDGE, JUST FOR THE RECORD - RON, YOU
17 MIGHT WANT TO STEP UP WITH ME - THIS WAS PROFFERED, THE RESULTS
18 OF DEFENSE EXHIBIT #4 WAS PROFFERED, SO, IT'S NOT EVEN BEEN
19 TESTIFIED TO AT ALL BEFORE THE JURY.

20 THE COURT: RIGHT.

21 MR. HOWE: I THINK THAT'S THE ONLY BIT OF EVIDENCE, I BELIEVE,
22 THAT WAS PROFFERED.

23 THE COURT: THAT DOESN'T GO BACK?

24 MR. HOWE: YES, SIR. I KNOW IT DOESN'T GO BACK, BUT I'M JUST
25 SAYING, MAYBE WE CAN KEEP THAT SEPARATE FROM THE ITEMS THAT WERE

1 ACTUALLY INTRODUCED AS EXHIBITS, BUT WILL NOT BE NECESSARILY BE
2 EVIDENCE.

3 THE COURT: OKAY.

4 MR. HOWE: I WAS JUST THINKING OF DOING IT THAT WAY. AND I DON'T
5 HAVE A PROBLEM, RON, IF YOU DON'T, WITH JUST LEAVING THAT THERE
6 SINCE THAT SHOULDN'T EVEN BE OUT ON THE TABLE AT ALL AND I DON'T
7 WANT TO PICK UP THE WRONG THING.

8 THE COURT: ALL RIGHT.

9 MR. HOWE: THANK YOU.

10 THE COURT: ALL RIGHT. YOU CAN BRING THEM IN.

11 (JURY IN AT 11:11 AM)

12 THE BAILIFF: ALL PRESENT, YOUR HONOR.

13 THE COURT: THANK YOU, LADIES AND GENTLEMEN. LADIES AND
14 GENTLEMEN, THANK YOU AGAIN FOR YOUR PATIENCE. YOU'VE NOW HEARD
15 ALL OF THE TESTIMONY, AS I TOLD YOU YESTERDAY, THAT YOU'RE GOING TO
16 HEAR IN THIS CASE AND IT'S TIME FOR US TO MOVE INTO THE CLOSING
17 ARGUMENTS AND CHARGE PORTION OF THE TRIAL. I WANT TO TELL YOU ONE
18 THING BEFORE THE CLOSING ARGUMENTS. THE INDICTMENT THAT YOU WILL
19 HAVE WITH YOU IN THE BACK INCLUDES AN INDICTMENT FOR CRIMINAL
20 SEXUAL CONDUCT WITH A MINOR. AND I'M GOING TO CHARGE YOU ON THE
21 LAW AND EXPLAIN A LITTLE MORE ABOUT THAT IN A MINUTE. THAT CHARGE
22 HAS NOW BEEN CHANGED TO ASSAULT WITH INTENT TO COMMIT CRIMINAL
23 SEXUAL CONDUCT WITH A MINOR. AGAIN, I WILL TELL YOU WHY DURING MY
24 CHARGE, BUT I THINK YOU NEED TO KNOW THAT BEFORE THE CLOSING
25 ARGUMENTS ARE GIVEN TO YOU. THAT WAS DONE BY ME AFTER HEARING

1 THE EVIDENCE AND I WILL CHARGE YOU ON THE LAW WITH REGARDS TO
2 ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT WITH A
3 MINOR. BUT, THAT IS THE NEW CHARGE, ALONG WITH LEWD ATTEMPT OR
4 COMMITTING A LEWD ACT ON A CHILD UNDER THE AGE OF SIXTEEN. AGAIN,
5 WHEN I GET TO THE POINT WHEN I'M CHARGING THE LAW, I WILL EXPLAIN
6 THOSE TWO CHARGES.

7 I WANT TO REMIND YOU THAT CLOSING ARGUMENTS ARE NOT
8 EVIDENCE. THEY ARE MERELY THE ATTORNEY'S OPPORTUNITY TO ARGUE
9 THEIR CASE. THE OPENING STATEMENT WAS NOT EVIDENCE, BUT IT WAS A
10 CHANCE FOR THE ATTORNEYS TO SORT OF OUTLINE WHAT THEY ARE GOING
11 TO DO. CLOSING ARGUMENTS ARE ACTUALLY AN ARGUMENT. THEY ARE
12 GOING TO TRY TO SWAY YOU TO THEIR POSITION. IT IS NOT EVIDENCE. ANY
13 INFORMATION THEY GIVE YOU REGARDING THE LAW - IT'S FINE IF THEY DO
14 THAT, BUT AFTER THE CLOSING ARGUMENTS I WILL CHARGE YOU. AND AS I
15 TOLD YOU YESTERDAY, I WILL READ TO YOU A FAIRLY LONG CHARGE ON THE
16 LAW. BUT, WHAT I TELL YOU IN REGARDS TO THE LAW NEEDS TO BE
17 CONTROL, NOT WHAT LAWYERS TELL YOU. I DON'T KNOW, THAT HAPPENS
18 OCCASIONALLY. SOMEONE MAY TELL YOU SOMETHING THAT MAY BE A
19 LITTLE LONG. I'M NOT GOING TO CORRECT THEM AT THE TIME, BUT I WILL
20 CHARGE YOU ON THE LAW AND YOU NEED TO TAKE WHAT I SAY AS OPPOSED
21 TO WHAT THE LAWYERS SAY.

22 AGAIN, THIS PROCESS MAY TAKE AN HOUR, AN HOUR-AND-A-HALF. IF
23 YOU NEED A BREAK AT ANY TIME DURING THE COURSE OF THE CLOSING
24 ARGUMENTS OR MY CHARGE, JUST RAISE YOUR HAND AND GET MY
25 ATTENTION. DEPENDING ON HOW LONG CLOSING ARGUMENTS ARE, I MAY

1 GIVE YOU TEN MINUTES TO STRETCH YOUR LEGS BEFORE I CHARGE YOU,
2 MAINLY, BECAUSE MY CHARGE IS A FAIRLY LONG CHARGE, 30 PAGES. AND I'M
3 GOING TO READ IT, EVEN THOUGH I DON'T LIKE READING IT, BUT I READ IT
4 BECAUSE IT IS THE LAW THAT YOU HAVE TO APPLY AND SO I HAVE TO MAKE
5 SURE I'M EXACTLY CORRECT. SO, WE'LL DECIDE AFTER CLOSING
6 ARGUMENTS ARE FINISHED. AND IF YOU THINK YOU NEED A BREAK, JUST
7 RAISE YOUR HAND. I'LL BE HAPPY TO GIVE IT TO YOU. ALL RIGHT.

8 CLOSING ARGUMENT BY MR. HOWE:

9 MR. HOWE: IF IT PLEASE THE COURT. GOOD MORNING. FOLKS, WE
10 NOW COME TO THE END OF THE CASE WHERE, AS THE JUDGE SAID, WE MAKE
11 CLOSING ARGUMENTS. AND I WANT TO TELL Y'ALL, AT THE BEGINNING, THAT
12 I APPRECIATE VERY MUCH THE FACT THAT Y'ALL HAVE BEEN PATIENT IN THIS
13 CASE AND THAT YOU'VE LISTENED TO THE EVIDENCE, BECAUSE I'VE NOTICED
14 THAT Y'ALL HAVE BEEN LISTENING TO THE EVIDENCE IN THIS CASE.
15 REMEMBER WHEN I TALKED WITH YOU AT THE BEGINNING OF THE CASE,
16 THAT'S WHAT I TOLD YOU NEEDED TO DO, WAS FOCUS ON THAT AND
17 ELIMINATE THE PASSIONS AND EVERYTHING ELSE THAT GOES WITH
18 SOMETHING LIKE THIS AND I APPRECIATE IT AND I KNOW THAT Y'ALL HAVE
19 DONE THAT. AND I APPRECIATE Y'ALL BEING PATIENT. I KNOW YOU'VE
20 GOTTEN YOUR EXERCISE GETTING UP AND DOWN SOME AND DOING THAT. I
21 TAKE SOME CREDIT FOR THAT, MAKING YOU DO THAT. BUT, THAT'S PART OF
22 WHAT GOES INTO A TRIAL, YOU KNOW, TO TRY TO GET IT RIGHT, TO PRESENT
23 TO Y'ALL WHAT YOU NEED TO HEAR TO MAKE A FAIR DECISION IN THIS CASE.
24 AGAIN, I APPRECIATE IT AND MY CLIENT OVER THERE APPRECIATES THE
25 FACT THAT Y'ALL LISTENED, LISTENED TO THE CASE. AS I TOLD YOU, THIS IS

1 THE KIND OF THING WHERE EVERYBODY WAS A LITTLE UNCOMFORTABLE, NO
2 DIFFERENT – AND IT'S GOING TO BE THE SAME WHEN I TALK TO Y'ALL HERE
3 AT THE END OF THE CASE. THIS – YOU KNOW, I'M ALMOST 53 YEARS OLD AND
4 SOME OF THIS IS HARD TO TALK ABOUT. BUT, IT HAS TO BE TALKED ABOUT
5 BECAUSE THIS MAN HAS BEEN ACCUSED OF THESE THINGS AND WE NEED TO
6 GET DOWN TO WHAT HAPPENED AND YOU APPLY THE LAW THAT THE JUDGE
7 GIVES YOU. AND WE'RE GOING TO GET THROUGH THIS AND I'M GOING TO
8 ATTEMPT TO DO THIS.

9 NOW, THIS IS THE LAST CHANCE I WILL GET TO SAY ANYTHING TO Y'ALL
10 AND THE REASON FOR THAT IS THAT THE STATE, THE GOVERNMENT HAS THE
11 BURDEN OF PROOF IN THIS CASE. THEY HAVE TO PROVE TO EACH AND
12 EVERY ONE OF YOUR SATISFACTION BEYOND A REASONABLE DOUBT, THAT
13 MY CLIENT IS GUILTY OF SOMETHING. AND THEY HAVE TO PROVE THAT AND
14 AS I TOLD YOU AT THE BEGINNING, THE JUDGE IS GOING TO TELL YOU THE
15 LAW. AND AS HE SAID, YOU LISTEN TO HIM WHAT THE LAW IS. BUT, WE
16 DON'T HAVE TO PROVE – THE DEFENSE DOESN'T HAVE TO PROVE ONE
17 THING. NOT ONE THING. AND THE JUDGE IS GOING TO TELL YOU, WHATEVER
18 WE PUT UP IN THE WAY OF EVIDENCE, WHETHER OR NOT SOMEBODY WHO IS
19 ACCUSED TESTIFIES, DOESN'T TESTIFY, YOU DON'T HOLD IT AGAINST THEM
20 BECAUSE THEY DON'T HAVE TO DO IT. IT'S THE LAW. AND IT'S THERE FOR A
21 REASON. COMMON SENSE, SOMETIMES, A PERSON SAYS, "WELL, HE DIDN'T
22 TESTIFY, I'M GOING TO HOLD THAT AGAINST HIM." THAT'S NOT THE LAW AND
23 THE JUDGE IS GOING TO TELL YOU THAT. YOU ARE TO FOCUS ON THE
24 EVIDENCE THAT WAS PRESENTED IN THE CASE. AND AGAIN, THIS IS THE
25 LAST CHANCE I GET TO SPEAK. WHEN – AND I KNOW MR. FLEMING WILL DO A

1 GOOD JOB ARGUING HIS POSITION AND WHEN HE DOES, I SIT OVER THERE
2 SOMETIMES IN THESE SITUATIONS, I LIKE TO STAND BACK UP, LIKE YOU DO
3 WHEN YOU'RE HAVING AN ARGUMENT, NO BODY WANTS TO GIVE UP THEIR
4 POSITION, I'D LOVE TO JUMP BACK UP AND SAY, "WELL, WHAT ABOUT THIS
5 AND WHAT ABOUT THIS, BUT WE CAN'T DO THAT BECAUSE WE'VE GOT TO
6 FINISH THIS THING. AND THAT'S THE LAW - I MEAN, I CAN'T JUMP BACK UP
7 AND SAY ANYTHING. I'D LIKE TO, BUT I WON'T GET THAT CHANCE BECAUSE
8 THE BURDEN OF PROOF IS ON THE PROSECUTION AND THEY GET THE LAST
9 ARGUMENT, TOO.

10 HAVING SAID ALL THAT, WHAT I WANT Y'ALL TO DO NOW IS KEEP DOING
11 WHAT YOU'VE BEEN DOING THROUGHOUT THE TRIAL AND BE FAIR AND
12 LISTEN, IF YOU WOULD, TO WHAT I'VE GOT TO SAY. I USED TO - WHEN I WAS
13 YOUNGER, I USED TO BE ABLE TO MEMORIZE THINGS BETTER AND BE ABLE
14 TO STAND UP HERE AND SPEAK FOR 30 MINUTES WITHOUT REFERRING TO A
15 NOTE OR ANYTHING LIKE THAT, WELL, I CAN'T DO THAT QUITE ANYMORE, SO
16 Y'ALL BEAR WITH ME WHILE I REFER TO THINGS BECAUSE I DON'T WANT TO
17 LEAVE ANYTHING OUT THAT I WANT Y'ALL TO CONSIDER. SO, BEAR WITH ME
18 WHEN I DO THAT.

19 BUT, YOU'VE HEARD THE TESTIMONY INDICATIONS, YOU'VE HEARD
20 Minor AND I KNOW THAT TESTIMONY IMPACTED YOU. I COULD
21 SEE THAT. I KNOW THAT I AND UNDERSTAND THAT AND I'M SURE MR.
22 FLEMING, IN MAKING HIS ARGUMENT IS GOING TO DO A GOOD JOB OF
23 EMPHASIZING TO YOU ALL THE THINGS TO MAKE YOU FEEL PASSIONATE
24 ABOUT THAT. BUT, AS I TOLD YOU AT THE BEGINNING AND WOULD ARGUE TO
25 YOU NOW, THAT Minor TESTIMONY IS NO DIFFERENT FROM ANY OTHER

1 WITNESS. YOU DON'T BELIEVE SOMEBODY MORE BECAUSE OF BEING
2 YOUNG, OLD, BLACK, WHITE, SHORT, TALL, ANYTHING LIKE THAT. YOU BASE
3 IT ON ACTUALLY HOW YOU PERCEIVED IT. MR. FLEMING, RON, DID A VERY
4 SKILLFUL JOB OF LEADING HER THROUGH THE TESTIMONY IN THE CASE.
5 THERE'S NO QUESTION ABOUT THAT. WASN'T A WHOLE LOT, TO TALK TO HER
6 ABOUT, YOU COULD TELL IT WAS DIFFICULT FOR HER TO COME IN AND
7 TESTIFY, OR IT APPEARED TO BE. BUT, IT'S IMPORTANT TO NOTE WHAT SHE
8 SAID, BECAUSE IS GOES TO THE PARTICULAR CHARGES THAT WE HAVE IN
9 THIS CASE. YOU KNOW, SHE -- YOU KNOW, IT'S IMPORTANT ALSO WHEN YOU
10 THINK OF WHAT SHE SAID, THE FACTOR IN WHAT MS. EHNEY FROM THE
11 CHILD'S PLACE SAID, BECAUSE AS YOU KNOW, THAT'S THE ONLY OTHER
12 PERSON THAT'S COME INTO COURT TO CORROBORATE OR SUPPORT WHAT
13 SHE SAID EVEN THOUGH MR. FLEMING IS GOING TO TELL YOU AND THE LAW
14 SAYS, YOU DON'T HAVE TO NECESSARILY CORROBORATE WHAT YOU SAID,
15 BUT SHE DID. AND IT'S IMPORTANT TO FACTOR IN WHAT SHE SAID BECAUSE
16 SHE'S THE TRAINED PERSON THAT ACTUALLY CONDUCTED THE INTERVIEW
17 AND WHO DID THAT. BUT LET ME, IF I CAN, GET INTO THE -- FOR A LACK OF A
18 BETTER WORD, SOME GRAPHIC TESTIMONY, IF YOU WILL, THAT WAS GIVEN IN
19 THE CASE. AND LET ME GET THROUGH THAT. SHE TESTIFIED THAT HE PUT
20 HIS WEE WEE ON HER MONKEY. THAT'S WHAT SHE TESTIFIED TO AND SHE
21 DID NOT TESTIFY THAT THERE WAS ACTUALLY ANY PENETRATION. SHE
22 DIDN'T EVEN TESTIFY THAT THERE WAS EVEN AN ATTEMPT OR EFFORT TO
23 DO THAT. THAT'S WHAT SHE SAID, AS YOU HEARD. AND THE JUDGE HAS
24 JUST TOLD YOU, AT THE BEGINNING, THAT HE -- THAT HE -- AND I'LL LET HIM
25 EXPLAIN A LITTLE BIT BETTER, BUT HE HAS DIRECTED A VERDICT, IN EFFECT,

1 NOT GUILTY ON THE CHARGE OF CRIMINAL SEXUAL CONDUCT, BASED ON THE
2 EVIDENCE, BASED ON WHAT ^{Minor} SAID. AND REMEMBER, THAT WAS THE
3 STATE WAS ATTEMPTING TO CONVICT HIM OF, ONE OF THE CHARGES THEY
4 WERE ATTEMPTING TO CONVICT HIM OF. AND THAT'S WHAT MR. FLEMING
5 TALKED TO YOU ABOUT IN OPENING STATEMENTS. BUT, THE JUDGE, BASED
6 ON THE EVIDENCE, HAS TAKEN THAT OUT. HE HAS LEFT IN THE QUESTION OF
7 WHETHER OR NOT THERE WAS AN ASSAULT WITH AN INTENT TO COMMIT
8 SEXUAL CONDUCT. HE'S LEFT THAT IN. AND THAT'S CALLED A LESSER
9 INCLUDED OFFENSE, I THINK THAT'S WHAT THEY CALL THAT. AND HE'S
10 GOING TO ALLOW Y'ALL TO CONSIDER THAT. BUT, I'M ASKING YOU, WHEN
11 YOU GET TO THAT POINT TO CONSIDER IT, TO REMEMBER WHAT JUNE SAID
12 AND WHAT MS. EHNEY SAID. AND THAT IS, THAT JUNE NEVER TESTIFIED
13 THAT THERE WAS AN EFFORT OR AN INTENT BY MR. WEATHERALL TO
14 ACTUALLY PENETRATE. AND I WOULD SUBMIT TO YOU, IF THERE WAS NOT
15 EFFORT OR INTENT TO DO THAT, THEN YOU CANNOT FIND, AS FAIR-MINDED
16 JURORS, WHO ARE DEALING WITH THIS VERY TOUGH CASE, YOU CANNOT
17 FIND THAT THERE IS PROOF BEYOND A REASONABLE DOUBT THAT THERE
18 WAS AN ASSAULT WITH THE INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT.
19 BECAUSE SHE DIDN'T SAY THAT'S THE WAY IT HAPPENED. SHE DIDN'T SAY -
20 THAT'S NOT WHAT SHE SAID. AND EVEN THOUGH THE JUDGE IS ALLOWING
21 YOU TO CONSIDER THAT, HE'S NOT TELLING YOU THAT THAT SHOULD BE
22 YOUR VERDICT. HE'S TELLING YOU THAT YOU'RE ALLOWED TO CONSIDER
23 THAT. BUT, WHEN YOU DO, AGAIN, I WANT YOU TO CONSIDER THE
24 TESTIMONY THAT YOU'VE HEARD. WHAT SHE SAID. BECAUSE THAT'S GOING
25 TO BE IMPORTANT.

1 NOW, SHE ALSO -- YOU'RE ALSO GOING TO BE GIVEN THE
2 OPPORTUNITY TO CONSIDER ANOTHER POSSIBLE CHARGE, ANOTHER
3 LESSER INCLUDED OFFENSE, OF ASSAULT AND BATTERY OF A HIGH AND
4 AGGRAVATED NATURE. AND THE JUDGE IS GOING TO CHARGE TO YOU AND
5 EXPLAIN WHAT THAT IS. BUT, IT'S AN ASSAULT AND AN ILLEGAL TOUCHING,
6 BUT IT'S NOT A SEXUAL BATTERY. IT'S AN ASSAULT AND ILLEGAL TOUCHING
7 THAT DOES NOT BECOME SEXUAL BATTERY BECAUSE SEXUAL BATTERY IS
8 DEFINED AS PENETRATION. HE'S GOING TO TELL YOU THAT. BUT, ONE OF
9 THE ELEMENTS OF IT IS TAKING INDECENT LIBERTIES WITH A FEMALE. YOU
10 KNOW, THAT'S THE KEY ELEMENT THAT I WOULD THINK THAT YOU WOULD
11 CONSIDER TO DETERMINE WHETHER OR NOT HE IS POSSIBLY GUILTY OF
12 ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE, AGAIN,
13 LISTENING TO THE TESTIMONY THAT YOU HEARD RIGHT OVER THERE FROM
14 Minor AND THAT'S SOMETHING HE IS GOING TO ALLOW YOU TO CONSIDER.
15 HE'S ALSO GOING TO CHARGE YOU ON LEWD ACT, IMPROPERLY
16 TOUCHING OR DOING SOMETHING FOR YOUR OWN SEXUAL GRATIFICATION.
17 THAT IS A SEPARATE CHARGE. IT IS A SEPARATE CHARGE. IT IS NOT A
18 LESSER INCLUDED OFFENSE OF THE ORIGINAL CRIMINAL SEXUAL CONDUCT.
19 IT'S SOMETHING SEPARATE. AND HE'S GOING TO ALLOW YOU TO CONSIDER
20 WHETHER OR NOT THAT'S WHAT THIS WAS, WHETHER OR NOT IT WAS AN
21 IMPROPER TOUCHING. IF YOU FIND THAT Minor TESTIMONY IS PROPER AND
22 CREDIBLE.

23 NOW, TALKING ABOUT THAT, I WANT YOU TO CONSIDER, AND I ASK YOU
24 TO CONSIDER AS JURORS IN THIS CASE, WHETHER OR NOT, WHETHER OR
25 NOT THIS HAPPENED AT ALL. I THINK YOU SHOULD CONSIDER IT. I'M NOT

1 CONCEDING THAT IT DID. I WANT YOU TO CONSIDER THAT AND CONSIDER
2 THE EVIDENCE THAT YOU'VE HEARD. AND THE REASON I ASK YOU TO DO
3 THAT IS BECAUSE THERE IS SOME SERIOUS DISCREPANCIES IN THE
4 TESTIMONY. AND WHAT I'M TALKING ABOUT IS, THAT SHE TESTIFIED THAT
5 AFTER THIS HAPPENED, WHITE STUFF CAME OUT, SEMEN. THAT'S WHAT SHE
6 SAID. YOU KNOW, THAT'S WHAT SHE SAID. AND THAT A BLANKET WAS USED
7 TO WIPE THIS UP. THAT'S WHAT SHE SAID. AND THEN YOU HEARD THE
8 TESTIMONY FROM THE OTHER - FROM VICKIE WHITE, THAT SHORTLY AFTER
9 THIS WAS REPORTED, SHE GOT A SEARCH WARRANT, WENT TO THE HOUSE,
10 GOT A BUNCH OF STUFF, CLOTHES, A LOT OF STUFF, I THINK SHE - I'M
11 TRYING TO REMEMBER. Y'ALL ARE THE JUDGE OF THE FACTS, BUT I'M
12 TRYING TO REMEMBER. SHE MENTIONED IT WAS CLOTHING, BED CLOTHING,
13 THINGS OF THAT NATURE, MENTIONED THAT. AND SHE DECIDED THAT SOME
14 OF THE STUFF SHE WOULD GET AND SOME SHE DIDN'T AND I GUESS THE
15 EMPHASIS WAS GOING TO BE, "WELL, THIS WAS A CROWDED HOME, A LOT OF
16 STUFF, A LOT OF CLUTTER AROUND THERE, SO WE JUST, WE GOT
17 SOMETHING AND WE DIDN'T GET OTHER AND IT WAS JUST RANDOM, THERE
18 WAS NO EXPLANATION FOR WHAT SHE GOT AND HOW SHE GOT IT. WHY IS
19 THAT IMPORTANT? BECAUSE IF THIS HAPPENED, I WOULD SUBMIT TO YOU,
20 THAT IF IT HAPPENED THIS WAY, IT MAKES YOU WONDER WHETHER OR NOT
21 THERE WOULD HAVE BEEN AT LEAST SOME EVIDENCE OF THIS. SOME
22 EVIDENCE OF THIS. WELL, ^{Minor} SAID THAT THIS PARTICULAR BLANKET WAS
23 THE ONE THAT WAS INVOLVED. REMEMBER HOW THAT BLANKET CAME INTO
24 POSSESSION OF LAW ENFORCEMENT. IT WAS NOT AS A RESULT OF THE
25 SEARCH WARRANT, ALTHOUGH THEY HAD AN OPPORTUNITY TO GO IN THERE

1 AND GET EVERYTHING. THAT BLANKET, ACCORDING TO VICKIE WHITE, SHE
2 COULDN'T TELL YOU WHEN SHERIFF'S OFFICE GOT IT, ONLY THAT IT CAME
3 FROM A DSS EMPLOYEE. AND ABOUT A MONTH OR SO AGO, SHE CALLED
4 THAT TO THE ATTENTION OF THE PROSECUTOR. THIS THING HAPPENED, AND
5 KEEP IN MIND, THIS EVENT WE'RE TALKING ABOUT WHERE IN 2004. NOW,
6 WHY IS THAT IMPORTANT? BECAUSE YOU HEARD TESTIMONY YESTERDAY
7 FROM MR. FRANKLIN THAT HE WENT INTO THE HOME AND GOT THE PINK
8 NIGHTSHIRT AND THIS SLEEPING BAG/BLANKET THAT YOU HAVE HERE,
9 TURNED THAT OVER TO LAW ENFORCEMENT, TO OFFICER VICKIE WHITE,
10 TURNED IT OVER TO HER. AND THE ONLY ITEMS, THE ONLY ITEMS THAT
11 WERE TESTED, THAT WERE ATTEMPTED TO TEST BY THE SLED EMPLOYEE,
12 RUTH, WERE THESE TWO ITEMS. SHE SAID NOTHING ELSE WAS SUBMITTED
13 TO HER AND I SUBMIT TO YOU THAT THAT WAS IMPORTANT, BECAUSE I
14 SUBMIT THAT THEY WERE EXPECTING TO FIND SOMETHING ON THOSE ITEMS.
15 THEY WERE EXPECTING IT. BUT, LOW AND BEHOLD, AND YOU'LL HAVE THE
16 REPORT IN EVIDENCE. AUGUST 9, 2006. AUGUST 9, 2006, MS. RUTH SAYS SHE
17 MADE THE REPORT AND MAILED IT TO MS. WHITE WHO SAYS SHE DIDN'T GET
18 IT, SHE LEARNED ABOUT IT. AND IT SAYS THAT ON THE SPONGE BOB
19 SLEEPING BAG AND NIGHTSHIRT, NOTHING WAS FOUND. THESE ARE THE
20 ONLY ITEMS SENT. AND, YOU KNOW, Y'ALL USE YOUR COMMON SENSE, WHY
21 WERE THESE SENT OFF TO BE INSPECTED? THERE WASN'T ANYTHING ON
22 THEM. AND I SUBMIT TO YOU THAT MS. RUTH IS THE TYPE PERSON THAT
23 DOES HER JOB RIGHT, AND SHE SAYS SHE MAILED THE LETTER. AND THEN, I
24 SUBMIT TO YOU, I SUBMIT THAT THIS BLANKET COMES IN. OH, WELL, IT'S NOT
25 THIS ONE, IT'S NOT THE SPONGE BOB, IT'S THIS ONE. AFTER, I SUBMIT TO

1 YOU, AFTER THE REPORT COMES BACK WITH THE "NOTHING ON THE
2 NIGHTSHIRT AND THE SPONGE BOB BLANKET, THEN THIS COMES IN AND YOU
3 HEARD HER TESTIFY THAT SHE'S WORKED ON CASES TWENTY YEARS WHERE
4 YOU CAN FIND DNA. TWENTY YEARS. NOW, I'M GOING TO ASK YOU, AS FAIR-
5 MINDED JURORS, CONSIDERING ALL OF THAT, WHETHER OR NOT THAT
6 MAKES YOU THINK, "WELL, IS THERE A REASONABLE DOUBT ABOUT THIS?"
7 DOES IT MAKE YOU HESITATE? THAT'S ONE OF THE THINGS THE JUDGE IS
8 GOING TO TELL YOU, ONE OF THE DEFINITIONS OF REASONABLE DOUBT AND
9 I'M GOING TO ASK YOU TO CONSIDER THAT WHEN YOU ARE CONSIDERING
10 ALL THE EVIDENCE IN THE CASE. I'M GOING TO ASK YOU TO CONSIDER THAT,
11 BECAUSE THERE WAS OPPORTUNITY, IF THIS HAPPENED AS DESCRIBED TO
12 GATHER EVIDENCE. WAS IT DONE? NOW, YOU MAY SAY, THAT, WELL, YOU
13 KNOW, I STILL BELIEVE^{Minor} WHETHER THEY'VE GOT THE EVIDENCE OR NOT.
14 YOU MAY SAY THAT. YOU MAY VERY WELL SAY THAT. I STILL BELIEVE IT
15 HAPPENED EXACTLY AS SHE SAID. AND CERTAINLY YOU HAVE THE RIGHT TO
16 DO THAT. BUT YOU DON'T HAVE TO. YOU MAY SAY, WELL, BEFORE WE'RE
17 GOING TO CONVICT SOMEBODY WITH ASSAULT WITH INTENT TO COMMIT
18 CRIMINAL SEXUAL CONDUCT, LET'S GET A LITTLE BIT BETTER EVIDENCE IN
19 THERE. WHEN YOU'VE GOT TESTIMONY THAT SOMETHING LIKE THIS
20 HAPPENED, YOU MAY SAY -- AND AGAIN, I WOULD EMPHASIZE TO YOU THAT
21 EVEN IF YOU DO ACCEPT^{Minor} VERSION OF WHAT HAPPENED, SHE DID NOT
22 TESTIFY THAT THERE WAS AN ATTEMPT TO PENETRATE. THAT THERE WAS
23 AN ATTEMPT TO COMMIT A SEXUAL BATTERY. SHE DIDN'T SAY THAT.
24 NEITHER DID THE COUNSELOR THAT SHE TALKED TO. IT'S A FACT.
25 AGAIN, YOUR OPTIONS ARE, YOUR OPTIONS ON THIS CASE ARE: NOT

1 GUILTY OF ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT,
2 ANOTHER OPTION IS – OR GUILTY. NOT GUILTY OF ASSAULT AND BATTERY
3 OF A HIGH AND AGGRAVATED NATURE OR GUILTY. LEWD ACT, NOT GUILTY
4 OR GUILTY. THOSE ARE YOUR OPTIONS. I'M ASKING YOU, AGAIN, ON BEHALF
5 OF MY CLIENT, THAT Y'ALL WEIGHT THE FACTS AS Y'ALL HEARD THEM AND
6 Y'ALL MAKE YOUR DECISIONS NOT BASED ON YOUR PASSIONS, NOT WHAT
7 YOU THINK MIGHT HAVE HAPPENED, BUT BASED ON WHAT YOU HEARD AND
8 THE TESTIMONY THAT YOU SAW. AND ALL THESE FACTORS THAT WE'RE
9 TALKING ABOUT HERE, WITH THE BLANKET AND THE NIGHTSHIRT AND
10 EVERYTHING ELSE. AND I'M SURE THAT MR. FLEMING IS GOING TO ARGUE
11 THAT VICKIE WHITE BASICALLY GOT A CONFESSION FROM MY CLIENT.
12 REMEMBER, THAT'S NOT WHAT SHE SAID. THAT'S NOT WHAT SHE SAID.
13 THAT'S NOT WHAT SHE SAID AT ALL. SHE DIDN'T SAY HE ADMITTED THIS
14 CRIME. SHE DIDN'T SAY THAT.

15 YOU ALSO HEARD DR. PRITCHARD, AND THIS GOES TO THE ASSAULT
16 WITH INTENT TO COMMIT ISSUE, BECAUSE DR. PRITCHARD, YOU REMEMBER,
17 SHE TESTIFIED THAT WHEN SHE DID THE EXAMINATION SHE FOUND NO
18 EVIDENCE OF ANY KIND OF TRAUMA OR INJURY OTHER THAN THE CLEFT SHE
19 REPORTED THAT SHE SAID THERE WAS NO WAY SHE COULD SAY BEYOND A
20 REASONABLE DOUBT OR ANYTHING THAT THAT WAS THE RESULT OF A
21 SEXUAL BATTERY. AND THE COURT HAS ALREADY RULED THAT IT WASN'T
22 SEXUAL BATTERY. BUT, SHE ALSO SAID THERE WAS NO OTHER EVIDENCE OF
23 ANY KIND OF TRAUMA. AND I WOULD ARGUE TO THAT IF THERE WAS AN
24 ATTEMPT BY A GROWN PERSON TO DO THIS THAT WAY, THAT THERE WOULD
25 BE SOME EVIDENCE OF TRAUMA. I WOULD ARGUE TO YOU THAT COMMON

1 SENSE WOULD TELL YOU THAT THERE WOULD HAVE BEEN TRAUMA.

2 I'VE TOLD YOU EVERYTHING I CAN TELL YOU. I PROBABLY LEFT OUT A
3 BUNCH OF STUFF THAT I WANTED TO TELL YOU. I'LL PROBABLY THINK OF IT
4 LATER AND IT'LL BE TOO LATE. ALL I ASK YOU TO DO IS KEEP AN OPEN MIND,
5 REMEMBER WHAT YOU ACTUALLY HEARD AND APPLY THE LAW THAT THE
6 JUDGE GIVES YOU. AND IF YOU DO THAT, THEN YOU'VE DONE YOUR JOB.
7 AND THAT'S WHAT I'M ASKING YOU TO DO AND I APPRECIATE IT VERY MUCH
8 THAT YOU SAT UP HERE AND LISTENED TO ME TALK. THANK YOU.

9 CLOSING ARGUMENT BY MR. FLEMING:

10 MR. FLEMING: IF IT PLEASE THE COURT, YOUR HONOR. LADIES AND
11 GENTLEMEN, I TOO WANT TO THANK YOU FOR COMING HERE AND LISTENING
12 TO THIS CASE. THIS IS A DUTY THAT WE ALL HAVE TO PERFORM AS CITIZENS
13 IN THIS FREE COUNTRY THAT WE LIVE IN AND IT'S ONE OF OUR PATRIOTIC
14 DUTIES WE MUST PERFORM AND YOU'VE DONE IT. YOU'VE COME HERE AND
15 YOU'VE TAKEN THE BULL BY THE HORN AND YOU'VE DONE WHAT YOU'RE
16 SUPPOSED TO DO AND I THANK YOU. YOU KNOW, I SPENT ALL LAST NIGHT,
17 YOU KNOW, JUST BEATING MYSELF TO DEATH TRYING TO THINK OF WHAT I
18 WANTED TO SAY TO Y'ALL. AND LADIES AND GENTLEMEN, HERE'S NOTHING
19 MORE COMPELLING OR MORE DECISIVE THAN WHAT THAT LITTLE GIRL SAT UP
20 THERE AND TOLD YOU. NOTHING. BUT, I AM GOING TO TRY TO. I'M GOING TO
21 TRY TO GO THROUGH SOME OF THIS EVIDENCE WITH YOU AND BRING IT OUT.
22 BUT, THERE'S NOTHING MORE COMPELLING AND DECISIVE THAN WHAT SHE
23 SAID. A SEVEN-YEAR-OLD LITTLE GIRL. YOU'VE GOT TO TAKE INTO ACCOUNT
24 THAT SHE WAS FIVE WHEN IT HAPPENED. FIVE YEARS-OLD. A LITTLE GIRL. A
25 LITTLE GIRL THAT COULDN'T EVEN READ THEN. COULDN'T EVEN EXPRESS

1 HERSELF LIKE A TEENAGER OR GROWN-UP WOULD DO. SHE HAD THE GUTS
2 TO COME INTO THIS COURTROOM AND TELL YOU WHAT HAPPENED.

3 LET ME GO INTO SOME DEPTH ON THE TESTIMONY. WHAT I WANT TO
4 DO IS GO THROUGH THAT OF DR. PRITCHARD. YOU HEARD MR. HOWE TELL
5 YOU THAT, "WELL, SHE COULDN'T SAY BEYOND A REASONABLE DOUBT THAT
6 THAT WAS THE CAUSE, THE CLEFT WAS CAUSED BY SEXUAL BATTERY. SHE
7 ALSO TOLD YOU THAT IT WAS VERY INDICATIVE OF SEXUAL BATTERY, TOO.
8 SHE COULDN'T TELL YOU THAT IT WASN'T CAUSED BY SEXUAL BATTERY.
9 THAT'S BASICALLY WHAT SHE'S TELLING YOU. SHE HAD A CLEFT ON HER
10 HYMAN, LADIES AND GENTLEMEN AND YOU NEED TO CONSIDER THAT. NOW, I
11 KNOW THAT WE'VE TAKEN OUT CRIMINAL SEXUAL CONDUCT AND THIS JUDGE
12 HAS GRANTED A DIRECT VERDICT. BASICALLY, BECAUSE THE LITTLE GIRL
13 DIDN'T SAY THAT THE DEFENDANT PUT HIS WEE WEE INSIDE OF HER. NOW,
14 SHE'S ONLY SEVEN-YEARS-OLD, LADIES AND GENTLEMEN. SHE MAY NOT
15 HAVE BEEN ABLE TO BRING HERSELF TO SAY THAT OR SHE MAY NOT BE
16 EXPRESSING HERSELF THE WAY SHE THOUGHT SHE SHOULD HAVE OR THE
17 WAY SHE COULD HAVE.

18 TAKE THE TESTIMONY OF VICKIE WHITE. MS. WHITE STATED TO YOU
19 THAT SHE WENT AND HAD A REPORT MADE TO HER THAT THERE WAS A
20 POSSIBLE SEXUAL ABUSE OF A CHILD THAT WAS OCCURRING IN CROSS HILL,
21 WHICH IS IN LAURENS COUNTY. SHE WENT TO THAT HOUSE A COUPLE OF
22 TIMES. THERE WAS NO ONE THERE. SHE FINALLY FOUND OUT THAT THE
23 DEFENDANT -- WHERE HE WAS AT, THE DEFENDANT, AND SHE WENT AND
24 INTERVIEWED HIM. NOW, I'VE GOT TO TELL YOU, HE DIDN'T ADMIT TO THE
25 POLICE OFFICERS IN THAT STATEMENT THAT HE GAVE, THAT HE DID IT.

1 WHAT HE DID TO WAS ADMIT IT. HE ADMITTED IT TO HIS WIFE, OR HIS
2 GIRLFRIEND AND HIS MOTHER. IF YOU'RE INNOCENT LADIES AND
3 GENTLEMEN, WHY WOULD YOU ADMIT IT TO ANY BODY? WHY? YOU ALSO
4 HEARD DETECTIVE WHITE STATE THAT HE NEVER DID DENY IT. EITHER, HE
5 NEVER DENIED THAT HE COMMITTED SOME KIND OF CRUEL SEXUAL
6 CONDUCT OR ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL
7 CONDUCT ON THIS MINOR CHILD. NEVER DENIED IT. HAD A CHANCE TO. HAD
8 A CHANCE TO WRITE A WRITTEN STATEMENT DENYING EVERYTHING AND
9 WOULDN'T DO IT. HAD A CHANCE TO WRITE THE STATEMENT. HE SOUND
10 LIKE HE TRIED TO MAKE IT SOUND LIKE IN THERE THAT IT WAS ALL THE
11 LITTLE GIRL'S FAULT. SHE WAS THE ONE COMING ON TO HIM, SHE WAS THE
12 ONE. LADIES AND GENTLEMEN, DO YOU THINK A FIVE-YEAR-OLD LITTLE GIRL
13 IS GOING TO KNOW ABOUT STUFF LIKE THAT? FIVE-YEAR-OLD. I WOULD
14 PUT TO YOU THAT NO, SHE WOULDN'T. YOU ALSO HEARD EVIDENCE LADIES
15 AND GENTLEMEN, THE DEFENDANT WROTE A NOTE. "MICHELLE, WHAT
16 HAPPENED? HOW DID THEY HEAR ABOUT THIS SHIT? ARE YOU THE ONE
17 THAT TOLD THEM? I THOUGHT WE WERE GOING TO WORK THROUGH THIS.
18 "AM I GOING TO JAIL FOR THE REST OF MY LIFE?" DOES THAT SOUND LIKE AN
19 INNOCENT PERSON SAYING THEY ARE INNOCENT RIGHT THERE? IT SOUNDS
20 LIKE AN ADMISSION, A CONFESSION TO ME. SOUNDS LIKE A CONFESSION.
21 CHARLOTTE EHNEY. THE GIRL, THE LADY THAT DID THE FORENSIC
22 INTERVIEW WITH ^{Minor} SHE TOLD YOU, FIRST AND FOREMOST, SHE WENT
23 THROUGH A SERIES OF SMALL TESTS WITH THE CHILD TO DETERMINE
24 WHETHER OR NOT SHE KNEW THE DIFFERENCE BETWEEN THE TRUTH AND A
25 LIE. SHE GOT ALL OF THE CORRECT. SHE KNEW - SHE KNOWS THE

1 DIFFERENCE BETWEEN THE TRUTH AND A LIE. YOU HEARD ME ASK HER IN
2 THIS COURTROOM, YOU KNOW, IF I TOLD HER THE COLOR OF MY TIE WAS
3 PINK, WOULD I BE TELLING THE TRUTH OR A LIE. SHE TOLD ME, "A LIE." SHE
4 KNOWS THE DIFFERENCE. SHE ACTUALLY STATED THAT SHE TELLS LIES TO
5 HER GRANDMOTHER EVERY NOW AND THEN AND SHE DOESN'T LET HER GET
6 AWAY WITH IT ALL THE TIME. SHE KNOWS WHEN SHE'S TELLING THE TRUTH
7 AND A LIE. AND SHE TOLD YOU RIGHT THERE SHE WAS TELLING THE TRUTH
8 HERE IN THIS COURTROOM. YOU ALSO HEARD MS. EHNEY STATE IN HER
9 INTERVIEW THAT CHILD TOLD HER THAT MAN RIGHT THERE SEXUALLY
10 MOLESTED HER. YOU HEARD THAT. MOST COMPELLING WOULD BE
11 TESTIMONY OF ^{Minor} HERSELF. MR. HOWE GOT UP HERE AND TRIED TO
12 CONVINCING YOU THAT THERE WAS NO ASSAULT WITH INTENT TO COMMIT
13 SEXUAL BATTERY OR SEXUAL CONDUCT IN THIS MATTER BECAUSE SHE
14 NEVER DID SAY HE WAS TRYING TO STICK HIS WEE WEE IN HER. SHE SAID,
15 THOUGH, AND I QUOTE, HE STUCK HIS WEE WEE ON ME. AND THEN I ASKED
16 HER DID IT HURT? AND WHAT DID SHE SAY? YES, IT HURT. IF THAT DOESN'T
17 PROVE THAT HE WAS TRYING TO STICK HIS WEE WEE IN HER, I DON'T KNOW
18 WHAT DOES. AND THEN SHE STATED, "HE MADE THAT WHITE STUFF COME
19 OUT ON MY BELLY." AND HE WIPED IT OF WITH ONE OF HER FAVORITE
20 BLANKETS, THE LOONEY TOONS BLANKET. MR. HOWE MAKES A BIG DEAL
21 ABOUT THESE TWO BLANKETS, THIS BLANKET HERE AND THE NIGHTSHIRT
22 BEING TESTED, BUT I PUT TO YOU THAT WAS NOT WHAT SHE WAS WEARING,
23 SHE WASN'T ON THAT BLANKET, SHE WASN'T WEARING THAT NIGHTSHIRT
24 THE DAY THAT THAT HAPPENED. SHE TOLD YOU WHAT BLANKET WAS USED.
25 I PUT TO YOU THAT THAT WASN'T FOUND OUT UNTIL LATER THAT THAT WAS

1 THE BLANKET USED. AND YOU HEARD THE SLED AGENT UP HERE, IF THAT
2 BLANKET'S BEEN WASHED IN DETERGENT, YOU'RE NOT GOING TO GET
3 ANYTHING OFF OF IT. I PUT TO YOU THAT THAT'S WHAT HAPPENED. THE
4 BLANKET WAS WASHED. THERE WAS NO SENSE IN TESTING IT. WASN'T NO
5 SENSE AT ALL. YOU THINK ABOUT THIS, LADIES AND GENTLEMEN. YOU
6 THINK ABOUT THE COURAGE IT TOOK FOR THAT SEVEN-YEAR-OLD LITTLE
7 GIRL TO COME IN HERE AND TELL YOU THOSE VIVID DETAILS OF WHAT
8 HAPPENED TO HER. HOW EMBARRASSING IT WAS FOR HER, HAD TO BE. HAD
9 TO BE. NOW, I'D LIKE YOU TO DO SOMETHING FOR ME. I'D LIKE YOU ALL TO
10 CLOSE YOUR EYES FOR A SECOND. I WANT YOU TO IMAGINE A FIVE-YEAR-
11 OLD LITTLE GIRL, SHE'S IN HER NIGHTGOWN, NOTHING ON BUT HER PAIR OF
12 PANTIES AND SHE'S LAYING ON THE COUCH IN A PLACE THAT SHE IS
13 COMFORTABLE IN HER OWN HOME. CAN YOU SEE HER? SHE'S WATCHING
14 CARTOONS. IT MIGHT BE SATURDAY MORNING. IT MIGHT BE WEDNESDAY
15 MORNING. I DON'T KNOW. BUT, SHE'S IN A COMFORTABLE PLACE WATCHING
16 CARTOONS AND SOMEONE YOU KNOW AND TRUST COMES INTO THAT ROOM
17 AND SITS DOWN ON THE COUCH BESIDE HER AND HE MAKES HER TAKE HER
18 PANTIES OFF. AND THAT PERSON GETS ON TOP OF HER WITH HIS SWEATING,
19 STINKING BODY AND HE TRIES TO PUT HIS PENIS INTO HER FIVE-YEAR-OLD
20 VAGINA. CAN YOU SEE THE FEAR IN THAT CHILD'S EYES? CAN YOU SEE THE
21 TEAR ROLLING DOWN HER CHEEK AS IT HURTS? CAN YOU SEE IT LADIES AND
22 GENTLEMEN? CAN YOU SEE HER LAYING THERE IN FEAR NOT KNOWING
23 WHAT TO DO? DO YOU THINK THAT'S NOT GOING TO HAVE AN AFFECT ON
24 HER FOR THE REST OF HER LIFE? DO YOU THINK SHE'S NOT GOING TO SEE
25 HIS FACE IN HER NIGHTMARES EVERY NIGHT FOR THE REST OF HER LIFE? I

1 PUT TO YOU THAT SHE WILL. YOU CAN OPEN UP YOUR EYES. BUT, YOU CAN
2 SEE THAT LITTLE GIRL LAYING THERE ON THAT COUCH, NOT KNOWING WHAT
3 TO DO, AND THAT MAN TAKING ADVANTAGE OF HER. YOU KNOW, LADIES
4 AND GENTLEMEN, I'M FROM A SMALL TOWN NEAR HERE. I'M FROM THIS
5 COUNTY. I'M JUST AN OLD FARM BOY. GREW UP ON A FARM AND WORKING
6 IN A COTTON MILL. THAT'S WHEN I DECIDED I WANTED TO FURTHER MY
7 EDUCATION BECAUSE THAT'S SOME HARD WORK. HARD WORK. I WORKED IN
8 A COTTON MILL ALL THE WAY THROUGH HIGH SCHOOL. MY DAD ALWAYS
9 TOLD ME, IF IT SMELLS LIKE A PIG, SQUEALS LIKE A PIG, AND LOOKS LIKE A
10 PIG, IT'S A PIG. IF IT SMELLS LIKE SEXUAL CONDUCT OR ASSAULT WITH
11 INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT, LOOKS LIKE IT AND SOUNDS
12 LIKE IT, IT IS. AND THAT'S WHAT YOU'VE GOT HERE, LADIES AND GENTLEMEN,
13 CRIMINAL SEXUAL CONDUCT. YOU'VE GOT A FIVE-YEAR-OLD LITTLE GIRL
14 THAT'S NOW SEVEN, GOING ON EIGHT, THAT IS GOING TO SEE HIS FACE IN
15 HER DREAMS EVERY NIGHT.

16 NOW, YOU'RE GOING TO GO BACK THERE AND YOU'RE GOING TO
17 DELIBERATE AND YOU'LL COME OUT WITH A VERDICT. VERDICT IS A LATIN
18 WORD, FROM THE LATIN WORK VERDI, WHICH MEANS TO SPEAK THE TRUTH.
19 THERE'S ONLY ONE TRUTH HERE LADIES AND GENTLEMEN. THERE WILL BE
20 ONLY ONE JUSTICE AND THAT'S TO BRING BACK A VERDICT OF GUILTY OF
21 ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT WITH A
22 MINOR IN THE FIRST DEGREE AND A GUILTY VERDICT ON THE LEWD ACT.
23 YOU CAN FIND HIM GUILTY ON BOTH OF THOSE COUNTS AND THAT WOULD
24 BRING JUSTICE IN THIS MATTER. THANK YOU VERY MUCH.

25 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN, DOES ANYONE

1 NEED A BREAK BEFORE I START THE CHARGE? ALL RIGHT.

2 CHARGE OF THE COURT:

3 THANK YOU VERY MUCH FOR YOUR PATIENCE THIS WEEK. I KNOW
4 THAT IT HAS BEEN DIFFICULT. I KNOW THAT THE TRIAL'S BEEN DIFFICULT. I
5 KNOW THAT THE WAITING IN THE BACK IS PROBABLY VERY DIFFICULT. THIS
6 WAS A DIFFICULT TRIAL TO TRY AND DIFFICULT FOR YOU TO MAKE A
7 DECISION, BUT YOU'RE SWORN TO DO YOUR DUTY. I WANT TO EXPLAIN ONE
8 OF THE THINGS THAT THE ATTORNEYS MENTIONED TO YOU. I HAVE
9 STRICKEN THE CRIMINAL SEXUAL CONDUCT WITH A MINOR CHARGE FROM
10 THE INDICTMENT. THE REASON IS THAT THE STATUTE REQUIRES EVIDENCE
11 OF PENETRATION. I HAVE STRICKEN THAT. A LESSER INCLUDED OFFENSE IS
12 ONE THAT INCLUDES MANY OF THE SAME ELEMENTS OF THE CHARGE, BUT
13 THERE ARE ONE OR TWO THAT MAY BE ABSENT AND I WILL READ THE
14 CHARGE TO YOU IN A MINUTE. THE ASSAULT WITH INTENT TO COMMIT
15 CRIMINAL SEXUAL CONDUCT IS SOMETHING I WILL CHARGE YOU. THAT IS
16 THE POTENTIAL CRIME E THAT YOU WILL NEED TO ADDRESS. YOU WILL ALSO
17 NEED TO ADDRESS, AND I WILL SHOW YOU IN A FEW MOMENTS, THE
18 COMMITTING OR ATTEMPTING TO COMMIT A LEWD ACT ON A CHILD UNDER
19 THE AGE OF SIXTEEN YEARS OF AGE. IN ADDITION, YOU ARE GOING TO HAVE
20 TO ADDRESS THE LESSER INCLUDED CRIME OF ABHAN, WHICH IS ASSAULT
21 AND BATTERY OF A HIGH AND AGGRAVATED NATURE. THAT, AGAIN,
22 CONTAINS ALL OF THE ELEMENTS OF CRIMINAL SEXUAL CONDUCT WITHOUT
23 THE PENETRATION. AND I'M GOING TO EXPLAIN THAT TO YOU IN MORE
24 DETAIL, BUT I WANT YOU TO UNDERSTAND WHAT I H.E. DONE AND WHAT YOU
25 HAVE TO DO AND MR. FOREMAN, IF THERE IS ANY ISSUE WITH THAT AFTER

1 YOU GET THE VERDICT FORM, WRITE DOWN THE QUESTION AND I'LL
2 ADDRESS THAT WITH YOU.

3 NOW, LADIES AND GENTLEMEN, THE FIRST THING I WANT TO TELL YOU
4 IS SOMETHING I TOLD YOU EARLY ON. JUST BECAUSE A PERSON HAS BEEN
5 INDICTED WITH A CRIME, MEANS NOTHING. THIS INDICTMENT IS MERELY THE
6 PIECE OF PAPER THAT WE USE TO BEGIN THE PROCESS. IT IS THE OFFICIAL
7 LOG OF THE CHARGES AGAINST A PERSON IS NOT EVIDENCE, SHOULD NOT
8 BE CONSIDERED AS EVIDENCE BY ANY ONE ON THE JURY AND, IN FACT, YOU
9 SHOULD JUST UNDERSTAND THAT THIS DOCUMENT IS THE DOCUMENT THAT
10 STARTS THIS PROCESS. THE DEFENDANT HAS PLED NOT GUILTY TO ALL OF
11 THESE CHARGES. AND THAT IS A CORNERSTONE OF OUR SYSTEM AND IT
12 PUTS THE BURDEN ON THE STATE. BUT, I DO WANT YOU TO UNDERSTAND
13 THAT THE DEFENDANT'S PLED NOT GUILTY ON THAT INDICTMENT. THE FACT
14 THAT HE WAS ARRESTED AND THE FACT THAT HE WAS CHARGED, SHOULD
15 NOT BE CONSIDERED BY YOU IN ANY WAY AS GUILT OR EVIDENCE AS GUILT
16 IN THIS CASE.

17 NOW, LADIES AND GENTLEMEN, THERE ARE MULTIPLE CHARGES. AS I
18 SAID, YOU WILL HAVE ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL
19 CONDUCT, YOU'LL HAVE A LEWD ACT CHARGE, AND YOU WILL HAVE ASSAULT
20 AND BATTERY OF A HIGH AND AGGRAVATED NATURE. MR. FOREMAN, I THINK
21 THE VERDICT FORM WILL BE FAIRLY CLEAR. YOU WILL ACTUALLY HAVE
22 THREE VERDICT FORMS: YOU'LL HAVE THE FIRST ONE WHICH WILL HAVE
23 ASSAULT AND BATTERY WITH INTENT TO COMMIT CRIMINAL SEXUAL
24 CONDUCT AND YOU'LL HAVE A LEWD ACT AND THEN YOU WILL HAVE ASSAULT
25 AND BATTERY OF A HIGH AND AGGRAVATED NATURE. YOU WILL HAVE TO

1 ADDRESS THOSE CHARGES SEPARATELY AND INDEPENDENT OF THE OTHER.
2 AND AGAIN, YOU'LL HAVE TO APPLY THE LAW AS I GIVE IT TO YOU AND TO
3 THE FACTS AS YOU DETERMINE THEM TO BE. YOU MAY CONVICT OR ACQUIT
4 ON ALL THREE CHARGES SEPARATELY. THE FACT THAT YOU MAY ACQUIT OR
5 CONVICT ON ONE CHARGE WILL HAVE NO AFFECT ON THE OTHER AND SO
6 YOU WILL HAVE TO ADDRESS EACH ONE.

7 AS I TOLD YOU AT THE BEGINNING OF THIS TRIAL, YOU AND I HAVE
8 VERY DIFFERENT ROLES. YOU ARE THE JUDGES OF THE FACTS. YOU'VE
9 HEARD ALL OF THE TESTIMONY, YOU'RE GOING TO HAVE YOU ALL THE
10 EVIDENCE THAT HAS BEEN ADMITTED INTO EVIDENCE AND SO THE
11 DOCUMENTS AND ITEMS THAT HAVE BEEN ADMITTED INTO EVIDENCE, YOU'LL
12 HAVE THEM IN THE BACK ROOM WITH YOU. YOU HAVE TO DETERMINE, BASED
13 UPON WHAT YOU'VE HEARD, WHAT THE FACTS ARE IN THIS CASE. AND THEN
14 YOU HAVE TO APPLY THE LAW AS I AM GIVING IT TO YOU NOW, TO THOSE
15 FACTS. I WILL TELL YOU THAT MY VOICE HAS BEEN ABOUT TO GO THIS WEEK
16 AND I DON'T THINK I'VE RAISED IT THAT MUCH, BUT IF I'VE RAISED MY VOICE,
17 IF I'VE GIVEN YOU AN IMPRESSION IN ANY WAY THAT I HAVE AN OPINION
18 ABOUT A FACT, DISREGARD IT. MY OPINIONS OF THE FACTS HAVE VERY
19 LITTLE TO DO WITH WHAT YOU HAVE TO DO IN BACK. YOU HAVE TO
20 DETERMINE WHAT THE FACTS ARE. I HAVE SPENT THE WEEK TRYING TO PUT
21 TOGETHER THIS CHARGE AND I'M THE SOLE JUDGE OF THE LAW IN THIS
22 CASE. I'LL HAVE TO LIVE WITH THE FACTS THAT I MAKE LEGALLY, YOU'LL
23 HAVE TO LIVE WITH THE DECISIONS THAT YOU MAKE ON THE FACTS. AND AS
24 I TOLD YOU, IF I'VE MADE A MISTAKE ON A LEGAL MATTER, THERE ARE WAYS
25 TO CORRECT IT. YOU CAN APPEAL THIS CASE TO THE SUPREME COURT ON A

1 LEGAL ISSUE. I KNOW THAT YOU'RE GOING TO PAY CLOSE ATTENTION TO
2 THIS CHARGE AND I KNOW YOU PAID CLOSE ATTENTION THIS WEEK AND I
3 KNOW YOU'LL UNDERSTAND ONCE YOU GET BACK THERE IN THAT ROOM,
4 YOU'LL HAVE TO DETERMINE WHAT THE FACTS ARE AND THERE IS VERY
5 LITTLE THAT CAN BE DONE. AND SO I WANT YOU TO REALLY CONTINUE TO
6 DO WHAT I'VE SEEN YOU DO ALL WEEK.

7 NOW, LADIES AND GENTLEMEN, AS I'VE SAID, THE DEFENDANT HAS
8 PLED NOT GUILTY TO THESE INDICTMENTS AND THAT PLEA PUTS THE
9 BURDEN ON THE STATE TO PROVE THAT PERSON GUILTY. THE PERSON
10 CHARGED WITH COMMITTING A CRIMINAL OFFENSE IN SOUTH CAROLINA IS
11 NEVER REQUIRED TO PROVE HIMSELF INNOCENT. I CHARGE YOU THAT IT IS
12 AN IMPORTANT RULE OF LAW THAT THE DEFENDANT IN A CRIMINAL TRIAL, NO
13 MATTER THE SERIOUSNESS OF THE CHARGE MAY BE, WILL ALWAYS BE
14 PRESUMED TO BE INNOCENT OF THE CRIME IN WHICH THE INDICTMENT WAS
15 ISSUED UNLESS GUILT HAS BEEN PROVEN BY EVIDENCE SATISFYING YOU OF
16 THAT GUILT BEYOND A REASONABLE DOUBT. THE PRESUMPTION OF
17 INNOCENCE DOES NOT END WHEN YOU BEGIN YOUR DELIBERATIONS, BUT IT
18 ACCOMPANIES THE DEFENDANT THROUGHOUT THE DELIBERATIONS AND
19 ONLY ENDS WHEN YOU REACH A VERDICT BASED ON THE EVIDENCE
20 SATISFYING YOU OF GUILT BEYOND A REASONABLE DOUBT. A LOT OF JUDGE
21 USE THE EXAMPLE OF THE ROBE OF RIGHTEOUSNESS. IT'S AN OLD METHOD
22 OF EXPLAINING THE PRESUMPTION OF INNOCENCE, BUT I THINK IT'S A GOOD
23 ONE. THE DEFENDANT ENTERED THIS COURTROOM WITH A ROBE OF
24 RIGHTEOUSNESS ON HIM. HE WAS INNOCENT. HE CONTINUES TO HAVE THAT
25 ROBE OF RIGHTEOUSNESS ON HIM AT THIS POINT. YOU WILL HAVE IT ON HIM

1 UNTIL YOU STRIP IT FROM HIM BY DETERMINING THAT THE STATE HAS
2 PROVEN ITS CASE BEYOND A REASONABLE DOUBT.

3 NOW, THE PRESUMPTION OF INNOCENCE IS NOT MERELY A THEORY. IT
4 IS NOT JUST A LEGAL PHRASE. IT'S A SUBSTANTIAL RIGHT THAT EVERY
5 DEFENDANT IS ENTITLED TO AND IT'S BASICALLY A CORNERSTONE OF OUR
6 SYSTEM. YOU MUST REQUIRE THE STATE TO PROVE EACH ELEMENT OF
7 EACH CRIME BEYOND A REASONABLE DOUBT.

8 NOW, WHAT IS REASONABLE DOUBT? I CHARGE YOU THAT THE STATE,
9 AS I SAID, HAS THE BURDEN OF PROVING THE DEFENDANT GUILTY BEYOND A
10 REASONABLE DOUBT. SOME OF YOU MAY HAVE SERVED AS JURORS IN A
11 CIVIL CASE WHERE YOU WERE TOLD IT WAS ONLY NECESSARILY TO PROVE
12 THAT A FACT WAS MORE LIKELY TRUE THAN NOT TRUE, SUCH AS A GREATER
13 WEIGHT OF THE PREPONDERANCE OF THE EVIDENCE. IN CRIMINAL CASES,
14 THE STATE'S BURDEN MUST BE MORE POWERFUL THAN THAT. IT MUST BE
15 BEYOND A REASONABLE DOUBT. PROOF BEYOND A REASONABLE DOUBT IS
16 PROOF THAT LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT.
17 THERE ARE VERY FEW THINGS IN THIS WORLD THAT WE KNOW WITH
18 ABSOLUTE CERTAINTY. AND IN CRIMINAL CASES, THE LAW DOES NOT
19 REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT. IF, BASED ON
20 YOUR CONSIDERATION OF THE EVIDENCE YOU'RE FIRMLY CONVINCED THAT
21 THE DEFENDANT IS GUILTY OF THE CRIME CHARGED, YOU MUST FIND THE
22 DEFENDANT GUILTY. IF, ON THE OTHER HAND, YOU THINK THERE IS A REAL
23 POSSIBILITY THAT THE DEFENDANT IS NOT GUILTY, YOU MUST GIVE THE
24 DEFENDANT THE BENEFIT OF THE DOUBT AND FIND HIM NOT GUILTY.
25 ANOTHER WAY TO SAY IT, IS THAT REASONABLE DOUBT IS THE KIND OF

1 DOUBT THAT WOULD CAUSE A PERSON A REASONABLE PERSON, HESITATE
2 TO ACT.

3 NOW, THERE ARE TWO TYPES OF EVIDENCE THAT HAVE BEEN
4 PRESENTED IN THIS TRIAL IN WHICH IS PRESENTED IN EVERY TRIAL. THERE
5 IS DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE. DIRECT EVIDENCE IS
6 THE TESTIMONY OF A PERSON WHO CLAIMS TO HAVE ACTUAL KNOWLEDGE
7 OF A FACT, SUCH AS AN EYEWITNESS. IT IS EVIDENCE WHICH IMMEDIATELY
8 ESTABLISHES THE MAIN FACT TO BE PROVED. CIRCUMSTANTIAL EVIDENCE IS
9 PROOF OF A CHAIN OF FACTS AND CIRCUMSTANCES INDICATING THE
10 EXISTENCE OF A FACT. IT IS EVIDENCE WHICH IMMEDIATELY ESTABLISHES
11 COLLATERAL FACTS FROM WHICH THE MAIN FACT MAY BE INFERRED.
12 CIRCUMSTANTIAL EVIDENCE IS BASED ON INFERENCE AND NOT ON
13 PERSONAL KNOWLEDGE OF OBSERVATION. THE LAW MAKES ABSOLUTELY
14 NO DISTINCTION BETWEEN THE WEIGHT OR VALUE TO BE GIVEN DIRECT
15 EVIDENCE OR CIRCUMSTANTIAL EVIDENCE. YOU SHOULD WEIGH ALL THE
16 EVIDENCE IN THIS CASE AND AFTER WEIGHING ALL THE EVIDENCE, IF YOU
17 ARE NOT FIRMLY CONVINCED OF THE GUILT OF THE DEFENDANT BEYOND A
18 REASONABLE DOUBT, YOU MUST FIND THE DEFENDANT NOT GUILTY.

19 NECESSARILY, AS A PART OF YOUR DELIBERATIONS, YOU MUST
20 DETERMINE THE CREDIBILITY OF WITNESSES WHO HAVE TESTIFIED IN THIS
21 CASE. CREDIBILITY SIMPLY MEANS BELIEVABILITY. IT BECOMES YOUR DUTY
22 AS JURORS TO ANALYZE AND EVALUATE THE EVIDENCE AND DETERMINE
23 WHICH OF THE EVIDENCE CONVINCES YOU OF ITS TRUTH. IN DETERMINING
24 THE BELIEVABILITY, THE CREDIBILITY, OF A WITNESS YOU MAY BELIEVE
25 EVERYTHING THAT ONE WITNESS SAYS AND DISREGARD ALL OF THE REST.

1 OR YOU MAY BELIEVE A PORTION OF WHAT ONE WITNESS SAYS AND
2 DISREGARD ALL THE REST. YOU HAVE TO DETERMINE WHETHER SOME
3 WITNESS HAD SOME BIAS OR PREJUDICE THAT CAUSED THEM TO TESTIFY
4 THE WAY THEY DID. YOU CAN WATCH THEIR DEMEANOR. YOU CAN TELL
5 FROM THEIR DEMEANOR AND DETERMINE WHETHER OR NOT YOU BELIEVE
6 THEM. IT'S UP TO YOU. AND I CAN'T TELL YOU HOW TO DO IT. BUT, THAT'S
7 ONE OF THE MAIN JOBS YOU HAVE, WHICH IS TO DETERMINE WHO'S
8 CREDIBLE AND WHO'S BELIEVABLE AND WHETHER OR NOT YOU DO BELIEVE
9 THEM.

10 NOW, THE RULES OF EVIDENCE ORDINARILY IN THIS STATE DON'T
11 PERMIT WITNESSES TO TESTIFY TO OPINIONS OR CONCLUSIONS. AND
12 EXCEPTION TO THIS RULE IS FOR WITNESSES THAT WE CALL EXPERT
13 WITNESSES. A WITNESS WHO BY EDUCATION OR EXPERIENCE HAS BECOME
14 EXPERT IN SOME ART, SCIENCE, PROFESSION OR CALLING, MAY STATE AN
15 OPINION AS TO RELEVANT AND MATERIAL MATTER IN WHICH THE WITNESS
16 CLAIMS TO BE AN EXPERT AND MAY ALSO STATE THE REASONS FOR THAT
17 OPINION. YOU SHOULD CONSIDER ANY EXPERT OPINION RECEIVED IN
18 EVIDENCE IN THIS CASE AND LIKE OTHER EVIDENCE, GIVE IT THE WEIGHT IT
19 DESERVES. IF YOU DECIDE THAT THE OPINION OF AN EXPERT WITNESS IS
20 NOT BASED ON SUFFICIENT EDUCATION OR EXPERIENCE OR YOU CONCLUDE
21 THAT THE REASONS GIVEN IN SUPPORT OF THE OPINION ARE NOT SOUND,
22 OR THAT THE OPINION IS OUTWEIGHED BY OTHER EVIDENCE, YOU MAY
23 DISREGARD THE OPINION IN ITS ENTIRETY. AN EXPERT WITNESS' TESTIMONY
24 IS TO BE GIVEN NO GREATER WEIGHT THAN THAT OF OTHER WITNESSES
25 SIMPLY BECAUSE A WITNESS IS AN EXPERT. FURTHER YOU ARE NOT

1 REQUIRED TO ACCEPT THE EXPERTS OPINION EVEN THOUGH IT'S
2 UNCONTRADICTED.

3 NOW, DURING THE COURSE OF THIS TRIAL WE HAD THE TESTIMONY OF
4 A CHILD. AND I WANT TO CHARGE YOU THAT DURING THIS TRIAL, AS YOU'VE
5 HEARD, THERE WAS TESTIMONY FROM A CHILD. WHEN A WITNESS IS A CHILD
6 YOU MUST DETERMINE, AS WITH ANY WITNESS, WHETHER THAT TESTIMONY
7 IS BELIEVABLE. IN DECIDING BELIEVABILITY YOU MAY CONSIDER NOT ONLY
8 MATTERS I'VE ALREADY DISCUSSED WITH YOU, BUT YOU MAY ALSO
9 CONSIDER THE AGE OF THE CHILD, THE CHILD'S ABILITY TO OBSERVE AND
10 REMEMBER FACTS, AND THE CHILD'S ABILITY TO UNDERSTAND AND ANSWER
11 QUESTIONS. BECAUSE YOUNG CHILDREN MAY NOT FULLY UNDERSTAND
12 WHAT'S HAPPENING HERE, IT'S UP TO YOU TO DECIDE WHETHER THE CHILD
13 UNDERSTOOD THE SERIOUSNESS OF APPEARING AS A WITNESS AT THIS
14 CRIMINAL CHILD. WHETHER THE CHILD UNDERSTOOD THE QUESTIONS,
15 WHETHER THE CHILD HAS A GOOD MEMORY AND WHETHER THE CHILD
16 UNDERSTOOD THE DIFFERENCE BETWEEN LYING AND TELLING THE TRUTH.
17 IN ADDITION, YOUNG CHILDREN MAY BE INFLUENCED BY THE WAY QUESTION
18 IS ASKED. IT IS UP TO YOU TO DECIDE WHETHER THE CHILD UNDERSTOOD
19 THE QUESTIONS ASKED.

20 NOW, I INSTRUCT YOU AND EMPHASIZE TO YOU THAT THE FACT THE
21 DEFENDANT DID NOT TESTIFY IN THIS TRIAL CANNOT BE CONSIDERED BY
22 YOU IN ANY WAY WHATSOEVER OR BE CONSIDERED AS A FACTOR WHEN YOU
23 DETERMINE GUILT OR INNOCENCE. IT CANNOT BE CONSIDERED AT ALL. A
24 DEFENDANT HAS A CONSTITUTIONAL RIGHT TO REMAIN SILENT. AND THE
25 ASSERTION OF THAT RIGHT MUST NOT BE CONSIDERED BY YOU IN YOUR

1 DELIBERATIONS. UNDER YOUR OATH, YOU ARE TO DRAW NO CONCLUSIONS
2 WHATSOEVER FROM THE FACT THAT THE DEFENDANT IN THIS CASE DID NOT
3 TESTIFY. THE FACT THAT THE DEFENDANT DID NOT TESTIFY SHOULD NOT
4 EVEN BE DISCUSSED IN THE JURY ROOM. THE BURDEN OF PROOF, AS I
5 STATED TO YOU, IS ON THE STATE. THE DEFENDANT IS NOT REQUIRED TO
6 PROVE HIS INNOCENCE. THE BURDEN OF PROOF REMAINS ON THE STATE TO
7 PROVE INNOCENCE BEYOND A REASONABLE DOUBT.

8 NOW, AS I SAID, YOU ARE GOING TO HAVE THREE DIFFERENT CHARGES
9 WITH YOU. I'M GOING TO CHARGE YOU THE DEFINITIONS FIRST OF ASSAULT
10 WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT. THE DEFENDANT IS
11 CHARGED WITH ASSAULT TO COMMIT CRIMINAL SEXUAL CONDUCT WITH A
12 MINOR. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE
13 DEFENDANT ENGAGED IN AN ASSAULT WITH INTENT TO COMMIT SEXUAL
14 BATTERY WITH THE VICTIM OR SEXUAL CONDUCT WITH THE VICTIM. A
15 SEXUAL BATTERY IS SEXUAL INTERCOURSE, CUNNILINGUS, FELLATIO, ANAL
16 INTERCOURSE OR ANY INTRUSION HOWEVER SLIGHT OF ANY PART OF A
17 PERSON'S BODY OR OF ANY OBJECT INTO THE GENITAL OR ANAL OPENINGS
18 OF A PERSON'S BODY, EXCEPT WHEN THE INTRUSION IS ACCOMPLISHED FOR
19 MEDICAL RECOGNIZED TREATMENT OR DIAGNOSTIC PURPOSES. THE STATE
20 MUST PROVE BEYOND A REASONABLE DOUBT THAT THE VICTIM WAS LESS
21 THAN ELEVEN-YEARS-OLD AT THE TIME OF THE SEXUAL BATTERY. CONSENT,
22 WILLINGNESS, INDIFFERENCE OR IGNORANCE ON THE PART OF THE MINOR,
23 IF ANY, AS TO WHAT WAS TAKING PLACE DOES NOT IN ANY WAY AFFECT THE
24 CHARGE OF CRIMINAL SEXUAL CONDUCT WITH A MINOR OR ASSAULT WITH
25 INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT WITH A MINOR BECAUSE AN

1 UNMARRIED WOMAN UNDER THE AGE OF FOURTEEN CANNOT LEGALLY
2 CONSENT TO SEXUAL INTERCOURSE. NOW, LADIES AND GENTLEMEN, THAT
3 CHARGE ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT
4 WITH A MINOR, INCLUDES THE DEFINITION OF ASSAULT. YOU HAVE TO KNOW
5 THE DEFINITION OF ASSAULT TO DETERMINE WHETHER OR NOT THERE WAS
6 AN ASSAULT WITH INTENT TO COMMIT THAT CRIMINAL SEXUAL CONDUCT. AN
7 ASSAULT OCCURS WHEN A PERSON UNLAWFULLY ATTEMPTS OR OFFERS TO
8 COMMIT A VIOLENT INJURY UPON ANOTHER PERSON AND HAD THE PRESENT
9 ABILITY TO COMPLETE THE ATTEMPTED INJURY. AN ASSAULT IS THE
10 INTENTIONAL CREATION OF A REASONABLE FEAR OF IMMEDIATE BODILY
11 HARM. IT'S NOT NECESSARY THAT THE ATTEMPTED INJURY OR HARM
12 ACTUALLY TAKE PLACE. FOR EXAMPLE, IF I WALK UP TO YOU AND WE ARE
13 WITHIN ARMS REACH, I DRAW BACK TO HIT YOU, THAT IS AN ASSAULT.

14 NOW, LADIES AND GENTLEMEN, YOU WILL ALSO HAVE BEFORE YOU
15 THE CHARGE OF ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED
16 NATURE. IF YOU FIND THAT THE STATE HAS NOT PROVED THE DEFENDANT IS
17 GUILTY OF ASSAULT WITH THE INTENT TO COMMIT CRIMINAL SEXUAL
18 CONDUCT WITH A MINOR, YOU MUST THEN DETERMINE WHETHER THE STATE
19 HAS PROVEN WHETHER THE DEFENDANT IS GUILTY OF ASSAULT AND
20 BATTERY OF A HIGH AND AGGRAVATED NATURE. ASSAULT AND BATTERY OF
21 A HIGH AND AGGRAVATED NATURE INCLUDES ALL OF THE ELEMENTS OF
22 ASSAULT WITH THE INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT WITH
23 THE EXCEPTION OF PENETRATION. ASSAULT AND BATTERY OF A HIGH AND
24 AGGRAVATED NATURE INCLUDES ALL OF THE ELEMENTS EXCEPT FOR THE
25 ELEMENT OF PENETRATION. IT DOES NOT REQUIRE THAT. IN ADDITION, THE

1 STATE MUST PROVE BEYOND A REASONABLE DOUBT AN AGGRAVATING
2 CIRCUMSTANCE. ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED
3 NATURE IS AN UNLAWFUL ACTION OF VIOLENT INJURY TO A PERSON OF
4 ANOTHER ACCOMPANIED BY CIRCUMSTANCES OF AGGRAVATION.
5 CIRCUMSTANCES OF AGGRAVATION INCLUDE: THE USE OF A DEADLY
6 WEAPON, THE INTENT TO COMMIT A FELONY, THE INFLICTION OF SERIOUS
7 BODILY INJURY, A GREAT DISPARITY BETWEEN THAT AGES OR PHYSICAL
8 CONDITIONS OF THE PARTIES, A DIFFERENCE IN THE GENDER OF THE
9 PARTIES, TAKING OF INDECENT LIBERTIES OR FAMILIARITIES WITH A FEMALE
10 THROUGH THE USE OF FORCE, THE PURPOSEFUL INFLICTION OF SHAME AND
11 DISGRACE, AND THE RESISTENCE OF LAWFUL AUTHORITIES. THESE ARE
12 ONLY EXAMPLES OF AGGRAVATION AND IN THIS CASE, THE MAJOR
13 AGGRAVATION THAT YOU WILL HAVE TO DETERMINE IS THE TAKING OF
14 INDECENT LIBERTIES OR FAMILIARITIES WITH A FEMALE THROUGH THE USE
15 OF FORCE. IF YOU DETERMINE THAT THOSE ELEMENTS HAVE BEEN PROVEN
16 BY THE STATE, THEN YOU MUST FIND THE DEFENDANT GUILTY OF ASSAULT
17 AND BATTERY OF A HIGH AND AGGRAVATED NATURE. IF YOU FIND THAT
18 THEY HAVE NOT, THEN YOU MUST FIND HIM NOT GUILTY.

19 NOW, FINALLY, YOU WILL HAVE TO DETERMINE WHETHER OR NOT THE
20 DEFENDANT IS GUILTY OR NOT GUILTY OF LEWD ACT ON A MINOR. A MINOR,
21 IN THIS CASE, IS A PERSON UNDER THE AGE OF EIGHTEEN. AND THE STATE
22 MUST PROVE, FIRST, BEYOND A REASONABLE DOUBT THAT THE DEFENDANT
23 WAS OVER THE AGE OF FOURTEEN. THAT IS, THE DEFENDANT IS OVER THE
24 AGE OF FOURTEEN. AND THE STATE MUST PROVE THAT THE DEFENDANT
25 WILLFULLY AND LEWDLY AND COMMITTED OR ATTEMPTED A LEWD OR

1 LASCIVIOUS ACT ON OR WITH THE BODY OR ITS PARTS OF A CHILD UNDER
2 THE AGE OF SIXTEEN YEARS WITH THE INTENT TO AROUSE, APPEAL TO OR
3 GRATIFY THE LUSTS, PASSIONS, OR SEXUAL DESIRES OF THE DEFENDANT OR
4 THE CHILD. WILLFULLY MEANS VOLUNTARILY AND INTENTIONALLY WITH THE
5 SPECIFIC INTENT TO DO SOMETHING THAT THE LAW FORBIDS. LEWD MEANS
6 OBSCENE, LUSTFUL, INDECENT OR LECHEROUS. LASCIVIOUS MEANS
7 TENDING TO INCITE LUST, LEWD, INDECENT, OBSCENE OR INTENDING TO
8 DEPRAVE THE MORALS IN RESPECT TO SEXUAL RELATIONS.

9 NOW, LADIES AND GENTLEMEN, IN ORDER TO ESTABLISH CRIMINAL
10 LIABILITY, CRIMINAL INTENT IS REQUIRED. FOR EXAMPLE, THE MENTAL
11 STATE REQUIRED TO BE PROVEN BY THE STATE FOR A PARTICULAR CRIME
12 MIGHT BE PURPOSE, INTENT, KNOWLEDGE, RECKLESSNESS OR CRIMINAL
13 NEGLIGENCE. CRIMINAL INTENT MUST BE PROVEN BY THE STATE BEYOND A
14 REASONABLE DOUBT. CRIMINAL INTENT IS ALWAYS A MATTER THAT MUST BE
15 DETERMINED BY THE JURY FROM THE CIRCUMSTANCES SURROUNDING THE
16 SITUATION. THERE IS NO WAY TO PROVE INTENT TO A MATHEMATICAL
17 CERTAINTY. THERE IS NO WAY TO DETERMINE WHAT THE DEFENDANT WAS
18 THINKING AT THE TIME OF THE ACT. SO, THE LAW SAYS CRIMINAL INTENT
19 MAY BE INFERRED FROM THE CIRCUMSTANCES SHOWN TO HAVE EXISTED.
20 THIS IS HOW TO MAKE A DETERMINATION OF WHETHER OR NOT THE
21 ELEMENT REQUIRING INTENT WAS PRESENT. IT'S NOT NECESSARY TO
22 ESTABLISH INTENT BY DIRECT OR POSITIVE EVIDENCE, BUT INTENT MAY BE
23 ESTABLISHED BY INFERENCE IN THE SAME WAY AS OTHER FACTS BY TAKING
24 INTO CONSIDERATION THE ACTS OF THE PARTIES AND ALL THE FACTS AND
25 CIRCUMSTANCES OF THE CASE. CRIMINAL INTENT IS A MENTAL STATE, A

1 CONSCIOUS WRONGDOING. IT'S UP TO YOU TO DECIDE AND DETERMINE
2 WHAT THE DEFENDANT INTENDED TO DO BASED ON THE CIRCUMSTANCES
3 SHOWN TO HAVE EXISTED. CRIMINAL INTENT MAY ARISE FROM AN ACTION
4 OR A FAILURE TO ACT. IT MAY ARISE FROM NEGLIGENCE, RECKLESSNESS,
5 OR AN INDIFFERENCE TO DUTY OR CONSEQUENCES THAT IS CONSIDERED BY
6 THE LAW TO BE THE EQUIVALENT OF CRIMINAL INTENT.

7 NOW, LADIES AND GENTLEMEN, I ALSO WANT TO TELL YOU THAT OUR
8 SOUTH CAROLINA CODE §16-3-657 SAYS THAT, AND THIS IS THE LAW IN THIS
9 STATE, TESTIMONY OF A VICTIM NEED NOT BE CORROBORATED IN
10 PROSECUTIONS OF ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL
11 CONDUCT.

12 NOW, I UNDERSTAND, LADIES AND GENTLEMEN, WHEN YOU'RE SITTING
13 THERE LISTENING TO A CHARGE, I WATCH IT EVERY WEEK. YOU MAY HAVE
14 QUESTIONS. I CANNOT SEND THE CHARGE BACK TO THE JURY ROOM WITH
15 YOU, WHICH IS A PROBLEM, BUT I CANNOT DO IT. WHAT I WILL TELL YOU IS,
16 THAT DURING THE COURSE OF YOUR DELIBERATIONS, IF YOU HAVE A
17 QUESTION ABOUT MY CHARGE, MR. FOREMAN, IF YOU WILL JUST WRITE
18 DOWN WHICH PORTION YOU WANT REPEATED, WHAT YOU WANT EXPLAINED,
19 AND I WILL BRING YOU BACK IN HERE AND EXPLAIN IT TO YOU.

20 AS I SAID, YOU ARE GOING TO HAVE THREE VERDICT FORMS BACK
21 THERE. EACH VERDICT FORM WILL HAVE A GUILTY OR NOT GUILTY. THE
22 FACT THAT GUILTY MAY BE FIRST ON ONE AND NOT GUILTY IS FIRST ON
23 ANOTHER, MEANS NOTHING. SOMETHING'S GOT TO GO FIRST. YOU WILL NEED
24 TO LOOK AT EACH VERDICT SEPARATELY FOR EACH CRIME. SO, YOU'LL HAVE
25 BEFORE YOU: ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL

1 CONDUCT WITH A MINOR, COMMITTING OR ATTEMPTING TO COMMIT LEWD
2 ACT UPON A CHILD UNDER THE AGE OF SIXTEEN YEARS OF AGE, AND
3 ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE. YOU'LL HAVE
4 TO DETERMINE GUILT OR INNOCENCE ON EACH ONE OF THOSE. I SUSPECT
5 WHEN YOU GET INTO YOUR DELIBERATIONS, YOU WILL NEED TO GET ME TO
6 EXPLAIN THE CHARGE MORE. I WILL DO MY BEST TO EXPLAIN IT. YOU MAY
7 HAVE OTHER QUESTIONS. ANY QUESTION THAT YOU MAY HAVE, YOU NEED
8 TO USE THE SAME FORMAT. THE FOREMAN WRITES IT OUT, SIGNS YOUR
9 NAME, KNOCKS ON THE DOOR, THE BAILIFF WILL BRING IT TO ME. I'LL TELL
10 YOU THAT THERE ARE SOME QUESTIONS I CAN'T ANSWER BY LAW. IF I CAN'T
11 ANSWER IT, I'M GOING TO BRING YOU IN HERE, LOOK YOU IN THE EYE AND
12 TELL YOU I CAN'T ANSWER IT AND SEND YOU BACK. IF I CAN, I'LL ANSWER IT.
13 ALMOST EVERY JURY HAS QUESTIONS THAT I CAN'T ANSWER AND I'LL TELL
14 YOU THAT THE LAW IS PRETTY SPECIFIC ON WHAT I CAN AND CAN'T ANSWER.

15 NOW, WHAT WE'RE GOING TO DO NOW IS SEND YOU BACK. THE
16 LAWYERS HAVE AN OPPORTUNITY TO TELL ME IF THEY WANT ME TO CHARGE
17 YOU SOMETHING, IF I HAVE READ SOMETHING INCORRECTLY, IF I WANT TO
18 CHANGE, OR IF THEY WANT ME TO CHANGE MY CHARGE - I'M GOING TO GIVE
19 THEM THE OPPORTUNITY TO PUT THAT ON THE RECORD. IF I'M GOING TO
20 MAKE A CHANGE OR CORRECTION, I'M GOING TO BRING YOU BACK IN AND
21 CHARGE YOU, JUST THAT PORTION. AND IF I'M NOT, IN A FEW MINUTES,
22 WE'LL DELIVER ALL THE EVIDENCE TO YOU ALONG WITH THE VERDICT
23 FORMS. AT THAT POINT, YOU CAN BEGIN YOUR DELIBERATIONS. BUT, ONLY
24 WHEN THE EVIDENCE IS DELIVERED TO YOU. UNTIL THEN, MY ADMONITION
25 THAT YOU NOT TALK ABOUT THIS CASE IS STILL IN EFFECT UNTIL THE

1 VERDICT FORMS GET TO YOU. YOUR DECISIONS HAVE TO BE UNANIMOUS.
2 YOU HAVE TO MAKE THE DETERMINATION AND ALL TWELVE OF YOU MUST
3 AGREE ON IT. AND AGAIN, IF YOU HAVE A QUESTION OR SOMETHING, JUST
4 WRITE IT OUT AND I'LL DO MY BEST TO ANSWER IT.

5 NOW, I'M GOING TO SEND YOU BACK NOW. IT'S VERY LIKELY THAT I'LL
6 CALL YOU BACK IN TO CORRECT SOMETHING AND, AS I SAID, IF I DON'T WE'LL
7 SEND THE VERDICT FORMS WITH THE EVIDENCE BACK IN A FEW MINUTES
8 AND YOU CAN BEGIN. ONCE YOU REACH A VERDICT, JUST SIGN YOUR NAME
9 AND DATE THE VERDICT FORM KNOCK ON THE DOOR AND WE'LL BRING YOU
10 OUT. THANK YOU.

11 I NEED THE ALTERNATE JUST TO WAIT IN THE HALL FOR ME.

12 (JURY OUT AT 12:14 PM)

13 THE COURT: ANY CHANGES OR ALTERATIONS OR CORRECTIONS I
14 NEED TO MAKE FROM THE STATE?

15 MR. FLEMING: YOUR HONOR, I JUST -- ONE THING, YOU MIGHT VERIFY
16 THIS FOR ME. I NOTICED WHEN YOU WERE GIVING THE CHARGE BETWEEN
17 YOUR SAYING THE DIFFERENCE BETWEEN ASSAULT WITH INTENT TO COMMIT
18 CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE FIRST DEGREE AND THE
19 DIFFERENCE BETWEEN ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED
20 NATURE IS PENETRATION. THAT'S NOT TRUE UNDER ASSAULT, THERE IS NO -
21 -ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT, THERE IS
22 NO PENETRATION.

23 THE COURT: THE ABHAN, YOU'RE RIGHT ABOUT THAT. I'LL BRING THEM
24 IN AND EXPLAIN IT TO THEM.

25 MR. FLEMING: I GUESS THE DIFFERENCE BETWEEN THE TWO WOULD

1 BE – THERE'S ASSAULT – WITH THE FIRST ONE THERE IS AN ATTEMPT TO
2 COMMIT PENETRATION AND THE SECOND ONE IT'S NOT -- THE ABHAN
3 THERE'S NOT THE ATTEMPT TO PENETRATION.

4 THE COURT: AS I SAID, THAT STATUTE THAT ALLOWS ASSAULT WITH
5 INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT IS MORE THAN JUST
6 CONFUSING.

7 MR. HOWE: I DIDN'T HEAR THAT LAST.

8 THE COURT: IT'S MORE THAN JUST CONFUSING. I MEAN, IT DOES NOT
9 COMPLETELY STATE WHAT I SHOULD TELL THEM. WHAT I'LL DO IS BRING
10 THEM BACK IN AND TELL THEM THAT THE ASSAULT WITH INTENT TO COMMIT
11 CRIMINAL SEXUAL CONDUCT DOES NOT REQUIRE PENETRATION. WOULD
12 ONLY REQUIRE AN INTENT TO COMMIT SEXUAL BATTERY. THAT'S THE
13 PROBLEM WITH THE STATUTE. I THINK THAT'S THE WAY IT IS DEFINED IN
14 THERE. AND ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE
15 WITHOUT PENETRATION. ANY OBJECTION?

16 MR. HOWE: JUDGE, I'LL GO AHEAD AND STATE ON THE RECORD MY
17 OBVIOUSLY I WANT TO MAKE SURE I'M PROTECTED ON THE RECORD WITH
18 THE OBJECTION TO THE CHARGE OF ASSAULT WITH INTENT TO COMMIT
19 CRIMINAL SEXUAL CONDUCT IN ITS ENTIRETY. RECOGNIZING THAT YOU'VE
20 RULED ON THAT, I UNDERSTAND WHAT YOU'RE SAYING. I ALSO AM
21 REQUESTING THE COURT – WHEN YOU DEFINE ASSAULT, I WOULD REQUEST
22 THAT YOU AGAIN THAT YOU AGAIN DEFINE INTENT SO THE ASSAULT PART IS
23 NOT EMPHASIZED WITHOUT THE INTENT TO COMMIT CRIMINAL SEXUAL
24 CONDUCT WITH A MINOR.

25 THE COURT: IT'S THE INTENTIONAL CREATION —

1 AN ASSAULT IS THE INTENTIONAL CREATION OF A REASONABLE FEAR
2 OF IMMEDIATE BODILY HARM. IT'S NOT NECESSARY THAT THE ATTEMPTED
3 INJURY OR HARM ACTUALLY TAKE PLACE. SO, WHEN YOU'RE MAKING YOUR
4 DETERMINATION YOU NEED TO DECIDE WHETHER OR NOT THE STATE HAS
5 PROVEN THAT THERE WAS AN ASSAULT AND THAT THAT ASSAULT HAD THE
6 INTENTION OF COMMITTING SEXUAL BATTERY, WHICH WOULD HAVE BEEN
7 THE INTRUSION ANY WAY WHATSOEVER INTO ANOTHER PERSON'S BODY.
8 SO, THERE WAS A QUESTION ABOUT WHETHER THAT WAS READ CORRECTLY.
9 I'LL ASSUME THE FAULT OF NOT READING IT CORRECTLY, BUT I DO WANT TO
10 MAKE SURE THAT YOU UNDERSTAND THAT YOU HAVE TO HAVE AN ASSAULT
11 AND THAT ASSAULT HAS TO BE COMMITTED WITH THE INTENT TO COMMIT
12 CRIMINAL SEXUAL CONDUCT. ALL RIGHT. I HAVE TO SEND YOU OUT ONE
13 MORE TIME. I SUSPECT THAT WILL BE THE ONLY CHANGE I WILL MAKE. I
14 WILL TELL YOU ALSO THAT ABHAN, THE ASSAULT AND BATTERY OF A HIGH
15 AND AGGRAVATED NATURE THAT CHARGE, AS I SAID, INCLUDES ALL OF THE
16 ELEMENTS OF CRIMINAL SEXUAL CONDUCT EXCEPT PENETRATION. IT AGAIN,
17 IS WHAT IS CALLED A LESSER INCLUDED OFFENSE, WHICH MEANS IT
18 CONTAIN ALL OF THE ELEMENTS -- IF YOU WANT TO THINK OF IT ON A CHART,
19 YOU'VE GOT ASSAULT AND BATTERY OF A HIGH AND AGGRAVATED NATURE
20 ABOVE IT IS CRIMINAL SEXUAL CONDUCT. ASSAULT AND BATTERY CONTAINS
21 ALL OF THE ELEMENTS OF CRIMINAL SEXUAL CONDUCT WITHOUT THE
22 PENETRATION. SO, AGAIN, ONCE YOU BEGIN DELIBERATIONS, IF YOU HAVE A
23 QUESTION, FEEL FREE AND I'LL DO MY BEST. I CAN RE-CHARGE ANY OR ALL
24 OR THIS CHARGE AT ANY TIME THAT YOU WANT. I JUST CAN'T SEND IT BACK
25 WITH YOU. ALL RIGHT. I'LL SEND YOU BACK ONE MORE TIME. I SUSPECT I'LL

1 BE SENDING THIS STUFF BACK TO YOU IN JUST A FEW MINUTES. I DO NEED
2 THE ALTERNATE TO WAIT IN THE HALL FOR ME.

3 (JURY OUT AT 12:14 PM)

4 (EVIDENCE AND VERDICT FORMS SENT BACK AT 12:26 PM)

5 (THE COURT RELEASES THE ALTERNATE FROM SERVICE)

6 (NOTE FROM THE JURY 1:26 PM)

7 THE COURT: ALL RIGHT. I'VE GOT TWO JURY QUESTIONS AND I'M
8 GOING TO HAVE TO CALL THEM IN TO ASK THEM. THEY'VE JUST BEEN
9 DELIVERED LUNCH AND SO I'M GOING TO GIVE THEM A LITTLE TIME TO EAT,
10 BUT THE FIRST JURY QUESTION IS NOT REALLY A QUESTION, IT JUST STATES
11 THREE THINGS. ONE, IS THE LETTER THAT MR. WEATHERALL WROTE TO
12 JUNE'S MOTHER AND THEN UNDERNEATH THAT IT SAYS ^{Minor} TESTIMONY.
13 AND THAT'S SIGNED MR. FOREMAN. AND THE SECOND ONE IS NOT SIGNED
14 AND WE'LL HAVE TO SEND IT BACK AND ASK HIM TO SIGN IT. BUT, IT SAYS,
15 "THE SOCIAL WORKER TESTIMONY." I'M ASSUMING WHAT THEY WANT IS FOR
16 US TO REPEAT THAT TESTIMONY, WHICH IS GOING TO TAKE A LITTLE TIME.
17 SO, I'M GOING TO GIVE THEM A LITTLE TIME TO EAT. THEY'VE JUST SERVED
18 THEM THEIR STUFF, I'M GOING TO BRING THEM IN, CONFIRM THAT THEY
19 WANT TO HEAR THIS TESTIMONY AGAIN AND THEN I'LL HAVE TO SEND THEM
20 BACK WHILE WE FIND IT AND THEN IF THAT'S WHAT THEY WANT TO HEAR,
21 WE'LL PLAY IT. NOW, THE LETTER THAT MR. WEATHERALL WROTE TO ^{Minor}
22 MOTHER, WASN'T THAT IN EVIDENCE?

23 MR. FLEMING: NO, SIR.

24 THE COURT: WELL, I'LL JUST TELL THEM THEY CAN'T -- THAT'S NOT AN
25 ISSUE. BUT, I'M GOING TO GIVE THEM A MINUTE. LITERALLY, JUST AS I WAS

1 WALKING OUT, THEY WERE JUST SERVED. I'M GOING TO TELL THE BAILIFF TO
2 TELL THEM TO GO AHEAD AND EAT, GIVE THEM FIFTEEN TO TWENTY
3 MINUTES. CAN YOU DO THAT?

4 THE BAILIFF: TELL THEM TO GO AHEAD AND FINISH THEIR MEAL?

5 THE COURT: YES. AND THEN WE'LL BRING THEM OUT. ALL RIGHT.
6 WE'LL TAKE A BREAK FOR A FEW MINUTES.

7 (JURY IN 2:16 PM)

8 (REPLAYED) Minor TESTIMONY AND CHARLOTTE EHNEY'S

9 TESTIMONY)

10 (NOTES FROM JURY MARKED AS COURT'S EXHIBITS #1 AND #2)

11 (JURY OUT AT 3:15 PM)

12 THE COURT: I UNDERSTAND THE JURY HAS A VERDICT. IS THAT
13 RIGHT? ALL RIGHT. LET ME TELL YOU GENERICALLY, I DON'T KNOW IF THERE
14 ARE ANY FAMILY MEMBERS HERE, I DON'T KNOW IF THERE ARE ANY PEOPLE
15 PARTICULARLY INTERESTED IN THIS CASE, I'LL JUST TELL YOU GENERICALLY,
16 I'M NOT GOING TO STAND FOR ANY OUTBURSTS. EVERY BODY IS TIRED, AND
17 I'M TIRED AND I'M JUST NOT GOING TO STAND FOR IT HOWEVER IT GOES. SO,
18 JUST KEEP IT TO YOURSELF. ALL RIGHT. YOU CAN BRING THEM IN.

19 (JURY IN WITH VERDICT 4:40 PM)

20 THE BAILIFF: ALL PRESENT , YOUR HONOR.

21 THE COURT: ALL RIGHT. THANKS. MR. FOREMAN, I UNDERSTAND YOU
22 HAVE A VERDICT.

23 FOREMAN: YES, SIR, WE DO, YOUR HONOR.

24 THE COURT: IF YOU WOULD, HAND IT TO THE BAILIFF.

25 (FOREPERSON HANDS VERDICT FORMS TO THE BAILIFF, WHO

1 HANDS THEM TO THE JUDGE WHO REVIEWS THEM AND HANDS THEM TO THE
2 CLERK OF COURT)

3 CLERK OF COURT: IN THE CASE OF THE STATE OF SOUTH CAROLINA
4 versus DONALD WEATHERALL, INDICTMENT NUMBER 2005-GS-30-166, AS T^H
5 THE CHARGE OF ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL
6 CONDUCT WITH A MINOR, WE THE JURY UNANIMOUSLY FIND THE
7 AFOREMENTIONED INDICTMENT THAT THE DEFENDANT DONALD
8 WEATHERALL IS GUILTY OF ASSAULT WITH INTENT TO COMMIT CRIMINAL
9 SEXUAL CONDUCT WITH A MINOR. SIGNED BY THE FOREMAN, JIMMY CURLY.

10 AS TO THE CHARGE OF COMMITTING OR ATTEMPTING TO COMMIT A
11 LEWD ACT UPON A CHILD UNDER THE AGE OF SIXTEEN YEARS OF AGE, WE
12 THE JURY FIND THE DEFENDANT GUILTY OF COMMITTING OR ATTEMPTING TO
13 COMMIT A LEWD ACT UPON A CHILD UNDER THE AGE OF SIXTEEN YEARS OF
14 AGE. SIGNED BY THE FOREMAN, JIMMY CURLY.

15 AS TO THE CHARGE OF ASSAULT OF A HIGH AND AGGRAVATED
16 NATURE, WE THE JURY FIND THE DEFENDANT NOT GUILTY, SIGNED BY THE
17 FOREMAN JIMMY CURLY. LADIES AND GENTLEMEN, IF THOSE BE YOUR
18 VERDICTS PLEASE INDICATE BY RAISING YOUR RIGHT HANDS. (ALL JURORS
19 RAISE THEIR RIGHT HANDS)

20 THE COURT: THANK YOU. LADIES AND GENTLEMEN, I HAVE TO SEND
21 YOU BACK FOR ONE LAST TIME. PROBABLY, IN A FEW MINUTES, I'M GOING TO
22 COME BACK AND TALK TO YOU AND RELEASE YOU FROM BACK THERE. BUT,
23 AGAIN, STAY BACK THERE AND GIVE ME A FEW MINUTES AND I'LL BE BACK
24 THERE TO SPEAK WITH YOU IN JUST A FEW MINUTES WITH THE CLERK WHO
25 WILL HAVE YOUR INFORMATION ON HOW YOU GET YOUR CHECKS AND SOME

1 OTHER INFORMATION REGARDING JURY SERVICE, SO I'LL BE RIGHT BACK.

2 (JURY RELEASED AT 4:42 PM)

3 THE COURT: ALL RIGHT. I WON'T HEAR ANY MOTIONS, BUT I WILL TELL
4 YOU THIS. I USUALLY GO BACK AND SPEAK TO THEM PERSONALLY FOR JUST
5 A FEW MINUTES AND RELEASE THEM FROM BACK THERE. I GIVE THEM THE
6 OPPORTUNITY TO COME BACK IN AND WATCH THE SENTENCING IF THEY
7 WANT TO. DOES ANY BODY OBJECT TO ME TALKING WITH THEM
8 PERSONALLY? FROM THE STATE?

9 MR. FLEMING: NOTHING FROM THE STATE, YOUR HONOR.

10 MR. HOWE: NO, SIR.

11 THE COURT: ALL RIGHT. ANY MOTIONS AT ALL?

12 MR. HOWE: I DO, JUDGE.

13 THE COURT: YES, SIR.

14 MR. FLEMING: NONE FROM THE STATE.

15 THE COURT: ALL RIGHT.

16 MR. HOWE: YOUR HONOR, FIRST OF ALL, I WANT TO RENEW THE
17 MOTIONS THAT I MADE AT THE CLOSE OF THE STATE'S CASE AND AT THE
18 CLOSE OF THE PRESENTATION OF THE DEFENSE'S EVIDENCE, TO REQUEST A
19 NEW TRIAL AND THEN TO FIND MR. WEATHERALL NOT GUILTY. BASIS FOR
20 THE MOTIONS WOULD BE THE FOLLOWING, JUDGE: THE FIRST THING, I
21 THINK, THAT WE OBJECTED TO WAS THE TESTIMONY FROM THE WITNESS,
22 MS. EHNEY -- I'M ASSUMING THERE WAS AN EFFORT TO QUALIFY HER AS AN
23 EXPERT WITNESS. I DON'T THINK SHE WAS EVER DECLARED AND SHE GAVE
24 AN OPINION -- I BELIEVE TESTIFIED TO AN OPINION ABOUT CERTAIN THINGS IN
25 THE CASE AND ALSO TESTIFIED TO THE CHILD'S THE COURT RULED AND

1 OVERRULED MY OBJECTION. THAT'S PART OF THE BASIS FOR IT. THE
2 COURT'S RULING WITH REGARDS TO ALLOWING THE STATE TO IMPEACH MY
3 CLIENT BASED ON THE FAILURE TO REGISTER AS A SEX OFFENDER WAS
4 PARTICULARLY DAMAGING BASICALLY PUT US IN THE POSITION UNDER RULE
5 609 – PUT US IN THE POSITION WHERE HE SIMPLY COULD NOT TESTIFY
6 UNDER THOSE CIRCUMSTANCES. JUDGE, WE WOULD ARGUE AND STILL
7 MAINTAIN THAT 609, FAILURE TO REGISTER, CERTAINLY THE SECOND
8 POTENTIAL SENTENCE WAS NOT IN EXCESS OF YEARS, BUT MORE
9 IMPORTANTLY PRIMARILY BECAUSE THE COURT DETERMINED THAT THAT
10 INVOLVED DISHONESTLY AND WE CONTEND IT DID NOT INVOLVE THAT. AND
11 MORE IMPORTANTLY, JUDGE, WE MAINTAIN THT EVEN IF THE COURT WERE
12 TO FIND THAT FAILURE TO REGISTER DID INVOLVE DISHONESTY
13 IMPEACHMENT, IT WAS SO DAMAGING, IT WAS A 401 ARGUMENT THAT
14 SHOULD BE MADE BY THE COMPLETELY PREJUDICIAL AND BASICALLY PUT –
15 JUST ELIMINATED ANY REALISTIC POSSIBILITY OF WINNING THIS CASE IF WE
16 PUT MR. WEATHERALL UP TO TESTIFY. JUDGE, WE ALSO RAISE THE ISSUE
17 AND ATTEMPTED TO INTRODUCE TESTIMONY AND PROFFER FROM DR.
18 BURGESS WHO TESTIFIED THAT THE CHILD HAD BEEN DIAGNOSED WITH
19 HERPES SIMPLEX II, VAGINAL TYPE HERPES AND I BELIEVE SHE OFFERED
20 SOME TESTIMONY THAT SHE HAD BEEN TREATING THIS CHILD FOR
21 SYMPTOMS THAT COULD HAVE LED TO THAT BACK IN 2004. I UNDERSTAND
22 THE STATE'S ARGUMENT ON RELEVANCY WAS THAT THE DIAGNOSIS DIDN'T
23 COME UNTIL MARCH, 2006, BUT THAT WAS THE BASIS FOR THAT. AND, OF
24 COURSE, FOLLOW-UP THAT TESTIMONY, WE PROFFERED THE TESTIMONY OF
25 THE JAIL NURSE WHO TESTIFIED THAT MY CLIENT DID NOT HAVE HERPES

1 SIMPLEX II. JUDGE, WE ALSO, THE COURT RULED, OF COURSE, THAT THE
2 CRIMINAL SEXUAL CONDUCT OF THE MINOR WOULD NOT GO TO THE JURY. I
3 THINK WE'RE PROTECTED ON THE RECORD AND WOULD, AGAIN, ARGUE THAT
4 THE ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT CHARGE
5 WOULD NOT HAVE GONE FORWARD. THAT THERE WAS NO EVIDENCE OF
6 INTENT OR ANY INTENTION TO COMMIT A SEXUAL BATTERY AND THAT WAS
7 THE BASIS FOR THAT. JUDGE, WE ALSO OBJECTED TO THE CHARGE THAT
8 YOU INSTRUCTED THE JURY UNDER § 16-3-357 ABOUT THE CORROBORATION
9 OF THE STATE'S WITNESS, EXCUSE ME, THE VICTIM IN THIS CASE. JUDGE, I
10 HAVE TO BRING UP ONE THAT I'LL BE PERFECTLY HONEST WITH THE COURT
11 BECAUSE IT NEEDS TO BE ADDRESSED NOW, I'M ASKING THE COURT TO
12 CONSIDER ACTUALLY ON THE COURT'S OWN ACCORD, FINDING THAT THE
13 STATE DID NOT INTRODUCE ALL OF THE ELEMENTS REQUIRED TO CONVICT
14 MR. WEATHERALL OF LEWD ACT. I DID NOT MAKE THAT MOTION AT CLOSING
15 STATE'S CASE, DID NOT MAKE IT AT THE CLOSE OF THE PRESENTATION OF
16 EVIDENCE, QUITE HONESTLY, CAUGHT IT AFTER YOU KNOW, LATER ON AFTER
17 THE CASE HAD ESSENTIALLY GONE TO THE JURY. I THINK THERE WAS A
18 REQUIREMENT THAT THE JURY HAD TO SEE EVIDENCE TO FIND IF MR.
19 WEATHERALL WAS IN EFFECT OLD ENOUGH TO COMMIT THE LEWD ACT. I
20 THINK THAT WAS A REQUIREMENT AS I UNDERSTAND IT, HIS AGE, AND I DON'T
21 THINK THERE WAS EVER ANY PROOF OFFERED OF THAT IN THIS CASE. AND
22 FOR THAT REASON, JUDGE, THE ONLY REMEDY THAT I CAN SEE OCCUR WITH
23 THAT RIGHT NOW, BEING PERFECTLY FRANK WITH THE COURT, IS IF YOU
24 FIND THAT THE STATE DID NOT DO THAT. IT GOES TO THE ELEMENTS OF THE
25 OFFENSE AND I THINK, CLEARLY, WE SHOULD HAVE THE RIGHT TO ASK THE

1 COURT TO MAKE A RULING CONCERNING THAT. I THINK I'VE ESTABLISHED
2 EVERYTHING THAT I CAN THINK OF THAT WOULD BE THE BASIS FOR MY
3 MOTION FOR EITHER A NEW TRIAL, OR THE COURT, ON ITS OWN, HAVE THE
4 AUTHORITY OR THE CHANGE OF VERDICT THAT'S BEEN RENDERED BY THE
5 JURY.

6 THE COURT: THANK YOU. I THINK YOU'RE PROTECTED ON THE
7 RECORD. I DENY THOSE MOTIONS. ALL RIGHT. WHAT I'M GOING TO DO IS GO
8 BACK AND TALK WITH THEM AND THEN COME BACK OUT. HAVE YOU GOT THE
9 SENTENCING SHEETS AND ALL?

10 MR. FLEMING: YES, SIR.

11 THE COURT: LET ME TALK WITH THEM AND THEN I'LL BE BACK.

12 (JUDGE LEAVES TO GO TALK TO THE JURY)

13 THE COURT: ALL RIGHT. Y'ALL WANT TO COME UP?

14 (MR. HOWE AND MR. WEATHERALL APPROACH THE BENCH)

15 THE COURT: JUST FOR THE RECORD, THE ASSAULT WITH INTENT TO
16 COMMIT CARRIES WITH IT FIFTEEN YEARS. IS THAT RIGHT?

17 MR. FLEMING: THIRTY.

18 THE COURT: THIRTY. ALL RIGHT. AND THE LEWD ACT, FOR THE
19 RECORD, HOW MUCH IS THAT?

20 MR. FLEMING: THAT IS FIFTEEN.

21 THE COURT: ALL RIGHT. I'VE GOT YOU. ALL RIGHT, YES SIR, ANYTHING
22 FROM THE DEFENDANT?

23 MR. HOWE: JUDGE, JUST BRIEFLY, WHAT I'D LIKE TO ASK THE COURT
24 TO DO, IS TO CONSIDER, OF COURSE THE EVIDENCE THAT WAS PRESENTED.
25 ALSO CONSIDER THE FACT THAT MR. WEATHERALL MOST PROBABLY,

1 BECAUSE OF PRIOR CRIMINAL HISTORY, IS LOOKING AT THE POSSIBILITY
2 ACTUALLY A GOOD CHANCE THEY WOULD DECLARE HIM TO BE A SEXUAL
3 VIOLENT PREDATOR. I'VE EXPLAINED THAT TO HIM IN THE EVEN HE ENTER A
4 PLEA OR FOUND GUILTY OF THESE CHARGES. AND I THINK THE COURT
5 WOULD NOTE THAT THERE WOULD BE SOME SUPERVISION OF HIM
6 REGARDLESS OF WHAT SENTENCE YOU GIVE. I'D ASK THE COURT TO
7 CONSIDER GIVING HIM SOMETHING OTHER THAN THE MAXIMUM UNDER THE
8 CIRCUMSTANCES AND GIVE HIM AN OPPORTUNITY TO ONE DAY GET OUT AND
9 RECEIVE WHATEVER TYPE TREATMENT THAT WOULD BE AVAILABLE. I THINK
10 HE WOULD CERTAINLY MAINTAIN HIS INNOCENCE WOULD CERTAINLY
11 UNDERGO THAT TYPE TREATMENT. WE ASK YOU CONSIDER ALL THAT.

12 THE COURT: ALL RIGHT. MR. WEATHERALL, HOW OLD ARE YOU?

13 MR. WEATHERALL: THIRTY-TWO.

14 THE COURT: THIRTY-TWO. ALL RIGHT, ANYTHING FURTHER? MR.
15 WEATHERALL, ANYTHING?

16 MR. WEATHERALL: JUST CLAIMING MY INNOCENCE.

17 THE COURT: ALL RIGHT. ANYTHING FROM THE STATE?

18 MR. FLEMING: YES, SIR, YOUR HONOR. WE WOULD ASK THE COURT TO
19 IMPOSE THE MAXIMUM SENTENCE !N THIS CASE, YOUR HONOR. HE'S GOT A
20 CRIMINAL SEXUAL CONDUCT AND BURGLARY IN 1991, HERE IN GREENWOOD
21 COUNTY HE'S GOT A CONTRABAND POSSESSION FURNISHING CONVICTION IN
22 2002, HE'S GOT SOME MISCELLANEOUS FRAUDULENT CHECKS, HE'S ALSO
23 GOT A CORRUPTION OF MINORS IN THE STATE OF PENNSYLVANIA WHICH
24 OCCURRED IN 1995, YOUR HONOR. AND OTHER THAN THAT HE WAS A
25 REQUIRED TO REGISTER AS A SEX OFFENDER IN PENNSYLVANIA. THERE IS

1 DEFINITELY A PATTERN ON HIS PART AND WE WOULD ASK FOR THE MAXIMUM
2 SENTENCE IN THIS CASE CONSIDERING THE NATURE OF EVENTS AND THE
3 AGE OF THE VICTIM.

4 THE COURT: ALL RIGHT. I TELL YOU SOMETHING, LISTENING TO THAT
5 CHILD TESTIFY BREAKS MY HEART AND THAT CHILD IS A WRECK WAITING TO
6 HAPPEN. THERE'S AN AWFUL LOT OF BLAME TO GO AROUND, BUT MR.
7 WEATHERALL, I THINK MOST OF THE BLAME FALLS WITH YOU. THE
8 SENTENCE OF THE COURT OF ASSAULT WITH INTENT TO COMMIT CRIMINAL
9 SEXUAL CONDUCT IS THIRTY YEARS PROVIDED UPON THE SERVICE OF
10 ~~TWENTY YEARS~~, THE BALANCE SUSPENDED WITH PROBATION OF FIVE
11 YEARS, THAT RUNS CONCURRENT WITH LEWD ACT WHICH IS ~~FIFTEEN YEARS~~.
12 BOTH OF THOSE RUN CONCURRENT. RANDOM DRUG AND ALCOHOL TESTING
13 WHILE ON PROBATION. THANK YOU.

14 MR. FLEMING: THANK YOU, JUDGE.

15 THE COURT: THANK YOU.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DONALD THOMAS WETHERALL,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. Did the judge err in submitting an assault with intent to commit criminal sexual conduct with a minor first degree charge to the jury when the appellant was indicted for criminal sexual conduct with a minor first degree and lewd act and the judge directed a verdict of not guilty on the criminal sexual conduct with a minor first degree?

2. Did the judge err in refusing to allow defense counsel to present evidence that the juvenile victim had herpes simplex II and the appellant did not?

STATEMENT OF THE CASE

In January 2005, the Laurens County Grand Jury indicted Wetherall for criminal sexual conduct with a minor first degree and committing or attempting to commit a lewd act on a minor under sixteen years of age, indictment #05-GS-30-166. On September 14, 2006, Wetherall proceeded to jury trial before the Honorable Cordell Maddox. At the close of the State's case Judge Maddox directed a verdict of not guilty on the criminal sexual conduct with a minor first degree charge. (R. p. 102, lines 5 – p. 103, lines 1-18). The judge, however, submitted to the jury the charge of assault with intent to commit criminal sexual conduct with a minor first degree. (R. pp. 157 – 171). The jury returned verdicts of guilty of both assault with intent to commit criminal sexual conduct with a minor first degree and lewd act. Judge Maddox sentenced Wetherall to 30 years suspended upon the service of 20 years with 5 years probation for assault with intent to commit criminal sexual conduct with a minor first degree and 15 years concurrent for lewd act. A timely notice of intent to appeal was filed on September 19, 2006. This appeal follows.

ARGUMENT

1. The judge erred in submitting an assault with intent to commit criminal sexual conduct with a minor first degree charge to the jury when the appellant was indicted for criminal sexual conduct with a minor first degree and lewd act and the judge directed a verdict of not guilty on the criminal sexual conduct with a minor first degree.

Counsel for Wetherall moved for a directed verdict on the criminal sexual conduct with a minor first degree [CSC first with a minor] charge based on the fact that there was no evidence of a sexual battery as defined by S.C. Code §16-3-651(h). (R. p. 93, lines 8 – p. 94, 95, lines 1-21). The State argued that even if the judge directed a verdict on the CSC first with a minor charge, the State was still entitled to a charge on attempt to commit criminal sexual conduct under S.C. Code §16-3-656. (R. p. 96, lines 12-13). The judge granted the directed verdict motion and then asked, “The question then becomes whether attempted CSC is a lesser included offense. Y’all got any information on that?” (R. p. 102, lines 5-16). The State argued that the attempt was a lesser included offense and the judge agreed. (R. p. 102, lines 17 – p. 103, lines 1-18). Counsel reserved the right to argue the issue prior to the charge to the jury and the judge agreed. (R. p. 102, lines 19 – p. 104, lines 1-3).

During the charge conference the judge explained that he was going to charge the jury with the law on assault with intent to commit criminal sexual conduct. (R. p. 134, lines 23 – p. 135, lines 1-25). Counsel objected based on the fact that there was no evidence that the appellant committed an assault and there was no evidence that the

appellant intended to commit a sexual battery or attempted to commit a sexual battery. (R. p. 136, lines 4 – p. 137, lines 1-10). Alternatively, counsel argued that the State should have indicted the appellant for assault with intent to commit criminal sexual conduct with a minor first degree. (R. p. 137, lines 21 – p. 138, lines 1-7).

The judge then instructed the jury, “The defendant is charged with assault to commit criminal sexual conduct with a minor. The State must prove beyond a reasonable doubt that the defendant engaged in an assault with intent to commit sexual battery with the victim or sexual conduct with the victim.” (R. p. 165, lines 10-14). Counsel objected to the charge on assault with intent to commit criminal sexual conduct as a whole but failed to object to the erroneous specific language “or sexual conduct with the victim” used by the judge in the charge. (R. p. 172, lines 16-24). The charge given impermissibly dilutes the requirement from intent to commit a sexual battery to intent to have sexual conduct.

Based on an erroneous charge given to the jury that the only difference between assault and battery of a high and aggravated nature and assault with intent to commit CSC with a minor first degree was penetration, the State asked the judge for a re-charge. (R. p. 166, lines 20-23; p. 171, lines 15-22). The judge, over objection of defense counsel, re-charged the jury. (R. p. 173, lines 3-11; lines 17 – p. 174, lines 1 – p. 175, lines 1-2). The judge again erroneously charged the jury in omitting the requirement of intent to commit a sexual battery by stating, “I’ll assume the fault of not reading it correctly, but I do want to make sure that you understand that you have to have an assault and that assault has to be committed with the intent to commit criminal sexual conduct.” (R. p. 174, lines 9-12).

As the South Carolina Court of Appeals wrote in State v. Brock, 335 S.C. 267, 516 S.E.2d 212 (Ct.App. 1999), "The offense of first degree assault with intent to commit CSC on a minor requires the victim to be under the age of eleven and provides no minimum age for the perpetrator. Furthermore, an assault must take place, and the perpetrator must act with intent to commit a sexual battery." Brock at 214. Assault with intent to commit CSC on a minor requires an intent to commit a sexual battery. "Sexual conduct" does not meet the standard required by the statute.

The judge erred in submitting an assault with intent to commit criminal sexual conduct with a minor first degree charge to the jury when the appellant was indicted for criminal sexual conduct with a minor first degree and lewd act and the judge directed a verdict of not guilty on the criminal sexual conduct with a minor first degree. Assault with intent to commit criminal sexual conduct with a minor is not a lesser included offense of criminal sexual conduct with a minor first degree. "In determining whether one crime is a lesser included offense of another, the test is whether the greater of the two offenses includes all of the elements of the lesser offense. If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense." State v. Brock, 335 S.C. 267, 271, 516 S.E.2d 212, 214 (Ct.App. 1999). Assault with intent to commit criminal sexual conduct with a minor first degree requires an assault and an intent to commit a sexual battery, elements not required for criminal sexual conduct with a minor first degree. Criminal sexual conduct with a minor first degree requires a sexual battery, an element not required for assault with intent to commit criminal sexual conduct with a minor.

Importantly, there was no evidence that the appellant committed an assault and there was no evidence that the appellant intended to commit a sexual battery or attempted to commit a sexual battery. There was no factual basis to support a charge of assault with intent to commit criminal sexual conduct with a minor. The trial judge correctly directed a verdict on the criminal sexual conduct with a minor first degree charge because there was no evidence of a sexual battery. The appellant was also indicted for lewd act. This was the sole charge that should have been submitted to the jury. The judge erred in submitting the unindicted assault with intent to commit criminal sexual conduct with a minor charge to the jury.

2. The judge erred in refusing to allow defense counsel to present evidence that the juvenile victim had herpes simplex II and the appellant did not.

Counsel for appellant proffered the testimony from Dr. Sally Burgess. (R. pp. 107 - 112). Dr. Burgess testified that in March of 2006, the minor victim tested positive for genital herpes. (R. p. 109, lines 18-24). Dr. Burgess first treated the minor child for vaginitis on August 26, 2004. Dr. Burgess testified that it is difficult to pinpoint when a patient contracted herpes. (R. p. 110, lines 5-11). Dr. Burgess testified that vaginitis could be an indicator of herpes. (R. p. 109, lines 9-15). The indictment alleges contact between the appellant and the minor child between April and June 2004.

The State objected to the testimony as irrelevant. (R. p. 104, lines 16-24). After hearing argument, the judge sustained the State's objection but allowed defense counsel to proffer the doctor's testimony. (R. pp 105 - 106). After the doctor's testimony, the judge

affirmed his earlier ruling precluding testimony about the child having herpes. (R. p. 112, lines 12-17).

Counsel for appellant then proffered the testimony of Tonya Hughes, a nurse from the Laurens County Detention Center. (R. pp. 127-130). The nurse testified that the appellant did not have herpes. (R. p. 128, lines 21-25). The judge erred in refusing to allow defense counsel to present evidence that the juvenile victim had herpes simplex II and the appellant did not.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 557, 546 S.E.2d 87, 93 (2002). A trial judge's ruling on the admissibility of evidence will not be reviewed on appeal absent an abuse of discretion. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct.App. 2000). An abuse of discretion occurs when the trial judge's ruling is based on an error of law. Id. For an error of law to warrant reversal, however, the error must result in prejudice to the appellant. Id. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE.

The fact that the child may have contacted herpes in 2004, and the appellant does not have herpes makes it more probable than not that someone other than the appellant committed the acts alleged. The minor child was seven at the time of trial and five at the time of the allegation contained in the indictment. The only direct evidence against appellant comes from the child.

The judge's ruling prevented appellant from presenting a complete defense. The Due Process Clause of the Fourteenth Amendment requires that criminal defendants be

afforded a meaningful opportunity to present a complete defense. California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). The judge erred in precluding the herpes testimony.

CONCLUSION

Based on the above arguments, Weatherall's conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



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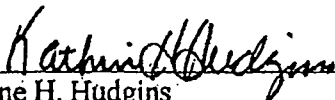
ATTORNEY FOR APPELLANT

This 19th day of June, 2008.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Laurens County
J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

DONALD THOMAS WETHERALL,

Appellant.

PROOF OF SERVICE

I certify that I have served the within Final Brief of Respondent on Appellant by depositing three copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Katherine H. Hudgins, Assistant Appellate Defender, S.C. Commission on Indigent Defense, Division of Appellate Defense, P.O. Box 11589, Columbia, SC 29211.

I further certify that all parties required by Rule to be served have been served.

This 17th day of June, 2008.



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THE STATE,

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STATEMENT OF ISSUES ON APPEAL

I.

Is Wetherall's Issue 1 available for appellate review?

II.

Did the trial judge err when he submitted assault with intent to commit first degree criminal sexual conduct with a minor after directing a verdict on the charged offense of first degree criminal sexual conduct with a minor?

III.

Did the trial judge err by excluding evidence the victim was diagnosed with genital herpes two years after the crime and that he did not have it?

STATEMENT OF THE CASE

Respondent concurs with the procedural Statement of the Case of Appellant Donald Thomas Wetherall.

STATEMENT OF FACTS

The seven-year-old victim¹ testified that when she was five, she lived with her mother in their home in Cross Hill. She said Wetherall sometimes lived there with them. (R. 1-3). The victim recalled an incident while her mother was asleep. The victim testified that as she watched cartoons on the couch, Wetherall came in and made her take off her panties. She said he then "stuck his wee wee . . . on my monkey," which the victim indicated was her "private part." When Wetherall did this to her, the victim said that it hurt. The victim said Wetherall "did that white stuff . . . on my belly" and then wiped it off with her blanket. (R. 4-7, 9).

The police were contacted about the allegation of sexual abuse on June 23, 2004. (R. 51). Charlotte Ehney conducted a forensic interview of the victim in July. (R. 20-21). Ehney testified the victim described the sexual abuse using anatomical identification. She said the victim referred to her vagina as her "monkey." (R. 24-25). Ehney stated the victim claimed Wetherall "touched" her on her "monkey." (R. 26). She also talked about several other instances of sexual abuse committed by Wetherall. The victim said Wetherall "touched" her "monkey" with his hand one time while they were at his brother's pond. The victim described another instance in her home when Wetherall touched her mouth with his tongue and that he also touched her "titties" with his tongue. (R. 27-28).

Dr. Lyle Pritchard conducted a physical examination of the victim. (R. 86). Pritchard described a cleft and a slight split in the victim's hymen which he testified was "suspicious" of penetration. He said, however, this was not conclusive because "it can be caused by other

¹The State has elected to protect the name of the victim in this case.

things besides just penetration, such as trauma . . ." (R. 88-91). Pritchard testified there was no evidence of a sexually-transmitted disease. (R. 87-88).

Deputy Vickie White spoke with Wetherall while he was incarcerated. Wetherall waived his rights and provided a statement. (R. 54-56). In the statement, Wetherall said he had been staying with the victim's mother for several months. He claimed the victim's mother was "openly sexual" around her, and he provided instances where she engaged in sex in the presence of the victim. He described the relationship between the victim's mother and the father of the victim. Wetherall claimed they planned to engage in a threesome shortly after he met her, but it did not happen. He also said the victim's father engaged in sex with another woman on a bed in his room in the victim's presence. Wetherall claimed the victim's father wanted to have sex with the victim. He said that after the victim's father left the house, the victim asked him to rub her breasts and between her legs. She then made the allegations against him. Wetherall said the victim once tried to put her hands down his pants. He admitted touching the victim at the time, but only because he "thought it would be the right thing to do at the time" because the victim's mother and his mother kept asking him if he did it. Wetherall claimed the victim lied about the sexual abuse to get attention. (R. 56-60, 82).

During his incarceration, Wetherall wrote a letter to the victim's mother. It read as follows:

Michelle, what happened? How did they hear about this shit?
Are you the one who told them? I thought we were going to
work through this. I am going to jail for the rest of my life . .
. I can't call from here. Can you get collect calls?

(R. 60-61).

The police subsequently searched the victim's home for any evidence of sexual abuse.

(R. 63-66). The few items tested were inconclusive for semen. (R. 127-28).

ARGUMENT

1.

Wetherall's Issue 1 is not available for appellate review. The trial judge did not err when he submitted assault with intent to commit first degree criminal sexual conduct with a minor after directing a verdict on the charged offense of first degree criminal sexual conduct with a minor. (Wetherall's Issue 1; Respondent's Issues I & II).

At the conclusion of the State's case, defense counsel moved for a directed verdict on the charge of first degree criminal sexual conduct with a minor based on the absence of evidence of a sexual battery. (R. 93-95). The State argued the trial judge should consider submitting assault with intent to commit first degree criminal sexual conduct with a minor as a lesser-included offense. (R. 96). The trial judge directed a verdict on the charge of first degree criminal sexual conduct with a minor. (R. 102).

The trial judge then asked counsel "whether attempted CSC is a lesser included offense . . ." (R. 102). The trial judge indicated his intent to charge the jury on assault with intent to commit first degree criminal sexual conduct with a minor, "unless you have something that says otherwise." (R. 102-103). Defense counsel reserved his right to argue the issue prior to the charge to the jury, and the trial judge agreed. (R. 103-04).

During the later charge conference, the trial judge again explained his intent to charge the jury on assault with intent to commit first degree criminal sexual conduct with a minor. (R. 134-35). Defense counsel stated, "even though I understand the case law says that this is, in fact, a lesser included charge in this case . . .," he objected to the charge based on the absence of evidence Wetherall committed an assault, or whether he intended to commit a

sexual battery or attempted to commit a sexual battery. (Emphasis added). (R. 136-37).

Wetherall was convicted of assault with intent to commit first degree criminal sexual conduct with a minor.

On appeal, he argues the trial judge erred in submitting the offense, because it is not a lesser-included offense of first degree criminal sexual conduct with a minor. In the alternative, Wetherall contends there was no evidence he committed an assault, and no evidence he committed or intended to commit a sexual battery.

A. Error preservation

A contemporaneous objection is required to preserve issues for appellate review. State v. King, 334 S.C. 504, 514 S.E.2d 578 (1999); State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999).

In the present case, defense counsel at trial never argued that assault with intent to commit first degree criminal sexual conduct with a minor should not be submitted because it was not a lesser-included offense of first degree criminal sexual conduct with a minor. In fact, he readily conceded that it was a lesser-included offense. (R. 136, lines 22-23). Wetherall's assignment of error in this regard, therefore, cannot be argued or considered on appeal. State v. Benton, 338 S.C. 151, 526 S.E.2d 228, 231 (2000)[holding issue not preserved for appellate consideration where defendant conceded the issue at trial]; TNS Mills, Inc. v. South Carolina Dept't of Revenue, 331 S.C. 611, 503 S.E.2d 471, 474 (1998)[issue conceded to the trial judge cannot be raised on appeal]; State v. Brannon, 347 S.C. 85, 552 S.E.2d 773, 775 (Ct. App. 2001)[same]; State v. Nathari, 303 S.C. 188, 399 S.E.2d 597, 605 (Ct. App. 1991)[holding even if it were recognized that recklessness was an

element of felony DUI by virtue of recklessness being an element in the lesser-included offense of involuntary manslaughter, and if the defendant was entitled to an instruction the State was required to prove recklessness for conviction of felony DUI, counsel for defendant conceded defendant's recklessness in his closing argument and thereby waived any objection to the trial judge's charge in this regard]; see also State v. Prioleau, 345 S.C. 404, 548 S.E.2d 213 (2001)[a party may not argue one ground at trial and an alternate ground on appeal].²

²In his general instructions, the trial judge submitted aggravated assault and battery (ABHAN) as a lesser-included offense. At the conclusion of the trial judge's charge, the State requested a re-charge. The assistant solicitor noted the jury was instructed the only difference between ABHAN and assault with intent to commit criminal sexual conduct with a minor was penetration, but "under . . . assault with intent to commit criminal sexual conduct, there is no penetration." (R. 171-72). At this point, defense counsel merely renewed his general objection to the submission of assault with intent to commit criminal sexual conduct, because the evidence did not support the charge. Defense counsel then specifically requested an additional instruction on assault, "so that the assault part is not emphasized without the intent to commit criminal sexual conduct with a minor." (R. 172-73). The trial judge indicated he would also define an assault "as the intentional creation of a reasonable fear of immediate bodily harm." (R. 173). Defense counsel abstrusely replied, ". . . I'm objecting to the charge cooperation." (R. 173, lines 10-11). The trial judge then re-charged the jury. (R. 173-74). Following the re-charge, there were no further objections. (R. 175-76).

On appeal, Wetherall notes the trial judge gave the jury erroneous specific language, "or sexual conduct with the victim," in his initial instructions to the jury on assault with intent to commit criminal sexual conduct with a minor. (R. 165). He argues this language "impermissibly dilute[d] the requirement from intent to commit a sexual battery to intent to have sexual conduct[, because] '[s]exual conduct' does not meet the standard required by statute." (BOA at 6-7).

Wetherall failed to set forth this issue in his Statement of Issues on Appeal. (BOA at 3). The assignment of error, therefore, cannot be considered on appeal. Rule 208(b)(1)(B), SCACR; State v. Bray, 342 S.C. 23, 535 S.E.2d 636 (2000)[it is error for an appellate court to consider issues not raised to it].

Additionally, there were no objections to the trial judge's instructions to the jury on this ground at trial. In fact, Wetherall readily concedes defense counsel failed to do so. (BOA at 6). His failure to object to the charge on this ground precludes appellate review of Wetherall's assignment of error for the first time on appeal. See Wilder Corp. v. Wilke, 330

B. Assault with intent to commit first-degree criminal sexual conduct with a minor is a lesser-included offense of first degree criminal sexual conduct with a minor

If this Court determines the issue is presented for appellate review, the trial judge did not err by submitting assault with intent to commit first degree criminal sexual conduct with a minor as a lesser-included offense of first degree criminal sexual conduct with a minor.

S.C. Code Ann. §16-3-655(1) (Supp. 2007) defines criminal sexual conduct with a minor in the first degree as "sexual battery with the victim who is less than eleven years of age." The offense of assault with intent to commit criminal sexual conduct with a minor in the first degree is analyzed as: (1) an assault (2) with the intent to commit a sexual battery (3) against a minor under the age of eleven. Sections 16-3-655(1) and 16-3-656 (2003); State v. Brock, 335 S.C. 267, 516 S.E.2d 212 (Ct. App. 1999).

An assault with intent to commit criminal sexual conduct with a minor in the first

S.C. 71, 76, 497 S.E.2d 731, 733 (1998)[holding that issues not raised to or ruled upon by the trial judge are not preserved for appellate review]; State v. Johnson, 315 S.C. 485, 445 S.E.2d 637 (1994)[failure to object to a jury charge constitutes a waiver of the right to raise the issue on appeal]; see also State v. McCray, 332 S.C. 536, 506 S.E.2d 301, 303 (1998)[holding that a party may not argue one ground at trial and an alternate ground on appeal].

Regardless of Wetherall's failure to preserve the issue, the trial judge properly set forth the law and there was no error requiring reversal. The trial judge explained the offense of assault with intent to commit criminal sexual conduct required an assault take place, and that the perpetrator must act with intent to commit a sexual battery. (R. 165-66, 174). The instructions as a whole were a proper statement of the law. State v. Todd, 290 S.C. 212, 349 S.E.2d 339 (1986)[when reviewing a jury charge for error, the appellate court must consider charge as a whole]; see also State v. Hicks, 305 S.C. 277, 407 S.E.2d 907 (Ct. App. 1991)[in reviewing challenged jury charge, trial judge's instructions must be considered as a whole; an appellate court will not find error based upon isolated excerpts which, standing alone, might be misleading]. There was, therefore, no reasonable likelihood that the jury understood the instructions to allow a conviction based on proof insufficient to meet the statute. Todd v. State, 355 S.C. 396, 585 S.E.2d 305 (2003).

degree is more aptly designated as an "attempt" to commit criminal sexual conduct with a minor. State v. Sosbee, 371 S.C. 104, 637 S.E.2d 571, 573 (Ct. App. 2006); see State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464, 471 (Ct. App. 2001)["Assault is an attempted battery or an 'unlawful attempt or offer to commit a violent injury upon another person, coupled with the present ability to complete the attempt or offer by a battery'" (quoting State v. Sutton, 340 S.C. 393, 532 S.E.2d 283, 285 (2000))]; see also 6 Am. Jur.2d Assault & Battery §1 (1999)[defining assault as an "intentional attempt by a person, by force or violence, to do an injury to the person of another, or as any attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it an immediate intention, coupled with a present ability, to commit a battery"]; Black's Law Dictionary 109; 123 (7th ed. 1999)[defining assault as an "attempt to commit battery, requiring the specific intent to cause physical injury"; and defining an attempt as "an overt act that is done with the intent to commit a crime but that falls short of completing the crime"]].

The trial judge, therefore, did not err by submitting assault with intent to commit criminal sexual conduct with a minor in the first degree as a lesser-included offense of first degree criminal sexual conduct with a minor. See State v. Frazier, 302 S.C. 500, 397 S.E.2d 93 (1990)[upholding convictions for assault with intent to commit first degree criminal sexual conduct, when trial judge directed a verdict for charged offense of first degree criminal sexual conduct and lewd act, where the convictions were for different acts constituting separate offenses and did not violate the defendant's constitutional right against double jeopardy].

C. There was sufficient evidence of an assault with intent to commit criminal sexual conduct with a minor in the first degree to submit the case to the jury

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury. State v. Buckmon, 347 S.C. 316, 555 S.E.2d 402 (2001). On appeal from the denial of a directed verdict, the appellate court must view the evidence in the light most favorable to the State. McHoney, supra.

The standard for reviewing a directed verdict when the charge requires proof of intent to commit a crime has been clarified additionally. Intent to commit a crime is rarely proved by direct evidence and "must ordinarily be proven by circumstantial evidence, that is, by facts and circumstances from which intent may be inferred." State v. Tuckness, 257 S.C. 295, 185 S.E.2d 607, 608 (1971). "The question of intent with which an act is done is ordinarily for jury determination except in extreme cases where there is no evidence thereon." Id. It is clear that a penetration, however slight, constitutes a sexual battery. Section 16-3-651(h) (2003); see State v. Johnson, 334 S.C. 78, 512 S.E.2d 795, 798-99 (1999). It is also clear that a conviction for assault with intent to commit criminal sexual conduct may be sustained on the uncorroborated testimony of the victim. Section 16-3-657 (2003); see State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768, 771 (Ct. App. 1999)[holding the victim's testimony was sufficient to withstand a directed verdict motion on a lewd act charge].

Additionally, an assault is an unlawful attempt or offer to commit a violent injury

upon another person, coupled with the present ability to complete the attempt or offer by a battery. State v. Murphy, 322 S.C. 321, 471 S.E.2d 739, 740-41 (Ct. App. 1996).

In this case, the victim testified Wetherall made her remove her panties. According to the victim, Wetherall then "stuck his wee wee . . . on [her] monkey," which she identified as her vagina. The victim said it hurt when he did this to her. The State's evidence proved a completed assault and there was sufficient evidence to send the case to the jury.³ See State v. Williams, 257 S.C. 257, 185 S.E.2d 529 (1971)[holding evidence supported assault conviction where the defendant reached in a car window and rubbed the neck of a female victim]; see also In re McGee, 278 S.C. 506, 299 S.E.2d 334, 334 (1983)[“While words alone do not constitute an assault, if by words and conduct a person intentionally creates a reasonable apprehension of bodily harm, it is an assault”].

Further, from the position in which Wetherall placed himself, penetration could have occurred very quickly, even in the next second. Viewing the evidence in the light most favorable to the State, Wetherall's intent to penetrate the victim, thereby committing criminal sexual conduct, could be logically deduced by the jury from the testimony. Because Wetherall touched the victim's vagina with his penis, the jury could infer his intent to commit a sexual battery. See State v. Fulp, 310 S.C. 278, 423 S.E.2d 149, 150-51 (Ct. App.

³The State submits that testimony Wetherall “stuck his wee wee . . . on [the victim's] monkey” and it “hurt,” and the physical evidence consistent with a penetration injury, was more than sufficient to submit the charge of first degree criminal sexual conduct with a minor to the jury, even though the trial judge opted to direct a verdict and submit the lesser-included offense. See Johnson, 512 S.E.2d at 799 [holding that although there was no direct evidence of digital penetration, the victim's testimony the defendant touched her and it hurt, and the results of her physical examination, were sufficient to create a jury question as to whether there was any intrusion].

1992)[holding the jury could infer the defendant's intent to commit a sexual battery upon the victim, because he knocked the victim to the ground and fumbled with her clothing]; see State v. Gerald, 261 S.C. 392, 200 S.E.2d 243, 244 (1973)[holding "when the evidence is susceptible of more than one reasonable inference, questions of fact must be submitted to the jury"].

The Supreme Court has stated, "it would indeed be impossible to say as a matter of law to what limit a would-be rapist would have to go before an overt act has been committed is sufficient to warrant a conviction for assault with intent to ravish." State v. Wilkins, 217 S.C. 105, 59 S.E.2d 853, 855 (1950). At a minimum, since Wetherall touched the victim's vagina with his penis, the evidence created a jury question about his intent. The evidence raised more than "a mere suspicion of guilt" and the trial judge, therefore, properly submitted the case to the jury. State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000).

II.

The trial judge did not err by excluding evidence the victim was diagnosed with genital herpes two years after the crime and that he did not have it. (Wetherall's Issue 2; Respondent's Issue III).

The victim was sexually assaulted by Wetherall in 2004. As previously noted, Dr. Pritchard testified there was no evidence of a sexually-transmitted disease when he examined the victim. (R. 87-88).

At trial, Wetherall proffered testimony from Dr. Sally Burgess, the victim's pediatrician. (R. 108). Burgess testified that in March of 2006, the victim tested positive for genital herpes. (R. 109-10). Burgess testified it is difficult to pinpoint when a patient contracted herpes. (R. 110). She first treated the victim for vaginitis on August 26, 2004. She explained vaginitis is "kind of a catch-all term for irritation of the vagina, the vaginal area." (R. 110-11). She said vaginitis "could be" an indicator of herpes. (R. 109). Burgess admitted, however, that she did not test the victim for herpes in 2004.⁴ (R. 109). Burgess further admitted herpes is not contracted exclusively from sexual transmission. (R. 111).

The State objected to this testimony as irrelevant. (R. 104). The trial judge sustained the objection, but he allowed defense counsel to proffer Burgess' testimony. (R. 105-06). Following the proffer, the trial judge affirmed his earlier ruling precluding the testimony about the victim having herpes two years after the sexual assault. (R. 112).

Defense counsel then proffered testimony of Tonya Hughes, a nurse from the Laurens

⁴As previously noted, Dr. Pritchard testified the victim tested negative for sexually-transmitted diseases when he examined her after the sexual assault was reported. (R. 87).

County Detention Center. (R. 127-28). Hughes testified Wetherall did not have herpes. (R. 128).

On appeal, Wetherall argues the trial judge erred by excluding evidence the victim had herpes and he did not, because this evidence made it more probable than not that someone other than he committed the act alleged. Wetherall contends the trial judge's ruling denied him an opportunity to present a defense.

The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Saltz, 346 S.C. 114, 551 S.E.2d 240, 244 (2001). The right to present a defense is not unlimited, but must "bow to accommodate other legitimate interests in the criminal trial process." Rock v. Arkansas, 483 U.S. 44, 55 (1987). While defendants are entitled to a fair opportunity to present a defense, that right does not encompass the right to present any evidence regardless of its admissibility under the rules of evidence. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586, 594 (Ct. App. 2001), *overruled on other grounds by*, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); *see* State v. Petit, 144 S.C. 452, 142 S.E. 725, 730-31 (1928); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ."); *see also* State v. Cooley, 342 S.C. 63, 536 S.E.2d 666 (2000)[although evidence is relevant, it should be excluded where danger of unfair prejudice substantially outweighs its probative value]; State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1990)[same]; *cf.* State v. Boiter, 302 S.C. 381, 396 S.E.2d 364 (1990)[in making a determination of admissibility under the rape shield statute, a trial judge should consider the traditional concerns of prejudice, and issue and jury

confusion]. The trial judge's ruling is entitled to great deference by the appellate court. State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000).

Further, the trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. Hamilton, 543 S.E.2d at 593-94.

Wetherall has not shown the trial judge abused his discretion in this instance. Although proof that either the victim or the aggressor in a sexual assault had (or did not have) a sexually-transmitted disease certainly can be relevant, the proffered evidence here was inadmissible. The victim tested positive for herpes two years after the sexual assault. There were no indications of a sexually-transmitted disease when the victim was examined shortly after the abuse was reported. Although the pediatrician reported the victim was treated for vaginitis a few months after the assault, this was not conclusive of herpes since there are many causes of vaginal infections. The pediatrician did not test the victim for herpes in 2004. In the absence of evidence the victim had the disease during the relevant time when the assault occurred and Wetherall did not have it, the proffered evidence was remote, totally speculative, and irrelevant.⁵ See State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 397 (Ct. App. 1997)[stating that otherwise relevant evidence may lose its probative value when it becomes too far removed from the event in question]; State v. Bright, 323 S.C. 221, 473

⁵In the light most favorable to Wetherall, the proffered evidence merely inferred the victim was victimized by an unknown person or persons in the years following his sexual assault on the victim. This type of evidence or any inferences in this regard were likewise inadmissible. See Boiter, 396 S.E.2d at 365.

S.E.2d 851, 853 (Ct. App. 1996)[noting there is no set rule as to what lapse of time will make particular evidence too remote to be probative; the determination of remoteness is usually a matter of discretion with the trial judge whose discretion will not be disturbed absent an abuse of discretion].

Because the excluded evidence did not show the falseness, impossibility, or even improbability of the victim's testimony at trial, it was properly excluded. See Skeen v. State, 325 S.C. 210, 481 S.E.2d 129, 133 (1997)[in a PCR matter, the Supreme Court held trial counsel was not ineffective for failure to question the twelve-year-old male victim about prior sexual activities he may have engaged in, because "this testimony would have been barred by the rape shield statute"].

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and convictions of the lower court should be affirmed.

Respectfully submitted,

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Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

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JERRY W. PEACE
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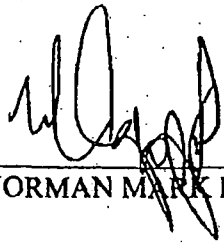
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ATTORNEYS FOR RESPONDENT

June 17, 2008

By: 
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ATTORNEYS FOR RESPONDENT

June 17, 2008

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Laurens County
J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

DONALD THOMAS WETHERALL,

Appellant.

CERTIFICATE OF COUNSEL

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

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

NORMAN MARK RAPOPORT
Senior Assistant Attorney General

JERRY W. PEACE
Solicitor, Eighth Judicial Circuit

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

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

The State, Respondent,

v.

Donald Thomas Wetherall, Appellant.

Appeal From Laurens County
J. Cordell Maddox, Jr., Circuit Court Judge

Unpublished Opinion No. 2009-UP-340
Submitted June 1, 2009 – Filed June 15, 2009

AFFIRMED

Appellate Defender Kathrine H. Hudgins, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W.
Elliott, Senior Assistant Attorney General Norman
Mark Rapoport, of Columbia, for Respondent.

PER CURIAM: Donald Thomas Wetherall appeals from a jury verdict finding him guilty of (1) assault with intent to commit first-degree criminal sexual conduct (ACSC) with a minor and (2) committing a lewd act upon a child. Wetherall argues the circuit court erred in submitting the ACSC charge to the jury and in denying his request to present evidence of the victim's medical history. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. Regarding Wetherall's claim the circuit court erred in submitting the ACSC charge to the jury: State v. Cribb, 310 S.C. 518, 523, 426 S.E.2d 306, 309 (1992) (internal citations omitted) ("A lesser included offense is one that requires no proof beyond that which is required for conviction of the greater offense. The greater offense must include all the elements of the lesser."); State v. Sosbee, 371 S.C. 104, 109, 637 S.E.2d 571, 573 (Ct. App. 2006) ("An assault with intent to commit criminal sexual conduct with a minor in the first-degree is more

aply designated as an 'attempt' to commit criminal sexual conduct with a minor."); State v. Brock, 335 S.C. 267, 272, 516 S.E.2d 212, 214-15 (Ct. App. 1999) (stating the offense of ACSC first-degree with a minor requires the victim to be under the age of eleven, an assault to occur, and "the perpetrator must act with intent to commit a sexual battery").

2. Regarding Wetherall's claim the circuit court erred in failing to allow him to present evidence of medical tests conducted on the victim two years after his alleged criminal acts: State v. Brock, 335 S.C. 267, 272, 516 S.E.2d 212, 215 (Ct. App. 1999) (citing State v. Aiken, 322 S.C. 177, 470 S.E.2d 404 (Ct. App. 1996)) ("The admission or rejection of evidence is largely within the sound discretion of the trial judge, and the trial judge's decision will not be disturbed on appeal absent an abuse of discretion."); Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

AFFIRMED.[1]

HUFF, PIEPER, and GEATHERS, JJ., concur.

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

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DONALD THOMAS WETHERALL,

APPELLANT

Appeal from Laurens County

J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 2009-UP-340

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Donald Thomas Wetherall petitions the Court for rehearing. Counsel respectfully submits that the Court overlooked the fact that assault with intent to commit criminal sexual conduct with a minor is not a lesser included offense of criminal sexual conduct with a minor first degree. Wetherall was indicted and went to trial for criminal sexual conduct with a minor first degree and committing or attempting to commit a lewd act on a minor under sixteen years of age. At the close of the State's case, the trial judge directed a verdict of not guilty on the criminal sexual conduct with a minor first degree based on the fact that the State failed to prove a battery. The judge, however, submitted to the jury the

charge of assault with intent to commit criminal sexual conduct with a minor first degree as well as the lewd act charge.

In the direct appeal, Wetherall argued that the judge erred in submitting the assault with intent to commit criminal sexual conduct with a minor charge to the jury when Wetherall had not been indicted for this charge and the charge is not a lesser included charge of the indicted of criminal sexual conduct with a minor first degree. This Court affirmed citing State v. Cribb, 310 S.C. 518, 523, 426 S.E.2d 306, 309 (1992); State v. Sosbee, 371 S.C. 104, 109, 637 S.E.2d 571, 573 (Ct. App. 2006) and State v. Brock, 335 S.C. 267, 272, 516 S.E.2d 212, 214-15 (Ct.App. 1999). Counsel submits that reliance on these cases is misplaced because assault with intent to commit criminal sexual conduct with a minor is not a lesser included offense of criminal sexual conduct with a minor first degree.

In regard to issue two involving the judge's refusal to allow Wetherall to present evidence of the fact that in 2006, two years after the alleged incidents involving Wetherall, the minor tested positive for herpes, counsel respectfully submits that this Court overlooked the fact that in 2004, the year alleged in the indictments, the minor was treated for vaginitis, a possible indicator of herpes. (R. p. 108, line 25 – p. 109, lines 1-15). Counsel for Wetherall proffered testimony that Wetherall did not have herpes. (R. p. 128, lines 21-25). The fact that the child may have contacted herpes in 2004, and the appellant does not is strong evidence that someone other than the appellant committed the acts alleged. The judge's ruling prevented appellant from presenting a complete defense. The Due Process Clause of the Fourteenth Amendment requires that criminal defendants be afforded a meaningful opportunity to present a complete defense. California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

Petitioner seeks rehearing on both issues.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County

J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,


v.

DONALD THOMAS WETHERALL,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Norman Mark Rapoport, Esquire, this 30th day of June, 2009.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 29th day
of June, 2009.


(L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014.

The South Carolina Court of Appeals

The State,

Respondent,

v.

Donald Thomas Wetherall,

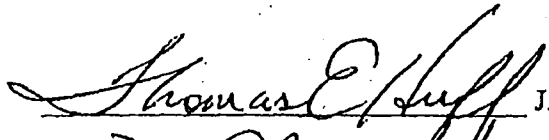
Appellant.

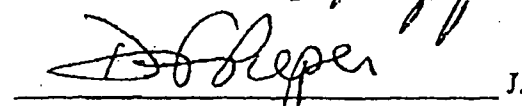
The Honorable J. Cordell Maddox, Jr.
Laurens County
Trial Court Case No. 2005-GS-30-00166

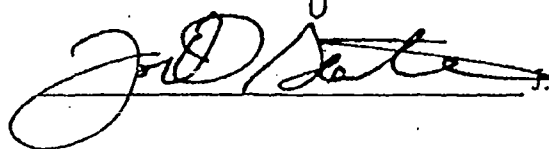
ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.



J.


J.


Columbia, South Carolina

August 25, 2009

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Laurens County

J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 2009-UP-340 (S.C. Ct. App. filed 6/15/2009)

05-GS-30-166

THE STATE,

RESPONDENT,

V.

DONALD THOMAS WETHERALL,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 8/25/2009.

QUESTIONS PRESENTED

1. Did the judge err in finding that assault with intent to commit criminal sexual conduct with a minor first degree was a lesser included charge of criminal sexual conduct with a minor first degree and submitting the assault with intent to commit criminal sexual conduct with a minor first degree charge to the jury when the appellant was indicted for criminal sexual conduct with a minor first degree and lewd act and the judge directed a verdict of not guilty on the criminal sexual conduct with a minor first degree?
2. Did the judge err in refusing to allow defense counsel to present evidence that the juvenile victim had herpes simplex II and the appellant did not?

STATEMENT OF THE CASE

In January 2005, the Laurens County Grand Jury indicted Wetherall for criminal sexual conduct with a minor first degree and committing or attempting to commit a lewd act on a minor under sixteen years of age, indictment #05-GS-30-166. On September 14, 2006, Wetherall proceeded to jury trial before the Honorable Cordell Maddox. At the close of the State's case, Judge Maddox directed a verdict of not guilty on the criminal sexual conduct with a minor first degree charge. (R. p. 102, lines 5 – p. 103, lines 1-18). The judge, however, submitted to the jury the charge of assault with intent to commit criminal sexual conduct with a minor first degree. (R. pp. 157 – 171). The jury returned verdicts of guilty of both assault with intent to commit criminal sexual conduct with a minor first degree and lewd act. Judge Maddox sentenced Wetherall to 30 years suspended upon the service of 20 years with 5 years probation for assault with intent to commit criminal sexual conduct with a minor first degree and 15 years concurrent for lewd act. A timely notice of intent to appeal was filed on September 19, 2006.

On June 15, 2009, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Wetherall, 2009-UP-340 (S.C.Ct.App. filed June 15, 2009). A petition for rehearing was denied on August 25, 2009. This petition for writ of certiorari follows.

ARGUMENT

1. The judge erred in finding that assault with intent to commit criminal sexual conduct with a minor first degree was a lesser included charge of criminal sexual conduct with a minor first degree and submitting the assault with intent to commit criminal sexual conduct with a minor first degree charge to the jury when the appellant was indicted for criminal sexual conduct with a minor first degree and lewd act and the judge directed a verdict of not guilty on the criminal sexual conduct with a minor first degree.

Assault with intent to commit criminal sexual conduct with a minor is not a lesser included offense of criminal sexual conduct with a minor first degree. "In determining whether one crime is a lesser included offense of another, the test is whether the greater of the two offenses includes all of the elements of the lesser offense. If the lesser offense includes an element which is not included in the greater offense, then the lesser offense is not included in the greater offense." State v. Brock, 335 S.C. 267, 271, 516 S.E.2d 212, 214 (Ct.App. 1999). "The offense of first degree assault with intent to commit CSC on a minor requires the victim to be under the age of eleven and provides no minimum age for the perpetrator. Furthermore, an assault must take place, and the perpetrator must act with intent to commit a sexual battery." Brock at 214. Assault with intent to commit criminal sexual conduct with a minor, first degree, requires an assault and an intent to commit a sexual battery, elements not required for criminal sexual conduct with a minor first degree. Criminal sexual conduct with a minor first degree requires a sexual battery, an element not required for assault with intent to commit criminal sexual conduct with a minor. The judge erred in submitting an assault with intent to commit criminal sexual conduct with a minor first degree charge to the jury when the appellant was indicted for criminal sexual conduct with a minor first degree and lewd act and the judge directed a verdict of not guilty on the criminal sexual conduct with a minor first degree.

At the close of the State's case, Wetherall moved for a directed verdict on the criminal sexual conduct with a minor first degree [CSC first with a minor] charge based on the fact that there was no evidence of a sexual battery as defined by S.C. Code §16-3-651(h). (R. p. 93, lines 8 – p. 94, 95, lines 1-21). The minor testified that petitioner placed his wee wee on the outside of her. (Tr. p. 42, lines 1-5). The State argued that even if the judge directed a verdict on the CSC first with a minor charge, the State was still entitled to a charge on attempt to commit criminal sexual conduct under S.C. Code §16-3-656. (R. p. 96, lines 12-13). The judge granted the directed verdict motion and then asked, "The question then becomes whether attempted CSC is a lesser included offense. Y'all got any information on that?" (R. p. 102, lines 5-16). The State argued that the attempt was a lesser included offense and the judge agreed. (R. p. 102, lines 17 – p. 103, lines 1-18). Counsel reserved the right to argue the issue prior to the charge to the jury and the judge agreed. (R. p. 102, lines 19 – p. 104, lines 1-3).

During the charge conference the judge explained that he was going to charge the jury with the law on assault with intent to commit criminal sexual conduct. (R. p. 134, lines 23 – p. 135, lines 1-25). Counsel objected based on the fact that there was no evidence that the appellant committed an assault and there was no evidence that the appellant intended to commit a sexual battery or attempted to commit a sexual battery. (R. p. 136, lines 4 – p. 137, lines 1-10). Alternatively, counsel argued that the State should have indicted the appellant for assault with intent to commit criminal sexual conduct with a minor first degree rather than criminal sexual conduct with a minor. (R. p. 137, lines 21 – p. 138, lines 1-7). The judge erred in submitting the assault with intent to commit criminal sexual conduct with a minor first degree because that charge is not a lesser included charge of criminal sexual conduct with a minor.

2. The judge erred in refusing to allow defense counsel to present evidence that the juvenile victim had herpes simplex II and the appellant did not.

Counsel for appellant proffered the testimony from Dr. Sally Burgess. (R. pp. 107 -112). Dr. Burgess testified that in March of 2006, the minor victim tested positive for genital herpes. (R. p. 109, lines 18-24). Dr. Burgess first treated the minor child for vaginitis on August 26, 2004. Dr. Burgess testified that it is difficult to pinpoint when a patient contacted herpes. (R. p. 110, lines 5-11). Dr. Burgess testified that vaginitis could be an indicator of herpes. (R. p. 109, lines 9-15). The indictment alleges contact between the appellant and the minor child between April and June 2004.

The State objected to the testimony as irrelevant. (R. p. 104, lines 16-24). After hearing argument, the judge sustained the State's objection but allowed defense counsel to proffer the doctor's testimony. (R. pp 105 - 106). After the doctor's testimony, the judge affirmed his earlier ruling precluding testimony about the child having herpes. (R. p. 112, lines 12-17).

Counsel for appellant then proffered the testimony of Tonya Hughes, a nurse from the Laurens County Detention Center. (R. pp. 127-130). The nurse testified that the appellant did not have herpes. (R. p. 128, lines 21-25). The judge erred in refusing to allow defense counsel to present evidence that the juvenile victim had herpes simplex II and the appellant did not.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 557, 546 S.E.2d 87, 93 (2002). A trial judge's ruling on the admissibility of evidence will not be reviewed on appeal absent an abuse of discretion. State v. Mansfield, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct.App. 2000). An abuse of discretion occurs when the trial judge's ruling is based on an error of law. Id. For an error of law to warrant reversal, however, the error must result in prejudice to the appellant. Id. Evidence is relevant if it has any tendency to

make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 401, SCRE.

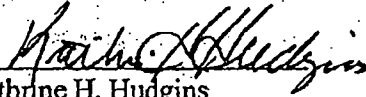
The fact that the child may have contacted herpes in 2004, and the appellant does not have herpes makes it more probable than not that someone other than the appellant committed the acts alleged. The minor child was seven at the time of trial and five at the time of the allegation contained in the indictment. The only direct evidence against appellant comes from the child.

The judge's ruling prevented appellant from presenting a complete defense. The Due Process Clause of the Fourteenth Amendment requires that criminal defendants be afforded a meaningful opportunity to present a complete defense. California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). The judge erred in precluding the herpes testimony.

CONCLUSION

Based on the above arguments, the petition for writ of certiorari should be granted to allow further briefing on the issues.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 29th day of December, 2009

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Laurens County

J. Cordell Maddox, Jr., Circuit Court Judge

Opinion No. 2009-UP-340 (S.C. Ct. App. filed 6/15/2009)
05-GS-30-166

THE STATE,

RESPONDENT,

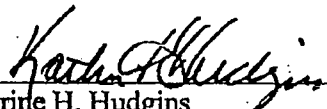
v.

DONALD THOMAS WETHERALL,

PETITIONER

CERTIFICATE OF SERVICE

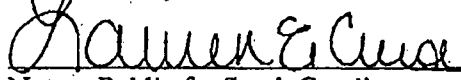
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Norman Mark Rapoport, Esquire, and the S.C. Court of Appeals this 29th day of December, 2009.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 29th day
of December, 2009.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

Appeal From Laurens County
J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

DONALD THOMAS WETHERALL,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

HENRY DARGAN McMASTER
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ATTORNEYS FOR RESPONDENT

The State v. Wetherall, Donald Thomas

Page Two

January 20, 2011

DES/lda

cc: Assistant Attorney General Mark Farthing
The Honorable Lynn W. Lancaster
The Honorable Tanya Gee

Other Authorities:

6 Am. Jur. 2d <u>Assault and Battery</u> § 1.	7
65 Am. Jur. 2d <u>Rape</u> § 15.	7
Black's Law Dictionary (8th ed. 2004).	7
S.C. Code Ann. § 16-3-655.	6
S.C. Code Ann. § 16-3-656.	6
S.C. Code Ann. § 16-3-659.1.	12

STATEMENT OF ISSUES ON CERTIORARI

I.

Did the trial judge err in submitting the lesser-included offense of assault with intent to commit criminal sexual conduct with a minor after directing a verdict on the indicted offense of first degree criminal sexual conduct with a minor?

II.

Did the trial judge abuse his discretion in excluding the presentation of evidence the juvenile victim was diagnosed with genital herpes two years after Appellant's crimes and Appellant tested negative for the same condition?

STATEMENT OF THE CASE

Procedural History

Appellant Donald Thomas Wetherall was arrested and indicted for one count of criminal sexual conduct with a minor in the first degree and committing or attempting to commit a lewd act on a minor under sixteen years of age. Appellant was tried by jury before the Honorable J. Cordell Maddox, Jr., circuit court judge. At the close of the State's case, Appellant moved for a directed verdict on the charge of criminal sexual conduct with a minor. The judge granted the directed verdict but agreed to submit to the jury the lesser-included charge of assault with intent to commit criminal sexual conduct with a minor. Appellant was convicted of both assault with intent to commit criminal sexual conduct and lewd act. Appellant was sentenced to 30 years suspended upon the service of 20 years with 5 years probation for the assault with intent charge and 15 years for the lewd act charge, with the sentences to run concurrently. Appellant timely filed and perfected an appeal.

In an unpublished decision, the South Carolina Court of Appeals affirmed Appellant's convictions. State v. Wetherall, 2009-UP-340 (S.C. Ct. App. filed June 15, 2009). Appellant petitioned the Court of Appeals for a rehearing, and the petition was denied. Appellant then timely filed a petition for writ of certiorari in the South Carolina Supreme Court.

Factual History

At trial, Victim, a seven-year old girl, testified about an incident involving Appellant when she was five years old. (R. pp. 103). At the time, Victim was living with her mother, and Appellant frequently stayed at their residence. (R. p. 3). Victim was watching cartoons

on the couch while her mother was asleep. (R. p. 5). Appellant approached Victim and made her remove her panties. (R. p. 5). In the words of Victim, Appellant then placed his "wee wee" on her "monkey," which she identified as her "private part." (R. p. 9). Victim indicated Appellant "did that white stuff" onto her stomach and wiped it off of her with her Looney Tune blanket. (R. p. 6). Victim revealed Appellant's actions physically hurt, and Appellant only ceased after Victim's mother ("Mother") awoke. (R. p. 6; p. 9).

Victim's testimony was corroborated at trial by Charlotte Ehney, a forensic interviewer who conducted an interview of the Victim on July 7, 2004, as part of an investigation into the incident. (R. p. 20-21). Ehney indicated Victim made the same claims testified to at trial and further detailed additional instances of sexual abuse Victim stated she suffered at the hands of Appellant. (R. pp. 26-28).

As part of the investigation, Dr. Lyle Pritchard examined Victim and performed a complete pre-pubertal genital exam. (R. p. 86). Dr. Pritchard discovered a cleft in Victim's hymen, which he indicated was suspicious and suggested sexual trauma. (R. p. 87). Additionally, Dr. Pritchard tested Victim for sexually transmitted diseases and found none, but he did not specifically test Victim for herpes. (R. p. 87-88).

Lieutenant Victoria White, an investigator with the Laurens County Sheriff's Department, interviewed Appellant while he was incarcerated. (R. p. 51; p. 54). Appellant waived his rights and gave a statement to Lieutenant White. (R. p. 56). Initially, Appellant detailed his relationship with Mother and indicated Victim had accused him of "licking her down there." (R. p. 57). Appellant then stated Mother was openly sexual around Victim. (R. p. 57). He further stated Victim, a five-year-old child at the time, wanted him to rub her

breasts and in between her legs. (R. p. 57). Appellant indicated he admitted to touching Victim's privates to Mother and a pastor because he believed the admission was the right thing to do at the time. (R. p. 57). He then indicated he believed Victim made up the allegations in order to receive attention. (R. p. 57). He further stated Victim rubbed his stomach and attempted to put her hands in his pants one time in a van. (R. p. 59). Additionally, Appellant admitted to writing a letter to Mother. (R. p. 59). He stated Mother was threatening to alert authorities after Victim told her about the sexual incident, and she was using the allegations to force him to stay with her. (R. p. 59).

Appellant's letter to Mother was published to the jury and read as follows: "Michelle, what happened? How did they hear about this shit? Are you the one who told them? I thought we were going to work through this. I am going to jail for the rest of my life – am I going to jail for the rest of my life? I can't call from in here. Can you get collect calls?" (R. p. 61).

At trial, Appellant did not testify in his own defense, but instead, offered the testimony of two witnesses. First, Victim's grandfather ("Grandfather") testified he found a hidden nightshirt and sleeping bag at Victim's home and turned them into the police. (R. p. 117). However, Grandfather acknowledged he was not present on the night of the incident and had no knowledge Victim was either wearing the nightshirt or laying on the sleeping bag. (R. p. 118). Next, Appellant offered the testimony of a SLED forensic evidence technician. (R. p. 119). The technician tested the Sponge Bob sleeping bag and discovered nightshirt, but no semen was found. (R. pp. 120-122). However, she acknowledged she had no knowledge linking the tested items to Victim and the tests would be useless if the items had

been washed. (R. pp. 125-126).

Additionally, outside of the presence of the jury, Appellant proffered the testimony of Dr. Sally Burgess, a pediatrician who first treated Victim after the incident on August 26, 2004. (R. p. 108). Dr. Burgess diagnosed Victim with vaginitis in August 2004, which is a catch-all term for irritation of the vagina but could be a possible indicator of herpes. (R. p. 109; p. 110). Dr. Burgess later diagnosed Victim with herpes in March of 2006. (R. p. 109). However, Dr. Burgess acknowledged she did not know if Victim had herpes in 2004 and noted there are many ways, including non-sexual ones, for an individual to get herpes. (R. p. 111). Appellant also proffered the testimony of Tonya Hughes, a nurse at the Laurens County Detention Center. (R. p. 127). Nurse Hughes testified Appellant was tested for herpes, but he did not test positive. (R. p. 128). The trial judge refused to allow the admission of the testimony regarding Victim's diagnosis of herpes based on the fact she was diagnosed two years after Appellant's alleged sexual abuse. (R. pp. 104-106; p. 112).

During the trial, the trial judge directed a verdict on the charge of criminal sexual conduct with a minor in the first degree. (R. p. 102). The trial judge charged the jury on the lesser-included offense of assault with intent to commit criminal sexual conduct with a minor, the lesser-included offense of assault and battery of a high and aggravated nature, and lewd act on a minor. (R. pp. 165-168). Based on an error, the trial judge re-charged the jury on assault with intent to commit criminal sexual conduct with a minor and assault and battery of a high and aggravated nature. (R. pp. 172-174). Following deliberations, the jury convicted Appellant of assault with intent to commit criminal sexual conduct with a minor and lewd act on a minor.

ARGUMENT

I.

The trial judge did not err in submitting the lesser-included offense of assault with intent to commit criminal sexual conduct with a minor after directing a verdict on the charged offense of first degree criminal sexual conduct with a minor. Furthermore, the issue is not properly preserved for appellate review.

Appellant contends the trial judge erred in charging the jury on the law regarding assault with intent to commit criminal sexual conduct with a minor in the first degree because this offense is not a lesser-included offense of criminal sexual conduct with a minor in the first degree. However, the trial judge and the Court of Appeals correctly found assault with intent to commit criminal sexual conduct was a lesser-included offense of the indicted criminal sexual conduct charge. Furthermore, Appellant conceded at trial the offense was a lesser-included offense and advanced a different legal theory than offered on appeal for the exclusion of the charge to the trial court, meaning the issue is not preserved for appellate review.

A. Lesser-Included Offense

The indicted offense in this case was criminal sexual conduct with a minor in the first degree. Under S.C. Code Ann. § 16-3-655(1), criminal sexual conduct with a minor in the first degree is defined as “sexual battery with a victim who is less than eleven years of age.” The offense submitted to the jury in this case was assault with intent to commit criminal sexual conduct with a minor in the first degree, an offense under S.C. Code Ann. § 16-3-656. The elements of assault with intent to commit criminal sexual conduct with a minor are: (1) an assault; (2) with the intent to commit a sexual battery, (3) against a minor under the age of eleven. State v. Brock, 335 S.C. 267, 272, 516 S.E.2d 212, 214 (Ct. App. 1999).

Our courts have previously concluded assault with intent to commit criminal sexual conduct on a minor is more appropriately designated an "attempt" to commit criminal sexual conduct with a minor. State v. Sosbee, 371 S.C. 104, 109, 637 S.E.2d 571, 573 (Ct. App. 2006); see State v. LaCoste, 347 S.C. 153, 165-166, 553 S.E.2d 464, 471 (Ct. App. 2001) ("Assault is an attempted battery or an 'unlawful attempt or offer to commit a violent injury upon another person, coupled with the present ability to complete the attempt or offer by a battery.'" (quoting State v. Sutton, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)); see also 6 Am. Jur. 2d Assault and Battery § 1 (defining assault as an "intentional attempt by a person, by force or violence, to do an injury to the person of another, or as any attempt to commit a battery, or any threatening gesture showing in itself or by words accompanying it an immediate intention, coupled with a present ability, to commit a battery"); 65 Am. Jur. 2d Rape § 15 ("An assault and a specific intent to commit a rape are the two elements that must coexist to constitute the crime of assault to commit rape. **In other words, an assault with intent to commit rape includes every essential element of the crime of rape, except the consummation of the sexual act.**" (citations omitted) (emphasis added)); Black's Law Dictionary 122 (8th ed. 2004) (defining assault in the context of criminal law as "[a]n attempt to commit battery, requiring the specific intent to cause physical injury."); Black's Law Dictionary 137 (8th ed. 2004) (defining attempt in the context of criminal law as "[a]n overt act that is done with the intent to commit a crime but that falls short of completing the crime."). Furthermore, our courts have previously addressed similar situations in which assault with intent to commit criminal sexual conduct was previously submitted to the jury after a directed verdict was granted on the offense of criminal sexual conduct. See State v.

Frazier, 302 S.C. 500, 502-503, 397 S.E.2d 93, 94 (1990) (affirming conviction for assault with intent to commit criminal sexual conduct and ABHAN where the convictions were separately supported by the evidence and arose from two different acts after the trial judge granted a directed verdict on the indicted offense of criminal sexual conduct); see, e.g., State v. Elliot, 346 S.C. 603, 606-607, 552 S.E.2d 727, 729 (2001), overruled on other ground by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) (examining lesser-included offenses of assault with intent to commit criminal sexual conduct).

In this case, the trial judge properly submitted the offense of assault with intent to commit criminal sexual conduct with a minor as a lesser-included offense to the indicted charge. The evidence in the record supported the submission of the charge to the jury. Furthermore, the elements of assault with intent to commit criminal sexual conduct with a minor are implicit in the offense of criminal sexual conduct with a minor. The difference between the two offenses, as recognized by the trial judge, is the completion of the sexual battery in the greater offense. Assault with intent to commit criminal sexual conduct with a minor is essentially an attempt falling short of the commission of the sexual battery. Criminal intent is a necessary element of both offenses, and the assault element of the lesser-included offense is an attempted battery. The facts of this case support an inference of both criminal intent to commit a sexual battery and an attempt to do so.

The trial court and the Court of Appeals correctly decided the issue, and Appellant has failed to establish sufficient reasons warranting the grant of a writ of certiorari. Appellant's petition for a writ of certiorari should be denied.

B. Issue Preservation

During the charge conference at trial, Appellant's counsel conceded the charged offense was a lesser-included offense of the indicted offense, stating "even though I understand the case law says that this is, in fact, a lesser included charge in this case. . . ." (R. p. 136). Appellant's counsel opposed the assault with intent to commit criminal sexual conduct charge on the basis the facts of the case did not support the charge. (R. p. 137). On appeal, Appellant is advancing the theory the charged offense was not a lesser-included offense of the indicted offense.

In order to preserve an issue for appellate review, a contemporaneous objection is required. State v. Beckham, 334 S.C. 302, 313, 513 S.E.2d 606, 611-612 (1999). An issue conceded at trial cannot be argued on appeal. State v. Benton, 338 S.C. 151, 156-157, 526 S.E.2d 228, 231 (2000); see State v. Nathari, 303 S.C. 188, 200, 299 S.E.2d 597, 605 (Ct. App. 1991) ("Even if this Court were to recognize recklessness as an element of felony D.U.I. by virtue of recklessness being an element in the lesser included offense of involuntary manslaughter, and if Nathari was entitled to an instruction that the State is required to prove recklessness for conviction of felony D.U.I., counsel for Nathari conceded Nathari's recklessness in his closing argument and thereby waived any objection to the trial court's charge in this regard."). Furthermore, a party cannot argue one ground at trial and new ground on appeal. State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001).

In this case, Appellant conceded at trial assault with intent to commit criminal sexual conduct with a minor was a lesser-included offense of criminal sexual conduct with a minor in the first degree. Appellant then argued the charge on assault with intent to commit criminal sexual conduct was inappropriate because the facts did not support the charge.

Now, on appeal, Appellant is asserting the charged offense was not a lesser-included offense of the indicted offense. Even though the Court of Appeals elected to address the issue on the merits, the issue was conceded at trial and Appellant has offered new grounds on appeal regarding the issue. Therefore, the issue is not preserved for appellate review.

II.

The trial judge did not abuse his discretion in excluding evidence the juvenile victim was diagnosed with genital herpes two years after Appellant's crimes and Appellant tested negative for the same disease.

Appellant asserts the trial judge erred in disallowing testimony regarding Victim's diagnosis for genital herpes in the years following Appellant's actions. The trial judge properly exercised his discretion in excluded this evidence as it was irrelevant to any issue raised in the case. Appellant's ability to present a complete defense could not have been infringed by excluding testimony regarding the Victim's medical diagnosis several years after the commission of Appellant's crimes.

The admission or exclusion of evidence is left to the sound discretion of the trial judge, and that decision will not be reversed on appeal absent an abuse of discretion. State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). The trial judge is afforded considerable latitude in ruling on the admission of evidence, and these rulings will not be disturbed without a showing of probable prejudice. State v. Brazell, 325 S.C. 65, 78, 480 S.E.2d 64, 72 (1997). The trial judge's ruling is entitled to great deference by the appellate court. State v. Aleksey, 343 S.C. 20, 35, 538 S.E.2d 248, 256 (2000).

Criminal defendants are guaranteed the right to present a complete defense. See State v. Lyles, 379 S.C. 328, 341, 665 S.E.2d 201, 208 (Ct. App. 2008) (outlining federal and state constitutional safeguards regarding right to present a complete defense). However, the right to present a defense is not unlimited, but instead must "bow to accommodate other legitimate interests in the criminal trial process." Rock v. Arkansas, 483 U.S. 44, 55 (1987). While defendants are entitled to a fair opportunity to present a defense, that right does not

encompass the right to present any evidence regardless of its admissibility under the rules of evidence. State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586, 594 (Ct. App. 2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). "Defendants are entitled to a fair opportunity to present a full and complete defense, but that right does not supplant the rules of evidence and all proffered evidence or testimony must comply with any applicable evidentiary rules prior to admission." Lyles, 379 S.C. at 343, 665 S.E.2d at 209.

Only relevant evidence should be admitted by the trial judge. Hamilton, 344 S.C. at 353, 543 S.E.2d at 591. "Evidence which assists a jury at arriving at the truth of an issue is relevant and admissible unless otherwise incompetent." State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986); see Rule 401, SCRE (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). However, relevant evidence is appropriately excluded when it creates a danger of unfair prejudice that is substantially outweighed by its probative value. State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1990). "Evidence is incompetent if it could create dangers such as prejudice, undue delay, confusion of the issues, tendency to mislead the jury, waste of time, or cumulative presentation." Lyles, 379 S.C. at 337, 665 S.E.2d at 206.

In this case, Appellant sought to introduce evidence of Victim's diagnosis of genital herpes and Appellant's negative tests for the same condition. Notwithstanding the fact this evidence was potentially inadmissible under legislation designed to protect victims of sexual assault, the medical diagnosis in this case was irrelevant. See S.C. Code Ann. § 16-3-659.1

(addressing the admissibility of evidence concerning a victim's sexual conduct). Victim was only diagnosed with genital herpes in 2006, two years after the incident involving Appellant. While Appellant alleges this evidence may have shown Victim contracted genital herpes as early as 2004, Victim was not diagnosed with the condition until 2006. Furthermore, the proffered testimony merely established Victim was diagnosed with vaginitis in 2004, a broad diagnosis that only could possibly have been an indicator of genital herpes. This evidence is too remote and highly speculative. See State v. Glenn, 328 S.C. 300, 309, 492 S.E.2d 393, 397 (Ct. App. 1997) (finding otherwise relevant evidence may lose its probative value when it becomes too far removed from the event in question); State v. Bright, 323 S.C. 221, 226, 473 S.E.2d 851, 853 (Ct. App. 1996) (noting there is no set rule as to what lapse of time will make particular evidence too remote to be probative and the determination of remoteness is usually left to the trial judge absent an abuse of discretion). Furthermore, it is highly prejudicial and stands to confuse the issues or potentially mislead the jury. No testimony presented suggested Victim suffered from genital herpes at the time of Appellant's crimes, which removes any probative value the evidence may have had.

The trial judge did not abuse his discretion in excluding the evidence, and his ruling should be afforded great deference on appeal. The Court of Appeals correctly affirmed the trial judge's ruling, and Appellant has failed to establish any error in the courts' rulings warranting the grant of a writ of certiorari. Appellant's petition for a writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted the petition for writ of certiorari should be denied:

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General


JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

N. MARK RAPOPORT
Senior Assistant Attorney General

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Assistant Attorney General

JERRY W. PEACE
Solicitor, Eighth Judicial Circuit

BY: 
MARK R. FARTHING

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ATTORNEYS FOR RESPONDENT

January 28, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari
To the Court of Appeals

Appeal From Laurens County
J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

Respondent,

vs.

DONALD THOMAS WETHERALL,

Petitioner.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petitioner for Writ of Certiorari on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 28th day of January, 2010.

Ellen R. DuBois
ELLEN R. DUBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Laurens County
J. Cordell Maddox, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

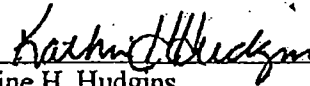
V.

DONALD THOMAS WETHERALL,

APPELLANT

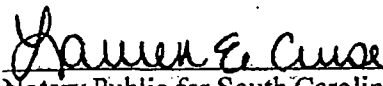
CERTIFICATE OF SERVICE

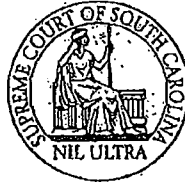
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Norman Mark Rapoport, Esquire, Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201 this 19th day of June, 2008.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of June, 2008.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
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January 20, 2011

Appellate Defender Kathrine H. Hudgins
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

RECEIVED

JAN 20 2011

ATTORNEY GENERALS
OFFICE

MF-File

Re: The State v. Wetherall, Donald Thomas

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

“Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

January 20, 2011.”

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

Daniel E. Shearouse
35

CLERK

**RECEIVED**

FEB 08 2011

ATTORNEY GENERALS
OFFICE

The South Carolina Court of Appeals

MF-File

TANYA A. GEE
CLERKV. CLAIRE ALLEN
DEPUTY CLERK
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 www.sccourts.org

February 7, 2011

REMITTITUR
 The Honorable Lynn W. Lancaster
 100 Hillcrest Sq Suite B
 PO Box 287
 Laurens, SC 29360-0287

 Re: The State v. Wetherall, Donald Thomas
 2005-GS-30-00166

Dear Ms. Lancaster:

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

Sincerely,

 V. Claire Allen
 Deputy Clerk of Court

VCA/lf

 cc: Appellate Defender Kathrine H. Hudgins
 Senior Assistant Attorney General Norman Mark Rapoport

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STATE OF SOUTH CAROLINA)
In the Court of Common Pleas

County of Laurens)
2011 FEB -4 A 11:17

Donald Wetherell 319576)
2011 -CP30- 114

Full name and prison number, if any, of applicant)
LAURENS COUNTY)
APPLICANT FOR)

v.)

POST-CONVICTION RELIEF

State of South Carolina)
Name of Respondent)

CLERK OF COURT
Lynn W. Lanning
Laurens County Courthouse

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Broadriver Correctional Institution
4460 Broadriver Rd, Columbia, SC 29210
2. Name and location of Court which imposed sentence The Eighth Judicial
Circuit Laurens County PO Box 287 Laurens SC 29360
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2005 GS 30 0166 Assault with/E to commit CSC 1st Lowd Act on Min
 - (b) _____
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 9-14-06
 - (b) _____
 - (c) _____

5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X _____
- (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes _____
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
- i. Court of Appeals _____
- ii. The Supreme court _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. court of Appeals - ~~denied~~ ^{Affirmed} / rehearing - denied _____
- ii. The Supreme court - writ of Certiorari - denied _____
- iii. _____
- (c) the date of each such result:
- i. Affirmed Submitted June 1, 2009 Filed June 15, 2009 _____
- ii. rehearing - denied August 25, 2009 _____
- iii. writ of certiorari denied January 20, 2011 _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. unpublished opinion No. 2009-UP-340 _____
- ii. Order dated January 2011 _____
- iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of counsel _____
- (b) Judge ERR _____
- (c) Malice Prosecution _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

- (a) Failure to make contemporaneous objections, made lies to the judge, Failure to Object to Argument, motion for mistrial
- (b) Errored when charged jury with Assault W/E to commit CSC as a lesser Included charge, plus there was no Evidence of Aki
- (c) ~~Argument~~ in closing State ment things he did not prove changed statement from opening to closing, Broke two cour

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

Yes

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

NO

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) NO

(d) any other petitions, motions or applications in this or any other Court?

NO

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. Assault W/E to commit CSC ^{1st} is not a lesser Included Offen
- ii. Judge err by excluding Evidence Victim was diagnosed
- iii. _____
- iv. _____

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

- i. Court of Appeal State of South Carolina and
- ii. Court of Appeal State of South Carolina and
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Affirmed and denied
- ii. Affirmed and denied
- iii. _____
- iv. _____

302

12) A) i - of CSC ¹⁵¹

12) A) ii - with genital herpes and I did not have genital herpes

12) B) i - Supreme court state of South Carolina

12) B) ii - Supreme court state of South Carolina

10) B - Errored when excluding the Evidence that victim had herpes and I did not, Allowing the State to Impeach me, Allowed charge of Lewd Act to go to jury with out state proving all Elements requiered to convict me

10) A

(d) the date of each such disposition:

i. June 1st 2009 & January 20, 2011

ii. June 1st 2009 & January 20, 2011

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. Petition for writ of Certiorari Denied January 20, 2010

ii. Opinion No. 2009 UP 340 SC Ct App Filed 6/15/2009

iii. _____

iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? Yes

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

i. Judge Error

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. Direct Appeal / Writ of Certiorari

ii. _____

iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective Assistance of Counsel had Direct Appeal in

(b) Malice Prosecution had Direct Appeal in

(c) _____

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence?

yes

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? yes

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Claude H. Howett III PO. Box 921, Clinton, SC. 29325
- ii. Kathrine H. Hudgins PO Box 11589, Columbia, SC. 29211-1589
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. arraignment, trial and sentencing
- ii. appeal, rehearing, writ of certiorari
- iii. _____

18. State clearly the relief you seek in filing this application.

New trial and/or vacate sentence

19. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)
COUNTY OF Laurans)
VERIFICATION

2011 FEB -4 A 11: 17

I, Donald Wetherall 317576, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

[Signature]

Sworn to and subscribed before me
This 2 day of February, 2011.

[Signature]
Notary Public for South Carolina
My Commission Expires My Commission Expires April 4, 2016

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Donald Wetherall 317576, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

[Signature]
Applicant

Sworn to and subscribed before me
This 2 day of February, 2011.

[Signature]
Notary Public for South Carolina
My Commission Expires: My Commission Expires April 4, 2016

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	EIGHTH JUDICIAL CIRCUIT
COUNTY OF LAURENS)	
)	
)	2011-CP-30-0114
)	
Donald Wetherall, #317576,)	
)	
Applicant,)	
)	RETURN AND PARTIAL
v.)	MOTION TO DISMISS
)	
State of South Carolina,)	
)	
Respondent.)	

The Respondent, making its Return to the application for post conviction relief (PCR) filed February 4, 2011, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Laurens County. He was indicted at the January 2005 term of the Laurens County Grand Jury for Criminal Sexual Conduct ("CSC") with a Minor (2005-GS-30-0166, Count I), and Committing or Attempting Lewd Act Upon a Child under Sixteen Years of Age (2005-GS-30-0166, Count II). He was represented by Claude H. Howe, III, Esquire. From September 12-14, 2006, he proceeded to a jury trial and was found guilty of the lesser-included offense of Assault with Intent to Commit CSC with a Minor, First Degree, and guilty as indicted of the lewd act charge. The Honorable Cordell Maddox sentenced him to thirty (30) years suspended after twenty (20) years with five (5) years probation for the CSC charge, and fifteen (15) years for the lewd act charge, concurrent.

A Notice of Appeal was filed on the Applicant's behalf, and an appeal was perfected by Kathrine H. Hudgins, Esquire. The S. C. Court of Appeals affirmed. State v. Wetherall, 2009-

UP-340 (Ct. App. filed June 15, 2009). The Applicant's Petition for Rehearing was denied by written Order dated August 25, 2009. The S. C. Supreme Court denied the Applicant's Petition for Writ of Certiorari by written Order dated January 20, 2011. The Remittitur was sent on February 7, 2011.

Attached herewith and incorporated herein by reference are the records of the Laurens County Clerk of Court regarding the subject convictions, the Applicant's records from the Department of Corrections, the Applicant's appellate records, and the trial transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post-conviction relief, the Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a) "Failure to make contemporaneous objections"
 - b) "Made lies to the judge"
 - c) "Failure to object to argument"
 - d) "Motion for mistrial"
2. "Judge err"
 - a) "Errored when charged jury with Assault W/I to commit CSC 1st as a lesser-included charge, plus there was no evidence of AWIC"
3. "Malice prosecution"
 - a) "Argument in closing statement things he did not prove, changed statement from opening to closing"
 - b) "Broke two court orders"

III.

Respondent interprets each of the Applicant's claims, with the exception of the allegation of trial court error, to be an allegation of ineffective assistance of counsel. In a post-conviction

relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Butler at 442, 334 S.E.2d at 814 (quoting Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984)).

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 at 690, 466 U.S. 2066. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry at 117, 386 S.E.2d at 625 (quoting Strickland at 688, 104 S.Ct. at 2065). 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 at 117-18, 386 S.E.2d at 625.

The Respondent submits the 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. The 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.

The Applicant also alleges the trial court erred in charging the jury with assault with intent to commit CSC with a minor, first degree, as a lesser-included offense of CSC with a minor, first degree. "Allegations of trial court error are not cognizable on PCR." Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). An applicant asserting a constitutional violation "must frame the issue as one of ineffective assistance of counsel." Id. (citing Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999)). Therefore, Respondent submits this allegation should be dismissed for failure to state a cognizable claim.

Moreover, Respondent submits this claim should be summarily dismissed because the Applicant is collaterally estopped from raising this issue. An issue previously litigated at trial and lost on appeal is precluded from being raised in a subsequent PCR action. See Koon v. State, 358 S.C. 359, 364-65, 595 S.E.2d 456, 459 (2004), *overruled on other grounds by State v. Gentry*, 363 S.C. 359, 364-65, 595 S.E.2d 456, 459 (2004). This issue was already raised to and rejected by the S. C. Court of Appeals. Accordingly, the allegation should be summarily dismissed because he is precluded from relitigating this issue.

V.

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

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the issue of ineffective assistance of counsel.

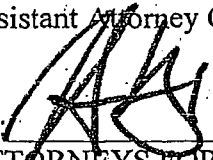
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

HARRISON D. BRANT
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

August 19, 2011.

STATE OF SOUTH CAROLINA)

COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS

2011-CP-30-0114

DONALD WETHERALL,)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

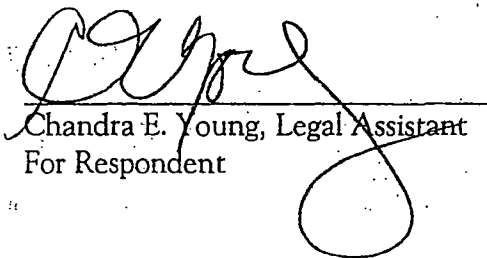
STATE OF SOUTH CAROLINA,)

Respondent.)

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

Rodney W. Richey, Esquire
 Post Office Box 10916
 Greenville, SC 29603

DATED this 19th day of August, 2011.


 Chandra E. Young, Legal Assistant
 For Respondent

COPY

STATE OF SOUTH CAROLINA, ANCASTER)
COUNTY OF LAURENS,)
OCT 27 A 10: 03

IN THE COURT OF COMMONS PLEAS
CASE NO: 2011-CP-30-114

Donald Wetherall SCDC# 317576)
Applicant, LAURENS COUNTY)
CLERK OF COURT)

AMENDMENTS TO
POST CONVICTION
RELIEF APPLICATIONS

vs.)

THE STATE OF SOUTH CAROLINA,)
Respondent.)

The applicant hereby amends answers to number 9 and number 10 of his Application for Post-Conviction Relief to state the following:

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(A) The Applicant was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of The South Carolina Constitution.

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) The applicant was provided with deficient representation by his attorney, in that the conduct of his attorney was objectively unreasonable under the circumstances. Strickland v. Washington, 466 U.S. 668 (1984). The outcome of the applicant's proceeding was prejudiced, and it is reasonable probable that the outcome would have been different had counsel's performance not been deficient. Strickland, 466 U.S. at 694. Defense counsel was ineffective based on one or more of the following:

1. My defense attorney failed to conscientiously discharge his professional responsibilities while he was handling my case.
2. My defense attorney failed to effectively challenge the arrest and seizure of Applicant.
3. My defense attorney failed to act as my diligent, conscientious advocate.
4. My defense attorney failed to give me his complete loyalty.
5. My defense attorney did not have my best interest in mind while he was supposed to be investigating and preparing my case.
6. My defense attorney failed to serve my cause in good faith.
7. My defense attorney neglected the necessary investigations and the preparation of my case.
8. My defense attorney did not do the necessary factual investigations on my behalf.
9. My defense attorney did not do the necessary legal research.
10. My defense attorney did not conscientiously gather any information to protect my rights.
11. My defense attorney did not try to have my case settled in a matter that would have been to my best advantage.
12. My defense attorney did not advise me of all my rights or take any of the actions that were necessary to protect preserve them; knowing that I was not versed in the law.
13. My defense attorney, knowing I was illiterate in the law, never properly ascertained whether or not I actually understood or comprehended all of the issues that were involved in my case.
14. My defense attorney never properly consulted with me or kept me informed with what was going on as far as my case was concerned.

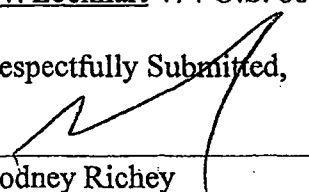
15. My defense attorney never explained to me or discussed with me any of the elements of the crime charged.
16. My defense attorney never made any attempt to ascertain whether or not I actually knew what the elements fo the crime charged were or whether or not I understood exactly what the term "criminal" element" actually meant.
17. My defense attorney never explained to me or discussed with me how the elements of the crime charge and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State V. Boyd.
18. My defense attorney never informed me of any of the defenses that were available to me.
19. My defense attorney never intended to offer any defense to the court on my behalf.
20. My defense attorney never explained to me or discussed with me any kind of defense strategy.
21. My defense attorney never explained to me or discussed with me any of the tactical choices that they either made or were planning to make.
22. My defense attorney dictated to me exactly how my case was going to be handled and offered no alternative options.
23. My defense attorney failed to properly acquaint themselves with the law and the facts surrounding my case and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts.
24. Because of my defense attorney's gross neglect and his many legal errors no defense at all was put in issue for me during the Court proceedings.
25. My defense attorney did not subject the prosecution's case to any adversarial testing.
26. My defense attorney failed to oppose the prosecution's case with

- any adversarial litigation.
27. My defense attorney failed to function as the government's adversary in any sense of the word.
 28. My defense attorney failed to pursue any of the legal recourse that were available to him.
 29. The attorney that represented me on this charge in Court failed to function as the counsel that the Constitution's Sixth Amendment Guarantees.
 30. My defense attorney failed to call alibi witnesses on my behalf which would have proven my innocence.
 31. My defense attorney failed to appeal my case after I was convicted when I wanted to appeal.

His counsel's representation was not within the range and scope of competence demanded by Strickland and its progeny.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show first, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Sosebee v. Lecke, S.C. 362, F. 2nd 221 (1987), citing Strickland v. Washington 46 S.E.2D. 813 (1984), See also Butler v. State 286 S.C. 441, 334 S.E. 2d 813 (1985), also, Hill v. Lockhart 474 U.S. 88 (1985).

Respectfully Submitted,

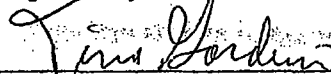

Rodney Richey
Richey and Richey, P.A.
Post Office Box 10916
Greenville, South Carolina 29603
Attorney for the Applicant

October 24, 2011

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMONS PLEAS
 LYNN W. LANCASTER) CASE NO: 2011-CP-30-114
 COUNTY OF LAURENS)
 2011 OCT 27 A 10:13)
 Donald Wetherall SCDC# 317576,) **AFFIDAVIT OF SERVICE**
 vs.)
 LAURENS COUNTY)
 CLERK OF COURT)
 THE STATE OF SOUTH CAROLINA)

I certify that I have served the PCR Application on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on October 24, 2011, addressed to their attorney of record, J. Rutledge Johnson, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Respectfully submitted:



Tina Garduno, paralegal
 Richey and Richey, P.A.
 Post Office Box 10916
 Greenville, South Carolina 29603

Sworn to before me on
 October 24, 2011.



Notary Public of South Carolina
 My Commission Expires: 3-28-18

State of South Carolina)
County of Laurens)

In the Court of Common Pleas
Eighth Judicial Circuit
2011-CP-30-0114

Donald Wetherall,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

Transcript of Record

March 12, 2012
Greenwood, South Carolina

B E F O R E:

The Honorable Frank R. Addy, Jr., Judge

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

Rodney W. Richey, Esquire
Attorney for the Applicant

J. Rutledge Johnson, Esquire
David A. Spencer, Esquire
Attorneys for the Respondent

Maryann S. Nevers, CVR-M
Circuit Court Reporter

I N D E X

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 Direct Examination by Mr. Richey 5
 Cross-Examination by Mr. Johnson 23
Claude H. Howe, III,
 Direct Examination by Mr. Richey 28
 Cross-Examination by Mr. Johnson 41
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<u>No.</u>	<u>Description</u>	<u>Page No.</u>
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No Exhibits Introduced.

TRANSCRIPT OF RECORD

1
2 (Whereupon, the proceeding was commenced at 12:59
3 p.m.)

4 THE COURT: All right. Mr. Johnson.

5 MR. JOHNSON: All right, Your Honor. This is the case
6 of *Donald Wetherall v. State of South Carolina*. It's 2010-
7 CP-30-0114 [sic]. Mr. Wetherwall -- Mr. Wetherall was
8 true-bill indicted at the January 2005 term of the Laurens
9 County Grand Jury for criminal sexual conduct with a minor
10 and committing or attempting a lewd act on a child under
11 the age of 16.

12 It was -- he went to a jury trial, where he was found
13 guilty of a lesser-included assault with intent to commit
14 criminal sexual conduct and guilty as indicted for the lewd
15 act. The Honorable Cordell Maddox sentenced Mr. Wetherall
16 to 30 years, suspended to 20 years, with five years
17 probation for the assault charge; and 15 years concurrent
18 for the lewd-act charge.

19 There was a direct appeal filed on his behalf, and the
20 Court of Appeals affirmed that. There was a petition for
21 rehearing that was denied, and Supreme Court denied
22 certiorari. Remittitur was on February 7, 2011.

23 Thereafter, he filed a timely PCR application on
24 February 4th, 2011, and amended on October 24th, 2011. The
25 state made its return on October 19th, 2011. He is

DIRECT EXAMINATION BY MR. RICHEY - DONALD WETHERALL

5

1 represented here today by Mr. Rodney Richey.

2 THE COURT: All right. Mr. Richey, are you ready to
3 proceed, sir?

4 MR. RICHEY: Yes, sir.

5 THE COURT: All right.

6 MR. RICHEY: We call Mr. Wetherall.

7 THE COURT: Mr. Wetherall, come on up, please, sir.

8 (Whereupon, The applicant came forward.)

9 DONALD WETHERALL, having been first duly sworn,
10 testified as follows:

11 DIRECT EXAMINATION

12 BY MR. RICHEY:

13 Q Sir, will you state your name, please?

14 A Donald Wetherall.

15 Q And, Mr. Wetherall, are you currently incarcerated?

16 A Yes, sir.

17 Q And where are you incarcerated?

18 A Broad River Correctional -- Correctional Institution
19 in Columbia.

20 Q What are you in there for?

21 A Assault with intent to commit CSC and a lewd act.

22 Q Did you have a jury trial in Laurens County?

23 A Yes, sir.

24 Q And who represented you on that trial?

25 A Chip Howe.

1 Q And what sentence did you receive?

2 A Thirty years, suspended to 20, with 5 years probation;
3 15 for the lewd act, running concurrent.

4 Q Okay. You filed an application for postconviction
5 relief. And is your position that Mr. Howe did not
6 effectively represent you?

7 A That's correct.

8 Q And can you tell me why you believe he did not
9 effectively represent you?

10 A There are several reasons. First, he -- he lied to
11 the trial judge.

12 Q Okay. And when you say "he lied to the trial judge,"
13 what do you mean?

14 A In -- in the transcripts -- let me get this situated.
15 Let me find it. In the transcripts, page 10, starting at 6
16 -- lines 6, 7, and then, down to 15, he -- he states that I
17 had a hearing before Judge Johnson October 27th, 2005,
18 motion for a speedy trial, which the Court denied. That
19 there is a lie. And he says that the speedy -- again, in
20 line 14 and 15, he says Judge Johnson denied the fast and
21 speedy trial. I have the motion here, if I may present ---

22 Q Yes, sir.

23 A --- that he did grant the fast and speedy trial. Even
24 at my bond hearing, the judge put a time limit on this
25 case. And it went over.

1 Q So the judge granted your motion and gave the state a
2 time limit to try you?

3 A Yes.

4 Q Okay. And what was that time frame?

5 A By the end of -- of the year of 2005 -- or on --
6 before the first court -- first date of the court term of
7 '06.

8 Q Okay.

9 A And at the bond hearing, he gave them another 120 days
10 to get me to trial within that time period. And it was 180
11 days before the trial actually started.

12 Q Okay. And you also believe he failed to make
13 contemporary objection; is that correct?

14 A Yes.

15 Q And what -- what did you want to object to?

16 A Well, I guess, I -- I -- I'm going to going through
17 this slowly and -- so I'm going to try to get everything
18 down. The first thing is on transcripts, page 54, lines 1
19 through 15 ---

20 THE WITNESS: (To the Court) Do I need to read this?

21 THE COURT: (Gestures.)

22 Q Go -- go ahead. What -- what do you believe he should
23 objected to?

24 A That the witness should've been disqualified.

25 Q Okay. And is it your position the witness should've

1 been qualified [sic] because she did not answer the
2 questions about telling the truth?

3 A Correct.

4 Q Go -- go ahead.

5 A Oh. The way she said this is: "Did you ever" ---

6 Q The witness is asked whether she knows ---

7 A The ---

8 Q --- right or wrong --

9 A Right.

10 Q --- knows that telling the truth is the correct thing
11 to do, correct?

12 A Right. And it's -- and she's -- ends up saying that
13 her grandma lets her get away with lying sometimes.

14 Q So you believe that she did not know the consequences
15 of not telling the truth ---

16 A Correct.

17 Q --- having suffered them? You have to answer.

18 A Do what, now?

19 Q Is your position that she disqualified because she
20 does not know the consequences or do not know the value of
21 telling the truth; is ---

22 A Correct.

23 Q --- that correct?

24 A Under rules of evidence -- I forget exactly what rule
25 that is -- but under disqualifying a witness, anybody that

1 is taught that it's okay to lie ought to be disqualified as
2 a witness.

3 Q Okay. And go ahead. And this is the alleged child
4 victim, correct?

5 A The only witness against me.

6 Q Okay.

7 A That's a judge's error. We don't talk about judge's
8 errors right there. I believe that Mr. Howe was
9 ineffective when, on page -- page 81, lines 10, 11, 12,
10 Court asked that -- if he wanted to make a motion to
11 exclude the testimony of Vickie White. And he says no.
12 Going through all this, her testimony, I believe Mr. Howe
13 was wrong for not trying to exclude it at that time.

14 Q And why is that?

15 A Vickie White's testimony -- she did not do her job
16 properly the way she was trained. She testifies to the --
17 all this. She's -- when she -- interviewing me, she didn't
18 record it; she did not tape -- tape it. She did not ask me
19 to write a handwritten testimony.

20 Q Let me go back. Who was she employed with?

21 A Laurens County.

22 Q Laurens County what? Laurens County law enforcement?

23 A Yes.

24 Q Okay. Go ahead.

25 A She did not -- there are several things in her

1 testimony that she flat out lies. I mean, I -- it's -- I
2 can prove it, given enough time. But Mr. Howe did not try
3 to exclude her when the judge himself asked if he wanted to
4 exclude her.

5 Q Well, let me ask you: Did -- do you know -- do you
6 know whether or not Mr. Howe knew that she was not telling
7 the truth?

8 A Yes. Because I tried to get Mr. Howe to put somebody
9 on the stand to counterdict [sic] what she was saying, and
10 Mr. Howe flatly refused me. I -- I wanted Dee Deals from
11 DSS from Laurens County to testimony that I did, in fact,
12 deny the charges, when Vickie White says I was never
13 denied. Both of them were at the interview of -- interview
14 with me.

15 Q Okay. Go ahead.

16 A Next ---

17 Q That -- and let me -- but go ahead. I'll let you take
18 them in order.

19 A Okay. There's another -- on the same witness, Vickie
20 White, I believe, makes a -- a -- was asked -- the question
21 was: "Is that the full statement of the defendant?" And
22 the answer is: "All except for the portions taken out."

23 Again, the state wanted to put it into exhibit, and my
24 attorney didn't object to it. I think he should have. And
25 that all goes under the same ---

DIRECT EXAMINATION BY MR. RICHEY - DONALD WETHERALL 11

1 Q Okay.

2 A --- under Vickie White.

3 Q Go ahead.

4 A There's a -- let's see. Vickie White again -- they
5 were talking about a certain letter that was in evidence.

6 Q What page are you reading from?

7 A This would be 97 and 98. It would go from 20 through
8 5. And they're talking about a certain note that was put
9 in. And on page 98, 1 through 5 is what -- what it -- was
10 actually said. And I believe Mr. Howe should've objected
11 to that on hearsay, because I don't see how she can say
12 that was written by me when I never testified to it.

13 Q Okay.

14 A Okay. Going to the blanket issue, which is another
15 topic ---

16 Q Okay. When you say "the blanket issue," what -- was
17 this a blanket supposedly found at the home?

18 A The initial statement from the witness is saying that
19 the white stuff happened -- happened on her belly and it
20 was wiped up with a certain blanket. In the beginning it
21 was supposed to be this blanket was wrapped up into
22 cellophane was supposed to been sent -- sent to SLED.
23 After 26 -- 25/26 months it finally goes to SLED. The
24 results come back, saying no hair/no semen found on this
25 blanket.

1 After this point they bring in another blanket, saying
2 it was -- this blanket was actually used. And this is only
3 several weeks before my trial. There was no chain of
4 custody on that blanket. There's -- there -- on 107, 20
5 through 25, they were talking about this other blanket.

6 And Mr. Howe did not object to -- to trying -- where'd
7 this blanket come from. They were saying -- the -- the --
8 this -- Vickie's White's saying it'd come from DSS. Well,
9 where'd this blanket come from? I have never seen a -- a
10 -- a -- a -- what's it called? -- a search warrant for that

11 ---

12 Q Wasn't that ---

13 A --- or evidence received for that or anything of that
14 matter.

15 Q Okay.

16 A Well, I guess -- all right. As far as the lesser-
17 included charge ---

18 Q Okay. You were charged with what?

19 A I was charged with a criminal sexual conduct, first-
20 degree, with a minor; I guess, a lewd act -- I never got a
21 warrant on it -- anything on that. Until my trial started,
22 I didn't know I had that charge on me. But during the
23 trial, when the state rested their case, the judge directed
24 to not -- not -- direct verdict of not guilty on the CSC.
25 Then, the issue was: Was assault with intent a lesser-

DIRECT EXAMINATION BY MR. RICHEY - DONALD WETHERALL 13

1 included charge?

2 Okay. There was no evidence of that charge; there was
3 no indictment on that charge. And I can't say that Mr. --
4 or Mr. Howe was ineffective on that particular incident.
5 He did a pretty good job preserving that. But I would also
6 say that he did not research assault with intent, because
7 any assault-with-intent charge, the perpetrator is
8 interrupted.

9 Q Okay. And so how do you believe Mr. Howe could have
10 prevented or requested the judge not -- to -- not to charge
11 that?

12 A If he had researched and found the other case of -- of
13 -- resulting with assault with intent, he would've been
14 able to say that with her testifying that the white stuff
15 happened on her belly, that is a completed act. Assault
16 with an intent is an interrupted act; the perpetrator never
17 completed what he intended to -- to -- to do. Mr. Howe did
18 not research that enough to -- to argue that point.

19 What he argued was that he -- the -- the state
20 could've indicted me and there was no evidence of that.

21 Q Okay.

22 A Okay. I would like to start with the herpes deal now.

23 Q Okay.

24 A Okay. The state made a motion for me to be tested for
25 genital herpes, because the witness in this case was

1 diagnosed with genital herpes. I'd consented to be tested.
2 I come back no hair, no -- or come back not -- I don't have
3 herpes -- genital herpes. When I tried to present this --
4 when Chip tried to present this, the state said it was ill-
5 relevant [sic]. And ---

6 Q Okay.

7 A --- I think that was between the state and the judge's
8 errors on that one. While it's -- even the Court says on
9 page 149, line 12 and 13, after he's heard [sic]
10 testimony, he said: "Obviously, that gives me some pause
11 that she had a problem." But he still denies me the right
12 to present that as a defense, showing that somebody else
13 could've done this.

14 Q Okay.

15 A Okay.

16 MR. JOHNSON: What page was that?

17 THE COURT: 149.

18 MR. JOHNSON: 149? Thank you.

19 Q Go ahead.

20 A I'm looking through here, making sure I don't miss
21 anything.

22 Q Okay. I'm going to direct you to page 190.

23 A That would be closing arguments?

24 Q Yeah. 190, lines 3 through 4, where it says: "Also,
25 you heard Detective White" -- this is Mr. Fleming, the

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1 prosecutor's, closing argument -- "you also heard Detective
2 White state that he never denied it either. He never
3 denied that he committed some kind of cruel, sexual conduct
4 on the child." Do you believe that Mr. Howe should
5 objected there?

6 A Yes, I do.

7 Q And why do you believe that?

8 A Because I did deny it several times. I denied it from
9 the very beginning, since I first started talking to the
10 detectives -- or law enforcement.

11 Q Do you believe that you have a constitutional right
12 not to say anything?

13 A I got a constitutional right not to testify if I feel
14 that it would be -- harm my -- or harm my case more than it
15 would help it. And with -- and -- and that would bring in
16 the -- to -- what's that called? -- impeachment.

17 Q Uh-huh.

18 A What they tried to impeach me on is failure to
19 register. And I believe they should not have been able to
20 -- to impeach me on that.

21 MR. JOHNSON: Objection ---

22 A But they ---

23 MR. JOHNSON: --- Your Honor. That's a direct-appeal
24 issue, not here for this -- this Court.

25 THE COURT: All right. Let -- I have not had a chance

1 to review the direct appeal. But if there are any issues
2 of law, I don't know that we need to necessarily need to
3 address those, because those would've been handled in the
4 appellate decision. So ---

5 MR. RICHEY: Okay.

6 THE WITNESS: If I may something? The only two issues
7 that the -- the -- my appellate defense brought up in my
8 direct appeal is that assault with intent is not a lesser-
9 included charge of assault -- or criminal sexual conduct
10 and the lewd-act issue. That's the only two issues that
11 she brought up. But as you can see, there are other issues
12 that I would've brought up myself, if I had been able to
13 put the motion in myself.

14 Q Let me direct you to page 192 ---

15 A That one ---

16 Q --- line --- okay.

17 A You want me to ---

18 Q Said ---

19 A --- go ahead on this one?

20 Q Huh?

21 A The state ---

22 Q No, no. I'm -- I'm sorry. Go ahead and finish what
23 you were saying.

24 A The state makes a statement in their closing argument
25 that the second blanket that was supposed to be -- come in

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1 had been washed. My attorney should've objected to that
2 statement because the state never put anybody on the stand
3 stating that that blanket had been washed.

4 Q I'm going -- page 192. On 192 this is in Mr. Fleming,
5 the prosecutor's, closing argument, where he talks about --
6 "I'd like you all" -- he -- he's speaking to the jury --
7 "I'd like you all to close your eyes for a second. I want
8 you to imagine a 5-year-old girl" -- and it goes on to line
9 24 and -5. Do you -- do you believe, after -- after this
10 point, Mr. Howe should objected?

11 A Yes. Because I'm not supposed to be convicted on
12 something imagined. I thought anything that I was supposed
13 to be convicted on is hard evidence, not an imagination.
14 And I believe Mr. Howe should've objected at that point
15 too.

16 Q Okay. Okay. Do you -- do you believe that Mr. Howe
17 properly investigated the case?

18 A No.

19 Q And can you tell me why not?

20 A I asked him to get several different witnesses on the
21 stand to testify that the victim is a known liar. And he
22 never even tried to get any witnesses on my behalf to do
23 that.

24 Q And ---

25 A Either ---

1 Q I'm sorry. Go ahead.

2 A All he was trying to do is get me to plead guilty to a
3 -- or lewd act, and I would not do that.

4 Q Did they -- did they make you any offer to plead to
5 lewd act?

6 A Yes. They offered me 10 years nonviolent the first
7 time. Then they offered me 12 years, and then 15. That
8 was during the trial. That's the first time they come to
9 me with a plea.

10 Q Is during ---

11 A That is in Laurens. Now, McCormick, which is same
12 victim with the same type of charge, tried to offer me
13 eight years nonviolent, and I refused to do that. And
14 that's why they shipped me to Laurens before McCormick.

15 Q Okay. So you had two separate charges in McCormick
16 and Laurens, and the solicitor's office came to you with an
17 offer in McCormick of eight years, but no offer in Laurens;
18 is ---

19 A Correct.

20 Q --- that correct?

21 Was there any offer they was going to be ran
22 concurrent?

23 A Not that I had heard of.

24 Q Okay.

25 A Because if I had pled guilty in Laurens, they would've

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1 took me back to McCormick and tried to get me to plead
2 again in Laurens.

3 Q And when you turned down the McCormick offer, then
4 they -- they ---

5 A Then ---

6 Q --- shipped you to Laurens for trial?

7 A Correct. I -- the solicitor down there said, "Since
8 we ain't got the evidence that the -- Laurens is supposed
9 to, we'll send him up there and get him convicted up there
10 and we'll bring him back."

11 I said, "No problem. Let's do it." Because I knew I
12 wasn't guilty of it. And with ---

13 Q Have you -- what's the status of the McCormick cases?

14 A Pending, as far as I know.

15 Q And you believe also in this case that there were
16 several court orders that were not complied with; is that
17 correct?

18 A That's correct. Court order for -- from the fast and
19 speedy trial, which the Court -- Court ordered that the --
20 "On or before November 18th, 2005, the solicitor office
21 shall inform the counsel of -- for the defense as to
22 whether the charges in this county or those in McCormick
23 County shall be disposed of first. In -- in -- in any
24 event, should this charge -- in any event, should the
25 charge of -- in this county not be disposed of on or before

1 the first day of the term of '06, then counsel shall apply
2 for a bond."

3 And then, at the bond hearing -- well, I never ---

4 Q Okay.

5 A --- even got the bond hearing until March of '06.

6 Q All right.

7 A Okay. At the bond hearing, the judge asked the
8 solicitor, "What happened?"

9 The solicitor says, "Well, we switched lawyers." The
10 one that had my case went to another county and a new one
11 took over.

12 The judge asked Ronald Fleming -- says, "How much time
13 do you need to get this case prepared for trial?"

14 Ronald Fleming says, "About two months."

15 The judge says, "I'll give you four months. If it's
16 not tried within four months, he'll have a bond set of 100
17 -- \$250,000."

18 Q Uh-huh.

19 A After -- in June that -- or 120 days was up. I put
20 motions in, trying to be heard, to have the case dismissed
21 because I haven't heard anything from anybody. And when I
22 went to trial, I brought all this up. And the state's --
23 states that they had a big murder trial for trial before
24 they got to me. If that's the case, I got a right to due
25 process, saying that due process -- the state should've put

1 a motion for an extension, but they didn't.

2 Q So you think Mr. Howe should've moved for the charge
3 to be dismissed for his failure to act on those motions?

4 A Correct. But he -- he never did. Because he -- he
5 even lied to the judge, saying I was denied it -- denied
6 those motions.

7 Q And if you -- do you believe, with what you had
8 testified, Mr. Howe had done that the outcome this trial
9 would've been different?

10 A Yes.

11 Q And you are asking this Court to grant you a new
12 trial?

13 A Correct.

14 Q And -- and you understand that means starting over
15 from the beginning; that you could receive more or -- well,
16 you could receive more or less time?

17 A Yes. All I want is a fair trial.

18 Q And -- and you -- and you did not do this to this
19 child; is that correct?

20 A That's correct.

21 Q And did you tell Mr. Howe that?

22 A Yes. And at -- actually, at the end of the -- before
23 I was sentenced, judge asked me if I wanted to say
24 anything. The only thing I said was, "I claim my
25 innocence."

1 Q And this case there -- there was not a lot of evidence
2 in this case; is that correct?

3 A The only evidence in this case was the girl's
4 testimony. Everything else -- the blanket that was
5 supposed to be used come back no hair/semen found. The
6 girl had genital herpes. I was tested; I don't have
7 herpes. Who gave her herpes? I don't know. Not me.

8 Q All right.

9 A But I wasn't allowed to present that.

10 Q And when did this -- when'd this case take place, what
11 year?

12 A Originally in '04. And ---

13 Q Okay.

14 A --- the trial didn't start until '06.

15 Q Okay. So at this point, in 2004 to 2012, that's been
16 some eight years, correct?

17 A Yeah. This June will be eight years.

18 Q And has the eight years affected your ability to find
19 witnesses that you would need at this point?

20 A Greatly. Because I know at least one's dead.

21 Q Okay. And at -- and in 2004, when you were first
22 tried for this, did you have more access to the witnesses?

23 A Yes.

24 Q Thank you. Answer any question attorney general have
25 for you.

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1 THE COURT: All right. Mr. Johnson, before I turn to
2 you, Madam Clerk, do y'all need to go get some lunch?
3 Y'all go get some lunch if you need to. I'm okay to go
4 without you.

5 CLERK OF COURT: Okay.

6 THE COURT: All right. Maryann, you okay?

7 THE COURT REPORTER: Sir? Yes, sir.

8 THE COURT: You sure?

9 THE COURT REPORTER: Yes, sir.

10 THE COURT: All right. Y'all go eat. Bye. Mr.
11 Johnson?

12 MR. JOHNSON: Yes, sir. May it please the Court, Your
13 Honor?

14 THE COURT: Yes, sir.

15 CROSS-EXAMINATION

16 BY MR. JOHNSON:

17 Q Just a few quick question, Mr. Wetherall. Now --
18 let's see. You claim that the only evidence in this case
19 is the alleged victim's testimony, right?

20 A Correct.

21 Q So when they read the statement supposed orally given
22 by you, that's not considered evidence?

23 A If it had been recorded, I would say yes. They didn't
24 offer me a chance to write any kind of statement. And
25 beside even my statement, I claimed that it's not true.

1 Q But will you agree with me that there was testimony
2 they gave you a chance to write the statement but ---

3 A No.

4 Q --- you declined?

5 A There may be -- they -- may be testimony saying that I
6 was asked and denied it; that is false.

7 Q Okay. But there's evidence in the record that says
8 they offered you; would you agree with me on that?

9 A Yes.

10 Q Okay. And there's also a letter written by --
11 allegedly written by you to the victim's mother; isn't that
12 correct? There was evidence ---

13 A Allegedly ---

14 Q --- offered?

15 A --- yes.

16 Q And ---

17 MR. JOHNSON: Judge, it's in the record.

18 Q But, you know, it said -- I may quote on page 98 --
19 "Michelle, what happened? How did they learn about this
20 shit? Are you the one who told them? You know, I thought
21 you were going -- I thought we were going to work through
22 this. Am I going to jail for the rest of my life? I can't
23 call from here. Can you get collect calls?"

24 Wasn't that offered at trial?

25 A That should've been excluded.

1 Q But wasn't it offered at trial?

2 A Well, that -- where I'm coming in, it -- it's
3 ineffective assistance of counsel for not even trying to
4 exclude that. Yes. The -- it was read to the jury, which
5 it should've never been read to the jury, because it
6 should've never been presented to the Court.

7 Q My -- my only point is there was more than just the
8 victim's testimony that resulted in a -- in your
9 conviction; isn't that correct?

10 A Hearsay testimony. There's no physical evidence. The
11 only evidence against me was hearsay evidence.

12 Q And you say that your attorney didn't argue the
13 assault with intent to, you know, commit criminal sexual
14 conduct. That's what you testified on direct; isn't that
15 right?

16 A He didn't research it, so he didn't argue it the
17 proper way.

18 Q Okay. But he did argue it at the -- his closing
19 argument, didn't he?

20 A Yes, he did.

21 Q Okay. And the jail nurse who tested you for herpes,
22 he proffered that testimony, didn't he? And the judge
23 denied that?

24 A Yeah. I mean ---

25 Q Okay.

1 A --- I mean ---

2 Q So that's not for this Court. You understand that?
3 That's a direct-appeal issue?

4 A (Nods head up and down.)

5 Q All right. And then, you say that -- that you -- the
6 attorney should've objected to the statement about the
7 blanket being washed?

8 A That's correct.

9 Q But will you agree with me that that's not exactly
10 what the statement says? The solicitor says: "If the
11 blanket would have been washed, there wouldn't be any
12 evidence."

13 A That was, what, page 190, lines 3 and 4: "The blanket
14 was washed."

15 Q And so I put that to you: That's for the jury to
16 decide? But he's -- he's talking about the SLED agent
17 said: "If the blanket had been washed in detergent, you're
18 not going to" ---

19 A That's ---

20 Q --- "get anything off of it."

21 A I'm -- I'm not arguing that part.

22 Q Okay.

23 A My argument is that the -- Mr. Fleming, at his closing
24 arguments, stated to the jury that the blanket was washed.
25 Mr. Howe should've objected to that, because they presented

1 no evidence that that blanket was washed.

2 Q All right. And you talk about your speedy-trial
3 motion and that the judge didn't grant that speedy-trial
4 motion.

5 A I didn't say that.

6 Q What were you just explaining about your speedy-trial
7 motion?

8 A That the judge did grant it; that Chip Howe and Ron
9 Fleming told the trial judge that I was denied it.

10 Q Okay. But will you agree with me that early on in
11 this case, the judge decides it was because of the backlog
12 of cases in Laurens County, is why you ---

13 A That was ---

14 Q --- didn't get to be tried earlier that you did?

15 A At the trial, yes.

16 Q And you have a previous conviction for some type of
17 sexual-related incident, don't you?

18 A Yes. In this Court.

19 MR. JOHNSON: Court's indulgence, Your Honor.

20 THE COURT: Yes, sir.

21 MR. JOHNSON: No further questions at this time, Your
22 Honor.

23 MR. RICHEY: None, Your Honor.

24 THE COURT: (To the applicant) Thank you, sir. You
25 can step down.

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1 (Whereupon, the applicant exited the witness stand.)

2 MR. RICHEY: That's all, Your Honor.

3 THE COURT: All right. Mr. Johnson?

4 MR. JOHNSON: The state calls Mr. Chip Howe, please.

5 THE COURT: All right. I'm trying to get Mr. Howe out
6 of here. But if I -- any of y'all are about to pass out,
7 let me know and I'll take a break. Are y'all okay to keep
8 going? I'd like to be able to get him back to Clinton.

9 MR. JOHNSON: Thank you.

10 THE COURT: Come on up.

11 (Whereupon, Mr. Howe came forward.)

12 CLAUDE H. HOWE, III, having been first duly sworn,
13 testified as follows:

14 DIRECT EXAMINATION

15 BY MR. JOHNSON:

16 Q Mr. Howe, how you doing?

17 A Good.

18 Q We'll try to get you out of here quickly as possible.

19 I just want to start off: First off, how long have you
20 been practicing law?

21 A Just -- 1978.

22 Q And how much of your practice today is criminal law?

23 A Seventy-plus percent.

24 Q And about how many trials have you been involved with?

25 A I don't know. At least 20.

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1 Q Have you ever handled criminal-sexual-conduct cases
2 before?

3 A Yes.

4 Q Do you remember becoming involved in Mr. Wetherall's
5 case?

6 A Yes.

7 Q Were you appointed or retained?

8 A Appointed.

9 Q And did you have the opportunity to review his -- his
10 discovery -- the state provide you with discovery?

11 A Yes.

12 Q And about how many times did you meet with Mr.
13 Wetherall?

14 A I don't know. I would say ample time to get ready for
15 his trial.

16 Q And did you provide him copies of discovery?

17 A I believe I did. And we had a -- an investigator on
18 the case as well.

19 Q And at those meetings you went over the indictments
20 and the elements of the charges he was facing?

21 A Yes.

22 Q Potential sentences?

23 A Yes.

24 Q And did you discuss his version of the facts?

25 A Yes.

1 Q And what were those?

2 A He didn't do it.

3 Q Plain and simple?

4 A He didn't -- he didn't do it, and the alleged victim
5 was not telling the truth.

6 Q And -- let's see. And so based upon that answer, what
7 was your trial strategy, if you had any?

8 A Trial strategy was to attack the evidence that the
9 state introduced; challenge the -- every bit of the
10 evidence; challenge the testimony of the child witness.
11 And we did that, and she did not testify to all of the
12 elements of criminal sexual conduct with a minor.

13 Q And so in response to that, not testifying to all the
14 elements, any actions you take?

15 A We -- we -- we made the appropriate motions, and the
16 state made a ruling. And apparently, it was upheld or
17 addressed by the appellate courts that I still disagree
18 with. They allowed it to go forward on assault with intent
19 to commit, rather than CSC.

20 Q And based on your review of the file and the
21 applicant's version, were you able to form an opinion about
22 the state's ability to prove this case?

23 A I -- it -- it was going to be jury trial, a jury
24 question. And we were going to try to win the case.

25 Q And the state put up a few different witnesses in this

DIRECT EXAMINATION BY MR. JOHNSON - CLAUDE H. HOWE, III 31

1 case?

2 A Yes.

3 Q One was the -- the child interviewer -- the forensic
4 interviewer?

5 A I -- I don't recall specifically that interviewer, but
6 I -- I think so. I think there was a question about what
7 that interviewer was allowed to say. That -- I'm drawing a
8 blank on that, and I don't have the benefit of the
9 transcript.

10 Q Okay. Do you need a copy of the transcript?

11 A If -- if you need to point something out, but ---

12 Q The only ---

13 A --- not ---

14 Q --- thing I was ---

15 A Not ---

16 Q --- going to ---

17 A --- not right this second to do that, I mean.

18 Q Okay. Would you agree that you did object to what the
19 forensic interviewer -- what the child told the forensic
20 interviewer?

21 A I'm sure I would've. I mean, I -- I -- I would agree
22 with that. These forensic interviewers -- what -- what the
23 courts allow them to say and give opinions on is -- is
24 something that any competent defense lawyer is going to
25 challenge in these-type cases.

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1 Q And that you had an ongoing objection to anything that
2 was said by ---

3 A I ---

4 Q --- the child to the ---

5 A I would hope that I would.

6 Q Okay. And let's go back to the -- the actual trial
7 itself. The -- did you make any pretrial motions in this
8 case?

9 A I don't recall specifically what pretrial motions that
10 I made. I know I made a motion to dismiss the case and was
11 heard on that, having to do with the -- what I still
12 understand Judge Johnson's ruling, where Judge Johnson did
13 not grant a speedy-trial motion. And I moved to dismiss
14 the case because of evidence about the second blanket that
15 came up well after the case was filed and prepared.

16 I -- specifically, other motions that -- pretrial
17 motions that I made, I don't recall at this time. But I'm
18 sure I did.

19 Q Okay. And did you ask for the witnesses to be
20 sequestered in this case?

21 A I don't recall, but I -- if -- if I did or not. But
22 that would typically be what I would do.

23 Q And why is that?

24 A It's just all -- it's -- from experience, it's -- if
25 -- if you're going to have several witnesses testifying on

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1 the same issues, it's -- it's a -- it just makes sense to
2 have them sequestered so that one witness does not hear
3 what the other witness says.

4 Q Okay. Let's see. So ---

5 A And -- and if I may, I ---

6 Q Yeah. Absolutely.

7 A --- this wouldn't be a pretrial motion, but I -- I --
8 I have a standard motion, pursuant to Rule 5 and -- and
9 *Brady* material. I would've made that as well.

10 Q Okay.

11 A And I have a copy of that.

12 Q All right. And was there any evidence that was not
13 let in that you wanted in this case?

14 A I -- I think we did proffer the evidence about the
15 testing that showed that -- that -- that Mr. Wetherall did
16 not have herpes, I think it was. I think I tried -- tried
17 to introduce that.

18 Q And why, in your opinion, would that be relevant?

19 A Well, because, as I understood, the -- the -- the --
20 the child did, in fact -- was at some point in time
21 diagnosed as having that.

22 Q And that may have shown that it wasn't the applicant?

23 A Exactly. And I disagree with the Court's ruling there
24 as well.

25 Q And were there any motions made about -- did -- did

1 you talk to your client about whether he -- or not he
2 wanted to testify at this trial?

3 A Absolutely.

4 Q And what were those discussions?

5 A Well, typically, I'm going to discuss -- "All right.
6 You -- you have a right to testify or not testify, but it's
7 going be your decision. Let's discuss whether or not it
8 can help us or hurt us."

9 We go over the fact that -- that -- that if you
10 testify, your prior criminal history may be brought out and
11 -- for impeachment purposes only and whether or not the
12 Court has -- the Court has made a ruling or will make a
13 ruling on what or -- is or is not an impeachable offense.
14 Typically, I will attempt to get the Court to make a ruling
15 on that so that I know whether or not the -- the -- that
16 prior criminal history is going to come out, should the
17 client testify.

18 Q And he chose not to testify in this case?

19 A I believe so.

20 Q So there was some criminal history that he didn't want
21 brought out that the judge ---

22 A I ---

23 Q --- ruled admissible?

24 A I wouldn't -- I wouldn't have wanted the jury to know
25 it as well.

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1 Q Okay. But it's ultimately his decision not to take
2 that stand ---

3 A Absolutely.

4 Q --- potentially ---

5 A And ---

6 Q --- take the ---

7 A --- and ---

8 Q --- stand?

9 A --- and I don't know if I did it in this case.

10 Typically, you'll ask the judge to go over that and swear
11 the client and go over that with the -- with -- with --
12 with the client on the record. I don't know that that
13 occurred in this case or not. But if it hadn't, I would've
14 covered the same matters that the judge would've.

15 And Mr. -- Mr. Wetherall is very opinionated, capable
16 of expressing his own viewpoint; had -- had his own idea
17 and theories on -- on the case. And -- and -- and it
18 would've been his decision. You would've not been able to
19 force Mr. Wetherall to do something he didn't want to do.

20 Q Okay.

21 THE COURT: And just so the record's clear: It
22 appears, on page 168, the Court did review with Mr.
23 Wetherall his fifth amendment rights.

24 MR. JOHNSON: Thank you, Your Honor.

25 Q And I'll go ahead and address it: Is there anything

1 in the closing argument you feel was objectionable?

2 A Yes, sir, I do.

3 Q And is -- what Mr. Wetherall testified to about the
4 imagine ---

5 A Yes. By ---

6 Q --- scenario?

7 A --- way of background, if I can explain how that
8 occurred, I was still wrestling with what I could do and
9 not do to address the Court's ruling that -- that -- that
10 he was actually being tried on assault with intent to
11 commit CSC, as opposed to CSC, because the child did not
12 testify to penetration. The child did testify to other
13 matters, but would not testify to penetration.

14 In Ron Fleming's closing argument, I will -- would
15 admit: At some point in time, I got distracted, still
16 wrestling with that issue. And ---

17 Q And you ---

18 A --- at that point in time, that must've been when
19 Fleming made that -- the argument from one of Grisham's
20 books.

21 THE COURT: *A Time to Kill.*

22 THE WITNESS: *A Time to Kill.* Exactly.

23 A And I admit, I was asleep at the wheel when that took
24 place. And I should've objected to that at that point in
25 time. There's no question in my mind; I should've done

DIRECT EXAMINATION BY MR. JOHNSON - CLAUDE H. HOWE, III 37

1 that.

2 Q Mr. Howe, will you agree with me that overall, courts
3 give attorneys wide latitude in their closing argument as a
4 general practice?

5 A As a general practice, they do. But -- but courts
6 will also rule on an objection if it's properly made. And
7 this is one I think I should have made.

8 Q All right. And there's also testimony -- there's a
9 statement that comes into evidence that was taken by, I
10 think, Ms. Vickie White that ---

11 A Correct.

12 Q All right. Did you find anything objectionable about
13 that statement?

14 A I'm -- I'm -- I'm hoping -- I -- I -- I'm assuming
15 that I challenged that -- that statement at the appropriate
16 time if -- if my client told me that I needed to, it --
17 unless he disagreed -- unless he agreed with what -- what
18 he said. Vickie White was known, in my experience in
19 dealing with her, to not take any kind of written or
20 recorded statement from the accused, as a lot of law -- law
21 enforcement officers are. One of these days, that may be
22 changed.

23 Q All right. But -- but -- but it -- will you agree
24 with me that transcript says that they had to proffer that
25 statement before it was admitted?

1 A If -- if that -- I -- I would agree if that's what it
2 says. I -- I was listening to what Mr. Wetherall said
3 about that, and I can't recall specifically how that took
4 place.

5 Q Okay. So it didn't just come straight in; it had to
6 be admitted before she could testify as to that?

7 A Yes.

8 Q And there was also a note that the applicant allegedly
9 wrote that I read to him that came in as well?

10 A Right. And -- and -- and Wetherall told me that he
11 wrote it; he never disputed that he wrote it. He -- he was
12 going to attempt to give an explanation as to why he wrote
13 it and the way it came across.

14 And I don't think that explanation would've worked too
15 well, had he testified, with the jury. I think it'd have
16 done him more damage. He didn't deny making the -- writing
17 the note at all.

18 THE COURT: (To the witness) It -- say that again?

19 I'm sorry. He did ---

20 THE WITNESS: He -- he did not deny writing ---

21 THE COURT: Okay.

22 THE WITNESS: --- the note.

23 A He in -- he -- in fact, he admitted he wrote the note.
24 His -- he had an explanation with me privately that didn't
25 make a whole lot of sense.

DIRECT EXAMINATION BY MR. JOHNSON - CLAUDE H. HOWE, III 39

1 Q Okay. Let me jump back to the statement that he
2 allegedly gave to Ms. White.

3 A Okay.

4 Q In that statement that's offered, doesn't the -- the
5 applicant here admit to admitting this crime? Do you
6 remember that?

7 A In ---

8 Q He told ---

9 A --- that ---

10 Q --- a pastor and ---

11 A In -- in -- in that statement, it certainly -- it --
12 it -- put it this way: If -- if -- if -- you -- you'd
13 rather not have -- him not say anything. It certainly
14 didn't help him. I don't know if it was such a clear
15 admission. But it -- but it certainly caused Mr. Wetherall
16 problems.

17 Q So there was more than just the child's testimony that
18 pinned him to this -- this alleged crime?

19 A Yes.

20 Q Okay. Do you feel that you spent sufficient time
21 preparing this case?

22 A Yes.

23 Q And were well prepared for this case?

24 A Well prepared, as -- as best I could under the
25 circumstances. I did not anticipate the assault with

1 intent because didn't know until that child testified that
2 there was going to be testimony that lacked all the
3 elements of CSC.

4 Q So in your dealings with the state, it was always
5 going to be the child's testimony that there was some type
6 of penetration?

7 A That's what we fully expected.

8 MR. JOHNSON: Court's indulgence one second, Your
9 Honor.

10 THE COURT: Yes, sir.

11 Q Mr. Howe, just one more quick question. Is there
12 testimony from the alleged victim that one morning she was,
13 I guess, watching cartoons and the applicant sexually
14 assaulted her?

15 A Yes.

16 Q So -- okay. Just get that clear.

17 A Yes. There -- there was testimony that -- we expected
18 testimony that involves actual criminal sexual conduct.

19 Q Okay. But there was testimony that he assaulted the
20 alleged victim?

21 A Yes. And that's apparently the basis for the Court's
22 ruling, which it -- which was affirmed by the appellate
23 courts.

24 Q And 12 people convicted Mr. Wetherall of this crime?

25 A He had a jury trial, and there were 12 jurors.

CROSS-EXAMINATION BY MR. RICHEY - CLAUDE H. HOWE, III 41

1 Q Okay.

2 MR. JOHNSON: No further questions at this time, Your
3 Honor.

4 CROSS-EXAMINATION

5 BY MR. RICHEY:

6 Q Mr. Hall -- Howe, just a few quick questions here.
7 Number one, the child's testimony -- you -- you recall the
8 -- the question on page 54 about the child with not
9 understanding the -- not understanding that -- that you get
10 punished for not telling the truth? Do you recall that --
11 any ---

12 A I don't.

13 Q --- of that?

14 Assuming that there's testimony in the record that the
15 child does not understand the responsibility in telling the
16 truth, do you believe that's grounds to have her testimony
17 suppressed?

18 A If it was made that clear and the child -- and the
19 child said that clearly and said nothing else and if it
20 wasn't cleared up or ruled on by the Court.

21 Q And I'm going ask you about what I referred on direct
22 on page 190 -- 190, where there's -- in Mr. Fleming's
23 closing argument. He says something about "You heard what
24 -- Detective White state that he'd never -- did deny it
25 either. He never denied that he -- he committed some kind

1 of crazy sexual conduct. He never denied it. He had a
2 chance to; he had a chance to write a statement -- a
3 statement denying everything; wouldn't do it."

4 Let me just ask you: In this type of case where the
5 client did not testify and -- and he has actually exercised
6 his right to remain silent; is that correct?

7 A Correct.

8 Q And in this closing argument, do you believe that that
9 was -- that that was Mr. Fleming's attempt to shift the
10 burden to -- to Mr. Wetherall?

11 A I agree to some extent on that.

12 Q Okay.

13 A I don't think that's quite as clear because you did
14 have at least a -- evidence of a statement that he gave to
15 law enforcement that was in evidence. Had there been no
16 statement at all or anything from Mr. Wetherall, then I
17 would clearly agree with you.

18 Q Okay.

19 A This was -- I think is a little closer case. Should I
20 objected to it? I won't disagree with you. I -- I'm not
21 as strong on that.

22 Q Okay. Okay. Thank you. No other questions.

23 THE COURT: Anything on redirect?

24 MR. JOHNSON: No redirect, Your Honor.

25 THE COURT: All right.

EXAMINATION

1
2 BY THE COURT:

3 Q One point of clarification, Mr. Howe -- and I haven't
4 had a chance to review the whole transcript. But the
5 portion of that transcript where Mr. Fleming is making the
6 argument -- the *A Time to Kill* argument, is that what you
7 were talking about, about the pajamas and watching the
8 cartoons a minute ago or something? Is that what he was
9 alluding to in his closing argument? Or do you -- I'm --
10 I'm trying to ---

11 A I was ---

12 Q Let -- let me -- let me ask you the -- let me it this
13 way: Was there evidence in the record that would have
14 supported the facts that Mr. Fleming had asked the jury to
15 close their eyes and picture?

16 A Some of it, Judge, there was. Some of it that I
17 recall that he had -- him smelly ---

18 Q Some of it was artistic license, perhaps, and some of
19 it was in the record?

20 A It -- some of it was in the record; some of it was --
21 was clearly not in the record ---

22 Q Okay.

23 A --- at all, Judge.

24 Q Very good.

25 A And, Judge, may I -- may I just say one ---

1 Q Please.

2 A --- thing and address one ---

3 Q Yes, sir.

4 A --- matter that -- that -- that wasn't brought up on
5 the thing?

6 The -- Judge, I was a little bit bothered by -- and --
7 and I understand these things. I was a little bit bothered
8 by Mr. Wetherall's claim that I -- I lied to the judge in
9 the case. Judge, I'd like -- I -- I -- I -- I just want
10 everybody here, so the record is complete on that, to -- to
11 realize that the -- Judge Johnson issued an order. And the
12 order is part of the record. And I'd -- I'd like to hand
13 it up.

14 Where he didn't grant the speedy-trial motion, he said
15 that Mr. Wetherall would get -- would revisit the issue of
16 bond if the case was not tried -- or the McCormick County
17 case was not tried by the first day of the term in 2006.
18 We were back before the Court in March, which may have been
19 the second -- the first opportunity to address that. And
20 the judge made a further ruling on bond at that time.

21 I don't think -- and -- and I've got -- and the -- the
22 -- the order speaks for itself. But I don't believe Judge
23 Johnson actually granted a speedy-trial motion. And I'd
24 like for the record to reflect that I did not lie to the
25 judge.

1 Q All right. Is -- and just so that I am clear: The --
2 it was Johnson that you went in front of; he did not grant
3 a speedy trial. But he basically did what I do sometimes,
4 and that is say, "Look, if y'all don't get moving on this
5 thing, then you can expect this man to be getting out of
6 jail."

7 A Yes, sir.

8 Q Was that basically what his -- what ---

9 A That's correct ---

10 Q --- you took ---

11 A --- Judge.

12 Q --- his comment ---

13 A You had a -- you had an interesting situation: Frank
14 Young had the case to begin with. Frank had come from
15 McCormick. McCormick was the better case when Frank was in
16 Laurens. And then when Frank left the solicitor's office
17 and went back to McCormick, then all of a sudden, Laurens
18 became the better case.

19 Q I understand.

20 THE COURT: All right. Now -- not yet. Based upon --
21 based upon that clarification and -- I think perhaps, Mr.
22 Richey, your client may have inartfully put his comments
23 concerning Mr. Howe's representations to the Court. I
24 assume that there's no objection to the Court taking notice
25 that -- that perhaps this was a misunderstanding or a

1 misapprehension on the part of your client, as opposed to a
2 outright fabrication or misrepresentation on behalf of Mr.
3 Howe.

4 MR. RICHEY: Your Honor, I just talked to the attorney
5 general. We -- we're -- we're not opposed to that being
6 stricken ---

7 THE COURT: All right.

8 MR. RICHEY: --- from ---

9 THE COURT: Very good.

10 MR. RICHEY: --- the record of ---

11 THE COURT: All right.

12 MR. RICHEY: --- Mr. Howe.

13 THE COURT: That -- that'll be noted, then, for the
14 record. And I was intending to go that way anyway, so --
15 any other questions of Mr. Howe, based upon those
16 statements?

17 MR. RICHEY: No, sir.

18 THE COURT: From the state?

19 MR. JOHNSON: Not from the state, Your Honor.

20 THE COURT: (To the witness) Sir, thank you.

21 THE WITNESS: Thank you ---

22 THE COURT: You're free ---

23 THE WITNESS: --- Judge.

24 THE COURT: --- to go.

25 (Whereupon, Mr. Howe exits the witness stand.)

1 THE WITNESS: Thank you for y'all working through
2 lunch.

3 THE COURT: Hopefully, not too much longer.

4 MR. RICHEY: Yes, sir.

5 MR. HOWE: Okay. All right.

6 THE COURT: All right. Next time we have a PCR where
7 Mr. Howe is a witness, I'd like for him to be called first,
8 okay?

9 MR. JOHNSON: Will do. We'll make ---

10 THE COURT: Thank you.

11 MR. JOHNSON: --- a note of it. That's all from the
12 state, Your Honor.

13 THE COURT: All right. Anything else from the defense
14 -- or from ---

15 MR. RICHEY: No, sir.

16 THE COURT: --- the applicant?

17 All right. I have not had an opportunity to review
18 this transcript. On trial cases I typically do like to
19 review the transcript. If I had a clerk at this point in
20 time, he would've hopefully had a chance to do that. I'm
21 without a clerk.

22 So I'm going to take the matter under advisement and
23 hopefully get to y'all -- get something to y'all in the
24 next couple of days if that's acceptable. All right.

25 MR. RICHEY: Thank you, Your Honor.

1 THE COURT: We're adjourned on this matter.
2 (Whereupon, the proceeding was concluded at 1:59 p.m.)
3 --- END OF TRANSCRIPT OF RECORD ---

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CERTIFICATE

I, THE UNDERSIGNED MARYANN S. NEVERS, CERTIFIED
VERBATIM REPORTER - MASTER, OFFICIAL COURT REPORTER
FOR THE EIGHTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH
CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD IN
THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO
APPEAL, IN THE CIRCUIT COURT FOR LAURENS COUNTY, SOUTH
CAROLINA, ON THE 12TH DAY OF MARCH, 2012.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



MARYANN S. NEVERS, CVR-M

COLUMBIA, SOUTH CAROLINA

AUGUST 6, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)

LYNN W. LANCASTER)
2012 APR 26) P 1:08

THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Donald Wetherall, #317576,)

2011 -
2010-CP-30-0114

Applicant LAURENS COUNTY)
CLERK OF COURT)

ORDER OF DISMISSAL

v.)

State of South Carolina,)

A TRUE COPY OF ORIGINAL

Respondent.)

Lynn W. Lancaster
Lynn W. Lancaster
Laurens County CCCP & OS

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 4, 2010 and amended on October 24, 2011. The Respondent made its Return on August 19, 2011. An evidentiary hearing into the matter was convened on March 12, 2012, at the Greenwood County Courthouse. Rodney Richey, Esquire represented the Applicant. J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Chip Howe, Esquire also testified. This Court had before it a copy of the records of the Laurens County Clerk of Court, records from the South Carolina Department of Corrections, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Laurens County. He was indicted at the January 2005 term of the Laurens County Grand Jury for Criminal Sexual Conduct (CSC) with a Minor (2005-GS-30-0166, Count I), and Committing or Attempting Lewd Act Upon a Child under Sixteen Years of Age (2005-GS-30-0166, Count II). He was represented by Claude H. Howe, III,

Esquire. From September 12-14, 2006, he proceeded to a jury trial and was found guilty of the lesser-included offense of Assault with Intent to Commit CSC with a Minor, First Degree, and guilty as indicted of the lewd act charge. The Honorable Cordell Maddox sentenced him to thirty (30) years suspended after twenty (20) years with five (5) years probation for the CSC charge, and fifteen (15) years for the lewd act charge, concurrent.

A Notice of Appeal was filed on the Applicant's behalf, and an appeal was perfected by Katharine H. Hudgins, Esquire. The S. C. Court of Appeals affirmed. State v. Wetherall, 2009-UP-340 (Ct. App. filed June 15, 2009). The Applicant's Petition for Rehearing was denied by written Order dated August 25, 2009. The S. C. Supreme Court denied the Applicant's Petition for Writ of Certiorari by written Order dated January 20, 2011. The Remittitur was sent on February 7, 2011.

In his application for post-conviction relief, the Applicant alleges he is being held unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a) "Failure to make contemporaneous objections"
 - b) "Made lies to the judge"
 - c) "Failure to object to argument"
 - d) "Motion for mistrial"
2. "Judge err"
 - a) "Errored(sic) when charged jury with Assault W/I to commit CSC 1st as a lesser-included charge, plus there was no evidence of AWIC"
3. "Malice prosecution"
 - a) "Argument in closing statement things he did not prove, changed statement from opening to closing"
 - b) "Broke two court orders"

In his amended application, the Applicant, through counsel, alleges he is being held unlawfully for the following reasons:

1. Counsel "failed to conscientiously discharge his professional responsibilities while he was handling my case"
2. Counsel "failed to effectively challenge the arrest and seizure of Applicant"
3. Counsel "failed to act as diligent, conscientious advocate"
4. Counsel "failed to give me his complete loyalty"
5. Counsel "did not have my best interest in mind while he was supposed to be investigating and preparing my case"
6. Counsel "failed to serve my cause in good faith"
7. Counsel "neglected the necessary investigations and the preparations in my case"
8. Counsel "did not do the necessary factual investigations on my behalf"
9. Counsel "did not do the necessary legal research"
10. Counsel "did not conscientiously gather any information to protect my rights"
11. Counsel "did not try to have my case settled in a matter that would have been to my best advantage"
12. Counsel "did not advise me of all my rights or take any of the actions that were necessary to protect preserve them; knowing that I was not versed in the law"
13. Counsel "knowing that I was illiterate in the law; never properly ascertained whether or not I actually understood or comprehended all of the issues that were involved in my case"
14. Counsel "never properly consulted with me or kept me informed with what was going on as far as my case was concerned"
15. Counsel "never explained to me or discussed with me any of the elements of the crime charged"
16. Counsel "never made any attempt to ascertain whether or not I actually knew what the elements of the crime charge were or whether or not I understood exactly what the term 'criminal element' actually meant"
17. Counsel "never explained to me or discussed with me how the elements of the crime charge and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State v. Boyd."
18. Counsel "never informed me of any of the defenses that were available to me"
19. Counsel "never intended to offer any defense to the court on my behalf"
20. Counsel "never explained to me or discussed with me any kind of defense strategy"
21. Counsel "never explained to me or discussed with me any of the tactical choices that they either made or were planning to make."
22. Counsel "[never] dictated to me exactly how my case was going to be handled and offered no alternative options"



23. Counsel "failed to properly acquaint themselves with the law and the facts surrounding my case and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts"
24. "Because of my defense attorney's gross neglect and his many legal errors no defense at all was put in issue for me during the court proceedings"
25. Counsel "did not subject the prosecution's case to any adversarial proceedings"
26. Counsel "failed to oppose the prosecution's case with any adversarial litigation"
27. Counsel "failed to function as the government's adversary in any sense of the word"
28. Counsel "failed to pursue any of the legal recourse that were available to him"
29. Counsel "that represented my on this charge in court failed to function as counsel that the Constitution's Sixth Amendment guarantees"
30. Counsel "failed to call alibi witnesses on my behalf which would have proven my innocence"
31. Counsel "failed to appeal my case after I was convicted when I wanted to appeal"

At the hearing, the Applicant proceeded on his claims that Counsel should have sought a speedy trial motion, Counsel should have objected to the victim testifying and Counsel should have objected to the Solicitor's comments during closing argument.

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 (2003):

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence."

Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 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, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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.

Speedy Trial Motion

The Applicant alleges Counsel should have made a speedy trial motion in this case. The Applicant testified there was an order from the Court to try his case by the end of 2005, but this order was not followed. The Applicant alleges Counsel should have moved for a speedy trial based on this.

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court also has read the trial transcript, all of which assists the Court in judging the witnesses' credibility. This Court finds the Applicant's testimony regarding Counsel's ineffectiveness is not credible while also finding the trial transcript dispositive on this issue.

According to the transcript, the Applicant was arrested on June 24, 2004 for charges stemming from McCormick County, SC. The Applicant was then charged with the Laurens County charges in this case. On October, 27, 2005, Counsel made a motion for a speedy trial, which Judge Johnson denied. The case was not tried until September 12-14, 2006. During the pre-trial motion stage of the trial, Counsel made a motion to dismiss the case in its entirety due to resulting prejudice of not receiving DNA test results until August 2006. Counsel also argued the State had in its possession the evidentiary items tested since June of 2004. (Tr. pp 9-14). The Solicitor then argued the reason for the delay was that the Applicant did not file a motion for a speedy trial until October of 2005, and since that time he had taken over for another Solicitor who had been working on this case. Additionally, the Solicitor stated that there had been a backlog of the Court's docket, that he had a major murder trial during the preceding term of General Sessions, and that this was the first term he could call this case. (Tr. pp. 17-19). The trial court then denied the Applicant's motion due to the backlog of cases. (Tr. p. 19-20).

I find that Counsel did, if fact, file a motion for a speedy trial on behalf of the Applicant. Counsel also argued a pre-trial motion to dismiss the case entirely based on the alleged prejudicial delay. Since Counsel presented both of these motion to the trial court, I find the Applicant has failed to meet his burden of proving counsel's performance was deficient or that he was prejudiced thereby. Accordingly, this allegation is denied.

Failure to Object to Victim Testifying

The Applicant alleges Counsel should have objected to the Victim testifying in this case because she was only seven years old and did not understand the consequences of lying.

Whether or not a child is competent to testify is solely a matter for the trial court's discretion.

Rule 601(a) states, "Every person is competent to be a witness except as otherwise provided by statute or these rules." Rule 601(b) clarifies when a witness should be disqualified.

A person is disqualified to be a witness if the court determines that
(1) the proposed witness is incapable of expressing himself concerning the matter as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or
(2) the proposed witness is incapable of understanding the duty of a witness to tell the truth.

SCRE 601(b)

This Court had the opportunity to observe the witnesses on the witness stand and heard their testimony. This Court also has read the trial transcript, all of which assists the Court in judging the witnesses' credibility. As stated earlier, this issue is a matter that is solely within the discretion of the trial judge. A thorough review of the record demonstrates sufficient evidence exists to prove the child was competent to testify. This Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient for not challenging the ability of the child to testify or that he was prejudiced thereby. Accordingly, this allegation is denied.

Solicitor's closing argument

The Applicant alleges Counsel was ineffective for not objecting to the Solicitor's closing arguments.

"A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999). "If a

solicitor's closing argument remains within the record, evidence and the reasonable inferences therefrom, no error occurs." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999).

First, the Solicitor referenced the statement the Applicant wrote to his girlfriend in which he basically admitted the crime. (Tr. p. 190) Counsel testified this caused the Applicant the greatest problem in his case. I find this statement was a fair commentary and a reasonable inference based on the evidence presented at trial. Therefore, Counsel was not ineffective for not objecting to the Solicitor's comments on the Applicant's own letter to his girlfriend.

Second, I find the statement concerning the blanket being washed (Tr. p. 192) was a fair commentary and a reasonable inference based on the evidence presented at trial. Therefore, Counsel was not ineffective for not objecting to the Solicitor's comments on the blanket being washed.

Third, the Solicitor made essentially "A Time to Kill" argument which may have been arguably objectionable. (Tr. pp. 192-193). However, I find this argument was not improper *per se*, ~~nor it is~~ improper as to mandate an objection or infer prejudice.
 was it so

This Court finds the Applicant has failed to meet his burden of proving counsel's performance was deficient for not objecting to the Solicitor's closing argument or that he was prejudiced thereby. Accordingly, this allegation is denied.

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.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining

MA

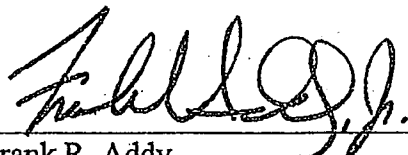
allegations set forth in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED!


 Frank R. Addy
 Presiding Circuit Court Judge
 Eighth Judicial Circuit

April 16, 2012

Greenwood, South Carolina

WITNESSES

andy Atkins

WARRANT NUMBERS

H-740119

True Bill

Philip [unclear]
Foreman of the Grand Jury

1-2405

VERDICT

Foreman

376

THE STATE OF SOUTH CAROLINA

COUNTY OF LAURENS

COURT OF GENERAL SESSIONS

January Term, 2005

Indictment # 05GS30-*166*

THE STATE

vs

DONALD THOMAS WETHERALL

IC

INDICTMENT FOR

- 1) CRIMINAL SEXUAL CONDUCT WITH A MINOR
- 2) COMMITTING OR ATTEMPTING LEWD ACT UPON A CHILD UNDER SIXTEEN YEARS OF AGE

A TRUE COPY OF ORIGINAL

Lynn W. Lancaster
Lynn W. Lancaster
Laurens County CCCP & GS

I, DONALD THOMAS WETHERALL, THE DEFENDANT, IN MY OWN PROPER PERSON, COME TO THE BAR OF THIS COURT, WAIVE GRAND JURY ACTION, AND FREELY AND VOLUNTARILY PLEAD _____ GUILTY TO THE CHARGE(S) OF:

THIS _____ DAY OF _____ A.D. _____

ATTEST:

DEFENDANT'S SIGNATURE

CLERK OF COURT, LAURENS, S.C.

THE STATE OF SOUTH CAROLINA
COUNTY OF LAURENS

INDICTMENT FOR

- 1. CRIMINAL SEXUAL CONDUCT WITH A MINOR
- 2. COMMITTING OR ATTEMPTING LEWD ACT UPON A CHILD UNDER SIXTEEN YEARS OF AGE

At a Court of General Sessions, convened on the 24th day of January, 2005, the Grand Jurors of Laurens County present upon their oath:

COUNT ONE

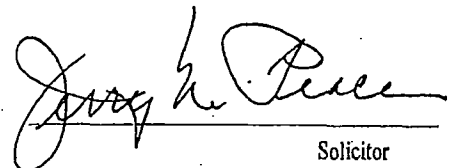
That DONALD THOMAS WETHERALL, did in Laurens County, state aforesaid, between the 1st day of April, 2004, and the 25th day of June, 2004, being older than the victim, wilfully and unlawfully commit criminal sexual conduct with a minor in the first degree, to wit: ~~XXXXXXXXXXXXXXXXXXXXXXXXXXXX~~ that the said defendant did engage in sexual battery upon a person under the age of eleven (11) years, to wit: one June S. Turner, in violation of Section 16-3-655 of the South Carolina Code of Laws, 1976, as amended.

COURT OF GENERAL SESSIONS
 COUNTY OF LAURENS
 J. H. B.

COUNT TWO

That DONALD THOMAS WETHERALL did in Laurens County, state aforesaid, between the 1st day of April, 2004, and the 25th day of June, 2004, being over the age of fourteen (14) years. the said defendant did unlawfully, wilfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, to wit: June S. Turner, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the said defendant, or of the said child, June S. Turner, in violation of Section 16-15-140 of the South Carolina Code of Laws, 1976, as amended

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



 Solicitor

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LAURENS)
)
 The State of South Carolina)
)
 v.)
)
 Donald Whetherall,)
 Defendant.)

IN THE COURT OF GENERAL SESSIONS

Indictment No. 2005-GS-30-166

VERDICT

A TRUE COPY OF ORIGINAL

Lynn W. Lancaster

 Lynn W. Lancaster
 Laurens County CCCP & GS

INDICTMENT NO. 2005-GS-30-166
 ASSAULT WITH INTENT TO
 COMMIT CRIMINAL SEXUAL CONDUCT WITH A MINOR

We, the jury, unanimously find on the above-mentioned indictment, 2005-GS-30-166, that the
 Defendant, Donald Whetherall, is:

Guilty of assault with intent to commit criminal sexual conduct with a minor.

OR

Not Guilty.

Jimmy Hurley

 Jimmy Hurley, Foreperson

Laurens, South Carolina
 September 14, 2006

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LAURENS)
)
 The State of South Carolina)
)
 v.)
)
 Donald Whetherall,)
 Defendant.)

IN THE COURT OF GENERAL SESSIONS

Indictment No. 2005-GS-30-166

VERDICT

A TRUE COPY OF ORIGINAL

Lynn W. Lancaster
 Lynn W. Lancaster
 Laurens County CCCP & GS

INDICTMENT NO. 2005-GS-30-166
 COMMITTING OR ATTEMPTING A LEWD ACT
 UPON A CHILD UNDER SIXTEEN YEARS OF AGE

We, the jury, unanimously find on the above-mentioned indictment, 2005-GS-30-166, that the
 Defendant, Donald Whetherall, is:

Guilty of committing or attempting a lewd act upon a child under sixteen years of age.

OR

Not Guilty.

Jimmy Hurley
 Jimmy Hurley, Foreperson.

Laurens, South Carolina
 September 14, 2006

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LAURENS)
)
 The State of South Carolina)
)
 v.)
)
 Donald Whetherall,)
 Defendant.)

IN THE COURT OF GENERAL SESSIONS

Indictment No. 2005-GS-30-166

VERDICT
A TRUE COPY OF ORIGINAL
Lynn W. Lancaster
 Lynn W. Lancaster
 Laurens County CCCP & GS

INDICTMENT NO. 2005-GS-30-166
ASSAULT AND BATTERY OF
A HIGH AND AGGRAVATED NATURE

We, the jury, unanimously find on the above-mentioned indictment, 2005-GS-30-166, that the
 Defendant, Donald Whetherall, is:

 Guilty of assault and battery of a high and aggravated nature.

OR

 Not Guilty.

Jimmy Hurley
 Jimmy Hurley, Foreperson

Laurens, South Carolina
 September 14, 2006

STATE OF SOUTH CAROLINA)
 COUNTY OF LAURENS)
 STATE VS.)
Donald Thomas Wetherall)
 AKA:)
 Race: W Sex: M Age: 37)
 SS#: [REDACTED])
 Address: [REDACTED])
 City, State, Zip [REDACTED])
 DL# [REDACTED] SID# [REDACTED])

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2005 -GS- 30 - 0166
 A/W#: H- 740119
 Date of Offense: 4/1/04 - 6/25/04
 S.C. Code §: 16-3-655(D)
 CDR Code #: 0 1 3 1 8 1 5
 CASE RESTORED
 SENTENCE
 PLEA TRIAL

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS TO: ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL CONDUCT FIRST DEGREE in violation of § 16-3-656 of the S.C. Code of Laws, bearing CDR Code # 0 1 2 1 5 1 3
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS 17-25-45

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.
 The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.
 ATTEST: Donald T. Flory Solicitor Lynn W. Lancaster Defendant
Lynn W. Lancaster Attorney for Defendant
Laurens County GCCP & GS

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 30 days/months/years or under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of 30 days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for 5 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation which are incorporated by reference.
 CONCURRENT or CONSECUTIVE to sentence on: 2005-65-30-0166 Separate
 The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

RESTITUTION: Heard, Waived, Ordered PTUP _____ days/hours Public Service Employment

Total: \$ _____ plus 20% fee: \$ _____
 Payment Terms: _____
 set by SCDPPPS _____

Recipient:		
*Fine:		\$ _____
§14-1-206 (Assessments 107.5%)		\$ _____
§14-1-211(A)(1). (Conv. Surcharge)	\$100	\$ <u>100.00</u>
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$ _____
§56-5-2995 (DUI Assessment)	\$12	\$ _____
§ 35.13 (Public Def/Prob)	\$500	\$ _____
§73.3, 1B TP (Law Enforce. Funding)	\$25	\$ <u>25.00</u>
§33.7, 1B TP (Drug Court Surcharge)	\$100	\$ _____
§50-21-114(BUI Breath Test Fee)	\$50	\$ _____
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$ _____
3% to County (if paid in installments)		\$ <u>3.75</u>
TOTAL		\$ <u>128.75</u>

Obtain GED _____
 Attend Voc. Rehab. or Job Corp. _____
 May serve W/E beginning _____
 Substance Abuse Counseling _____
 Random Drug/Alcohol Testing _____
 Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____
 \$ _____ paid to Public Defender Fund
 Other: _____

Appointed PD or appointed other counsel, §35.13 TP Requires \$500 be paid to Clerk during probation.

Barbara T. Nasson Clerk of Court/ Deputy Clerk
 Court Reporter: Jo Rice

PRESIDING JUDGE Jim Middle
 Judge Code: _____
 Sentence Date: 9/14/06

STATE OF SOUTH CAROLINA

COUNTY OF LAURENS
STATE VS.
Donald Thomas Wetherall
AKA:
Race: W Sex: M Age: 32
DOB: [REDACTED] SS#: [REDACTED]
Address: [REDACTED]
City, State, Zip [REDACTED]
DL# [REDACTED] SID# [REDACTED]

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2005 -GS- 30 - 0166
A/W#: OW JWF
Date of Offense: 4/1/04 - 6/25/04
S.C. Code §: 16-15-140
CDR Code #: 2 1 4 1 6 1 8
 CASE RESTORED
SENTENCE
 PLEA TRIAL

In disposition of the said indictment comes now the Defendant who was CONVICTED OF or PLEADS TO: Lewd Act, Committing or Attempting Lewd Act upon Child under 16
in violation of § 16-15-140 of the S.C. Code of Laws, bearing CDR Code # 2 1 4 1 6 1 8
 NON-VIOLENT VIOLENT SERIOUS MOST SERIOUS 17-25-45

A TRUE COPY OF ORIGINAL

The charge is: As Indicted, Lesser Included Offense, Defendant Waives Presentment to Grand Jury.
The plea is: Without Negotiations or Recommendation, Negotiated Sentence, Recommendation by the State.
ATTEST: Ronald M. Flory Solicitor Lynn W. Lancaster Defendant
Laurens County CCJP & GS Attorney for Defendant

WHEREFORE, the Defendant is committed to the State Department of Corrections, County Detention Center, for a determinate term of 15 days/months/years or under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____, provided that upon the service of _____ days/months/years and/or payment of \$ _____, plus costs and assessments as applicable*, the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
 CONCURRENT or CONSECUTIVE to sentence on: 2005 - GS - 30 - 0166 Sentence
 The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

RESTITUTION: Heard, Waived, Ordered
Total: \$ _____ plus 20% fee: \$ _____
Payment Terms: _____
 set by SCDPPPS _____

PTUP _____ days/hours Public Service Employment
Obtain GED _____
Attend Voc. Rehab. or Job Corp. _____
May serve W/E beginning _____
Substance Abuse Counseling _____
Random Drug/Alcohol Testing _____
Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____
\$ _____ paid to Public Defender Fund
Other: _____

Appointed PD or appointed other counsel, \$35.13 TP Requires \$500 be paid to Clerk during probation.

Recipient: _____
*Fine: \$ _____
§14-1-206 (Assessments 107.5%) \$ _____
§14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00
§14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____
§56-5-2995 (DUI Assessment) \$12 \$ _____
§ 35.13 (Public Def/Prob) \$500 \$ _____
§73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00
§33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____
§50-21-114(BUI Breath Test Fee) \$50 \$ _____
§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____
3% to County (if paid in installments) \$ 3.75
TOTAL \$ 128.75

Barbara T. Nasson Clerk of Court Deputy Clerk
Court Reporter: Jo Rice

PRESIDING JUDGE Judge [Signature]
Judge Code: 311
Sentence Date: 9/14/06