

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Pickens County

Honorable Alex Kinlaw, Circuit Court Judge

JUSTIN RYAN CONE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-000437

APPENDIX

JESSICA M. SAXON
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

TAYLOR Z. SMITH
Assistant Attorney General
Rembert Dennis Building
1000 Assembly Street, Suite 519
Columbia, SC 29201

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	
COUNTY OF PICKENS	)	Case No(s) : 2012GS3900660
	)	
State of South Carolina,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
Justin Ryan Cone,	)	
	)	
Defendant.	)	
_____	)	

November 18, 2014
Pickens, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

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

SAMUEL TOOKER, Esquire
Attorney for the Plaintiff

STEVE SUMNER, Esquire
Attorney for the Defendant

Teresa B. Johnson, CVR-M, CM
Certified Court Reporter
P.O. Box 2812
Greenville, S.C. 29602

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I N D E X

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EXHIBITS PAGE**NO.****DESCRIPTION****ID EV****PLAINTIFF EXHIBITS**

(No exhibits offered.)

DEFENSE EXHIBITS

(No exhibits offered.)

COURT EXHIBITS

(No exhibits offered.)

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

2 (Proceedings begin on the 18th day of November,
3 2014 at approximately 10:34 a.m.)

4 **THE COURT:** All right. Ladies and
5 Gentlemen, let me tell you what we're going to
6 be doing for the balance of the morning here
7 with you. I mentioned, briefly, that Judge
8 Keesley is going to be here. He is from
9 Edgefield. He is going to be here to try one of
10 the cases that we have on the docket this week.

11 The folks in Pickens County are looking out
12 for you so much that what we're going to do is,
13 instead of bringing you back this afternoon and
14 doing all this, we're going to pick our juries
15 that are starting -- for trials that are
16 starting today, we're going to pick them today.
17 That way, you -- that way, you can leave. You
18 can know what time to come back, and you won't
19 have to be, you know, coming and going from the
20 courthouse too much. All right.

21 The first case that we're going to pick a
22 jury for is the case of the State of South
23 Carolina versus Justin Ryan Cone. It is a
24 charge of Criminal Sexual Conduct with a Minor
25 first degree. I'm going to go through a list of

1 questions -- I'm going to go through a list of
2 questions with you. Some of these, or most of
3 these, I will tell you, have very much to do
4 with whether you know a witness in a case -- a
5 witness in the case or know anything about the
6 case or whatever. And if you do, if it's that
7 kind of question and you would like to stand
8 and respond, then I'll call on you and you tell
9 me your name and juror number.

10 I'm going to have one or two questions that
11 might call for something more of a personal
12 nature. It might not be about you. It might be
13 about a relative of yours or something. They
14 might call for something of a personal nature.
15 On those questions, I'm going to instruct you
16 that if anybody needs to respond to me, if you
17 do it the same way you did earlier this
18 morning, just come up and speak with me one by
19 one.

20 I'm going to have several questions in one.
21 Nobody's going to know which question you are
22 responding to. You could be responding to one
23 that you're fine standing up telling me about
24 or you could be responding to one that you're
25 not fine with, but that's how we're going to

1 deal with those questions. In any event, we'll
2 kind of fumble through it here for a few
3 minutes, but we'll get going.

4 The first thing I want to do is introduce
5 you to the attorneys involved in this case.

6 Mr. Tooker, would you stand and introduce
7 everyone?

8 **MR. TOOKER:** Yes, ma'am. Thank you. May it
9 please the Court.

10 My name is Sam Tooker. I'm a prosecutor
11 here in Pickens County. Seated beside me is
12 Detective Rita Burgess of the Pickens County
13 Sheriff's Office. We're representing the State
14 of South Carolina in today's case.

15 **THE COURT:** All right. Is any member of
16 the jury panel related by blood or marriage or
17 otherwise acquainted with in any way Mr. Tooker
18 from the Pickens County Solicitor's Office? If
19 so, please stand.

20 (No audible response.)

21 And none are standing.

22 Any member of the jury panel related by
23 blood or marriage or otherwise acquainted with
24 in any way anyone who is employed by the
25 Thirteenth Circuit Solicitor's Office. That's

1 the prosecutor's office for both Pickens and
2 Greenville County. Anybody related to or
3 acquainted with anyone in those offices? If so,
4 please stand.

5 Tell me your name and juror number please.

6 **PROSPECTIVE JUROR:** I'm Kelly Robinson.
7 I'm Juror Number 124.

8 **THE COURT:** Yes, ma'am. Who are you
9 related to or acquainted with?

10 **PROSPECTIVE JUROR:** Brittany Roper.

11 **THE COURT:** All right.

12 **PROSPECTIVE JUROR:** She's my daughter.

13 **THE COURT:** All right. All right. Thank
14 you so much.

15 All right. Mr. Sumner, would you stand and
16 introduce yourself?

17 **MR. SUMNER:** Thank you, Your Honor. May it
18 please the Court.

19 **THE COURT:** Yes, sir.

20 **MR. SUMNER:** My name is Steve Sumner. I
21 practice law in Greenville and Pickens, and I
22 represent Justin Cone.

23 **THE COURT:** Any member of the jury panel
24 related by blood or marriage or otherwise
25 acquainted with in any way Mr. Steve Sumner?

1 Anyone at all ever been involved in a case
2 represented by him or against him? Anyone in
3 the jury panel?

4 (No audible response.)

5 And none are standing.

6 Mr. Cone, would you stand please.

7 (The defendant complies.)

8 **THE COURT:** This is Justin Cone.

9 Okay. You can have a seat.

10 (The defendant complies.)

11 **THE COURT:** Anyone --

12 Thank you.

13 -- anyone in the jury panel related by
14 blood or marriage or otherwise acquainted with
15 in any way Justin Cone? If so, please stand.

16 (No audible response.)

17 And none are standing.

18 All right. If you are chosen to serve on
19 this particular jury, you're going to hear a
20 lot more about what an indictment is and what
21 an indictment is not. Let me tell you an
22 indictment is, for our purposes right now, an
23 indictment is, in no sense, evidence of
24 anyone's guilt whatsoever. It's simply the
25 document by which someone is charged with a

1 crime and brought back to court. That's it. For
2 our purposes here this morning, the only
3 purpose that this indictment is going to serve
4 whatsoever is I need to read to you just the
5 body of the indictment for the purposes only of
6 finding out if you know anything about this
7 incident whatsoever. All right.

8 The indictment alleges that Justin Ryan
9 Cone did, in Pickens County, between the dates
10 of January 1st, 2010 and January 1st, 2012,
11 commit a sexual battery on M.D.M. who was less
12 than 11 years of age in violation of the code
13 of laws of South Carolina. Any member of the
14 jury panel believe he or she knows anything
15 about this case whatsoever?

16 (No audible response.)

17 And none are standing.

18 Any member of the jury panel believe or she
19 has read anything about this case -- I don't
20 know if there were any media reports or
21 anything like that -- but read anything about
22 this case in the newspaper, heard anything
23 about it on television or radio or otherwise
24 been -- know anything about this case from
25 social media, anything like that? By social

1 media, I mean Facebook, Twitter and all these
2 things that I don't know how to use. Anyone
3 think you've heard anything about this case
4 either through the media or through social
5 media? If so, please stand.

6 (No audible response.)

7 All right. And none are standing.

8 I now have a list of potential witnesses
9 involved in this case. I will tell you these
10 attorneys involved in this case are excellent
11 attorneys. They have listed every possible
12 witness who could be called in the trial of
13 this case. Do not know if these witnesses will
14 be called. But if any member of the jury panel
15 is related by blood or marriage or otherwise
16 acquainted with in any way any of these
17 witnesses, if you would, please stand.

18 I'm going to go through the whole list:
19 Shauna Galloway-Williams; Christine Carlberg;
20 JB Kelley of the Pickens County Sheriff's
21 Office; Elijah Chapman of the Pickens County
22 Sheriff's Office; Rita Burgess of the Pickens
23 County Sheriff's Office; Douglas Miller, Jr.;
24 [REDACTED] Victim; Casey Miller; or Linda
25 Hutton. Any member of the jury panel related by

1 blood or marriage or otherwised acquainted with
2 in any way any of these witnesses? And if so,
3 please stand.

4 Yes, ma'am, in the blue sweater, will you
5 tell me your name and juror number please.

6 **PROSPECTIVE JUROR:** 155.

7 **THE COURT:** Yes, ma'am.

8 **PROSPECTIVE JUROR:** Wendy White.

9 **THE COURT:** Wendy White, 155. And yes,
10 ma'am, who are you acquainted with?

11 **PROSPECTIVE JUROR:** I met Lieutenant
12 Burgess last week.

13 **THE COURT:** Okay. All right. You met
14 Lieutenant Burgess last week. Is that what you
15 said?

16 **PROSPECTIVE JUROR:** Yes, ma'am.

17 **THE COURT:** All right. Let me ask you
18 this, do you believe that you could still be a
19 fair and impartial juror based upon the fact
20 that you have evidently met one time Deputy
21 Burgess?

22 **PROSPECTIVE JUROR:** Yes, ma'am.

23 **THE COURT:** All right. Thank you so much.

24 Yes, ma'am, in the plaid scarf, tell me
25 your name and juror number?

1 **PROSPECTIVE JUROR:** I'm Janice Bishop,
2 number 9.

3 **THE COURT:** Yes, ma'am.

4 **PROSPECTIVE JUROR:** I know Elijah through
5 church.

6 **THE COURT:** Through church. Knowing that
7 Elijah Chapman will likely be a witness in this
8 case, do you believe you could be a fair and
9 impartial juror in the trial of this case?

10 **PROSPECTIVE JUROR:** Yes.

11 **THE COURT:** All right. Thank you so much.

12 Ladies and Gentlemen, I am now going to go
13 through several questions. As I said, one or
14 two of them might call for some personal
15 information, if you need to respond. Other of
16 these do not call for any personal information,
17 but there are certain things I just would not
18 want you to stand up and talk about in any way.
19 I'm going to go through these lists of
20 questions. If you need to respond to any of
21 those questions, if you would, just hold your
22 response to the end, and then I'll speak with
23 you along with the attorneys.

24 All right. Has anyone been accused, charged
25 or convicted or does anyone have an immediate

1 family member or close friend that has been
2 accused, charged or convicted of a crime
3 against a child or a sex crime? If so, if you
4 would speak with me about that. Immediate
5 family, brother, sister, mother, father, child,
6 spouse. All right.

7 Has anyone been a victim or does anyone
8 have a family member -- immediate family member
9 or close friend that has been a victim of a
10 crime against a child or a sex crime? If so, if
11 you would speak with me about that at the end,
12 as well.

13 All right. Two more questions. Is there any
14 member of the jury panel who, for any reason
15 whatsoever, feels they could not be a fair and
16 impartial juror in a trial where a defendant is
17 accused of criminal sexual conduct of against a
18 minor?

19 And then my final question: you've heard
20 all the potential witnesses in the case. You
21 know -- you've met the attorneys in the case.
22 You've met the accused in the case. You know
23 the nature of the charges that are going to be
24 dealt with in this case. Is there any reason
25 for any reason whatsoever that any member of

1 the jury panel believes he or she could not be
2 a fair and impartial juror in the trial of this
3 case? And just so we're clear, a fair and
4 impartial juror is someone who can listen to
5 all of the evidence and give both the State and
6 the defense a fair trial. If so, if you feel
7 like you could not do that for any reason, if
8 you would, please speak with me about that at
9 the end. All right.

10 Those are all my questions. If you would,
11 if anyone needs to speak with me, you just step
12 exactly where you did before and we'll speak
13 about it.

14 (The following bench conferences are held on the
15 record:)

16 (Juror number 1, Heather Aleman, approaches the
17 bench.)

18 **PROSPECTIVE JUROR:** Heather Aleman.

19 **THE COURT:** Yes, ma'am.

20 **PROSPECTIVE JUROR:** My father was
21 convicted of a sex crime.

22 **THE COURT:** Do you believe you could be a
23 fair and impartial juror in this case?

24 **PROSPECTIVE JUROR:** I really don't think I
25 can.

1 **THE COURT:** Okay. Thank you. We've got
2 another trial coming up. That will be just
3 fine. Thank you.

4 (Juror number 1, Heather Aleman, exits the
5 bench.)

6 **THE COURT:** Yes, sir.

7 (Juror number 107, Joshua Parr, approaches the
8 bench.)

9 **THE COURT:** 107.

10 **PROSPECTIVE JUROR:** My sister was molested
11 as a child and I would have a difficult time.

12 **THE COURT:** I'll just ask you this right
13 out, do you think you could be a completely
14 fair and impartial juror?

15 **PROSPECTIVE JUROR:** I don't think I can.

16 **THE COURT:** I appreciate your candor.

17 (Juror number 107, Joshua Parr, exits the
18 bench.)

19 **THE COURT:** Yes, sir.

20 (Juror number 41, John Elrod, approaches the
21 bench.)

22 **THE COURT:** Hey there. Tell me your -- can
23 I see your juror number? 41. Yes, sir.

24 **PROSPECTIVE JUROR:** My son was charged.

25 **THE COURT:** Okay. Is it current right now?

1 **PROSPECTIVE JUROR:** Oh, no. It's been
2 years ago.

3 **THE COURT:** It's been years ago.

4 **PROSPECTIVE JUROR:** 20 years ago.

5 **THE COURT:** Tell me this. Do you think you
6 could be a fair and impartial juror in the
7 trial of this case?

8 **PROSPECTIVE JUROR:** Yes.

9 **THE COURT:** You could? Okay. All right.
10 Thank you so much.

11 (Juror number 41, John Elrod, exits the bench.)

12 **THE COURT:** So sorry. Yes. So sorry.

13 (Juror number 149, Nancy Tucker, approaches the
14 bench.)

15 **PROSPECTIVE JUROR:** I wasn't really sure
16 of this. You said anybody. My best friend -- my
17 best friend's grandson has been sexually
18 assaulted and I think their jury trial is
19 actually this week coming up.

20 **THE COURT:** Okay.

21 **PROSPECTIVE JUROR:** But I don't know if
22 that would influence me or not. I just know I
23 walk with her every night and I know what their
24 family has gone through.

25 **THE COURT:** Tell me this. Do you think you

1 can listen to all the evidence and --

2 **PROSPECTIVE JUROR:** I do. I just thought I
3 should get up and tell you all that, just in
4 case theirs come on the docket this week.

5 **THE COURT:** I'm so glad you told me. I'm
6 glad you told me. But you think you can be
7 fair?

8 **PROSPECTIVE JUROR:** Yes, ma'am.

9 **THE COURT:** All right.

10 **PROSPECTIVE JUROR:** Thank you.

11 **THE COURT:** Thank you.

12 (Juror number 149, Nancy Tucker, exits the
13 bench.)

14 (The bench conferences are concluded.)

15 **THE COURT:** All right. Ladies and
16 Gentlemen, in just a moment, things are going
17 to start moving real quickly. You're going to
18 hear the -- if you hear your name and juror
19 number called, you will come forward. The
20 bailiffs will tell you just where to stand.
21 You'll turn and face your fellow jurors. Don't
22 face me, but face your fellow jurors.

23 Once -- you'll hear the clerk ask the
24 attorneys some questions about seating you or
25 excusing you. You don't need to worry about it.

1 If you get excused, they'll tell you you are
2 excused and you can go back to your seat. If
3 you're seated, you'll go over here in the jury
4 box and have a seat and you will serve on this
5 jury.

6 When you come up, bring all your belongings
7 with you, because if you are seated, that way,
8 you won't have to go back and get them. Just do
9 bear in mind -- I don't think anybody would
10 take it personally -- but there are a million
11 reasons that attorneys strike certain jurors.
12 It's nothing personal. Please don't anybody
13 take it personally. We'll instruct you. You
14 don't need to worry about it. We're going to
15 walk you through it. All right. We'll get going
16 here in just a moment.
17 (There is a pause.)

18 **THE CLERK:** Juror number 40, James L.
19 Elling.

20 What says the State?

21 **MR. TOOKER:** Please excuse Mr. Elling from
22 the trial of this case.

23 **THE CLERK:** Okay. If you would, return to
24 your seat please, sir.

25 Juror number 115, Tom G. Reagan, Jr.

1 What says the State?

2 **MR. TOOKER:** Please present Mr. Reagan.

3 **THE CLERK:** And the defense?

4 **MR. SUMNER:** Please swear the juror.

5 **THE CLERK:** Sir, if you would, have a seat
6 in the jury box.

7 Juror number 73, Sharon P. Kallenbach.

8 What says the State?

9 **MR. TOOKER:** Please present
10 Ms. Kallenbach.

11 **THE CLERK:** And the defense?

12 **MR. SUMNER:** Please excuse Ms. Kallenbach
13 from the trial in this case.

14 **THE CLERK:** If you would, return to your
15 seat please, ma'am.

16 Juror number 58, Teresa D. Handley.

17 What says the State?

18 **MR. TOOKER:** Please present Ms. Handley.

19 **THE CLERK:** What says the defense?

20 **MR. SUMNER:** Please swear Ms. Handley.

21 **THE CLERK:** If you would, have a seat in
22 the jury box please, ma'am.

23 Juror number 35, Christina J. Dorman.

24 What says the State?

25 **MR. TOOKER:** Please present Ms. Dorman.

1 **THE CLERK:** What says the defense?

2 **MR. SUMNER:** Please swear Ms. Dorman.

3 **THE CLERK:** If you would, please have a

4 seat in the jury box please, ma'am.

5 Juror number 51, William S. Gassmann.

6 What says the State?

7 **MR. TOOKER:** Please present Mr. Gassman.

8 **THE CLERK:** And the defense?

9 **MR. SUMNER:** Please excuse Mr. Gassman.

10 **THE CLERK:** Return to your seat please,

11 sir.

12 Juror number 88, Anita W. Merck.

13 What says the State?

14 **MR. TOOKER:** Please present Ms. Merck.

15 **THE CLERK:** And the defense?

16 **MR. SUMNER:** Please swear Ms. Merck.

17 **THE CLERK:** If you would, have a seat in

18 the jury box please, ma'am.

19 Juror number 43, John W. Finley.

20 What says the State?

21 **MR. TOOKER:** Please present Mr. Finley.

22 **THE CLERK:** And the defense?

23 **MR. SUMNER:** Please swear Mr. Finley.

24 **THE CLERK:** If you would, have a seat in

25 the jury box please, sir.

1 Juror number 156, Edward M. Wilkins.

2 What says the State?

3 **MR. TOOKER:** Please present Mr. Wilkins.

4 **THE CLERK:** And the defense?

5 **MR. SUMNER:** Please swear Mr. Wilkins.

6 **THE CLERK:** If you would, have a seat in
7 the jury box please, sir.

8 Juror number 23, William M. Coker.

9 What says the State?

10 **MR. TOOKER:** Please excuse Mr. Coker from
11 the trial in this case.

12 **THE CLERK:** If you would, return to your
13 seat please, sir.

14 Juror number 153, Marissa T. Webster.

15 What says the State?

16 **MR. TOOKER:** Please present Ms. Webster.

17 **THE CLERK:** And the defense?

18 **MR. SUMNER:** Please swear Ms. Webster.

19 **THE CLERK:** If you would, have a seat in
20 the jury box please.

21 Juror number 155, Wendy H. White.

22 What says the State?

23 **MR. TOOKER:** Please present Ms. White.

24 **THE CLERK:** And the defense?

25 **MR. SUMNER:** Please excuse Ms. White from

1 the trial in this case.

2 **THE CLERK:** If you would, return to your
3 seat please, ma'am.

4 Juror number 9, Janice B. Bishop.

5 What says the State?

6 **MR. TOOKER:** Please present Ms. Bishop.

7 **THE CLERK:** And the defense?

8 **MR. SUMNER:** Please excuse Ms. Bishop from
9 the trial in this case.

10 **THE CLERK:** If you would, return to your
11 seat please, ma'am.

12 Juror number 142, Leslie A. Storm.

13 What says the State?

14 **MR. TOOKER:** Please present Mr. Storm.

15 **THE CLERK:** And the defense?

16 **MR. SUMNER:** Please swear Mr. Storm.

17 **THE CLERK:** If you would, have a seat in
18 the jury box please, sir.

19 Juror number 98, Veronica W. Newman.

20 What says the State?

21 **MR. TOOKER:** Please present Ms. Newman.

22 **THE CLERK:** And the defense?

23 **MR. SUMNER:** Please excuse Ms. Newman from
24 the trial in this case.

25 **THE CLERK:** If you would, return to your

1 seat please, ma'am.

2 Juror number 3, Christopher B. Austin.

3 What says the State?

4 **MR. TOOKER:** Please present Mr. Austin.

5 **THE CLERK:** And the defense?

6 **MR. SUMNER:** Please swear Mr. Austin.

7 **THE CLERK:** If you would, have a seat in
8 the jury box, sir.

9 Juror number 79, Nikki M. Bryson.

10 What says the State?

11 **MR. TOOKER:** Please present Ms. Bryson.

12 **THE CLERK:** And the defense?

13 **MR. SUMNER:** Please swear Ms. Bryson.

14 **THE CLERK:** If you would, please have a
15 seat in the jury box.

16 Juror number 108, Donna L. Patterson.

17 What says the State?

18 **MR. TOOKER:** Please present Ms. Patterson.

19 **THE CLERK:** And the defense?

20 **MR. SUMNER:** Please excuse Ms. Patterson
21 from the trial of this case.

22 **THE CLERK:** If you would, return to your
23 seat please, ma'am.

24 Juror number 55, Rhonda K. Green.

25 What says the State?

1 **MR. TOOKER:** Please present Ms. Green.

2 **THE CLERK:** And the defense?

3 **MR. SUMNER:** Swear Ms. Green.

4 **THE CLERK:** If you would, have a seat in
5 the jury box, ma'am.

6 Juror number 14, Angela K. Bryan.

7 What says the State?

8 **MR. TOOKER:** Please present Ms. Bryan.

9 **THE CLERK:** And the defense?

10 **MR. SUMNER:** Please swear Ms. Bryan.

11 **THE CLERK:** If you would, have a seat in
12 the jury box please, ma'am.

13 **THE COURT:** All right, and let's do two
14 alternates.

15 **THE CLERK:** This will be for the first
16 alternate, Juror number 20, Jeanna M. Chandler.
17 What says the State?

18 **MR. TOOKER:** Please present Ms. Chandler.

19 **THE CLERK:** And the defense?

20 **MR. SUMNER:** Please excuse Ms. Chandler.

21 **THE CLERK:** If you would, return to your
22 seat please, ma'am.

23 **MR. TOOKER:** And Your Honor, just so I'm
24 clear, is it one and two?

25 **THE COURT:** One and two on each alternate.

1 **MR. TOOKER:** Two each. Thank you, ma'am.

2 **THE CLERK:** Juror number 137, John E.

3 Sparks.

4 What says the State?

5 **MR. TOOKER:** Please present Mr. Sparks.

6 **THE CLERK:** And the defense?

7 **MR. SUMNER:** Please excuse Mr. Sparks.

8 **THE CLERK:** If you would, return to your
9 seat please, sir.

10 Juror number 37, Robert D. Earl.

11 What says the State?

12 **MR. TOOKER:** Please excuse Mr. Earl from
13 the trial of this case.

14 **THE CLERK:** If you would, return to your
15 seat please, sir.

16 Juror number 13, Allisa N. Barker.

17 What says the State?

18 **MR. TOOKER:** Please present Ms. Barker.

19 **THE CLERK:** And the defense?

20 **MR. SUMNER:** Please swear Ms. Barker.

21 **THE CLERK:** If you would, have a seat in
22 the jury box please, ma'am.

23 Juror number 26, Charles A. Crumpton.

24 What says the State?

25 **MR. TOOKER:** Please present Mr. Crumpton.

1 **THE CLERK:** And the defense?

2 **MR. SUMNER:** Please excuse Mr. Crumpton

3 from this case.

4 **THE CLERK:** If you would, return to your

5 seat please, sir.

6 Juror number 119, Linda J. Rice.

7 What says the State?

8 **MR. TOOKER:** Please present Ms. Rice.

9 **THE CLERK:** And the defense?

10 **MR. SUMNER:** Please excuse Ms. Rice.

11 **THE CLERK:** If you would, return to your

12 seat please, ma'am.

13 Juror number 123, Shirley B. Roberts.

14 What says the State?

15 **MR. TOOKER:** Please present Ms. Roberts.

16 **THE CLERK:** And the defense?

17 **MR. SUMNER:** Please swear Ms. Roberts.

18 **THE CLERK:** If you would, have a seat in

19 the jury box.

20 **THE COURT:** Any objection to the manner in

21 which the jury was selected from the State?

22 **MR. TOOKER:** Nothing from the State,

23 ma'am.

24 **THE COURT:** Any from the defense?

25 **MR. SUMNER:** Likewise.

1 **THE COURT:** All right. Ladies and
2 Gentlemen, you will serve as our jury for the
3 trial of this particular case. You have really
4 lucked out because you will be with Judge
5 Keesley from Edgefield, but he is a fantastic
6 judge. I think you will enjoy being jurors in
7 his courtroom very much. I am going to excuse
8 you at this time to return to Courtroom Number
9 4 upstairs. You will come back after lunch at
10 two o'clock and ask to be directed to Courtroom
11 Number 4.

12 All right. Let me tell you, you don't know
13 much about this case at all at this point, but
14 you do know the allegations and you know a
15 little bit about it. Over the lunch break,
16 forget that you're a juror on this case. Do not
17 do any kind of independent research or do
18 anything like that.

19 Don't discuss the case with anyone or even
20 mention what type of case you were on. A lot of
21 times, folks will say, oh, did you get picked
22 for a jury? Yes. Well, what kind of case is it?
23 And if you tell them, they will immediately
24 just volunteer something. So if you will, just
25 say, "I've been instructed I can not say

1 anymore than I'm serving on a jury."

2 Furthermore, if anybody tries to talk to
3 you about this case -- and these attorneys
4 involved in this case, you would never -- not
5 in a million years would either one of them
6 ever try to approach you and talk to you about
7 this case. But if someone did, immediately
8 identify yourself as a juror. If they don't
9 quit talking to you and walk away, please let
10 one of the bailiffs know when you return at two
11 o'clock today. If Judge Keesley does not take
12 care of the situation, which I have every
13 confidence he would -- I guarantee you would I
14 take care of that situation right away. All
15 right.

16 Thank you so much. I probably will not see
17 you the rest of this week. Due to my schedule
18 here at the courthouse, I probably won't see
19 you again this week, but I do thank you so much
20 for your service. I hope you have a good lunch.
21 Mr. Teal here is going to show you how to leave
22 the courthouse and where to come back. All
23 right.

24 (Jury exits at approximately 11:15 a.m.)

25 **--- END OF TRANSCRIPT OF RECORD ---**

[illegible]

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

Official Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

IN THE COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA,

PLAINTIFF,

-VS-

JUSTIN RYAN CONE,

DEFENDANT.

2012-GS-39-00660

NOVEMBER 17, 18, 19, 2014

TRANSCRIPT OF RECORD

BEFORE:

THE HONORABLE WILLIAM P. KEESLEY, JUDGE

APPEARANCES:

SAM TOOKER, ESQUIRE
ATTORNEY FOR THE STATE

STEVE SUMNER, ESQUIRE
ATTORNEY FOR THE DEFENDANT

DANETTE P. HANKS

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Deputy Elijah Chapman Tooker Sumner	46	50		
Victim Tooker Sumner	53	58		
Christine Carlberg Tooker Sumner	69	75		
Linda Gray Hutton Tooker Sumner	143	145	146	
Casey Miller Tooker Sumner	147	159	170 173	172
Detective Rita Burgess Tooker Sumner	174	185	187	
Douglas Miller Tooker Sumner	191	198	200	
Shauna Galloway-Williams Tooker Sumner	239	242	244	
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D-20	Photo of son's room	160	160
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D-23	Photo of living room	160	160

NO	DESCRIPTION	ID	EV
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1 **JURY VOIR DIRE/SELECTION WAS REPORTED**
2 **BY TERESA JOHNSON, ANOTHER CIRCUIT COURT REPORTER,**
3 **AND WILL NOT BE INCLUDED IN THIS TRANSCRIPT**

4
5 **NOVEMBER 17, 2014**

6 (WHEREUPON, Court convened at approximately 2:04 p.m.
7 with all parties present and the following proceedings
8 were had.)

9 (WHEREUPON, State Exhibit Numbers 1 and 2 were marked
10 for identification.)

11 THE COURT: Are there any pretrial issues I need
12 to address?

13 MR. TOOKER: Yes, sir, Your Honor. Sam Tooker on
14 behalf of the State. Before you I've placed a couple of
15 pretrial motions. Mr. Sumner and I have talked about
16 these, and I believe two of them are not going to be
17 disputed. One is a motion in limine excluding evidence of
18 any kind of prior sexual conduct regarding the victim. And
19 then the other -- and that's pursuant to Rape Shield. And
20 then the other is exclusion of third party guilt evidence.
21 Mr. Sumner and I discussed both of these, and I don't think
22 either of them is an issue.

23 The third motion before you is a motion for the
24 admission of the forensic interview tape in this case. We
25 have the victim who was interviewed at the time; she was

1 nine years of age. The allegations in this case are
2 criminal sexual conduct with a minor who was less than
3 eleven. We have the forensic interviewer present. We can
4 proffer testimony in-camera if Your Honor would prefer, and
5 then view the tape so Your Honor can make a ruling
6 regarding its admissibility.

7 MR. SUMNER: Your Honor, may it please the Court?
8 Good afternoon. Steve Sumner for the Defendant, Justin
9 Cone. I wanted to say that Mr. Tooker is correct. I will
10 not get into anything that violates the Rape Shield
11 Statute. I've been put on notice of that. So I agree with
12 that, Solicitor. I am not going to argue third party
13 guilt, so that will not be an issue. I agree to be bound
14 by that.

15 I'm just looking over my notes, Your Honor, to make
16 sure I've covered everything else. I have been provided
17 with the Defendant's prior record and any prior records of
18 witnesses; is that correct, Solicitor?

19 MR. TOOKER: Yeah, any witness that has a prior
20 criminal conviction that's going to take the stand, we've
21 provided that information to Mr. Sumner.

22 MR. SUMNER: Your Honor, I would just ask that --
23 I'm aware that the State is seeking to have the tape
24 played. And I agree with Mr. Tooker; he's put me on notice
25 of this, I guess that would be a pretrial matter, as I

1 would ask that it be excluded unless -- well, you see it,
2 you make the decision whether or not you feel like it meets
3 the evidentiary standards.

4 I would make a motion that all witnesses be
5 sequestered during the course of the trial. I understand
6 with the exception of Ms. Burgess, who I believe would be
7 the chief case investigator. Other than that, I would make
8 a motion that all witnesses from the State be sequestered,
9 unless they're testifying.

10 Other than that, I don't have anything else right now,
11 Your Honor.

12 THE COURT: How long will the hearing take?

13 MR. TOOKER: The tape itself is probably about
14 thirty-five minutes, sir. The testimony that lays the
15 foundation for the admission of the tape shouldn't take but
16 maybe five, ten minutes.

17 THE COURT: What time was the jury told to be
18 back?

19 MR. TOOKER: The jury is here now, sir.

20 THE CLERK: They just got here. They came in at
21 two.

22 THE COURT: They haven't been sworn in?

23 MR. SUMNER: No, sir.

24 THE COURT: Are there any Jackson versus Denno
25 hearings or anything like that that we're going to have to

1 do?

2 MR. TOOKER: No, sir, Your Honor. Defendant did
3 not make any statements to law enforcement in this case.

4 And if I may be heard with regards to sequestration?

5 THE COURT: Yes.

6 MR. TOOKER: Pursuant to the South Carolina
7 Victim Rights Act, the State is of the opinion that the
8 victim and, as she's a minor, her parents can remain in
9 Court. I understand that those are three witnesses in this
10 case, but I know they want to be present.

11 THE COURT: Are all three of them testifying?

12 MR. TOOKER: As of this point, the State
13 definitely intends to call the victim, of course, and her
14 mother. Her father, the State has not concluded as to
15 whether or not it intends to call the victim's father.

16 THE COURT: All right. Can I bring the jury in
17 and let them be selecting their foreperson? Can we do
18 that?

19 MR. TOOKER: No objection, sir.

20 MR. SUMNER: No objection from the Defense.

21 THE COURT: Where are they coming from? Over
22 here? Can you bring the jury in for me, please?

23 THE BAILIFF: Yes, sir.

24 (WHEREUPON, the jury entered the open Court at
25 approximately 2:09 p.m.)

1 THE COURT: Ladies and gentlemen of the jury, my
2 name is Billy Keesley. I live in Edgefield. This is my
3 first time being assigned to Pickens County. I look
4 forward to working with you folks. My home circuit is the
5 Eleventh Circuit, which consists of Lexington, McCormick,
6 Saluda and Edgefield Counties, which you can guess by that,
7 most of my work is in Lexington County. But the Chief
8 Justice has assigned me to preside over a term of General
9 Sessions Court here in Pickens.

10 Now, one of your resident judges was kind enough to
11 call me on Friday and tell me that I did not need to be up
12 here until two. So I got here at two, a little before.
13 They have advised me that she's already qualified and
14 selected a jury. And since I was not here for that, I
15 would prefer that you select the person that you want to
16 serve as your foreperson.

17 In every case there are pretrial matters. I did not
18 know until I got up here exactly what I would be dealing
19 with. And so I've talked with the attorneys. I've found
20 out what pretrial matters we have. And based on what
21 they're telling me, I think it's going to be about forty-
22 five minutes before I get to start with you folks. But I
23 wanted to let you know that.

24 I don't know that Judge Verdin has already told you
25 this; if she has I'm going to repeat it because it's

1 important. And when I talk to you again when you come back
2 out and we start the trial, I'll probably repeat some
3 things she told you then, too. But I need to make sure
4 they're said.

5 Do not discuss this case in any way. Don't talk about
6 the people involved in the case, what type of case it's
7 alleged to be. Don't talk about anything whatsoever
8 related to this case. In a lot of counties they take up
9 cell phones. I don't know if they do that here or not.
10 But if you happen to have a cell phone, it needs to be cut
11 off. Don't do any word searches. Don't do any type of
12 searches on the internet. And I'll explain all those
13 things to you when you come back in.

14 So I think that's all I have to tell you right now. I
15 need you to step in the jury room. The two alternates are
16 not eligible to be foreman. It can be any of the twelve
17 jurors. Just write the name of the juror and the juror
18 number on a little piece of paper and the bailiff will get
19 that for you. And when you come back out they'll give that
20 to me.

21 Thank you so much.

22 (WHEREUPON, the jury exited the open Court at
23 approximately 2:12 p.m.)

24 THE COURT: With regard to the sequestration is
25 there anything unique about the case that I need to know as

1 far as deciding the sequestration motion?

2 MR. TOOKER: I'll field that if Mr. Sumner
3 doesn't mind. And this is something else that Mr. Sumner
4 and I talked about. Some of the allegations in this case
5 harken back to the relationship between the victim's
6 parents and the Defendant. The victim's father and
7 Defendant were long-time friends. And eventually an
8 amorous relationship developed between the victim's parents
9 and the Defendant. This relationship continued for
10 sometime. And there ended up being a relationship between
11 the victim's mother and the Defendant. The victim's father
12 found out about that information, confronted the Defendant.

13 And the State can see from the Defense's position why
14 that information would be relevant in a trial like this.
15 Mr. Sumner and I talked about it, and my concern, of
16 course, was if we went into the prior sexual history of the
17 Defendant, it would look like prior back act evidence. I
18 think that's probably the most unique aspect of the
19 underlying circumstances, you know, that were in place
20 before the allegations of sexual abuse arose.

21 So from the State's perspective that is all that the
22 State is aware of that would make the case different than a
23 traditional CSC allegation.

24 MR. SUMNER: Briefly, Your Honor. There's no
25 physical evidence in this case. Credibility of the

1 witnesses will be key. If somebody is not going to testify
2 then I would certainly say that under the Victim Rights
3 Act, I'm not trying to bar them from the proceedings. But
4 for the Defendant to receive a fair trial, where
5 credibility is so key and people's versions of the events
6 are so important, then I don't think it's proper for
7 somebody who may be a witness to hear other testimony being
8 offered in the case. That goes to the central heart of the
9 allegations, if there's no physical evidence, and that's
10 what make sequestration, I think the right ruling here in
11 this case.

12 THE COURT: Anything else?

13 MR. TOOKER: I mean, I think the presence or lack
14 of physical evidence has nothing to do with sequestration.
15 He's absolutely right, credibility is a paramount issue in
16 any case, as Your Honor is well aware. And so, you know,
17 the rule of sequestration was designed so that witnesses
18 don't change their testimony upon hearing another witness's
19 testimony. The State appreciates that. But again, the
20 Victim Rights Act, as passed by our legislature,
21 contemplates that and still decided that minor victims and
22 the families or their guardians were permitted to remain in
23 Court for adjudicatory proceedings.

24 THE COURT: I think the Victim Rights Act allows
25 the victim and the chief investigating officer to stay in.

1 In this instance, if the minor -- the ruling of the Court
2 is that you can have one victim's representative of the
3 family in the courtroom at all times. You can have the
4 chief investigating officer in the courtroom at all times.
5 The other witnesses have to be sequestered until they
6 finish testifying.

7 Now, I understand that may affect reply, but they can
8 sit in here after they finish testifying. So if you want
9 the mother to stay in here or the father to stay in here or
10 the child, I'll let you make that decision.

11 All right. Let's go ahead with the -- do you need a
12 minute to decide that, before the in-camera?

13 MR. TOOKER: No, sir. State's prepared.

14 THE COURT: Okay.

15 MR. TOOKER: And then the State would call
16 Christine Carlberg to the stand.

17 THE COURT: Is the child in here?

18 MR. TOOKER: The child is presently in the hall.
19 She'll be our second witness, sir.

20 THE COURT: All right.

21 THE CLERK: Raise your right hand. Do you
22 solemnly swear or affirm the testimony you're about to give
23 in this case will be the truth, whole truth and nothing but
24 the truth, so help you God?

25 THE WITNESS: Yes, I do.

1 THE CLERK: Have a seat and state your name for
2 the record.

3 THE WITNESS: Christine Carlberg.

4 THE COURT: Spell your last name.

5 THE WITNESS: C-A-R-L-B-E-R-G.

6 THE COURT: Thank you.

7 **IN-CAMERA TESTIMONY**

8 **CHRISTINE CARLBERG,**

9 **BEING DULY SWORN, TESTIFIED AS FOLLOWS:**

10 **DIRECT EXAMINATION**

11 **BY MR. TOOKER:**

12 Q. Ms. Carlberg, ma'am, where do you work?

13 A. I am employed by the Greenville Department of Mental
14 Health, and I'm contracted to work at the Julie Valentine
15 Center.

16 Q. And what do you do at the Julie Valentine Center?

17 A. I'm a forensic interviewer.

18 Q. What does that mean?

19 A. That means I conduct forensic interviews with
20 children and developmentally delayed adults for purposes of
21 an investigation.

22 Q. And is there any kind of specific methodology you use
23 when you're interviewing a child?

24 A. We use a semi-structured protocol called RATAAC.

25 Q. And what does that mean?

1 A. It stands -- it's a five semi-structure stage that
2 stands for rapport, anatomy ID, touch inquiry, abuse
3 scenario and closure.

4 Q. Okay. Is that an interviewing technique that's used
5 in the field?

6 A. Yes, sir.

7 Q. Okay. And why is it you use that technique when
8 interviewing a child?

9 A. It's a nationally recognized protocol. And that's
10 what the South Carolina Forensic Interviewers are trained
11 in.

12 Q. Okay. Are you supposed to ask like leading questions
13 or questions that don't lead?

14 A. Non-leading, non-suggestive questions.

15 Q. Why is that?

16 A. Because we want the child or the adult to tell what
17 happened to them in their own words and from their own
18 memories and everything.

19 Q. Okay. And did you perform a forensic interview in
20 this case?

21 A. I did.

22 Q. And what person did you interview?

23 A. [REDACTED] Victim [REDACTED].

24 Q. Okay. How old was [REDACTED] Victim [REDACTED] when you interviewed
25 her?

1 A. Nine.

2 Q. Nine years old? What was the date of your interview?

3 A. February 1st, 2012.

4 Q. Okay. And did you prepare a copy of that interview
5 for the Court?

6 A. Yes, sir.

7 Q. I'm going to show you what's been marked as State's
8 2. Do you recognize this item?

9 A. That is a copy of the video from [Victim] interview.

10 Q. How do you know that that's a copy?

11 A. I watched it and initialed it on the day that I
12 watched it.

13 Q. Okay. And after watching it, would you say it's a
14 fair and accurate copy of the interview you conducted with
15 [Victim] on the day in question?

16 A. Yes, sir.

17 MR. TOOKER: Okay. At this point, Your Honor,
18 the State requests to publish State's 2 for Your Honor and
19 play it.

20 THE COURT: Go ahead.

21 Do you want your client over here?

22 MR. SUMNER: Yes, sir. Come on over here.

23 Thanks.

24 THE COURT: Y'all get him somewhere to sit. Is
25 he in custody or not?

1 MR. SUMNER: No, sir, he is not in custody right
2 now.

3 THE COURT: Do you want me to do this?

4 MR. TOOKER: Well, if you want the volume
5 adjusted, sir? Or I can do it for you.

6 THE COURT: Go ahead. Do you want to see it,
7 sir?

8 MR. SUMNER: We're okay, Your Honor. We've
9 already gotten a transcript of this anyway, so ...

10 (WHEREUPON, State Exhibit Number 2 was published in
11 open Court.)

12 Q. Now, Ms. Carlberg, you asked some questions that
13 maybe to myself, as a lay person, might seem like leading
14 questions, when you'd ask something like, did he touch you
15 here or here or somewhere else? Why ask questions in that
16 way to a child?

17 A. Well, they're still multiple choice questions, so she
18 still has choices about any answer. And we also -- when we
19 ask a multiple choice question, if we give two choices, we
20 always end with, or something else. So they have the
21 opportunity to answer either one of our choices or anything
22 else. And sometimes that just helps them to narrow down
23 what we're trying to ask about.

24 Q. Okay. And did you do anything else in this case?
25 Any other counseling in regards to Victim?

1 A. No, sir.

2 Q. Okay.

3 MR. TOOKER: No further questions at this time,
4 Your Honor.

5 THE COURT: Cross?

6 MR. SUMNER: Your Honor, as relates to the
7 admissibility of this piece of evidence, I don't have any
8 questions of Ms. Carlberg. I will cross examine her if she
9 appears as a witness. But for this limited purpose I don't
10 have any questions. Thank you.

11 THE COURT: Thank you. You may step down.
12 Any argument?

13 MR. TOOKER: Yes, sir, Your Honor. It's State's
14 contention that any time the Court is examining the
15 admissibility of a piece of evidence like this, the test
16 should be a totality of the circumstances test. And it's
17 that totality of circumstances surrounding making of the
18 statements and whether or not that provides a
19 particularized guarantee of trustworthiness. And so the
20 question is whether or not Your Honor believes that based
21 on what you heard and what you saw, the testimony or the
22 examination of the child by the forensic interviewer has
23 those guarantees of trustworthiness. And I think, you
24 know, some of the things Your Honor is allowed to consider
25 is whether or not the interviewer had been trained in

1 conducting investigative interviews of children. Whether
2 there's a detailed account of the offense. In this case, I
3 believe there was. Whether statements have internal
4 coherence. I believe she consistently described the acts
5 alleged perpetrated by the Defendant to be what I would
6 describe as, for lack of a better term, 60/90, you know,
7 reversed positions. And whether the sworn testimony of any
8 participant may be deemed necessary by the Court. And of
9 course, we're prepared to proffer, before the jury, Ms.
10 Carlberg so they can hear both about her training, her
11 methods and what she did, in particular, in this case.

12 So for those reasons, the State believes that this
13 interview has those guarantees and trustworthiness that are
14 necessary for Your Honor to conclude that it is something
15 that should be admitted and viewed by the finders of fact.

16 Thank you, sir.

17 THE COURT: All right. Mr. Sumner?

18 MR. SUMNER: Your Honor, you've handled plenty of
19 these cases. You've seen the tape. And I'll leave it to
20 your discretion whether or not you feel that it meets the
21 evidentiary standard. I don't think there's anything,
22 really, that I can add at this point that would illuminate
23 your experience or the case law. So I'm just going to
24 leave it to your discretion.

25 THE COURT: Under Section 17-23-175 of the Code,

1 there's a provision that out-of-court statements can be
2 admissible if they are the statements of a child under the
3 age of twelve. The statute sets out what the Court is to
4 do. I've read at least one case that's interpreted this.
5 Actually, I think it was Judge Welmaker's case. The
6 Statute provides that an out-of-court statement of a child
7 is admissible if the statement was given in response to
8 questioning conducted under an investigative interview of
9 the child, an audio and visual recording of the statement
10 is preserved, the child testifies at the proceeding and is
11 subject to cross examination on the elements of the offense
12 and the making of the out-of-court statement. And where
13 the Court finds, in a hearing conducted outside the
14 presence of the jury, that the totality of the
15 circumstances surrounding the making of the statement
16 provides particularized guarantees of trustworthiness.
17 Subsection (b) of that statute goes into guarantees of
18 trustworthiness.

19 The first factor -- this is not an inclusive list, but
20 the first factor is whether the statement was elicited by
21 leading questions. The Court finds that the questions were
22 by-and-large not leading. The interview was, in my
23 experience, a very clean interview.

24 The second factor is whether the interviewer has been
25 trained in conducting investigative interviews of children.

1 I don't know that she testified about that. She testified
2 about the method she used and she testified that that was
3 the method that was used in training in South Carolina,
4 that RATAC method. I don't know if she went into her
5 education, training and experience. I may have missed it.
6 But she said where she works and under the -- another
7 subsection later in the statute, it details the
8 investigative interview as being one conducted by someone
9 who would be in her field of employment or profession. So
10 I believe that category has been met despite the lack of
11 specifics.

12 Whether the statement represents a detailed account of
13 the alleged offense, and for a child it appears to be
14 detailed. The child did not always answer yes to
15 questions. She had the opportunity to say much -- or
16 allege much about other things and she was asked, for
17 example, about other parts of her body, other people, other
18 locations, and she denied all those. So she did not seem
19 to be of a mindset to just agree with the interviewer at
20 all.

21 It had internal coherence. The interview had -- the
22 statement the child had internal coherence. It was very
23 consistent throughout. It made reference to the physical
24 parts, the -- what was said to the child. For example, as
25 was mentioned by the Solicitor, the child was stating

1 repeatedly that the Defendant would lick her. When she
2 testified on video, she got on her hands and knees
3 basically and was facing -- she said she was facing away
4 from his face, which would be consistent with what she was
5 saying. She did not appear to be coached in any way that I
6 could pick up on. She did not use inappropriate language
7 for a child of her age. She said several times, I think,
8 that she did not know the word for certain things. But
9 there was a coherent recitation of what the child claims
10 happened to her.

11 And the fifth factor is sworn testimony of any
12 participant which may be determined as necessary by the
13 Court. The child has to testify. Are y'all going to call
14 the child first, before the interview?

15 MR. TOOKER: Yes, sir. We'll call the child
16 before we call the forensic interviewer.

17 THE COURT: Now, she said that she was nine at
18 the time of the -- nine at the time it happened. The
19 interview was on February 1st, 2012. She said her birthday
20 was [REDACTED], 2000. Is that what she said?

21 MR. TOOKER: Yes, sir, Your Honor.

22 THE COURT: The one bad thing about it is, I wish
23 she had a lavalier mike or something. That might have made
24 her more nervous. But it was really hard to hear her. But
25 I thought that's what she said, [REDACTED], 2000.

1 MR. TOOKER: I think it's 2002, sir.

2 THE COURT: 2002?

3 MR. TOOKER: Yes, sir.

4 THE COURT: Okay. Well, then she's -- I was just
5 making sure, as far as being the under twelve part of the
6 statute.

7 With regard to the case law, I also don't see any
8 problem with admitting this. As long as a proper
9 foundation is established, the ruling of the Court is that
10 the video interview of the child conducted on February 1st,
11 2012 will be admitted into evidence.

12 Anything else I need to address pretrial?

13 MR. TOOKER: No, sir. Not by the state's
14 understanding.

15 MR. SUMNER: No, sir.

16 THE COURT: Mr. Sumner?

17 MR. SUMNER: No, sir.

18 THE COURT: All right. We'll take just a couple
19 of minutes and then we'll get started.

20 MR. TOOKER: Yes, sir, Your Honor.

21 (WHEREUPON, the Court stood at recess for a short
22 break.)

23 THE COURT: Mr. Clerk, would you hand that to the
24 court reporter?

25 THE CLERK: Yes, sir.

1 (WHEREUPON, Court Exhibit Number 1 was marked for
2 identification.)

3 THE COURT: All right. The jury selected John W.
4 Finley, juror number 43, as the foreman of the jury.

5 Is the State ready for the jury?

6 MR. TOOKER: The state is ready to proceed, sir.

7 THE COURT: Is the Defense ready for the jury?

8 MR. SUMNER: Yes, sir.

9 THE COURT: Bring the jurors, please.

10 (WHEREUPON, the jury entered the open court at
11 approximately 3:06 p.m.)

12 THE COURT: All right. I received a note
13 indicating that John W. Finley is the foreman of the jury.
14 That's you, sir?

15 MR. FINLEY: Yes, sir.

16 THE COURT: All right. You keep that seat
17 throughout the trial, please.

18 The first order of business is that I have to have you
19 placed under the oath of a trial jury. I need for you to
20 stand and raise your right hand. The clerk will administer
21 your oath.

22 THE CLERK: Again, after the oath is administered
23 answer by saying I will. Raise your right hands. You
24 shall well and truly try the issues joined in this case of
25 the State versus Justin Ryan Cone and a true verdict

1 render, according to law and evidence, so help you God?

2 (WHEREUPON, all jurors answered I will.)

3 THE CLERK: Thank you. You may be seated.

4 THE COURT: All right. Ladies and gentlemen, I'm
5 going to tell you how we'll start with the trial. I won't
6 go through the whole process, but I'll tell you how we'll
7 get started. And then I'm going to give you some
8 instructions you have to follow throughout the trial.

9 The first thing that's going to happen is that you're
10 going to hear the opening statements of the attorneys. In
11 these opening statements the attorneys are not permitted to
12 engage in what we refer to as argument. An opening
13 statement is allowed to be an introduction, an outline, an
14 overview, but it cannot extend into what we call argument.

15 Once the opening statements are finished, then I will
16 call upon the State to present its case. The State brought
17 this charge against Mr. Cone and the State has the entire
18 burden of proof. Mr. Cone is presumed to be innocent. The
19 state has to prove every essential element of the offense
20 charged beyond a reasonable doubt. So I will call upon the
21 Solicitor to present evidence in an attempt to meet that
22 burden.

23 When the State is finished putting up its case in
24 chief, the Solicitor will advise me that the State rests.
25 At that point I have to send you out of the courtroom and I

1 have to discuss some legal issues with the attorneys. When
2 you come back in after that I'll tell you where we go from
3 there. But that's how we're going to get started. You can
4 look for those landmarks as we go along.

5 Now, it's really important that you understand some
6 things. First, that oath that you just took was one in
7 which you promised us that you're going to decide the case
8 based on the evidence and the law. So you need to know
9 where those things come from. The evidence comes from the
10 sworn testimony of the witnesses. The evidence can also
11 come in the form of exhibits. An exhibit is anything
12 tangible that's marked in the record. It can be a
13 photograph, a video, anything tangible. If something is in
14 evidence, you have it with you in the jury room when you
15 decide the case. And the reason I'm telling you that is
16 because it's not unusual for an attorney to have something
17 like a small photograph and to show it to you from a
18 distance or ask you to circulate it through the jury box,
19 so you're trying to pay attention to what's going on up
20 here while you're also trying to look at what's circulating
21 around. So just understand that if something is in
22 evidence, you will have it with you when you deliberate.

23 What the lawyers say is not evidence. Now, I want you
24 to pay close attention to the attorneys. They facilitate
25 the introduction of the evidence. But what comes out of

1 their mouths is not evidence. The evidence comes from the
2 witnesses and the exhibits. There is one exception to that
3 rule about what the lawyer is saying not being evidence and
4 if it happens in this trial, I'll tell you about it;
5 otherwise I won't bore you with it. So you know where the
6 evidence comes from.

7 The law comes from me. It's my job to decide what law
8 applies to the case and to tell it to the jury at the end
9 of the trial. You're perfectly equipped to do the job that
10 you have to do. You just need to listen attentively, pay
11 attention and at the end of the case, I'll tell you the law
12 and you will determine the facts.

13 Which gets me to the next very important thing you
14 must understand. You need to understand that there are two
15 judges in the courtroom. I'm the judge of the law. As I
16 just told you, I will tell you the law at the end of the
17 trial, and it's my job to rule on legal issues as they come
18 up and it's my job to preside over the trial to maintain
19 order.

20 You're the other judge. You must understand that you
21 are the only judge of the facts. Only you are going to get
22 to decide such things as whether evidence is believable or
23 not. Only you get to decide what weight, if any, should be
24 put on any evidence. Those things are entirely your
25 prerogative, and I'm not going to invade your providence.

1 Now, to give you a little example of how our roles
2 interact and how those things I just told you come into
3 play, there may be times during this trial where one side
4 or the other feels that the other side is trying to put
5 something before the jury that does not fit within the
6 rules for the jury to consider. And if that happens, these
7 attorneys have taken an oath, just like you and I have
8 taken an oath, and they have an obligation to stand up and
9 raise an objection. If they do that, that calls upon me to
10 make a ruling.

11 Now, if I sustain the objection that means that I
12 agree with the party that raised the objection that that is
13 not proper for the jury to consider, and you put it out of
14 your mind. But if I overrule the objection and let it come
15 before you, I want you to understand that it will not have
16 crossed my mind to think about whether or not that thing is
17 believable, because that's not my job. I will not spend
18 one second thinking about whether the jury should give any
19 weight to that thing, because that's not my job.

20 What I'll be doing is looking very narrowly, with
21 tunnel vision, to see whether I believe that that thing
22 fits within the rules for the jury to consider. And if I
23 believe it does, I'll let it come before you and then you
24 decide whether it's believable and you decide whether or
25 not to put any weight on it. And if so, how much. So

1 that's kind of how our roles interact as the two judges in
2 the courtroom.

3 Now, while you've promised us that you're going to
4 decide the case based on the evidence and the law, and you
5 must do that, I am not telling you to leave your common
6 sense at home. We want you to use your common sense. We
7 want you to use your sense of logic and reason and your
8 good judgment. It just makes good common sense that you
9 keep an open mind about the case and that you don't make up
10 your mind until you've heard all of the evidence and you
11 know what law applies to the case.

12 So there's a rule that I've already mentioned to you,
13 and I'm sure Judge Verdin mentioned it to you previously,
14 it's hard to follow, but you must follow it. And that rule
15 is that you are not to discuss this case in any way among
16 yourselves until I tell you to. Do not talk about the
17 people involved in the case; the type of case it's alleged
18 to be. Don't talk about anything at all related to the
19 case. Now, that's hard to do, because you fourteen folks
20 may feel that you have little in common except you all live
21 in Pickens County and you've all got picked on this jury.
22 So the logical thing you're going to want to talk about
23 when you walk out of the courtroom is what you just saw or
24 what you just heard. But you have to resist that
25 temptation and not talk about the case among yourselves

1 until I tell you to. And when I tell you to begin your
2 deliberations, we wait on you.

3 Now, I want you to understand, ladies and gentlemen,
4 that you're not to discuss the case with anybody else until
5 this week is over and you've been discharged from any jury
6 you might possibly be seated on. Now, you have to be able
7 to tell your boss that you're on a jury. You have to be
8 able to tell family members, friends, that you're on a
9 jury. But don't tell them what case, who's in it, or
10 anything about it. Don't discuss the case with anybody
11 else.

12 I don't know of any media coverage for this trial. I
13 don't anticipate any. But if there is any, get away from
14 it. And report to me what you may have seen, heard or read
15 through the media at the first opportunity. Likewise, if
16 anybody does attempt to contact you and discuss the case
17 with you, report that to me so that I can deal with it.

18 Now, folks, you are not to do any independent
19 investigation related to the case. As I mentioned to you
20 earlier, they have different procedures regarding smart
21 phones and cell phones in different counties. And I'm a
22 visitor here and whatever they normally do is fine with me.
23 And I don't even know what it is, but I'm sure they're
24 doing it right. But I have to tell you some things about
25 using computers and smart phones and things like that.

1 As you can tell by the color of my hair, I've been
2 doing this a long time. And years ago, I used to tell
3 people in the midlands, don't go over to the law library
4 and look up law. Well, they would laugh at me now because
5 they can go on a computer and look up law. In civil cases,
6 to give you an example just to take it in another context,
7 I'd have to tell people if I was in a case where it was who
8 ran the red light case, I'd have to say don't go out to the
9 intersection and look around. So don't go out to the scene
10 or anything like that and look around. There are
11 procedures for all of that to be put before you. And they
12 have protections and safeguards built into them. So don't
13 do any independent investigation.

14 Now, with the advent of smart phones and the internet,
15 it's increasingly more important that we stress to you that
16 you're not to do any independent investigations. Don't go
17 look up law. One of my favorite expressions is a little
18 knowledge is a dangerous thing. You have to be able to
19 understand the context, and the law has all kind of nuances
20 and things in it. And that's why they put me here, to sort
21 through all that. And if I'm wrong, there's a procedure
22 for that. But I tell you the law. So don't go look up
23 law. Don't do word searches and try to look up anything
24 about anybody in the case or anything about the case. Just
25 don't do it. When the week is over, you can do anything

1 you want to. But as long as you're on the jury, don't do
2 any of those things, please.

3 When we used to have concerns about that, we would
4 sequester juries in hotel rooms. We rarely do that
5 anymore. And nobody wants that to be done. So we depend
6 on your honor that you'll follow that oath and you'll
7 follow the instructions given to the jury.

8 I'm trying to pull something up here that the Chief
9 Justice says I have to read to you. Now, to give you a
10 little bit of context about what I'm about to read to you,
11 there's going to be a lot of overlap, but with all these
12 things, with the advent of social media and all those sorts
13 of things, there have been problems in other parts of the
14 country. I don't think we've had any problems in South
15 Carolina but probably because the Chief Justice and the
16 Supreme Court were proactive. They launched into it early
17 and they told us to make sure the juries understand these
18 things. We've had cases I read about where a juror would
19 go on Facebook and just talk about the case, write about
20 the case. Well, that's worse than going out on the steps
21 of the courthouse and screaming about the case. I've told
22 you, you can't talk about it. You can't discuss the case
23 through any media. You can't go on twitter. You can't go
24 on facebook. You can't do those sorts of things.

25 Now, on a more sinister level, there have been some

1 problems in other states where jurors who got on these big
2 high profile cases wanted to become famous, and so they
3 used social media for that purpose. And of course, that
4 messes up everything.

5 So the Chief Justice has given us a written
6 instruction we have to read to you, and I'll only read it
7 to you once. And it's going to be redundant of a lot of
8 things I've already told you. Until your jury service is
9 concluded, you're not to discuss the case with others,
10 including other jurors, except as authorized by the Court.
11 You're not to read or listen to any news reports about the
12 case. You're not to use a computer, cell phone or other
13 electronic device with communication capabilities while
14 attending the trial or during deliberations. You may use
15 those devices during extended breaks when you're away from
16 the courthouse, but not to obtain or disclose prohibited
17 information. You're not to use a computer, a cell phone or
18 any other electronic device with communication
19 capabilities, nor may you use any other method, to obtain
20 or disclose information about the case when you're not in
21 Court. And information about a case includes, but is not
22 limited to the following types of thing: any information
23 about a party, a witness, an attorney or court officer, any
24 news accounts of the case, any information collected
25 through juror research on any topics raised or testimony

1 offered by a witness, or any information collected through
2 juror research on any other topic that the juror might
3 think would be helpful in deciding the case. So don't do
4 an independent investigation. Don't discuss the case.

5 The last thing I want to say is thank you. Now,
6 folks, you haven't been around me much. I can tell you
7 already, I don't have much of a personality. And what I
8 have, I don't usually spend thanking jurors repeatedly,
9 because, I'll tell you why, I think it cheapens it. I
10 really do. I know you've got other places to be and other
11 things to do. And I cannot promise you that there will not
12 be hurry up and wait, because you've already experienced
13 hurry up and wait. There will be hurry up and wait if this
14 trial is like every other trial, pretty much.

15 Here's what I can promise you, if you're waiting,
16 we're working. There is never going to be a time where
17 we're out here goofing off and you're back there waiting on
18 us. That will not happen. If we get bogged down on some
19 legal matter and it doesn't look like we're going to get to
20 you for a long time, I'm going to bring you in here and I'm
21 going to tell you what's going on as best I can at the
22 time. And if it's better to let you go home and bring you
23 back the next day, that's what I'm going to do. So all I
24 can promise you is we'll work. I thank you very much for
25 your attention.

1 It's very easy to find yourself in a dispute like
2 these folks are in. If you're ever in one of these
3 disputes, you're going to be very grateful that folks like
4 you came away from everything else they had to do in their
5 lives so we can resolve these disputes and move on. So
6 thank you.

7 Now, to honor my commitment to you, I'm going to shut
8 up now. I'm going to invite your close attention.

9 Solicitor, you're recognized for your opening
10 statement.

11 MR. TOOKER: Thank you, Your Honor. May it
12 please the Court?

13 THE COURT: Yes, sir.

14 MR. TOOKER: Mr. Sumner.

15 MR. SUMNER: Yes.

16 OPENING STATEMENT

17 BY MR. TOOKER:

18 Mr. Foreperson, ladies and gentlemen of the jury, I'm
19 going to reiterate something the Judge said. I was going
20 to talk about it in my opening anyway. And he happened to
21 use it, but he's absolutely right; he is the judge of the
22 law. He's the judge of the law in this case and you are
23 the judges of the facts. And what that means is you are to
24 sit in judgment on this case. You are to analyze the case,
25 look at the facts and do your best as reasonable people to

1 determine what happened in this case.

2 And this is not an easy case. I wish that it were. I
3 wish that you were here on somebody stealing a car or
4 somebody punching somebody else, but the allegations in
5 this case are of a troubling nature. The allegations in
6 this case and the indictment in this case is for criminal
7 sexual conduct in the first degree. And what that means is
8 the Defendant has been charged of committing a sexual
9 battery on a minor under the age of eleven. Those are two
10 elements. There must be a sexual battery and the victim
11 must be under the age of eleven.

12 Now, I say two elements. When the Judge told you he's
13 the judge of the law, if anything I tell you contradicts
14 what His Honor says regarding the law in this case, you
15 must do what His Honor says. I'm doing my best to explain
16 it in a way that I think makes sense. But the elements in
17 this case are there must be a sexual battery, which is any
18 kind of penetration into a person, sexual penetration, and
19 the victim must be under the age of eleven.

20 Now, the facts in this case, as alleged by the State,
21 is that the Defendant, who is friends with the victim's
22 family, good friends with the victim's father, would spend
23 a lot of time at their house. Ultimately, the time he
24 spent there included drinking with the victim's father and
25 sex with the victim's father and mother. They engaged in,

1 for lack of a better word, threesomes, together. And
2 that's how this case starts. This case starts with those
3 acts. That is what got this ball rolling.

4 And eventually the Defendant started abusing sexually
5 the victim in this case. He started when she was younger
6 and it continued until she was about nine years of age. At
7 nine her mother noticed something strange; noticed
8 something funny. She went and talked to the victim. And
9 when she talked to the victim, the victim revealed abuse;
10 explained what had been happening.

11 And at that point the police got involved. Now,
12 you're going to hear from a few police officers in this
13 case, the first of which is Elijah Chapman, the deputy with
14 the sheriff's office. And he responded. He went out there
15 on the night the police were called and he made an initial
16 report. And then he forwarded that report to
17 investigations. That's why we have Detective Rita Burgess
18 here. Detective Burgess will explain what she did in this
19 case as the investigator.

20 Now, these cases are special. They are different than
21 other kinds of crimes because unlike an armed robbery like
22 at a convenience store or something, there's not video.
23 You don't have surveillance footage. There's not
24 eyewitnesses to these kinds of crimes. These are crimes
25 that happen behind closed doors. They're crimes of shame

1 and of secrets. And because of that, they are different.

2 In these kinds of cases, one way we investigate is we get
3 people who are good at talking to kids and we get those
4 people to talk to the victim.

5 You'll hear from a woman named Christine Carlberg.
6 She works for the facility that helps in cases like these,
7 and she talked to the victim. And you'll see an interview,
8 a recorded interview, what we call a forensic interview,
9 but a video recording of that conversation, that
10 conversation between Ms. Carlberg and the victim. And
11 you'll have that and you'll be able to review that and
12 you'll see that in Court.

13 You'll also hear from the victim's mother and she'll
14 explain the circumstances as I outlined them to you. And
15 ultimately, and His Honor touched on this as well, this
16 case, like any other case, any kind of criminal case, any
17 kind of civil case, hinges of credibility. The most
18 important thing is credibility. And credibility comes from
19 the witness stand. You look at the witnesses as they
20 testify, you listen to what they say, try to figure out if
21 what they're saying making sense to you. And this is why
22 you're judges of the facts, because you're reasonable
23 people. You use your common sense. You don't leave it at
24 the door. You bring it in here with you. And you use your
25 common sense the same way you evaluate the credibility of a

1 stranger. If you encountered somebody at work, if you met
2 somebody on the street, if you talked to somebody at
3 church, you would evaluate their credibility, the voracity
4 of what it is that they're telling you based on lots of
5 things; based on how they appear, based on what they say
6 and based on whether or not what they say makes sense to
7 you. So that's what you're here to do. And that's how
8 you'll function as the judge of the facts in this case.

9 Credibility has something kind of tied in with another
10 word we use a lot in the courtroom, and that's verdict. At
11 the end of the case, you'll go back into your jury
12 deliberation room where you'll be asked to render a
13 verdict. That will be a verdict of guilty or not guilty
14 and that will be based again, on the law as the Judge gives
15 it to you and the facts as you've seen them presented at
16 trial.

17 Now, that word verdict, it comes from two Latin words.
18 And if any of y'all are Latin scholars and I say them
19 wrong, please forgive me, but I believe it's veritas dico,
20 which means to speak the truth. And that's what your
21 verdict needs to be. When you look at the facts and you
22 look at the evidence and you consider everything you saw
23 and the witness' credibility, the evidence that's
24 presented, you need to render a verdict that speaks the
25 truth.

1 And at the end of the case, I'll come back before you
2 and I'll request that you do just that. And I'll ask you
3 to find the Defendant guilty.

4 THE COURT: Thank you, Mr. Solicitor.

5 Mr. Sumner, you're recognized for your opening
6 statement.

7 MR. SUMNER: Thank you, Your Honor. May it
8 please the Court?

9 THE COURT: Yes, sir.

10 MR. SUMNER: Solicitor?

11 MR. TOOKER: Yes, sir.

12 OPENING STATEMENT

13 BY MR. SUMNER:

14 Good afternoon. My name is Steve Sumner, and it is my
15 pleasure to be representing Justin Cone, who is seated to
16 my right. I know I've got a -- he introduced himself to
17 you briefly this morning, and I also got a chance to stand
18 up and say hello.

19 I join Judge Keesley and my colleague in thanking you
20 for your service. And you probably did not think when you
21 got the summons in the mail that you would be selected for
22 a case like this, because this is one of the most important
23 events in Justin Cone's life. And it's hard to come up
24 with a charge or an accusation that is more serious or more
25 life-changing than this.

1 This is not a civil case. Now, some of you may have
2 been involved in civil court during the course of your
3 lives; maybe as a litigant or maybe as a juror. But civil
4 court is about a money judgment. Civil court is about a
5 boundary dispute. Civil court is about maybe family court,
6 something along those lines. And that is not what this is.
7 This is a criminal prosecution. And because it's a
8 criminal prosecution, and because so much is at stake for
9 the accused, there are several important ground rules in
10 effect. I'm going to briefly touch on them.

11 First of all, Justin Cone is presumed to be not
12 guilty. And the presumed verdict that you would render now
13 or in the morning -- this case may last several days --
14 would be, and I know Judge Keesley has already mentioned
15 this -- not guilty.

16 Second of all, the State bears the entire burden of
17 proof. Justin Cone does not have to prove anything. He
18 doesn't have to have me up here talking for him or working
19 for him. The burden of proof rests entirely on the State.

20 Third, before you could consider rending a verdict of
21 guilty, it would have to be a unanimous vote in the jury
22 room before you can consider that.

23 And number four, it is the highest level of burden of
24 proof than any court in this state or any court in this
25 country, and that is beyond a reasonable doubt. And Judge

1 Keesley will tell you that it has been defined before. Our
2 Supreme Court has defined reasonable doubt as a doubt which
3 would cause you to hesitate to act.

4 And if at the conclusion of this case, you have any
5 hesitation about whether or not the State has proven every
6 element as charged against Justin, then your verdict should
7 be and must be not guilty.

8 Now, as I turn to my notes here and I come to
9 conclusion, my colleague has already defined and said what
10 criminal sexual conduct is, and I agree with him. I don't
11 agree with him on every point. It is a sexual battery.
12 It's an improper sexual encounter. I want to say that this
13 is going to be a very tough and difficult trial. I want to
14 say that. I've been involved, like Judge Keesley, he has
15 hair -- I don't even have any hair -- I've been involved
16 over the years in a lot of murder cases. I've been in a
17 lot of atrocious, tough trials. This is going to be a very
18 tough trial. Not simply because of the accusations, which
19 are graphic. Not simply because of that, but because of
20 the tragic upbringing that you are going to see that
21 surroundings that lady that -- the young child that has
22 made these accusations. Her upbringing has been horrific.
23 You will hear testimony, you will probably see pictures of
24 the home where she lived and lives now. You will hear
25 descriptions of discipline that she has been subjected to.

1 You will hear that she was exposed to pornographic images
2 on television. You will hear and see that sexual activity
3 of the type that she is going to describe took place often
4 in a very, very small home with no doors, with no curtains,
5 with no things like that. And it's going to make you want
6 to turn away. I'm just going to tell you that right now.
7 It's going to be a tough couple of days. And the tragic
8 way that she has been brought up and the tragic things that
9 you're going to hear are going to be tough. They are. And
10 I just want to warn you about that.

11 I will do my very best, because I'm sworn, too, as
12 Judge Keesley talked about being sworn. I will do my very
13 best to be as respectful and as professional and as
14 courteous with her and with other witnesses that come
15 forward as I can be. I promise you, I will not -- I will
16 not go over the line that I feel like -- but I will have to
17 ask questions because I'm here for him. And it's about his
18 future. So I have to ask hard questions. And you can hold
19 it against me, but please don't hold it against him.

20 I respect your time. I am not going to -- we're going
21 to keep the trial moving crisply. I want you to be patient
22 with me because some examinations may take quite some time.
23 Okay? But what is that in comparison to what we're here to
24 decide? It's a few days; it's nothing. Okay? I'll
25 respect your time. And some examinations may go on a

Opening Statement by Mr. Sumner

1 little bit longer and you may wonder. Judge Keesley has
2 already talked about the basic order of the trial.

3 At the conclusions of this case, unlike my colleague,
4 I'm not going to ask you to return a certain verdict. I'm
5 not going to do that right now. I'm just going to ask you
6 to follow your oath. And if the State proves this case
7 with everything that you hear, and everything that you see,
8 and not only what you don't hear and what you don't see and
9 what is not brought before you, if you have no hesitation
10 about whether or not the State has proven its case, then
11 your verdict should be guilty. But by the same token, if
12 you have any hesitation, if you pause, if you reflect when
13 you go back in that jury room, because of things that
14 you've heard, of the testimony you've heard, of pictures or
15 diagrams you've seen, of things that would make you
16 hesitate to convict somebody in a case where when you peel
17 it all back, you have this child, and that's it. If you
18 have a hesitation and if you find that the State just
19 hasn't proven it to the level that's needed for a criminal
20 conviction of this type, then I would ask you to return, by
21 the same token, to return a verdict of not guilty.

22 Thank you very much.

23 THE COURT: Thank you, Mr. Sumner.

24 Mr. Tooker, please call your first witness.

25 MR. TOOKER: Thank you, Your Honor. May it

1 please the Court? State calls Deputy Elijah Chapman to the
2 stand.

3 THE COURT: Come around, please.

4 THE CLERK: Do you solemnly swear or affirm the
5 testimony you're about to give in this case to be the
6 truth, the whole truth and nothing but the truth, so help
7 you God?

8 THE WITNESS: Yes, sir, I do.

9 THE CLERK: If you would have a seat and state
10 your name for the record, please.

11 THE WITNESS: My name is Elijah Brooks Chapman.

12 THE COURT: Spell your last name.

13 THE WITNESS: Chapman, C-H-A-P-M-A-N, sir.

14 THE COURT: Thank you.

15 **ELIJAH BROOKS CHAPMAN,**

16 **BEING DULY SWORN, TESTIFIED AS FOLLOWS:**

17 **DIRECT EXAMINATION**

18 **BY MR. TOOKER:**

19 Q. Deputy Chapman, where do you work, sir?

20 A. Pickens County Sheriff's Office.

21 Q. And if you would, make sure you talk real loud right
22 there in that microphone. We want to make sure all the
23 last jurors can you, please.

24 A. Okay. Everybody hear me?

25 Q. And how long have you been employed at the sheriff's

1 office?

2 A. I've been with Pickens County Sheriff's Office for a
3 little over seven years.

4 Q. Okay. What do your duties consist of?

5 A. I'm assigned to the uniform patrol division. Right
6 now I work as the front desk officer. At the time of this
7 incident or of the report, I was assigned to road patrol.

8 Q. And as an officer on road patrol, what were your
9 duties?

10 A. My duties as a road patrol deputy are to respond to
11 calls for service, radio calls; generally protect the
12 public; and to patrol for crimes in progress.

13 Q. Okay. And were you dispatched on an occasion in this
14 case?

15 A. Yes, sir. On January the 1st, 2012, I was dispatched
16 to [REDACTED] Lane, Easley, South Carolina, which is
17 inside Pickens County, at ten thirty in the p.m., I
18 believe, in reference to a sexual assault of a nine year
19 old female victim. The way the call came across the radio
20 was that it was not in progress, that it had already
21 occurred before I was dispatched.

22 Q. Okay. So with that under your belt, what's your
23 mindset as the responding officer when you go to the scene?

24 A. One, to make sure that the victim is safe when I
25 arrive on the scene; make sure that there's no threat of

1 further assault on the victim. Two, I speak with any
2 witnesses that I could find there on the scene, to take the
3 initial report, and to forward it on to investigations.

4 Q. Okay. So when you got on the scene were you able to
5 ascertain whether or not the victim was safe?

6 A. I spoke with the victim's mother who said that she
7 was safe. She was not on the scene when I arrived. In
8 speaking to the mother, she said that there was no danger
9 of her being exposed to the actor.

10 Q. Where did you speak to the victim's mother?

11 A. I spoke to the victim's mother outside the residence
12 in the front yard.

13 Q. Where outside in particular?

14 A. It doesn't have really a driveway. It's more of a
15 walkway from the road.

16 Q. Okay. Were there other people with you when you
17 talked to her?

18 A. Not when I took her statement. It was just me and
19 the mother.

20 Q. And she provided you with a written statement of the
21 events in this case?

22 A. Yes, sir. She did.

23 Q. And when she provided you with that statement would
24 you describe her emotional state to the jury?

25 A. When I spoke with the mother she was visually upset

1 at having to -- of what she was going through. She was
2 trembling to the point where I asked her if she needed me
3 to document her written statement for her? She said yes.
4 So I documented her written statement there on the scene.

5 Q. So that means you wrote it for her?

6 A. Yes, sir. I did.

7 Q. Because she couldn't write it herself?

8 A. Correct.

9 Q. Where was that? Where did you get that written
10 statement from her?

11 A. She was in the passenger seat of my patrol car. It
12 was cold. Again, this was January the 1st. Probably
13 getting close to eleven thirty at night when I took her
14 written statement.

15 Q. Was there anybody else with her when she did that?

16 A. No, sir. She was separated from anybody else that
17 might have been there.

18 Q. Okay. And you said that the fourth thing you do when
19 you respond to a scene is to forward what you get onto
20 investigations?

21 A. Yes, sir. It's also to notify my supervisor of
22 what's going on there at the scene, if he needs to get
23 involved at all. He didn't respond. But after I took the
24 initial report there on the scene, it was forwarded to
25 investigations.

1 Q. Okay. And who investigated this case for the
2 sheriff's office?

3 A. Lieutenant Rita Burgess.

4 Q. Okay. And what is her title; what division does she
5 work in?

6 A. She works with criminal investigations in the special
7 victims unit.

8 Q. Okay. Did you do anything else in this case, take
9 any other evidence or do anything else that you didn't
10 testify to to this jury?

11 A. Not to my recollection.

12 Q. Okay. No further questions at this time, sir.

13 THE COURT: Cross?

14 **CROSS-EXAMINATION**

15 **BY MR. SUMNER:**

16 Q. Just a couple of questions, Deputy Chapman. You had
17 mentioned that when you arrived that **Victim**, the young lady
18 that has made these accusations, she was not there; is that
19 correct?

20 A. That's correct.

21 Q. Okay. And you spoke with her mother, Casey; is that
22 correct?

23 A. Yes, sir.

24 Q. She gave you a written statement, a statement that
25 you transcribed for her?

1 A. Yes, sir. That's correct.

2 Q. Did you speak with anyone else that evening?

3 A. I did not; no, sir.

4 Q. Were you by yourself?

5 A. Initially ---

6 Q. Working?

7 A. Initially there on the scene I was. I believe Deputy
8 Steven Ticknor responded to the scene, as well. My
9 involvement was speaking with the mother and getting her
10 statement and completing the initial report.

11 Q. And that's primarily all that you did?

12 A. Yes, sir.

13 Q. Did you go into the house?

14 A. No, sir. I did not.

15 Q. So she met you outside and you -- and when I mean
16 she, I'm talking about the mother. She met you outside the
17 home and she just came inside of your car and basically you
18 took her statement and started the investigation rolling;
19 would that be correct?

20 A. Yes, sir.

21 Q. I don't have any other questions. Thank you.

22 THE COURT: Redirect?

23 MR. TOOKER: No, sir. Just permission for this
24 witness to be excused, sir.

25 MR. SUMNER: No objection from the Defense, Your

Victim - Direct Examination by Mr. Tooker

1 Honor.

2 THE COURT: You may step down. You're free to
3 go.

4 THE WITNESS: Thank you, Your Honor.

5 THE COURT: Thank you, sir.

6 Call your next witness.

7 MR. TOOKER: Yes, sir, Your Honor. State next
8 calls Victim to the stand.

9 THE COURT: Would someone bring her in, please?

10 THE CLERK: Put your left hand on the bible and
11 raise your right. Do you solemnly swear or affirm the
12 testimony you're about to give in this case will be the
13 truth, whole truth and nothing but the truth, so help you
14 God?

15 THE WITNESS: Yes, sir.

16 THE CLERK: If you would have a seat and state
17 your name for the record, please.

18 THE WITNESS: Victim.

19 THE COURT: Will you do me a favor? You see that
20 microphone with the cover over it right there, the orange
21 cover?

22 THE WITNESS: Uh-huh (Affirmative).

23 THE COURT: Pull that close to you; all right?
24 Speak loudly so everybody can hear you. Thank you.

25 Victim,

Victim - Direct Examination by Mr. Tooker

1 **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

2 **DIRECT EXAMINATION**

3 **BY MR. TOOKER:**

4 Q. Hey **Victim** .

5 A. Hi.

6 Q. What is your birth date?

7 A. ██████████ .

8 Q. And how old are you today?

9 A. I am twelve.

10 Q. And where are you in school?

11 A. Gettys Middle School.

12 Q. What are you studying? Everything?

13 A. Yeah.

14 Q. What's your favorite class?

15 A. Social studies.

16 Q. Why do you like social studies?

17 A. Because I like learning about history.

18 Q. Okay. And do you know why you've been called to

19 testify in Court here today?

20 A. Yes, sir.

21 Q. Do you know the difference between truth and a lie?

22 A. Yes, sir.

23 Q. What is the difference between truth and a lie?

24 A. The truth is where if you -- you can -- the truth is

25 ...

Victim - Direct Examination by Mr. Tooker

1 Q. You okay?

2 A. Yeah.

3 Q. You a little nervous?

4 A. Yeah.

5 Q. If I were to point to the carpet and say the carpet
6 is red; is that the truth or a lie?

7 A. That's a lie.

8 Q. Why is that a lie?

9 A. Because it's not red; it's green.

10 Q. Okay. And if I were to say the court reporter is a
11 young boy; is that the truth or a lie?

12 A. That's a lie.

13 Q. Why is that?

14 A. Because she is actually a older woman.

15 Q. Okay. That wasn't the best example. So you know the
16 difference between truth and a lie?

17 A. Yes, sir.

18 Q. And who is Justin Cone to you and your family?

19 A. He was a friend, but not anymore.

20 Q. And how long have you known Justin Cone?

21 A. Maybe about three or four years; I'm not sure.

22 Q. Is it kind of hard for you to remember?

23 A. Yes, sir.

24 Q. And do you know why it is that he's on trial?

25 A. Yes, sir.

Victim - Direct Examination by Mr. Tooker

1 Q. Okay. What is it that he did to you?

2 A. He made me -- do I have to like literally -- do I
3 have to say it?

4 Q. Yeah.

5 MR. SUMNER: Could you ask her just to scoot up
6 just a little bit? I'm sorry.

7 THE COURT: Pull that thing down just a little
8 bit; okay. Pull it down.

9 Q. Why don't you say test?

10 A. Test.

11 MR. SUMNER: She just kind of pulls away
12 sometimes. I'm just asking.

13 THE COURT: All right. Ask your question again,
14 please. If you speak loud enough for him to hear you
15 without that microphone, everything will be great; okay?
16 Thank you.

17 Q. What is it that the Defendant did to you?

18 A. He made me suck something.

19 Q. Made you suck something? What kind of thing did he
20 make you suck?

21 A. It was a private part.

22 Q. Of whose body?

23 A. His.

24 Q. Is this something that happened one time or many
25 times?

Victim - Direct Examination by Mr. Tooker

- 1 A. Many times.
- 2 Q. How many times did this happen?
- 3 A. I'm not sure.
- 4 Q. About how old were you, do you think, when it
- 5 started?
- 6 A. Four or five.
- 7 Q. And how old were you when it stopped happening?
- 8 A. Nine.
- 9 Q. Why did it stop happening?
- 10 A. Because I told.
- 11 Q. You told. Who did you tell?
- 12 A. My mom.
- 13 Q. You told your mom. After you told your mom what
- 14 happened?
- 15 A. Well, she told my dad and Robert and then Robert
- 16 called the police.
- 17 Q. Okay. And when the police came out did you talk to
- 18 anybody?
- 19 A. No, sir.
- 20 Q. Did you ever talk to this lady right here?
- 21 A. Yes, sir.
- 22 Q. Okay. Where did you talk to her?
- 23 A. At our kitchen counter, I think.
- 24 Q. In your house?
- 25 A. (Affirmative nod.)

Victim - Direct Examination by Mr. Tooker

1 Q. Okay. And when the Defendant did these bad things to
2 you, did he do anything to you? Did he touch you in any
3 way?

4 A. No, sir.

5 Q. He never touched you in any way?

6 A. (No verbal response.)

7 Q. Okay. When he did these things to you, where was he
8 in your house?

9 A. Either in my bedroom or in my mom and parents' house
10 when my parents were gone.

11 Q. Would this happen at the nighttime or the daytime?

12 A. Nighttime.

13 Q. Where would your parents be?

14 A. They would be in the living room.

15 Q. Why would your parents be in the living room?

16 A. Because they would give him the back room when they
17 wanted some time to themselves.

18 Q. Okay. And when he would do these things to you would
19 you be wearing clothes or not wearing clothes?

20 A. I would be not wearing clothes.

21 Q. Okay. Would he be wearing clothes or not wearing
22 clothes?

23 A. He would be sort of wearing clothes.

24 Q. Okay. And when you say sort of wearing clothes, what
25 do you mean?

Victim - Direct Examination by Mr. Tooker

1 A. His pants would be halfway down.

2 Q. His pants would be halfway down. Did he have on
3 underwear?

4 A. Yes, sir.

5 Q. Where would his underwear be?

6 A. Be halfway.

7 Q. Okay. When these things happened was anything ever
8 said to you?

9 A. Before we started he told me before don't tell any --
10 a bad word -- it started with a d. I don't cuss.

11 Q. Okay. If I say the word can you tell me if it's the
12 right word?

13 A. Yes, sir.

14 Q. Is it damn?

15 MR. SUMNER: Your Honor, I would object to any
16 leading questions.

17 THE COURT: That's leading. You can't do that.

18 Q. But he told you not to say a word?

19 MR. SUMNER: Again, Your Honor, that's a question
20 that suggests the answer. And I hate to jump up on that,
21 but she has to testify and he doesn't need to suggest an
22 answer.

23 MR. TOOKER: Your Honor, I'm just reiterating.
24 She did testify to that fact.

25 THE COURT: It doesn't change the leading

Victim - Cross Examination by Mr. Sumner

1 question that suggests the answer.

2 Q. And did he ever say anything else to you?

3 A. (No verbal response.)

4 THE COURT: Can you say that answer. You shook
5 your head.

6 A. No, sir.

7 Q. And after you told your mom and you told Detective
8 Burgess, did you ever talk to anybody else about it?

9 A. The Julie Valentine Center.

10 Q. Okay. And did you talk to a lady or a man there?

11 A. A lady.

12 Q. Okay. And did you tell her what happened to you, as
13 well?

14 A. Yes, sir.

15 Q. Okay. And did you tell her the truth?

16 A. Yes, sir.

17 Q. And did you tell the truth to the jury here today?

18 A. Yes, sir.

19 MR. TOOKER: Okay. No further questions at this
20 time, sir.

21 THE COURT: Cross-examination?

22 MR. SUMNER: Thank you, Your Honor. May it
23 please the Court?

24 **CROSS-EXAMINATION**

25 **BY MR. SUMNER:**

Victim - Cross Examination by Mr. Sumner

1 Q. Victim, have you ever told anybody about how your dad
2 would put you in the shower and ---

3 MR. TOOKER: Judge, I'm going to object at this
4 time and ask that the jury be excused.

5 THE COURT: Please step in the jury room, ladies
6 and gentlemen. Don't discuss the case.

7 (WHEREUPON, the jury exited the open court at
8 approximately 3:54 p.m.)

9 THE COURT: I'm going to let them take you to
10 another room. Now, when they take you out, we have some
11 rules we have to operate under, so while you're up here on
12 the stand testifying they can't talk to you about your
13 testimony at all. So while -- so I'll let you go out of
14 the courtroom and they still can't talk to you about your
15 testimony. You can't talk to them about your testimony
16 until you're finished. Okay? All right. I'm going to let
17 you go with that lady right there, but don't talk about
18 your testimony.

19 (WHEREUPON, the witness was escorted out of the
20 courtroom.)

21 THE COURT: Yes, sir?

22 MR. TOOKER: Yes, sir, Your Honor. If I'm not
23 mistaken, I believe Mr. Sumner is about to try to cross-
24 examine the victim as to punishments that her father
25 inflicted on her that resulted in DSS being contacted and a

Victim - Cross Examination by Mr. Sumner

1 temporary plan set up. And it's the State's opinion that
2 any kind of examination into any kind of corporal or
3 physical punishment should be both subject to 403 and
4 relevance. And I'm not sure how that makes any fact in
5 this case more or less likely. And I think there's a great
6 danger of both confusion of the issues and unfair prejudice
7 if the Defendant is -- if the Defense attorney is allowed
8 to cross-examine Victim as to how her father punished her on
9 that particular occasion.

10 THE COURT: Mr. Sumner?

11 MR. SUMNER: Your Honor, I was not going to
12 mention DSS; I was not because I agree with my colleague on
13 that point. I was not going to bring the DSS investigation
14 into it. But according to Ms. Carlberg's report, Victim
15 stated to her that her father would try to drown her when
16 they were having behavioral problems. And that when she
17 lie her father would put her under a shower of real cold
18 water with her clothes on.

19 Now, I think that is relevant. I'm not going to
20 mention DSS because I agree with Mr. Tooker on that point.
21 But I do think I'm entitled to ask her if she ever told
22 anybody that. And that's really all I was going to ask
23 her, was have you told anybody that your father did that?
24 And I was going to ask her, did your father do that?
25 Because I think if it's tied into her lying or her

Victim - Cross Examination by Mr. Sumner

1 potentially not telling the truth, that's why we're here.

2 And so I do think -- Judge, I think it's relevant. I

3 wasn't planning on spending thirty minutes on it. But I

4 mean, if she is in fear because she's told these

5 allegations to six or seven or eight different people and

6 if she's in fear of what would happen to her if she's

7 caught lying, I think the jury should know that. I mean

8 ... And I think only relevant to what the punishment was

9 to her for when she felt that -- or when her father felt

10 she was lying and the fact that she's told Ms. Carlberg

11 that, I believe, and correct me I'm wrong on that,

12 Solicitor, told her that, I believe that the jury should --

13 I believe that's a prior statement that is -- that should

14 come in. I mean, you know, I should be able to question

15 her on it. I'm not going to get into DSS.

16 MR. TOOKER: I'll agree with Mr. Sumner that if

17 he wants to examine the witness as to whether or not she's

18 afraid she'll be punished if she says something different,

19 that's an appropriate question. I think going into the

20 particular punishments does more to unfairly prejudice the

21 State's case than it does to help explain why this child

22 might say these things in this case.

23 THE COURT: Is there any evidence about the

24 interaction between the father and the child related to

25 these allegations of sex against Mr. Cone?

Victim - Cross Examination by Mr. Sumner

1 MR. SUMNER: No, sir, other than it was provided
2 to me in the report from Ms. Carlberg. I mean, she made a
3 note that Mr. Miller reported that when she would lie he
4 would make her stand in the shower with cold water running
5 over her when she was fully clothed. And that's the only
6 information that I have. And the fact that -- I wasn't
7 going to get into DSS because I agree; I wasn't going to
8 get into that.

9 But I would say that that is an unusual punishment. I
10 have two children. I haven't thought about putting them in
11 the shower and turning the water on cold when they were
12 fully clothed as punishment when I thought they were lying.
13 And I think since credibility -- since there's no physical
14 evidence in this case, there's no corroboration, there's no
15 other witness, eyewitness, to anything. It all depends on
16 this, to some degree, on this child's testimony and her
17 veracity I would ask that I be allowed to ask that. And
18 that's all I can add on that point.

19 THE COURT: Anything else?

20 MR. TOOKER: Nothing from the State, sir.

21 MR. SUMNER: Nothing from me, Your Honor.

22 THE COURT: Bring her back in.

23 **Victim**, if you'll come back around here and have a
24 seat. That oath you took to tell us the truth, you're
25 still under that oath; okay? Have a seat right there.

Victim - Proffered Testimony - Examination by Mr. Sumner

1 Now, I'm going to let Mr. Sumner ask you a few questions
2 while the jury is outside. Then I'm going to tell them
3 what they can and cannot do; okay?

4 MR. SUMNER: Thank you, Your Honor.

5 THE COURT: You can proffer, please.

6 MR. SUMNER: I apologize for interrupting the
7 Court. Yes, sir. Thank you.

8 **PROFFERED TESTIMONY OF**

9 **Victim**

10 **EXAMINATION**

11 **BY MR. SUMNER:**

12 Q. **Victim**, did your father ever put you in the shower and
13 turn the water on cold when he felt like you were not
14 telling the truth?

15 A. Yes, sir.

16 Q. Did your father ever tell you when you would come
17 near the television to shut your eyes and close your ears
18 because he didn't want you to see something that was on the
19 television?

20 A. Yes, sir.

21 MR. SUMNER: Your Honor, that was really the only
22 -- that was really going to be my only questions along that
23 line. I was then going to ask you -- I'll tell you I'm
24 just going to go ahead and examine her just so that we
25 don't have the interruption again; if you would like for me

1 to do that.

2 Q. Victim, you mentioned this for Mr. Tooker, and that is
3 that you have told this story regarding Justin Cone to a
4 lot of different people. Is that true?

5 A. Yes, sir.

6 Q. Over several years; would that be correct?

7 A. Probably like three years.

8 Q. You know what, that was a clumsy question. Let me
9 try to ask it again. From the time that you were first
10 asked about the statements that you had made to today, it's
11 been several years that you've talked to all -- lots of
12 different types of people about Justin Cone; is that
13 correct?

14 A. Yes, sir.

15 Q. Okay. Now, when you -- strike that. Your mother
16 came to you because she saw you and your sister playing
17 with some dolls; is that right?

18 A. Yes, sir.

19 Q. And y'all had a -- you all had a conversation about
20 where that came from?

21 A. Yes, sir.

22 Q. Then you also had that conversation with your father
23 about what happened; is that right?

24 A. Yes, sir.

25 Q. And then I believe that you spoke with a Mr. Odom,

1 Robert Odom; is that right?

2 A. Yes, sir.

3 Q. And then I believe that you also spoke with Ms.

4 Burgess?

5 A. Yes, sir.

6 Q. And your parents were with you during a large number
7 of these conversations?

8 A. Yes, sir.

9 MR. SUMNER: That was going to complete my
10 examination of the child.

11 THE COURT: All right. The question about her
12 being pushed in the shower and put under cold water, the
13 Court finds that not relevant. If it is relevant, it's
14 excluded under 403. Now, I could see how it could become
15 relevant, but based on the proffer that was given, I do not
16 see that it is. The part about the television is relevant
17 and it's admissible.

18 MR. SUMNER: All right. I'll start it from there
19 and just go -- I'll do my very best to do exactly what I
20 just did right then.

21 MR. TOOKER: Thank you, sir.

22 THE COURT: I'm not going to begin to tell you
23 how to try your case.

24 MR. SUMNER: I'm just telling you if I make a
25 mistake it's not intentional.

1 THE COURT: Bring the jury back in.

2 (WHEREUPON, the jury entered the open Court at

3 approximately 4:05 p.m.)

4 THE COURT: All right. You may continue, sir.

5 MR. SUMNER: Thank you, Your Honor. May it
6 please the Court?

7 THE COURT: Yes, sir.

8 Q. Victim, were there times at your home when you would
9 walk near the television and your father would tell you to
10 shut your eyes and close your ears?

11 A. Yes, sir.

12 Q. Since early January of 2012, almost three years ago,
13 would it be correct that you have told this story many
14 times?

15 A. Yes, sir.

16 Q. To many different people?

17 A. Yes, sir.

18 Q. That as you testified earlier, your mother inquired
19 about you because she observed you and your sister playing
20 with some dolls; is that right?

21 A. Yes, sir.

22 Q. So you spoke with her?

23 A. Yes, sir.

24 Q. Then you spoke with your father?

25 A. Yes, sir.

1 Q. Then another person came over to your home named
2 Robert Odom; is that right?

3 A. Yes, sir. He was actually with my father.

4 Q. Okay. He was with your father together? Okay. And
5 so they both questioned you about this; is that right?

6 A. Yes, sir.

7 Q. Then you at some point wound up speaking with this
8 lady, Ms. Burgess?

9 A. Yes, sir.

10 Q. And most of the time that you were telling this
11 story, your parents were with you?

12 A. Yes, sir.

13 MR. SUMNER: One second, Your Honor.

14 THE COURT: Yes, sir.

15 MR. SUMNER: Your Honor, I don't have any other
16 questions of this witness.

17 THE COURT: He gets a chance to ask you something
18 again. Do you have any other questions?

19 MR. TOOKER: No, sir. I just request that she be
20 permitted to step down and that she be excused.

21 THE COURT: Okay. You can step down and you can
22 leave the courtroom. Thank you.

23 Call your next witness.

24 MR. TOOKER: Yes, sir. State calls Christine
25 Carlberg.

1 THE COURT: Would someone get her, please?

2 THE CLERK: Do you solemnly swear or affirm the
3 testimony you're about to give in this case be the truth,
4 the whole truth and nothing but the truth, so help you God?

5 THE WITNESS: I do.

6 THE CLERK: Have a seat and state your name for
7 the record, please.

8 THE WITNESS: Christine Carlberg.

9 **CHRISTINE CARLBERG**

10 **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

11 **DIRECT EXAMINATION**

12 **BY MR. TOOKER:**

13 Q. All right. Ms. Carlberg, where do you work?

14 A. I'm employed by the Greenville Department of Mental
15 Health and I'm contracted to work at the Julie Valentine
16 Center.

17 Q. What is the Julie Valentine Center?

18 A. It's a local center in Greenville that deals with
19 sexual assault of children and adults.

20 Q. Okay. And what do you do at the Julie Valentine
21 Center?

22 A. I'm a forensic interviewer.

23 Q. What does that mean?

24 A. That means I talk with children or developmentally
25 delayed adults in a non-leading, non-suggestive manner for

1 purposes of an investigation who have allegations of some
2 sort of abuse.

3 Q. Okay. You say non-leading, non-suggestive manner.
4 Is there a name for that methodology?

5 A. We use a semi-structured protocol called RATAC, which
6 is a five-stage process that stands for rapport, anatomy
7 ID, touch inquiry, abuse scenario and closure.

8 Q. Okay. And did you interview anyone in this case?

9 A. Yes. I interviewed [REDACTED] Victim .

10 Q. Okay. Now, I'm going to step back. Do you have any
11 specific training or education with regards to counseling
12 or interviewing?

13 A. Yes. I have a bachelor's of science and
14 rehabilitation services education and a minor in psychology
15 from the Pennsylvania State University. And I have a
16 master's of arts in marriage and family therapy from
17 Reformed Theological Seminary in Jackson, Mississippi. And
18 since then I've been trained in forensic interviewing at
19 CornerHouse, which is a nationally recognized training
20 facility for forensic interviewing, and also at a program
21 called Finding Words in Mississippi and in South Carolina.
22 It's now called Child First, but it was called Finding
23 Words at the time.

24 Q. Okay. Did you go to continuing education events?

25 A. I do go to ongoing education regarding forensic

1 interviewing; yes.

2 Q. Okay. Do you need any licensure in South Carolina to
3 be a forensic interviewer?

4 A. No.

5 Q. And so you said you interviewed someone in this case?

6 A. Yes, sir. [REDACTED] Victim .

7 Q. [REDACTED] Victim ?

8 A. Yes.

9 Q. And how old was [REDACTED] Victim when you interviewed
10 her?

11 A. Nine.

12 Q. Nine years old?

13 A. Uh-huh (Affirmative).

14 Q. Where did you interview her?

15 A. At the Julie Valentine Center.

16 Q. Which family member or family members brought her to
17 the Julie Valentine Center?

18 A. Both her parents did; Doug and Casey Miller.

19 Q. Okay. And when you talked to her, did you talk to
20 her with her parents with her or were her parents not
21 there?

22 A. Her parents were not there. It was just me and her
23 in the interview room.

24 Q. Okay. And when you talked to her did you use that
25 methodology that you mentioned, that RATAC method?

1 A. Yes, sir.

2 Q. I'm going to show you what's been marked as State's

3 2. Do you recognize this item?

4 A. It is a copy of the interview I conducted with [Victim].

5 Q. Okay. How do you know that?

6 A. Because I initiated and dated it the day that I
7 watched it.

8 Q. When you watched it was it a fair and accurate copy
9 of the interview that you had with [Victim]?

10 A. Yes, sir.

11 Q. Okay. It didn't seem out of sorts with what you
12 recall happening?

13 A. No, sir.

14 MR. TOOKER: At this point, Your Honor, the State
15 would like to enter State's 2 into evidence and publish to
16 the jury.

17 THE COURT: Do you need to put anything on the
18 record?

19 MR. SUMNER: Your Honor, I would just say subject
20 to the objection articulated in limine.

21 THE COURT: Mark it into evidence, please, Madam
22 Court Reporter.

23 (WHEREUPON, State Exhibit Number 2 was admitted into
24 evidence.)

25 THE COURT: Ladies and gentlemen, they're going

1 to turn the volume up as loud as it'll go.

2 (WHEREUPON, State Exhibit Number 2 was played in open
3 Court.)

4 MR. TOOKER: Beg the Court's indulgence.

5 THE COURT: Yes, sir.

6 Q. All right. Ms. Carlberg, that video depicts a couple
7 of dolls. What are the dolls for?

8 A. They're anatomical dolls. They have body parts of
9 the male and female.

10 Q. Okay. So does the male doll have a penis?

11 A. It does. And the female has a vagina.

12 Q. What was the name given to the penis?

13 A. Tee-tee.

14 Q. And to the vagina?

15 A. Tee-tee.

16 Q. And to the rear?

17 A. Butt.

18 Q. Okay. And to the female chest?

19 A. Boobies.

20 Q. Okay. And you also had her draw on something? What
21 was she drawing on?

22 A. I had her point on the anatomical drawings.

23 Q. Yeah. Anatomical drawings. So what are those?

24 A. Those are drawings that we use to -- there's a male
25 and a female drawing that we use to establish -- usually

1 use to establish body parts, like what they call different
2 body parts. So we're using the same language throughout
3 the interview.

4 Q. And like the dolls, do they also have all the
5 requisite parts?

6 A. They do.

7 Q. Okay. And what was the male genitalia?

8 A. Tee-tee.

9 Q. And the female genitalia?

10 A. Tee-tee.

11 Q. The bottom or the rear?

12 A. Butt.

13 Q. And the female chest?

14 A. Boobies.

15 MR. TOOKER: No further questions at this time,
16 Your Honor.

17 THE COURT: Do you want to question the witness
18 now?

19 MR. SUMNER: Your Honor, if we could take a very
20 short break. I've got a few things I'd like to take up
21 with the Court before I begin my questioning of Ms.
22 Carlberg.

23 THE COURT: Sure.

24 All right. Ladies and gentlemen, please step in the
25 jury room. Don't discuss the case.

1 (WHEREUPON, the jury existed the open Court at
2 approximately 4:43 p.m.)

3 MR. SUMNER: Your Honor, I want to bring this up
4 outside the presence of the jury because I just don't want
5 to step over the line. Ms. Carlberg prepared a report that
6 I referenced in a line of questioning that you disallowed.
7 And I want to go ahead and ask her the questions now of her
8 report so that you can give me guidance before we have the
9 jury hear.

10 THE COURT: Sure.

11 MR. SUMNER: Okay.

12 **IN-CAMERA EXAMINATION**

13 **BY MR. SUMNER:**

14 Q. Good afternoon, Ms. Carlberg.

15 A. Hi.

16 Q. Do you have a copy of the report that you offered --
17 and I don't see the date right on the top -- from the Julie
18 Valentine Center? Let me go to the back and see if I can
19 get -- and I've got a copy of this if you need it.

20 A. I have a copy.

21 Q. You have a copy?

22 A. Yes, sir.

23 Q. And that -- well, thank you. And that would be --
24 I'm looking for the date -- May 11 of 2012?

25 A. That's when I finished it. The interview was done on

1 February 1.

2 Q. That is correct; right. And the report itself is
3 probably seven to ten pages; something in that range?

4 A. Six pages.

5 Q. Six pages; okay. I'm going to turn your attention,
6 if I can, to the second page of this report. Now, this
7 report was your report; is that right?

8 A. Yes, sir.

9 Q. It was authored by you?

10 A. Yes, sir.

11 Q. Exclusively?

12 A. Yes, sir.

13 Q. And it was a report generated after your interview
14 with [REDACTED] Victim?

15 A. (No verbal response.)

16 Q. And -- go ahead and answer.

17 A. I gather background information from the parents or
18 care givers or whoever brings the child beforehand.

19 Q. Okay.

20 A. And so that information I type while they're giving
21 me that information. So that's, besides editing it, is
22 done at that point.

23 Q. Okay.

24 A. And then the summary of the interview is done after
25 the interview while I watch the video and I just summarize

1 the video.

2 Q. Okay. I think you've answered that absolutely
3 correctly. You get it from -- you get the initial
4 information from parents and/or law enforcement or other
5 people and that comprises a portion of your report. Then
6 you interview the child or whoever you're interviewing, go
7 back and summarize that, and then that pretty much is your
8 report?

9 A. Yes, sir.

10 Q. Okay. Let me turn your attention to page two, and I
11 want to ask you, did Mr. Miller, who would be the victim's
12 father, did he report to you actions he would take when he
13 thought she was lying?

14 A. Yes, he did.

15 Q. And in fact, did he tell you that he would make her
16 stand in the shower with cold water running over her while
17 she was fully clothed?

18 A. Yes, sir.

19 Q. Okay. Did **Victim** also tell -- or was it reported to
20 you that **Victim** had told a teacher that her father would
21 drown her if they were having behavioral problems?

22 A. That was told to me that that was a report made to
23 DSS.

24 Q. Okay. Thank you. As we turn to page three, part of
25 your report is that **Victim** has been diagnosed previously

1 with anxiety and attention deficit disorder; is that
2 correct?

3 A. Yes, sir.

4 Q. And also on page three that it had been reported to
5 you that **Victim** lies to keep herself out of trouble; is that
6 correct?

7 A. Yes, sir.

8 Q. Okay. The rest of this report is primarily a very
9 thorough summary of you -- the interview that's already
10 been admitted into evidence?

11 A. Yes, sir.

12 Q. Thank you. I'm going to direct my comments now to
13 Judge Keesley.

14 MR. SUMNER: Judge, those were the questions that
15 I was going to ask her. I wanted to proffer. Those were
16 the questions I was going to ask her regarding the
17 preparation of her report. I just wanted to, like I
18 mentioned, get those out now while the jury is out.

19 MR. TOOKER: May it please the Court? I think
20 every single one of those questions elicits hearsay. I
21 mean, every single thing she wrote in this report as
22 solicited with Mr. Sumner's proffer of her testimony is
23 that she was told something by the care givers. And so
24 this beginning part, the introduction part of the report,
25 is all that hearsay. So with regards to, I believe, he

1 mentioned diagnosed with anxiety and ADHD, that was told to
2 her; ergo, hearsay. With regards to behavioral complaints,
3 purported lies to keep herself out of trouble; again,
4 hearsay. This is not a witness who is rendering an expert
5 conclusion, therefore she can't rely on hearsay statements
6 in making that conclusion, so I'm of the opinion that
7 anything that was told to her in anticipation of the
8 interview is inadmissible hearsay.

9 THE COURT: Yes, sir.

10 MR. SUMNER: Your Honor, briefly, I would just
11 say that this is a part of her report and I know I don't
12 have the hearsay exceptions in front of me right now. But
13 there's been a lot of hearsay that's already come in in the
14 State's case. I think, generally speaking, if it's good
15 for the goose, it's good for the gander. I think it's
16 fair. She prepared the report. If the solicitor wants to
17 redirect and say you didn't get that information yourself,
18 I think he can. But I believe that I should be allowed to
19 ask these questions. They're a part of her report.

20 Now, the statement Mr. Miller made was directly to
21 her. Mr. Miller, the father, reported that when she would
22 lie -- so that's not hearsay -- he would make her stand in
23 the shower with cold water running over her. So that
24 didn't come from any other source. So I wanted to clear
25 that up.

1 But you know, she prepared the report. I think it's
2 disingenuous for some parts -- for some certain classes of
3 hearsay to come in and others not. This is a report
4 prepared clearly in the normal course of her business. She
5 has said that she prepared a report every time that this
6 happens or that a case is assigned to her and a forensic
7 interview takes place. So I think there are plenty of
8 exceptions -- should the Court feel that it's hearsay,
9 there are plenty of exceptions to cover it. And I would
10 also say in fundamental fairness for him to get a fair
11 trial, it should come in. Thank you.

12 MR. TOOKER: If I could make a brief comment,
13 Your Honor?

14 THE COURT: Sure.

15 MR. TOOKER: Again, with regard to what Mr.
16 Miller said, that is hearsay. We're talking about an out-
17 of-court statement coming in through this witness being
18 offered for the truth of the matter.

19 That being said, I think it's worth nothing that
20 repeatedly in cases that have come down in probably the
21 last two and a half years from our Court of Appeals, the
22 South Carolina Court of Appeals has made it plain that the
23 forensic interviewer's report is not to be introduced into
24 evidence. Now, what Mr. Sumner is talking about is
25 examining her based on statements made to her that she

1 included in her report. But I think it's on par with just
2 about the same thing.

3 Now, in all those cases, the State proffered that
4 evidence and it was admitted and then the Court of Appeals
5 concluded that that was bolstering and improper. In this
6 case, again, these things are hearsay, in addition to which
7 there are issues with regards to the admission of a report
8 like this in a case like this.

9 So it's the State's position that anything Mr. Sumner
10 wants to ask of any witness that was mentioned in this
11 report, he's free to ask. If that witness denies saying
12 something or denies something being true, then denies
13 saying that thing, he can recall Ms. Carlberg and rebut
14 that testimony. But as to that, I don't think any of this
15 should come in. I can't think of an exception that would
16 allow it to.

17 THE COURT: Well, there are two possible
18 exceptions to the hearsay rule; 803(6), 803(a), but I don't
19 have a foundation to make a ruling.

20 MR. SUMNER: Can I just look over your shoulder,
21 Solicitor?

22 MR. TOOKER: Yeah, of course. 803(6). And what
23 was the other one, Your Honor?

24 THE COURT: (A).

25 MR. SUMNER: Your Honor, permission to continue

1 with my examination?

2 MR. TOOKER: I was going to say, I think we can
3 avoid this. If Mr. Sumner wants to lay the foundation for
4 these as records of regularly conducted activity, he's free
5 to do so. Again, the State's worry is how the Court of
6 Appeals looked at the admission of this type of evidence.
7 So if he laid that foundation and wanted -- and sought to
8 introduce the records themselves, that will be his
9 prerogative. I think it's a risky maneuver in light of
10 what the Court has been doing recently. But I mean, I'll
11 leave it at that.

12 MR. SUMNER: I was not going to try to --
13 Solicitor, you and I discussed this, this morning. I was
14 not going to try to get the report itself into evidence.
15 But I was going to try to ask her about different items in
16 the report and maybe phrase it as, is it a part of your
17 file? Maybe don't use the word report. Maybe say, is it a
18 part of your file in this case? I could do that to avoid
19 the use of the word report to where the jury might
20 speculate, why don't we have the report in front of us?
21 And I think you make a valid point on that, Solicitor.

22 MR. TOOKER: If I could just comment on that,
23 sir?

24 THE COURT: Yes, sir.

25 MR. TOOKER: I mean, 803(6), you have to

1 introduce the records and reports. I mean, that is an
2 exception specifically designed for the admission of
3 regularly conducted business activities that are compiled
4 into reports or records or data compilations. So under
5 803(6), if Mr. Sumner sought to get into this stuff -- if
6 he sought to introduce this stuff he could try to do it
7 under 803(6), but he would need to introduce the report
8 itself and the report in its entirety under the best
9 evidence rule.

10 THE COURT: Well, I might can shortcut this a
11 little bit. We'll take a little break and I'll let y'all
12 have a chance to look at the rule. I'm not saying it is or
13 is not admissible. I'm saying it's possibly admissible.
14 Both of those provide that subjective opinions do not come
15 in, judgments do not come in and conclusions do not come in
16 on subsection (a). So without me knowing more about this
17 statement that the child lies to keep herself out of
18 trouble, I don't see how I'm going to let that in. As far
19 as the -- what she was saying about the DSS statement is
20 double hearsay, maybe triple hearsay, and I'd have to
21 analyze both prongs of whether it's -- or all three prongs
22 because they all have to pass muster of some exception to
23 the hearsay rule.

24 MR. SUMNER: Yes, sir.

25 THE COURT: But I'll give y'all five minutes or

1 so. I mean, it's close to five. I don't know how long you
2 plan to question her, but ---

3 MR. SUMNER: Not real long. I'd like to go ahead
4 and go through it. And I feel confident I can be done by
5 five fifteen, five twenty at the latest. I do. Even
6 including the break.

7 THE COURT: That's fine. I'm sure you know the
8 rule, but you cannot discuss your testimony with anyone
9 during the break; all right?

10 THE WITNESS: Yes, sir.

11 THE COURT: Thank you. You can step down if you
12 need to or would like to. We'll be at ease for about five,
13 ten minutes.

14 MR. TOOKER: Yes, sir.

15 (WHEREUPON, the Court stood at recess for a short
16 break.)

17 MR. SUMNER: Your Honor, I'm just going to leave
18 that alone.

19 THE COURT: Okay.

20 MR. SUMNER: We won't even have to worry about
21 that.

22 THE COURT: All right.

23 MR. SUMNER: I'm ready when you are.

24 THE COURT: Do I need to wait on the clerk? I
25 don't have to have him, but sometimes they ---

1 MR. SUMNER: There won't be any questions
2 regarding that report.

3 THE COURT: I need you back up here, please.
4 Okay. Bring the jury, please.

5 (WHEREUPON, the jury entered the open Court at
6 approximately 5:02 p.m.)

7 THE COURT: All right. Cross-examination.

8 MR. SUMNER: Thank you, Your Honor. May it
9 please the Court?

10 THE COURT: Yes, sir.

11 **CROSS-EXAMINATION**

12 **BY MR. SUMNER:**

13 Q. Ms. Carlberg, are you professionally familiar -- and
14 if you need to consult your files, you can. Are you
15 professionally familiar with the concept that if a child
16 repeats something enough or hears something enough and
17 repeats it, that it can actually become a memory?

18 THE COURT: Hold on just a moment.

19 MR. TOOKER: Judge, I'm going to object to this
20 line of questioning. I think this is in essence the kind
21 of questioning that would be appropriate with an expert
22 witness. This lay witness just laid the foundation for the
23 video to describe her interview. So absent her
24 qualification as an expert, I'm not sure it's appropriate
25 to ask her hypothetical questions.

1 THE COURT: Yes, sir.

2 MR. SUMNER: Your Honor, I will say this. I was
3 very tailored with my question. That is does she have
4 familiarity with a professional concept of what I
5 described? And the solicitor went through her
6 qualifications to proffer this interview to this jury, and
7 I think it's a fair question. I mean, I was very tailored
8 with it. I'm not saying that -- I've not used the term of
9 expert in the field or anything. I just asked her, are you
10 professionally familiar with that concept?

11 THE COURT: I don't know how she answers that
12 unless she's an expert witness.

13 MR. SUMNER: I'll move forward, Your Honor.

14 Q. Now, Ms. Carlberg, it's come before the jury this
15 afternoon that you are a forensic interviewer; is that
16 correct?

17 A. Yes, sir.

18 Q. And if you would, tell us about the education that
19 you possess as you come here today and testify?

20 A. I have a bachelor's of science in rehabilitation
21 services education with a minor in psychology. And I have
22 a master's of arts and marriage in family therapy.

23 Q. All right. Let's talk about your training. We
24 talked about your education. What type training have you
25 had when you come into Court today regarding the interview

1 that took place between yourself and this child?

2 A. I've been interviewed at CornerHouse, which is a
3 nationally recognized facility for forensic interviewing.
4 It's in Minneapolis. It's a week-long course.

5 Q. Forty hours?

6 A. Forty hours.

7 Q. Pretty intense course?

8 A. Very intense, yes. And I've also been through ---

9 Q. I'm sorry. When did you -- I didn't mean to
10 interrupt you. I apologize. When did you complete the
11 CornerHouse program?

12 A. That was in ---

13 Q. Just roughly?

14 A. --- September 2000.

15 Q. I interrupted you, and I apologize. So you've gone
16 through the CornerHouse program. And tell us what else
17 you've done?

18 A. I've done two other forty-hour long week courses,
19 which was called Finding Words. It's now called Child
20 First. And I did that in Mississippi and in South
21 Carolina. And I've also attended many other conferences
22 that usually run like three days or a day or so ---

23 Q. Sure, sure.

24 A. --- regarding forensic interviewing.

25 Q. And that's a part of your resume. And I mean, would

1 it be fair to say that you've attended thirty or forty of
2 these type two-to-three days conferences in addition to the
3 three four-week conferences that you told the jury about?

4 A. Probably around there, yeah.

5 Q. Sure. Okay. Now, you mentioned for the jury that
6 the RATAC -- I want to make sure I'm saying that right,
7 R-A-T-A-C -- method of interviewing a child is important.
8 Do you feel that way?

9 A. It's important?

10 Q. Yes? Or it's important that that method be used when
11 you're interviewing a child?

12 A. Yes. And we're no longer using that protocol as of
13 earlier this year. But at that time we were using that
14 protocol.

15 Q. Okay. And you had been trained in that protocol?

16 A. Yes, sir.

17 Q. And I'm not going to go back through that again;
18 okay? Why is a -- do you feel like a forensic interview --
19 we're going to use that term; that's a term that's been
20 used today with the jury -- why is a forensic interview in
21 a case like this important?

22 A. Well, I think for many reasons. One, it's done in a
23 child-friendly setting. They don't have to be interviewed
24 at a hospital or the police station. It's a child-friendly
25 setting. It's done by interviewers who are trained to talk

1 with children. Like I said, we ask non-leading, non-
2 suggestive questions. It's also preserved, so you can see
3 how -- not only how she asked the questions but how I -- or
4 answers the questions but how I asked the questions.

5 Q. Did you get a chance to finish your answer?

6 A. Yes, sir.

7 Q. Okay. Just off the top of your head you just peeled
8 off four or five critical parts that you feel like of a
9 forensic interview?

10 A. Yes, sir.

11 Q. And I guess clearly why they're so important in a
12 case like this?

13 A. Yes, sir.

14 Q. Now, let's talk about this interview for just a
15 moment. I believe you testified to the jury that her
16 parents brought her into you; is that right?

17 A. Yes, sir.

18 Q. But now I noticed in the interview that they were not
19 in the room?

20 A. Yes, sir.

21 Q. Was that by design?

22 A. Yes, sir.

23 Q. Okay. Is that significant?

24 A. It is significant. We don't allow parents to either
25 be in the same room with the child or even observe the

1 interview. That's for many reasons. Also sometimes the
2 alleged perpetrator is a parent.

3 Q. Is it fair to say, without going into -- there are
4 numerous reasons why parents would not be a part of the
5 interview?

6 A. Yes, sir.

7 Q. And I guess you would agree with me that having
8 parents present in an interview such as this would be
9 highly unfavorable to the patient?

10 A. Yes, sir.

11 Q. It would break protocol?

12 A. Yes, sir.

13 Q. And protocol and following the protocol is important
14 in a case like this?

15 A. Yes, sir.

16 Q. Now, you've also mentioned the use of open-ended
17 questions; is that right?

18 A. Yes, sir.

19 Q. That's important, as well, or part of the protocol?

20 A. Yes, sir.

21 Q. That would be taking the story where -- I guess where
22 the child takes the story and not suggesting answers to the
23 questions?

24 A. Yes, sir.

25 Q. Letting the child be the one that supplies the

1 information?

2 A. Yes, sir.

3 Q. You interviewed this child what day? Would you check
4 your file?

5 MR. SUMNER: And I'm almost done, Judge.

6 THE COURT: Take your time.

7 MR. SUMNER: We're going to get out of here in a
8 minute.

9 THE COURT: I'm not planning on driving home
10 tonight.

11 A. I interviewed her February 1, 2012.

12 Q. February 1 of 2012. And this investigation began --
13 it may not be noted in your file -- on or about January 1
14 of that year; correct?

15 A. I think it was New Year's Day that she made the first
16 disclosure.

17 MR. SUMNER: Your Honor, I don't have any other
18 questions of this witness. Thank you.

19 THE COURT: Thank you. Redirect?

20 MR. TOOKER: Nothing on redirect, sir. I just
21 ask that she be permitted to step down and she be excused
22 from her subpoena.

23 MR. SUMNER: I'm fine with that.

24 THE COURT: Thank you, ma'am. You're free to go.

25 Is this a good stopping point?

1 MR. TOOKER: Yes, sir.

2 THE COURT: All right. Ladies and gentlemen,
3 we're going to break for the day. I need you back in the
4 jury room, please, at nine thirty in the morning. I don't
5 know if anybody said this to you before, so please forgive
6 me if I'm redundant. If you have some true emergency that
7 prevents you from being here, please have somebody call the
8 clerk's office and let us know what's going on, because I
9 can't do anything until I account for everybody. So if
10 you're not here at nine thirty-five I'm going to send
11 somebody looking for you. So make sure you let us know if
12 something's going on; all right?

13 And remember all those admonitions. I hope you have a
14 very pleasant evening, and I look to see you in the morning
15 at nine thirty.

16 Do they know where to report?

17 THE CLERK: Yes, sir.

18 THE COURT: All right. Thank you.

19 (WHEREUPON, the jury exited the open Court at
20 approximately 5:13 p.m.)

21 THE COURT: Mr. Cone out on bail?

22 MR. SUMNER: Yes, sir.

23 THE COURT: Do y'all want to be heard on that?

24 MR. TOOKER: May I proceed?

25 THE COURT: Yes.

1 MR. TOOKER: Thank you, sir. The State is of
2 some concern that looking at charges as serious as these
3 charges and as much time as Mr. Cone is looking at, that
4 that might be some sort of inducement or incentive to flee.
5 Now, the State would acknowledge he showed up when he was
6 bond carded and he showed up for his court date today. But
7 nevertheless now that the trial has started, he has no
8 bond, is not having to satisfied by his appearance today,
9 with the jury being sworn, the State would request that he
10 be taken into custody for the duration of the trial.

11 THE COURT: Does he have any record?

12 MR. SUMNER: Yes, sir. Mainly driving offenses.
13 Not offenses of this type, but it's driving offenses.

14 MR. TOOKER: Yes, sir.

15 THE COURT: Has he ever skipped Court before?

16 MR. TOOKER: There are no failure to appears, no,
17 sir.

18 THE COURT: All right. Mr. Cone, I'm going to
19 let you stay out on your own tonight. But I have to tell
20 you some things, and I want your responses under oath.
21 Would you please stand and raise your right hand for me.

22 Do you swear or affirm the statements you make be the
23 truth, whole truth, nothing but the truth, so help you God?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: All right. You can have a seat, but

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1 I need to ask you some things.

2 THE DEFENDANT: All right.

3 THE COURT: All right. Mr. Cone, you understand
4 the trial has started and the jury has been sworn?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: And that concept you hear about
7 double jeopardy? Jeopardy attaches when that jury gets
8 sworn. So the jury has been sworn and jeopardy is attached
9 in your trial. That means I'm going to continue with your
10 trial whether you're here or not. Do you understand?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: If you're not here the trial will
13 continue; I'll issue a bench warrant for your arrest. If
14 they find you, they'll bring you back into Court. If they
15 don't find you, we're going to keep going. And if you were
16 to be convicted then I would seal your sentence. Whenever
17 you were picked up on the bench warrant, you would be
18 brought before a judge and your sentence would be read to
19 you. Do you understand the process?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Okay. Now, you make absolutely
22 certain that you're here tomorrow no later than nine
23 thirty. If your lawyer wants you here sooner, you be here
24 whenever he says as long as it's sooner; okay?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: I don't know the conditions of your
2 bond; I don't know any of these folks in this trial, on
3 either side, which is the way it's supposed to be
4 basically.

5 You need me?

6 MR. SUMNER: I'm sorry. I just want to say there
7 was a condition I recall about no contact with the victim's
8 family. So that would need to certainly be ---

9 THE COURT: Well, that's what I'm about to
10 reinforce?

11 MR. SUMNER: I'm sorry. I apologize.

12 THE COURT: No, no, I assumed it was because it
13 normally is. Make absolutely certain that neither you nor
14 anybody on your behalf has any contact with anybody on the
15 other side; all right?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: Your lawyer has probably explained
18 this to you, but if somebody were to, on your behalf or you
19 yourself were to try to contact somebody who may be a
20 witness in this case, you can be charged with a separate
21 crime for that.

22 All right. Now, if you have some true emergency that
23 arises that prevents you from being here on time, you let
24 us know. I'm not promising you I'll wait on you, but you
25 make sure you let us know if something -- some true

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1 emergency comes up; all right?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Now, unless I say different, I'm
4 going to let you stay out during the trial. But I reassess
5 it every -- as we go along in every case. So if I don's
6 say any more about taking you into custody, you make
7 absolutely certain you're here at the time I designate
8 every single time; all right?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: All right.

11 MR. SUMNER: Thank you, Your Honor.

12 THE COURT: Court's in recess until nine thirty
13 in the morning.

14 MR. TOOKER: Thank you, sir.

15 (WHEREUPON, the Court stood at recess for the day at
16 approximately 5:30 p.m.)

17 **NOVEMBER 18, 2014**

18 (WHEREUPON, Court reconvened at approximately 9:39
19 a.m. with all parties present and the following
20 proceedings were had.)

21 (WHEREUPON, State Exhibit Number 3 was marked for
22 identification.)

23 THE COURT: I've received a note from a juror,
24 Nikki Bryson, number 79, which reads that she realized she
25 knows the victim's mom when she saw her. My law clerk

1 shared this note with the attorneys. My understanding is
2 you all agreed to substitute an alternate; is that right?

3 MR. TOOKER: Yes, sir, Your Honor.

4 MR. SUMNER: Yes, sir.

5 THE COURT: You have two alternates? Well, my
6 understanding of the procedure when you have two alternates
7 in criminal cases is that you draw them randomly.

8 MR. TOOKER: That's the State's understanding, as
9 well.

10 MR. SUMNER: That's fine.

11 THE COURT: You had two alternates, juror number
12 13, Melissa Barker and juror number 123, Shirley Roberts.
13 I've written the numbers 123 and 13 on two separate slips
14 of paper. I'm going to jumble them around; put them around
15 my back and jumble them around. Madam Clerk, pick one.
16 Read it out, please. It's just going to be a number.

17 THE CLERK: Number 123.

18 THE COURT: All right. 123, Ms. Roberts, will be
19 the -- so everybody can see 13 on the other piece of paper.
20 Bring Nikki Bryson in, please.

21 THE BAILIFF: Sir?

22 THE COURT: Bring Nikki Bryson in.

23 (WHEREUPON, Ms. Bryson entered the open Court.)

24 THE COURT: Just have a seat in any chair,
25 please, ma'am.

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1 THE JUROR: Okay.

2 THE COURT: Ms. Bryson, I got your note. I
3 shared it with the attorneys and they just agreed in an
4 abundance of caution we'll set you aside on this trial.
5 Did you get the instructions about calling in?

6 THE JUROR: Uh-huh (affirmative).

7 THE COURT: Do that tonight after six and follow
8 the instructions.

9 THE JUROR: Okay.

10 THE COURT: I don't know if they're going to turn
11 the jury loose or if they're going to bring them back in.

12 THE JUROR: Okay.

13 THE COURT: But if you'll do that for me, I'd
14 appreciate it.

15 THE JUROR: All right.

16 THE COURT: You're free to go.

17 THE JUROR: All right. Thank you.

18 THE COURT: Thank you.

19 Madam Clerk, would you give this to the court
20 reporter?

21 (WHEREUPON, Court Exhibit Number 2 was marked for
22 identification.)

23 THE COURT: My law clerk also indicated that
24 there may be some issues that you need to put on the record
25 before we bring the jury in?

1 MR. TOOKER: Yes, sir, Your Honor.

2 THE COURT: All right. What are they?

3 MR. TOOKER: With regards to the direct and cross
4 examination of the victim's mother, Casey Miller, the State
5 was going to go into the prior sexual history that she has
6 with the Defendant, Mr. Cone, and the sex acts that
7 occurred in their residence before these allegations arose.

8 The State thinks from the Defense perspective that is
9 relevant inasmuch as it could go to how the victim would
10 have been made aware of those type of sex acts if that's
11 the Defense. And so the State wants to bring it out on the
12 front end to lessen the sting, in effect.

13 The second thing, the State's first witness this
14 morning is going to be Ms. Linda Hutton. She is a
15 therapist who has dealt extensively with the victim. We're
16 going to seek to qualify her as an expert in counseling.
17 And she rendered an opinion in this case, diagnosing the
18 victim with post traumatic stress disorder. That being the
19 case, Mr. Sumner has indicated that it might be best if we
20 proffer her testimony in-camera so Your Honor can decide as
21 to whether or not her qualifications pass the standards
22 outlined in the case law.

23 THE COURT: Mr. Sumner?

24 MR. SUMNER: I just thought, you know, just in
25 terms of I guess a brief examination of her to see if

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1 you're going to recognize her as an expert, I thought we
2 could do that just before they come in. That way ...

3 THE COURT: All right. Call the witness.

4 MR. TOOKER: Thank you, Your Honor. State calls
5 Linda Hutton to the stand.

6 THE COURT: Come around, please, ma'am.

7 THE CLERK: Place your left hand on the bible and
8 raise your right hand. Do you solemnly swear or affirm
9 that the testimony you're about to give is the truth, the
10 whole truth and nothing but the truth so help you God?

11 THE WITNESS: I do.

12 THE CLERK: Have a seat and state your name for
13 the record, please.

14 THE WITNESS: My name is Linda Gray Hutton.

15 **IN-CAMERA TESTIMONY**

16 **LINDA GRAY HUTTON,**

17 **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

18 **DIRECT EXAMINATION**

19 **BY MR. TOOKER:**

20 Q. Ms. Hutton, ma'am, what do you do for a living?

21 A. I'm a clinical social worker.

22 Q. And how long have you been a clinical social worker?

23 A. A little over forty years.

24 Q. What is your background and training in that field?

25 A. Bachelor of arts from the University of Florida, a

1 major in psychology, graduated with honors in 1972. Master
2 of social work from Florida State University. As a part of
3 that training I completed two internships in the department
4 of child psychiatry at the University of Florida Shands
5 Teaching Hospital; graduated in 1974.

6 Q. Okay. After you graduated with your MSW, what did
7 you do for employment?

8 A. For approximately fourteen years I worked at the
9 Greenville Mental Health Center on Child and Adolescent
10 Services. And then I was transitioning into private
11 practice, so I worked part-time at Patrick Harris Hospital
12 for about a year and a half. There I did -- developed
13 patient education programs and also supervised -- provided
14 clinical supervision to some of the staff on the child
15 adolescent unit. And at the same time I was in private
16 practice part-time. And then for the last twenty-six years
17 or twenty-five, yeah, I've been in private practice full
18 time.

19 Q. Okay. Do you have any licensure?

20 A. Yes. I've licensed as an independent social worker
21 clinical practice in South Carolina.

22 Q. Have you been so licensed for sometime?

23 A. Since licensure came about. My license number is
24 ninety-six and they're up in the four thousands now.

25 Q. Okay. And do you do any continuing education?

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1 A. I do. As part of keeping licensure you do twenty
2 hours a year.

3 Q. Okay. What does your practice consist of primarily
4 now?

5 A. I work primarily with families where the concern is
6 with a child. It can be a number of issues. I will do
7 work with individual -- with adults individually if I'm
8 competent in that area.

9 Q. Okay. And did you do any kind of work with anyone in
10 this case?

11 A. Yes, with [Victim].

12 Q. Okay. How often did you meet with [Victim]?

13 A. I saw her -- I saw the family on twenty-three
14 sessions total over a period from April 19, 2012 through
15 November 11, 2013. And just recently I saw her twice; once
16 in October and then another time in November just prior to
17 Court, helping her feel comfortable with Court and talking
18 about what that process is.

19 Q. Okay. And what was the purpose of the majority of
20 those counseling sessions?

21 A. Well, she was referred to me by the Julie Valentine
22 Center. The presenting problem was sexual abuse.

23 Q. Okay. And what was your role to be with the
24 counseling of [Victim]?

25 A. My role?

1 Q. Uh-huh (affirmative).

2 A. Therapist to help her deal with what had happened.

3 Q. Okay. Did you render any diagnosis in this case?

4 A. Yes, sir.

5 Q. Okay. What kind of path or what methodology did you
6 rely on in rendering that diagnosis?

7 A. At the time that I saw her, I was involved in a
8 project called Project Best, which was run out of Medical
9 University of South Carolina. And that would be the
10 Medical University of South Carolina and National Crime
11 Victim Center. And the purpose of this project was to
12 bring -- to make trauma focused cognitive behavior therapy
13 as available as possible to all children in South Carolina
14 who would benefit from that treatment. This was an
15 endeavor funded by the Duke Endowment over a ten-year
16 period. And again, the modality was trauma focused
17 cognitive behavior therapy which has been -- it's evidence
18 based. It's the top model, if not one of the top.

19 Q. Okay. So is this a methodology relied on in your
20 field?

21 A. Yes. I mean, that was methodology used in the
22 treatment.

23 Q. Okay. And what is the methodology designed to
24 diagnose?

25 A. Well, in my diagnosis of her, one of the things --

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1 one of the instruments we used in the project to screen out
2 and rule out post traumatic stress disorder was the UCLA
3 PTSD Index for DSM-4. And typically if I was outside of
4 this project I would usually do an assessment -- diagnostic
5 assessment by interview and then a status exam. The
6 protocol in this project, which was a year-long project,
7 was to use this instrument.

8 Q. Okay. And did you use the instrument in this case?

9 A. I did.

10 Q. Okay. Who else was using the instrument at that
11 point in time?

12 A. Everyone who was in the project, plus this is out of
13 UCLA California, Los Angeles, so it's used, I would
14 imagine, pretty widely through the country.

15 Q. Okay. And who designed that particular project or
16 that methodology?

17 A. People at USLA.

18 Q. Doctors?

19 A. I would assume so. People who knew what they were
20 doing.

21 Q. And your analysis, you said, usually is based on the
22 DSM?

23 A. The DSM stands for diagnostic and statistical manual.
24 And what it does is it sets criteria for all psychiatric
25 diagnoses. And so you know there's criteria that has to be

1 met for someone to be diagnosed with an anxiety disorder,
2 PTSC or depression, or just memory actions. And the reason
3 for that is there needs to be uniformity across the board.
4 So professionals can talk to each other that when somebody
5 says PTSD, you know what they're talking about; you know
6 what the symptom clusters are.

7 Q. Okay. And the worksheet or the methodology you used
8 in diagnosing [Victim], is it based on that DSM
9 criteria?

10 A. It's based on the DSM-4 criteria, a revised edition
11 of the DSM-4 since then. A new edition of the DSM has come
12 out; it's DSM-5. But the treatment -- the diagnosis was
13 made when the DSM-4 was the one we used and treatment was
14 within that time.

15 Q. Okay. And so you made a diagnosis in this case?

16 A. Yes, sir.

17 Q. What was your diagnosis?

18 A. Post traumatic stress disorder.

19 Q. Okay. And what was your treatment plan for [Victim]?

20 A. It was doing trauma focused cognitive behavior
21 therapy.

22 Q. What does that mean?

23 A. That's a methodology of treatment. When people have
24 been traumatized, the normal reaction is to push it away
25 because it's uncomfortable. You try not to think about it,

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1 try to avoid it and all that. And the simplified view of
2 treatment is that what you do is you help the person
3 gradually by gradual exposure to come to terms and be able
4 to talk about what happened, to be able to process that,
5 process the feelings and the thoughts. So that in the end
6 that what happened to them does not become the sexual
7 organizing feature in their life. But that it's something
8 that happened to them that shouldn't have happened to them
9 and they can move on without carrying the trauma with them.

10 Q. Okay. Did you note any kind of behavioral issues
11 with **Victim** before she came there?

12 A. You know, on the assessment it hits at behavioral
13 issues on this UCLA.

14 Q. Okay. And is that what the treatment was designed to
15 deal with?

16 A. Right.

17 Q. Okay. All right. And did you rely on any kind of
18 underlying facts or data in rendering your opinion in this
19 case?

20 A. The diagnosis was made on the basis of interviewing
21 **Victim** based on this form.

22 Q. All right.

23 MR. SUMNER: I couldn't hear that last --
24 interview **Victim** and what?

25 A. Based on the UCLA PTSD index.

1 MR. SUMNER: Okay.

2 A. We went through that.

3 MR. TOOKER: No further questions at this time.

4 THE COURT: Cross?

5 MR. SUMNER: Yes, sir.

6 **CROSS-EXAMINATION**

7 **BY MR. SUMNER:**

8 Q. Ms. Hutton, have you been qualified as an expert
9 before?

10 A. Yes, sir.

11 Q. How many times? Roughly? I'm not asking for
12 particulars?

13 A. In Family Court probably thirty-five to a hundred
14 times; in Criminal Court maybe ten to fifteen.

15 Q. And in the Courts in this state?

16 A. Yes, sir. All in this state.

17 Q. Okay. I want to follow up a little bit on the best
18 project. That was a one-year, I guess, collaborative
19 effort in South Carolina using the UCLA model that you
20 referenced to Judge Keesley earlier?

21 A. No, sir. The model is trauma focused cognitive
22 behavioral therapy. The PTSD index is just a worksheet for
23 diagnostic purposes. So it's not the treatment itself.

24 Q. Okay. But was -- let me ask you this. How was the
25 UCLA method that -- or the UCLA role in your diagnosis of

1 **Victim** different than what you would have done under the old
2 DSM-4, I guess?

3 A. What I would do -- this was part of the project.
4 What I would do would be essentially the same thing that
5 you're trying to do on the UCLA, but I would have done it
6 in interview, doing a mental status exam and just asking
7 questions and then making an assessment based on the
8 information and judgment about diagnosis, whether it met
9 the diagnostic criteria.

10 Q. Okay. So in other words, under the DSM model that
11 you just testified about, there would have been more
12 interaction between yourself and **Victim**?

13 A. DSM is a reference book about that thick and it's a
14 reference book that lists all the mental disorders, and it
15 gives a diagnosis in that it tells you what criteria have
16 to be met in order to diagnose that. So it's a reference
17 book used by all clinicians.

18 Q. I'm somewhat familiar with it. But I guess what I'm
19 trying to do is figure out what -- when you testified
20 earlier you mentioned it was project best, I believe, B-E-
21 S-T?

22 A. Right.

23 Q. And it involved a UCLA produced document, University
24 of California Los Angeles, PTSD index; is that correct?

25 A. That was used in the diagnostic phase, yes.

1 Q. Okay. And I'm just trying to figure out what -- is
2 that still used today? Is the UCLA still a part of your
3 methodology today or was that a one-year experiment that
4 was retracted?

5 A. The training program that I was in was one year.

6 Q. Okay.

7 A. And I took it with about thirty-five or forty
8 therapists from around the upstate. The UCLA instrument is
9 used nationally. And so you choose whether to use it or
10 not. Sometimes I use it. Most of the time I just do my
11 interview.

12 Q. Okay. And as I come to a close, the solicitor asked
13 you what was the basis of your diagnosis. And my notes
14 reflect that you have it as interviewing **Victim** and using
15 the UCLA PTSD index; would that be correct?

16 A. It was mostly using the UCLA PTSD index; yes.

17 Q. Okay. Now, you're helping me get to the questions
18 that I'm trying to ask. It would have been -- the majority
19 of your diagnosis would have been use of the UCLA
20 materials. And then a secondary source would have been
21 actually interviewing **Victim**?

22 A. Yes, but I didn't -- yes. But I didn't ask her all
23 the PTSD rule-in/rule-out questions because actually what
24 this does is I think it's putting in writing, asking her
25 the questions that are similar to the ones you typically

1 ask just on interview. It's just the standardized way of
2 doing it. And I think they were using this because there
3 was a lot of research coming out of this project, too.

4 Q. You mentioned earlier, I believe, and you can feel
5 free to look at your file, look at your notes, that the
6 family was involved in twenty-three sessions, I believe?

7 A. Well, yes, sir, not all of them were involved in
8 every single session. Mostly **Victim**. A lot of times it was
9 **Victim** and her mom. And dad would come some. The treatment
10 approach trauma focused cognitive behavior therapy we
11 involve the family or involve the parents to help them deal
12 with the issues related to whatever the trauma is and help
13 them contribute to the healing of their child.

14 Q. So her father did participate some?

15 A. He did.

16 Q. And her mother participated more?

17 A. Yes, sir.

18 Q. Okay. You also -- that ended in November of 2013?

19 And please, feel free.

20 A. Hold on.

21 Q. Yes, of course. That's not a trick question.

22 A. I appreciate that.

23 Q. Sure. I'm not sure I can ask those anyway.

24 A. Yes, sir.

25 Q. Okay. So my notes reflect that you started this

1 process with Victim and her family in April of 2012 and
2 ended in November of 2013?

3 A. Yes, sir.

4 Q. And you did meet with her twice in the last, I don't
5 know, four to six weeks?

6 A. Yes, sir.

7 Q. Preparing her for Court?

8 A. Familiarizing her, yes, sir. It would not be telling
9 her what to say, but just, you know, she's a witness.

10 Q. Well, what did y'all talk about?

11 A. Well, it turned out that she was ---

12 Q. I'm talking about in the Court preparations.

13 A. Yeah, she had -- it became very obvious to me very
14 quickly that she had -- they had worked with her on that at
15 the solicitor's office and so it was just really review.
16 What I tell kids, they feel like they're on trial a lot and
17 I tell them that it's the State of South Carolina versus
18 the perpetrator; that they're not on trial. That their job
19 is to tell the truth. If they don't know the answers, so I
20 don't know. If they don't understand, say I don't
21 understand. But they're there to just give information
22 because the Judge wants to hear from everybody who knows
23 something about what happened. The other thing I do with
24 the family is typically what will happen for everybody, the
25 child and the adults, is that their anxiety will increase

1 as the trial time comes closer. So if we can have
2 something after trial that they can look forward to, that
3 helps the kids. And so I ask the family to come up with
4 something after court's over that they could do, you know,
5 that's child centered; might be going to Frankie's Fun Park
6 or something like that.

7 Q. Some type of reward or something to look forward to?

8 A. Look forward to; not a reward. But ---

9 Q. That wasn't a code word. Something to look forward
10 to?

11 A. Yeah.

12 Q. Okay. How long would you estimate, roughly, that you
13 met with her when you combined those two sessions in
14 October and November of this year?

15 A. The second session, I think was short. Altogether,
16 with her over an hour.

17 Q. Did you meet with her family also?

18 A. With mom. And also with her catching up.

19 Q. Thank you.

20 THE COURT: Redirect?

21 MR. TOOKER: No, sir.

22 THE COURT: Thank you. You may step down.

23 MR. SUMNER: Your Honor, may it please the Court?

24 I believe her -- I know she's been proffered as an expert
25 witness. I'm not going to make any argument on that. I'll

1 leave that to your discretion.

2 But I would ask that if she's asked about court
3 preparation that she not reference other children that
4 she's met with. I'd like to just keep the comments to this
5 case and what her work was with this particular **Victim**
6 **Victim** and her family. That would be the one thing I would
7 request, that she not talk about how she talks to other
8 people. Thank you.

9 THE COURT: All right. Solicitor?

10 MR. TOOKER: With regards to her testimony as an
11 expert, I believe what she would be testifying to is beyond
12 the scope of what, you know, an average juror would know
13 and being able to diagnose someone that's suffering from
14 post traumatic stress disorder. I think she's got the
15 requisite knowledge and skill based on both her education,
16 training, experience and professional experience, as well
17 as, you know, Mr. Sumner asked that her having been
18 qualified as an expert on numerous occasions before, and
19 that the substance of her examination is reliable. She
20 testified it's based on the DSM; the DSM is what they use
21 in her field for these kinds of diagnoses; that the
22 worksheet that she used in this case was based on the DSM
23 criteria and that she applied it based on how she knew it
24 to work.

25 And so I think because of those reasons she should be

1 permitted to testify -- to be qualified as an expert and
2 then to testify as to her conclusions regarding Victim
3 mental state.

4 THE COURT: What is she going to say about the
5 child's mental status?

6 MR. TOOKER: That the child was suffering from
7 post traumatic stress disorder, or diagnosed with post
8 traumatic stress disorder. That's the ultimate conclusion
9 the State wants to elicit with this witness's testimony.

10 THE COURT: Tell the jury it's going to be
11 another fifteen minutes or so.

12 THE BAILIFF: I'll tell them right now.

13 THE COURT: Do you have anything else, Mr.
14 Sumner?

15 MR. SUMNER: I didn't hear any testimony -- I
16 didn't hear much testimony about really the source of it.
17 She didn't talk about what all went into her analysis. I
18 didn't hear -- I don't believe that it meets the
19 evidentiary foundation from that perspective. And I would
20 ask that she not be allowed to offer the opinion that's
21 been proffered for those reasons. Thank you.

22 THE COURT: Do you have anything else, Solicitor?

23 MR. TOOKER: No, sir, Your Honor, except for my
24 articulation.

25 THE COURT: Bear with me a minute.

1 MR. TOOKER: Your Honor, I know I just said I
2 didn't have anything, but I've got one case I'd like to
3 cite for the Court's benefit.

4 THE COURT: All right.

5 MR. TOOKER: That is the case of Brown v.
6 Carolina Emergency Physicians, PA, 348 SC 569; parallel
7 citation is 560 SE 2d 624. That's a South Carolina Court
8 of Appeals decision from 2001. And in that case the South
9 Carolina Court of Appeals concluded that it was reversible
10 error -- and this is in a civil action -- but on summary
11 judgment motion for the Court to refrain from qualifying an
12 expert -- or as an expert a psychologist testifying to the
13 areas of diagnosis and treatment of mental illness inasmuch
14 as in that case there was a malpractice claim alleging that
15 doctor's negligent failure to adequately treat and/or
16 failure to hospitalize the patient for psychiatric problems
17 resulting in the patient beating her child to death. So in
18 that decision the Court of Appeals said the exclusion of
19 that testimony was a reversible error.

20 And in this case I think we have similar circumstances
21 inasmuch as the testimony would be to the diagnosis and
22 treatment of this person, this young person, by someone who
23 does this for a living as was testified to itself. For
24 those reasons, again, the State believes that this is
25 something in the expert's wheelhouse and should be allowed,

1 sir.

2 THE COURT: Thank you. I have a few questions.
3 Do you anticipate her linking the PTSD diagnosis to sexual
4 trauma?

5 MR. TOOKER: I can elicit that testimony. My
6 concern with doing that is I didn't want to cross the line
7 into bolstering. She can say that the complaint that **Victim**
8 came to her with and **Victim** family came to her with was
9 one of sexual abuse. And that she interviewed her, asked
10 her a series of questions, prepared her diagnostic based on
11 the answers to those questions and then diagnosed her with
12 PTSD. I don't think she can testify that there is a PTSD
13 -- and I may be mistaken, but I don't think I am -- PTSD
14 related to sexual abuse or PTSD related to physical abuse
15 or wartime exposure or any other type of traumatic event.
16 So if the question is relevance, she can lay the foundation
17 that the complaint was sexual abuse and that's why she
18 subjected the victim to these series of questions. But
19 again, my concern with that a little bit was I just didn't
20 want to cross that line into bolstering.

21 THE COURT: All right. My understanding of the
22 standard is that if I determine that the evidence will
23 assist the trier of fact and the expert witness is
24 qualified and that the underlying science is reliable, then
25 I am to admit -- allow the admission of the evidence.

1 However, it is subject to a Rule 403 analysis, as well, as
2 to whether the probative value is outweighed by the
3 prejudicial effect.

4 To determined this prior to the examination which is
5 the reason for this in-camera hearing and evaluate the
6 reliability, the expertise of the witness and the ability
7 of the testimony to assist the trier of fact and there's --
8 the notes I have there's a case, State versus Henry, that a
9 psychotherapist with a specialty in child sexual abuse may
10 be qualified to give an opinion in regard to post traumatic
11 stress disorder resulting from sexual abuse. The expert
12 testimony and the behavioral evidence are admissible to
13 rate trauma evidence in sexual abuse cases where the
14 probative value of the evidence outweighs the prejudicial
15 effect.

16 I guess what I'm concerned about is not so much about
17 the certain levels of this with the witness's
18 qualifications. I have a little lingering concern about
19 this mention to following the form that UCLA developed. I
20 don't know if that's been -- there was one question in
21 cross about whether that's been abandoned or whether it's
22 still pursued and that sort of thing. I really didn't get
23 much of an answer from that line of questioning. It wasn't
24 a line. It was one question.

25 My concern is where this -- what road this is going to

1 take us down because there's been all kinds of mentions
2 about the various traumas the child has undergone. And I
3 don't know -- I've already excluded some of that from the
4 jury's hearing. If she gets on the stand and she says the
5 child has post traumatic stress disorder, then I think that
6 opens the door to go into anything that might have caused
7 that. And am I going to be speculating as a lay person as
8 to whether a certain event in the child's life would have
9 caused that, like the discipline of the father, the DSS
10 investigation into that? I don't even know if they talked
11 about that in any of their discussions. I'm a little bit
12 concerned about -- well, I'm a lot concerned about the 403
13 analysis and I don't know what this opens the door to us
14 going into.

15 So maybe you can help me out.

16 MR. TOOKER: Yes, sir. So with regards to 403,
17 you know, it's whether the prejudicial -- or excuse me --
18 probative value substantially is outweighed by potential
19 prejudicial effect.

20 I think the probative value is significant. In this
21 case we do not have -- and there's a stipulation that has
22 not yet been entered, but there is a stipulation that will
23 be entered that the victim was seen by a medical
24 practitioner, a medical doctor, who examined her for
25 physical injuries and who had her tested for venereal

1 disease, and that she did not suffer any physical injuries
2 related to these allegations. Now, the allegations are not
3 the type that you would necessarily associate with physical
4 injury, and the State feels comfortable arguing that, but
5 that being the case, the State would like to be able to
6 argue that while there aren't necessarily physical
7 injuries, there are emotional injuries.

8 And again, the reason I didn't get into this with the
9 witness on the stand and I wasn't going to in front of the
10 jury, is I was a little concerned that I would look like I
11 was attempting to bolster improperly by going into the
12 allegations that the victim made or what the victim told
13 Ms. Hutton during the course of their meetings that enabled
14 Ms. Hutton to render this conclusion. I can do that. And
15 based on their conversations, **Victim** alleged sexual abuse,
16 she said that she was having, you know, trouble sleeping,
17 nightmares, all these different things, and that she then
18 rendered a diagnosis, Dr. Hutton, or Ms. Hutton rendered a
19 diagnosis of PTSD after having those conversations with
20 **Victim**.

21 So I think it passes 403 scrutiny. This is my
22 perspective, of course.

23 THE COURT: Yes, sir.

24 MR. TOOKER: It's interesting what Your Honor has
25 identified -- we've excluded or Your Honor has excluded

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1 testimony regarding physical punishments that the victim's
2 father inflicted upon the victim in her childhood and
3 whether or not that opens the door for that kind of
4 testimony. I think it very well may. If the diagnosis is
5 PTSD, unless the witness can say affirmatively that it's
6 PTSD as a result of sexual abuse, and I will certainly
7 confer with Ms. Hutton after Your Honor rules, then I think
8 at that point further evidence of traumatic events in the
9 victim's life would be admissible to show the source of
10 that post traumatic stress disorder.

11 I'll be candid, that is something that the State is
12 willing to contend with in this trial for the sake of the
13 admission of that testimony. So were I to have my
14 druthers, and again with regards to 403, I think 403, I
15 think its probative value is substantial. And I can see
16 where there's the potential for prejudice. But I don't
17 think any kind of prejudice is (a) unfair or that that
18 prejudice, you know, substantially outweighs its probative
19 value.

20 And with regards to what that could lead to down the
21 road, the State would just humbly request of Your Honor
22 that it be afforded leeway to strategize and to try its
23 case, you know, the way it thinks it can best do that.

24 THE COURT: You got anything?

25 MR. SUMNER: Briefly. First of all, on the 403,

1 I see it the way you do. You know, when I heard her
2 testimony she did not link this PTSD diagnosis to any
3 specific event at all. And I was listening as closely as I
4 could. I didn't hear it. I didn't hear one thing. I
5 heard I diagnosed her with PTSD. There is no question that
6 you have excluded evidence regarding discipline and other
7 things. I've got to be allowed to get into all that if
8 she's going to be allowed to testify, because she didn't
9 say the source of the PTSD, number one.

10 I think this violates the exact spirit of the Kromah
11 decision. And I may not be saying that name right, but it
12 was a recent decision about forensic interviewing. And the
13 Court -- the spirit of that decision talked about letting
14 people come in as experts, letting people come in and
15 really bolster the child's testimony. She did not link it.
16 She's already testified. She's already -- Ms. Hutton has
17 already been sworn. She did not ever link the PTSD
18 diagnosis to any sexual trauma that I heard whatsoever.
19 She didn't link it to anything. She said I've diagnosed
20 her with PTSD.

21 Well, I would object to the State being able to go
22 back now and I'm not going to say coach her because I
23 respect my colleague and I'm not going to say that, but to
24 -- now to sharpen this up to, oh, it was the sexual trauma.
25 I would strongly object to that. She's already been sworn.

1 I just don't think -- there wasn't a link. That was my
2 initial objection as to why she shouldn't be qualified to
3 give this opinion. She didn't link it to sexual trauma.
4 She said PTSD, and you've already included the testimony,
5 it's already in the file of Ms. Carlberg that the child was
6 disciplined in a manner where she was put under cold water
7 with her clothes on. And that certainly could lead to
8 PTSD.

9 I think this is a mess on this point. She did not
10 link her testimony whatsoever to PTSD. And I would ask
11 that he not speak with her now. I mean, he's speaking to
12 her now. She's under oath. She's sworn. I think we have
13 to go with where it stands right now. It wasn't linked.

14 THE COURT: I'm not going to stop the solicitor
15 from talking to her. The question is -- it's multi-
16 faceted. If she does -- if she has formed an opinion that
17 it is linked to sexual trauma, what other information was
18 she given? What information was she given about the -- you
19 all said this is a small house and there's no doors and
20 that they've been having threesomes in there and carrying
21 on.

22 MR. SUMNER: No question.

23 THE COURT: I don't know. I don't know anything
24 about it.

25 MR. SUMNER: Well, I've got pictures -- I mean,

1 it's not to that part yet. I've got pictures of this house
2 you could that it's very small -- I just want to ask, very
3 small area, very small space. I was not given -- the only
4 thing I was given in discovery was her PTSD worksheet. I
5 wasn't given anything else about where it came from or what
6 was stated to her. So I don't know.

7 THE COURT: I don't know what Ms. Hutton was
8 told. I don't know how you plug that stuff into this form,
9 if you do. That may just come into therapy.

10 You had something else, Solicitor? I'm sorry.

11 MR. TOOKER: I was going to respond to Mr.
12 Sumner's argument, sir.

13 THE COURT: Go ahead.

14 MR. TOOKER: He mentioned -- and the case he's
15 referring to is Cromer, State v. Kromah.

16 THE COURT: Yeah, I've read it two or three times
17 since we got started.

18 MR. TOOKER: And that case was the case -- and
19 again I mentioned this here today -- but we've seen cases
20 with that and Jennings where the Court of Appeals has said
21 very resolutely you can't -- and those are forensic
22 interviewer cases where a forensic interviewer, after
23 interviewing the child says, yes, that child made a
24 compelling disclosure. And the introduction of that
25 testimony, the Court of Appeals, again, has said quite

1 clearly, he's bolstering, and it's improper and it's
2 reversible. And again, that's sort of why I worded where I
3 talked to Ms. Hutton the way I did during direct is because
4 I wanted to avoid crossing that line if Your Honor
5 perceives her testimony to cross that line if she renders
6 an opinion that the PTSC was based on sexual allegations.

7 Now, part of her testimony, and I didn't provide this
8 to Your Honor. But ---

9 Do you want to make this a Court's exhibit so he can
10 refer to it?

11 MR. SUMNER: Yeah, that's fine by me. I don't
12 have any objection to making that a Court exhibit for you,
13 Judge Keesley, to make your decision and ruling on this
14 issue.

15 THE COURT: Mark this as a Court's exhibit.

16 (WHEREUPON, Court Exhibit Number 3 was marked for
17 identification.)

18 MR. TOOKER: Permission to approach?

19 THE COURT: Sure.

20 MR. SUMNER: And just for the record I have that,
21 Your Honor. That was provided to me last week so I've seen
22 it.

23 MR. TOOKER: And Ms. Hutton brought her copy in
24 as well. She indicates that based on the victim's
25 responses to her questions, one of the boxes she checked

1 was -- I believe it's on the second page -- exposed to
2 sexual materials or sexual abuse -- as I've handed up my
3 copy, I can't quote it.

4 THE COURT: What page is it, Solicitor?

5 MR. TOOKER: It's this page with the checks so
6 it's ...

7 THE COURT: Number ten?

8 MR. TOOKER: Number ten, yes, sir.

9 MR. SUMNER: Okay.

10 MR. TOOKER: Having someone much older touch your
11 private sexual -- can I use ---

12 MR. SUMNER: Sure.

13 MR. TOOKER: Number ten is having an adult or
14 someone much older than you touch your private sexual body
15 parts when you did not want them to. And that was checked
16 yes. And this is just one aspect of the multiple questions
17 that were asked when Ms. Hutton filled out this worksheet
18 and rendered her, you know, ultimate conclusion regarding
19 the post traumatic stress disorder. So that being the
20 case, she can provide that link inasmuch as that
21 information informed the victim's score, which informed Ms.
22 Hutton's conclusions regarding post traumatic stress
23 disorder.

24 THE COURT: All right. Number thirteen, other
25 than the situation described above, has anything else ever

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1 happened to you that was really scary, dangerous or
2 violent; yes or no. It's checked no.

3 MR. TOOKER: Yes, sir.

4 THE COURT: I've been told that there is no issue
5 that the father, if he suspected the child of lying, would
6 do various things to the child, including putting her in
7 cold showers ---

8 MR. SUMNER: Fully clothed.

9 THE COURT: Yeah. Now, I can understand that
10 that will be subject to cross-examination, and normally the
11 remedy would be cross-examination. My concern is, going
12 back to what I tried to say earlier, is what road we're
13 going to start going down and whether any of this has been
14 developed; if there's going to be a counter expert that's
15 going to be produced, if she's going to be given -- if Ms.
16 Hutton is going to be given different information now than
17 what she had before. I just don't know any of that from
18 that brief proffer.

19 I've had the jury back there an hour. I'm going to
20 have to make a call one way or the other. If y'all have
21 put everything on the record you want to put, I'm going to
22 make a call.

23 MR. TOOKER: I would like, then, to recall her,
24 Your Honor.

25 THE COURT: Go ahead.

1 MR. TOOKER: The State would recall Linda Hutton
2 to the stand.

3 THE COURT: And by the way, while she's coming
4 up, that case y'all referred to Kromah.

5 MR. TOOKER: Kromah.

6 THE COURT: The problem when it got to the PTSD
7 part, the lawyers had abandoned the argument. So I don't
8 know how much guidance we get from that decision about this
9 particular issue because the Court of Appeals ruled that
10 the argument was abandoned. So they basically stopped
11 considering it.

12 Go ahead, Solicitor.

13 **RECALL TESTIMONY OF LINDA GRAY HUTTON**

14 **DIRECT EXAMINATION**

15 **BY MR. TOOKER:**

16 Q. Ms. Hutton, ---

17 MR. TOOKER: And Your Honor, may I make use of
18 Court's 3?

19 THE COURT: Sure.

20 MR. TOOKER: Thank you, sir.

21 Q. Ms. Hutton, when you interviewed Victim what was your
22 understanding of the underlying trauma?

23 A. You mean what happened?

24 Q. Yeah. What happened to her before that led her into
25 your facility?

1 A. As I said, she was referred by the Julie Valentine
2 Center due to sexual abuse.

3 Q. Sexual abuse?

4 A. So that was the presenting problem when they came in.

5 Q. Okay. And did she, in communications with you
6 regarding your diagnosis and treatment of her, did she
7 disclose sexual abuse to you?

8 A. Yes, sir.

9 Q. Did she disclose sexual abuse from an adult or child
10 or what were the dynamics of that?

11 A. It was sexual abuse from an adult who was a friend of
12 the family and it happened more than one time.

13 Q. Okay. And what kind of things did you consider when
14 you were talking to **Victim** -- and feel free to refer to your
15 worksheet -- that helped you render your conclusion in this
16 case?

17 A. In using the index that I talked about before, the
18 PTSD index, part one, asks, you know, check yes if this
19 scary thing has happened to you. Check no if it has not.
20 And it has a number of different thing; like being in an
21 earthquake, being in disasters and accidents, being in war;
22 being hit, punched or kicked very hard at home, seeing a
23 family member being hit, punched or kicked very hard, being
24 beaten up or shot at or threatened to be hurt badly, seeing
25 someone in your town beat up, shot or killed, seeing a dead

1 body, having an adult or someone much older touch private
2 sexual parts when you did not want them to, hearing about a
3 violent death or serious injury, having painful or scary
4 medical treatments in the hospital. And then the last
5 question, other than situations described above, has
6 anything else ever happened to you that was really scary,
7 dangerous or violent. What these are a list of are
8 potentially traumatic events.

9 Q. Okay.

10 A. And she responded yes to having an adult or someone
11 much older touch your private sexual body parts when you
12 didn't want them to. And then hearing about the violent
13 death or serious injury of a loved one, she checked -- she
14 indicated yes. And when I inquired she said that her
15 brother had an ear injury and was in the hospital for a
16 month.

17 Q. Okay.

18 A. Now, down at the bottom of the page of the same
19 section it says, how long ago did this bad thing happen to
20 you? Please write what happened. And she said it happened
21 from four years old to nine years old. Quote, he would
22 lick my butt, close quotes. He made her, quote, suck
23 something. Happened more than twenty times.

24 Q. Okay. Is that alone enough to diagnose someone with
25 PTSD? Or did you need more information?

1 A. I would need more information. As I said, you know,
2 the part one is really looking at potentially traumatic
3 events.

4 Q. Okay. So after they checked yes or no on that
5 section are there further questions on page three?

6 A. Yes, sir. There's, you know, two more pages. Part
7 two, please check yes or no to answer how you felt during
8 or right after the bad thing happened. And the things she
9 checked yes to were things like were you scared you would
10 die? Yes. Were you scared that you would be hurt badly?
11 Yes. And it says were you hurt badly? No. Were you
12 scared that someone else would die? No. Were you scared
13 that someone else would be hurt badly? Yes. Was someone
14 else hurt badly? No. Did you feel very scared like this
15 was one of the most scary experiences ever? Yes. Did you
16 feel that you could not stop what was happening or that you
17 needed someone to help? Yes. Did you feel that you saw --
18 what you saw was disgusting or gross? Yes. Did you run
19 around or act like you were very upset? No. Did you feel
20 confused? Yes. Did you feel like what was happening did
21 not seem real in some way like it was going on in a movie
22 instead of real life? Yes.

23 Q. Okay. And what was the third part of your analysis?

24 A. The third part of this is asking how much of the time
25 during the past month, and you rate on a scale of zero to

1 four, with zero being none and four being most of the time.
2 And the questions are to watch out for danger or things
3 that I'm afraid of. She indicated a little bit. When
4 something reminds me of what happened, I get very upset,
5 afraid or sad? A little. I have upsetting thoughts,
6 pictures or sounds of what happened come into my mind when
7 I don't want them to? She said that didn't happen. I feel
8 grouchy, angry or mad? Most of the time. I have dreams
9 about what happened or other bad dreams? She said no. I
10 feel like I'm back at the time when the bad thing happened
11 living through it again? No. I feel like staying by
12 myself and not being with my friends? No. I feel alone
13 inside and not close to people? No. I try not to talk
14 about, think about or have feelings about what happened?
15 And that was most of the time. So that was a high score.
16 I have trouble feeling happiness or loved? A little. I
17 have trouble feeling sadness or anger? No, she doesn't
18 have trouble with that. I feel jumpy and startled easily
19 like when I hear a noise or when someone surprises me?
20 Sometimes. I have trouble going to sleep and I wake up
21 often during the night? A little bit. I think that some
22 part of what happened is my fault? A little bit. I have
23 trouble remembering important parts of what happened? A
24 little bit. I have trouble concentrating or paying
25 attention? That's most of the time. I try to stay away

1 from people, places or things that make me remember what
2 happened? Most of the time. When something reminds me of
3 what happened, I have strong feelings in my body like my
4 heart beats fast, my head aches and my stomach aches? A
5 little. I think I'll live a long life -- no, excuse me --
6 I think I will not live a long life? She doesn't feel that
7 way. I'm afraid that the bad thing will happen again? A
8 little.

9 Q. Okay. The next page, that's short mood and feelings
10 questionnaire. How is that relevant for your diagnosis?

11 A. That's something totally separate.

12 Q. That's what?

13 A. That's separate.

14 Q. And then the following page, UCLA PTSD index for DSM-
15 4. Did you use this?

16 A. Yes. What you do is this is where the data is
17 compiled from all these questions. And what you see are
18 the diagnostic criteria. There's four sections to the
19 criteria to meet the diagnosis of PTSD. One, if there's a
20 traumatic event. Second criteria is re-experiencing
21 symptoms. Third criteria is avoidance. Fourth criteria is
22 increased arousal.

23 Q. Okay. And were these symptoms present in her case?

24 A. They were. She met the diagnostic criteria for PTSD.

25 Q. Okay. Based on the information she provided you in

1 your expert conclusions?

2 A. Well, my expert conclusions was following directions
3 on the form.

4 Q. Okay.

5 A. But, you know, when you -- something I need to tell
6 you is that, you know, what this is doing is standardizing
7 I guess you could say for children because -- I'm sure they
8 have one for adults. But it's standardizing how you go
9 about making a diagnosis. Doing it by interview, you know,
10 without this form you're still looking for all these
11 criteria to be met, you know. And you know on each thing
12 the diagnostic manual will say for instance -- it gives a
13 number of -- on the criteria there has to be three symptoms
14 in this category, so many symptoms in this category. And
15 that's just the way the diagnostic manual is.

16 Q. Okay. And having diagnosed her with PTSD, can you
17 say or not say whether or not that PTSD is linked to sexual
18 abuse or not linked to sexual abuse?

19 A. This is geared toward sexual abuse because that was
20 the presenting problem and then that was the bad thing that
21 in part one that she had noted that was most scary that was
22 bothering her the most about having an adult or someone
23 older touch her private sexual parts. And then a lot of
24 the other questions are, you know, how did you feel during
25 and right after that specific thing happened? How did you

1 feel -- section three, please think about the bad thing
2 that happened to you that you wrote about in question
3 fourteen. So that goes back to the sexual abuse. And then
4 these things are all asked within the context of that
5 sexual abuse.

6 Q. Okay.

7 MR. TOOKER: No further questions, Your Honor.

8 MR. SUMNER: Briefly.

9 **CROSS-EXAMINATION**

10 **BY MR. SUMNER:**

11 Q. You just testified for the Court that she was referred
12 for sexual trauma; is that correct?

13 A. That was the presenting -- the presenting problem was
14 sexual abuse.

15 Q. Yes. It was not anything other than that. So you
16 were geared toward sexual abuse when you first saw her?

17 A. Yes, sir.

18 Q. Okay. Is this form -- and I'm just going to call it
19 UCLA PTSD Index for DSM-4. Is this form being used any
20 more? Is it being used by you?

21 A. Not much; no.

22 Q. When did you quit using it?

23 A. I quit using it consistently after the study was
24 over, after the program was over. Because, you know, I do
25 this by interview, too.

1 Q. Why did you quit using it? I mean you testified it
2 was for one year, she was a part of a study and now it's
3 not being used any more?

4 A. I don't use the form, but I'm essentially doing the
5 same assessment. So I'm not doing -- I'm just not using
6 the form. I'm doing the assessment. That's all in here.
7 But not that form.

8 Q. Were you ever told about any discipline -- any type
9 of discipline she underwent at home?

10 A. Nothing significant; no, sir.

11 Q. And she told you on question thirteen, you got the
12 information from her, and I'm on the first page here, Ms.
13 Hutton. Has anything else ever happened to you that was
14 really scary, dangerous or violent? And her answer to you
15 was no?

16 A. Yes, sir.

17 Q. Okay. And you were not told from any other source
18 that there was any potential trauma that she underwent
19 other than the referral for sexual abuse?

20 A. Not that I recall, sir; no.

21 Q. Okay.

22 THE COURT: Anything else of the witness?

23 MR. TOOKER: No, sir.

24 MR. SUMNER: I don't have any other questions.

25 THE COURT: Thank you very much. You may step

1 down.

2 If there's nothing else, we have not adopted the
3 Daubert standard in South Carolina, but we've made moves
4 toward what the Federal Courts do. And Ms. Hutton has the
5 requisite education, training, background and experience in
6 this field. The questions that were asked of her by the
7 State when she came back up I know were to aid the Court,
8 but those were the very things, many of them were the very
9 things that are not admissible before the jury. She can
10 rely on them in forming an opinion, but she can't say those
11 things to the jury. And that whole line of cases that you
12 all have been talking about, the attorneys have been
13 talking about, make that very clear, that we had gone too
14 far -- the pendulum had swung too far the other way. And
15 basically had folks coming in saying the child is telling
16 the truth. And it was happening all over the state. And
17 how we ever got to that point I don't know, but it was
18 pretty standard practice that interviewers were coming in
19 saying there's compelling evidence of sexual abuse and the
20 child is making a credible statement. And I presided over
21 several of those trials and tried to follow the law as I
22 understood it at the time. The pendulum's come back a
23 little bit. It still has a statute which treats child
24 situations differently.

25 But here's what I'm faced with. Even if I were to

1 find, as I have previously indicated, and do find that she
2 has the requisite training, education and experience. The
3 question then is whether her testimony will assist the
4 trier of fact. And whether the underlying science is
5 reliable. That last one about the underlying science being
6 reliable I'm not sure about because I don't know enough
7 about this UCLA thing. And when I was reading through this
8 and I was listening to Ms. Hutton go through the questions,
9 she pointed it out herself toward the end of her testimony,
10 the thing is you're focusing on the bad thing that you
11 identified. So you identify the bad thing, then you talk
12 about that. And so it almost seems to be a self-fulfilling
13 prophecy that the end result is going to be about the bad
14 thing. If she's not given information about other things
15 going on in the child's life, she could diagnose the child
16 has post traumatic stress disorder. The question then is,
17 does that assist the trier of fact? I do not believe that
18 it does.

19 Moreover, I believe -- and I'm going to pull up Rule
20 403, bear with me a second. I know it but I just want to
21 make sure I've got it in front of me -- even if the
22 evidence is relevant is may be excluded if its probative
23 value is substantially outweighed by the danger of unfair
24 prejudice, confusion of the issues or misleading the jury
25 or by considerations of undue delay, waste of time or

1 needless presentation of cumulative evidence. If this
2 witness testifies that that child has post traumatic stress
3 disorder, that opens the floodgates for everything that's
4 gone on in that child's life and confuses the issues, in my
5 view. If I exclude all of that then I mislead the jury.
6 So I don't think that's a fair trial if I do that. So ever
7 though I think that she is eminently qualified in her
8 field, I don't think it assists the trier of fact in this
9 particular case. So I'm not going to allow her to testify
10 about that.

11 All right. I'm going to give y'all a few minutes.
12 It's been almost an hour. You can regroup. If you need
13 more time let me know. I'm going to tell the jury I'm
14 going to bring them back out here in ten minutes unless I
15 hear differently from y'all.

16 MR. TOOKER: Yes, sir. And just real quick for
17 the record.

18 THE COURT: Yes, sir.

19 MR. TOOKER: I would still intend to call her as
20 a lay witness and just to testify -- to have her testify
21 that she saw the victim on a few occasions; who was with
22 her when she saw her. And then pursuant to, I think it's
23 801(d)(1)(d), time and place regarding allegations of
24 sexual abuse, that hearsay. That rules that says that is
25 not hearsay in the definition.

1 THE COURT: Where is the improper influence or
2 motive or recent fabrication?

3 MR. TOOKER: It's 801(d)(1)(d) consistent with
4 the declarant's testimony in a criminal sexual conduct case
5 or attempted criminal sexual conduct case where the
6 declarant is the alleged victim and the statement is
7 limited to the time and place of the incident.

8 THE COURT: All right. I'll hear y'all.

9 MR. SUMNER: Your Honor, I would just ask that
10 that be proffered because I don't -- I just would ask that
11 that be proffered just because we need to hear whether or
12 not the Court feels like it's admissible under that
13 exception. And I think if the jury heard it and it was
14 ruled not admissible that it would be kind of an
15 irreparable harm.

16 The only thing I heard her say was that she said
17 something from four years old to nine years old. And I
18 don't see how this can come in without opening the door. I
19 mean, I just don't see how it could come in without opening
20 the door to what she wasn't told. You know, I'm trying to
21 respect -- certainly going to respect the Court's rulings.
22 But I don't know how she could testify without it opening
23 the door to who she is, why the declarant was there. And
24 then I'm going to need to be able to ask about things that
25 she wasn't told. And so that would be my position.

1 MR. TOOKER: Well, I'm not sure ---

2 THE COURT: She can testify as long as it's
3 limited to the time and place of the incident. Do you want
4 -- she can testify as long as it's limited to the time and
5 place of the incident.

6 MR. TOOKER: Yes, sir. Doesn't identify
7 perpetrator, doesn't do anything else; just time and place.

8 THE COURT: And I think under the -- not under
9 this rule, which says it's not hearsay, isn't there
10 something like prompt reporting of a sexual assault.

11 MR. SUMNER: I'm sorry?

12 THE COURT: Prompt reporting of a sexual assault.
13 Is that in the statute or something?

14 MR. TOOKER: I'm not familiar with that language,
15 sir. And I can tell you for what it's worth, I try these
16 cases not infrequently and I rely on that exception pretty
17 commonly.

18 MR. SUMNER: Can I ask this question, Judge? How
19 narrow do you think it'll be, Solicitor?

20 MR. TOOKER: When was the abuse said to have
21 occurred? Between ages of four and nine. Where did it
22 occur? The house.

23 MR. SUMNER: Okay. You're talking thirty second?

24 MR. TOOKER: Yeah.

25 MR. SUMNER: I'll leave that up to your ---

1 THE COURT: It's not hearsay under the rules.

2 Whether it's excluded for some other reason is a different
3 issue. I don't know of anything that would exclude it off
4 the top of my head. I'll have to hear the specifics. If
5 you want her on the stand, I'll put her back on the stand.

6 MR. SUMNER: All right. He's -- I feel like he
7 said what she's going to say and, I mean, if it's kept that
8 brief I'm not aware of anything that would keep it out
9 myself.

10 THE COURT: All right. Well, I'm going back a
11 long time. It used to be -- there's something in the law
12 about prompt reporting. It doesn't fall under that. It's
13 not prompt.

14 MR. SUMNER: Yeah, yeah.

15 THE COURT: So it's not hearsay under that rule.

16 All right. Y'all think we can be ready in ten
17 minutes?

18 MR. SUMNER: Yes, sir.

19 MR. TOOKER: Yes, sir.

20 (WHEREUPON, the Court stood at recess for a short
21 break at 10:53 a.m.)

22 THE COURT: State ready for the jury?

23 MR. TOOKER: Yes, sir.

24 THE COURT: Defense?

25 MR. SUMNER: Yes, sir.

1 THE COURT: Bring the jury.

2 (WHEREUPON, the jury entered the open Court at
3 approximately 11:03 a.m.)

4 THE COURT: All right. Ladies and gentlemen, let
5 me offer my apologies to you for waiting that long. When I
6 took the bench at nine thirty, several issues arose and we
7 have worked on those continuously except for the last five
8 minutes where we had to take a break because we had been
9 working for an hour and a half. So you've been waiting for
10 an hour and a half.

11 The first issue that arose related to one of the
12 jurors who made a report as she was supposed to do where
13 she realized some prior connection with one of the people
14 in the case. She didn't realize it before. So everybody
15 was in agreement, and we used one of the alternates of
16 Shirley B. Roberts. Where are you, Mr. Roberts? Would you
17 come up and have that seat right there? You're one of the
18 twelve jurors now. Juror number 123 is substituted.

19 The other issue we've worked through and we're not
20 ready to proceed.

21 So if you would, Solicitor, call your next witness.

22 MR. TOOKER: Yes, sir. State calls Linda Hutton.

23 THE COURT: Come around, please.

24 THE CLERK: Place your left hand on the bible and
25 raise your right hand, please. Do you solemnly swear or

1 affirm the testimony you're about to give is the truth,
2 whole truth and nothing but the truth, so help you God?

3 THE WITNESS: I do.

4 THE CLERK: Have a seat and state your name for
5 the record, please.

6 THE WITNESS: Linda Gray Hutton.

7 **LINDA GRAY HUTTON,**

8 **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

9 **DIRECT EXAMINATION**

10 **BY MR. TOOKER:**

11 Q. Ms. Hutton, what do you do for a living, ma'am?

12 A. I'm a clinical social worker.

13 Q. How long have you been doing that?

14 A. Forty years.

15 Q. Okay. Where did you go to school?

16 A. Bachelor of arts with honors from the University of
17 Florida in 1972. And a study from Florida State in 1974.

18 As part of that training I completed two internships in the
19 Department of Child Psychiatrist at the University of
20 Florida Shands Teaching Hospital.

21 Q. Okay. And you work as a counsel now?

22 A. I'm a therapist, yes.

23 Q. Therapist? And did you provide therapy for **Victim**

24 **Victim** in this case?

25 A. Yes, sir, I did.

1 Q. How many times did you meet with **Victim** ?

2 A. I met with her twenty-three times during the course
3 of treatment and then I met with her more recently within
4 the last month, twice.

5 Q. Okay. Why did you meet with her in the last month?

6 A. Because Court was coming up and just -- my purpose
7 was to orient her to Court. Typically it's not something
8 that children and a lot of adults are used to.

9 Q. Okay. And who would usually come with **Victim** when she
10 would come to talk to you?

11 A. Usually her mom. And then sometimes her dad.

12 Q. Okay. Well, how many times did you say again? I
13 don't remember. How many times?

14 A. Twenty-three.

15 Q. Twenty-three times. Were most of those times the mom
16 or was it about a split?

17 A. Most of the time mom would come with her.

18 Q. And did **Victim** disclose sexual abuse to you?

19 A. Yes, sir. She did.

20 Q. Did she disclose when it happened?

21 A. Yes, sir.

22 Q. What did she say about that?

23 A. Between the ages of four and nine years old.

24 Q. Did she disclose where it happened?

25 A. Yes, sir.

1 Q. Where?

2 A. At her house.

3 Q. Okay. No further questions.

4 THE COURT: Cross?

5 MR. SUMNER: Yes, sir, Your Honor. Thank you.

6 Very briefly.

7 **CROSS-EXAMINATION**

8 **BY MR. SUMNER:**

9 Q. Now, Ms. Hutton, you first saw her in April of -- saw
10 **Victim** in April of 2012; is that right?

11 A. Yes, sir.

12 Q. And you've already testified for the jury that her
13 mother and father came with her as well; is that correct?

14 A. They were involved; mother much more than dad.

15 Q. Okay. But you saw the dad on multiple occasions?

16 A. I saw him a few times.

17 Q. And how much time -- so you saw her from, and her
18 family, from April of 2012 through, I believe, November of
19 '13; is that correct?

20 A. Yes, sir.

21 Q. But then you did see her twice within the last month
22 to prepare her for Court; is that correct?

23 A. To orient her to Court.

24 Q. And would you agree that she had already, I guess,
25 told you that she had already met with the solicitor's

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1 office about coming to Court, as well; hadn't she?

2 A. It became apparent to me that she had, just as I was
3 working with her.

4 Q. No other questions.

5 THE COURT: Redirect?

6 MR. TOOKER: Just one question.

7 **REDIRECT EXAMINATION**

8 **BY MR. TOOKER:**

9 Q. Did you coach her as to what to say?

10 A. No, sir.

11 Q. Okay. No further questions.

12 THE COURT: Recross?

13 MR. SUMNER: No. I'm fine.

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

15 MR. TOOKER: Permission for her to be excused
16 from her subpoena.

17 THE COURT: Any objection?

18 MR. SUMNER: That's fine.

19 THE COURT: You're free to go. Thank you, ma'am.

20 All right. Call your next witness.

21 MR. TOOKER: All right. Thank you, Your Honor.

22 State calls Casey Miller to the stand.

23 THE COURT: Come around, please, ma'am.

24 THE CLERK: Place your left hand on the bible,
25 raise your right hand. Do you solemnly swear or affirm the

1 testimony you're about to give is the truth, whole truth
2 and nothing but the truth, so help you God?

3 THE WITNESS: Yes, ma'am.

4 THE CLERK: Have a seat and state your name for
5 the record, please.

6 THE WITNESS: My name is Casey Miller.

7 **CASEY MILLER,**

8 **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

9 **DIRECT EXAMINATION**

10 **BY MR. TOOKER:**

11 Q. All right. Ms. Miller, what is your relation to the
12 victim in this case, [REDACTED] Victim?

13 A. I'm her mother.

14 Q. You're her mother. What's her birth date?

15 A. [REDACTED], 2002.

16 Q. Do you have any other children?

17 A. I've got two others.

18 Q. What are their names?

19 A. [REDACTED] Minor and [REDACTED] Minor.

20 Q. Okay. How old is [REDACTED] Minor?

21 A. [REDACTED] Minor -- he'll be fourteen tomorrow.

22 Q. What about [REDACTED] Minor; how old is she?

23 A. She is seven.

24 Q. Okay. Do you live at the same residence that you
25 lived at when these things were said to have transpired?

1 A. We do.

2 Q. What is that address?

3 A. [REDACTED] Lane, Easley.

4 Q. Is that in Pickens County, South Carolina?

5 A. Yes, sir.

6 Q. And we're just going to go back. How long have you
7 known the Defendant Cone?

8 A. I would say between six to eight years at the time.

9 Q. At the time. So you mean 2012, between six and eight
10 years?

11 A. Uh-huh (affirmative).

12 Q. Okay. So as of now it's even more than that?

13 A. Yes.

14 Q. How is it that you and your family got to know the
15 Defendant?

16 A. Through racing.

17 Q. What do you mean racing?

18 A. My husband raced, and his family.

19 Q. Race cars?

20 A. Yes, sir.

21 MR. SUMNER: Would you lean up just a little bit?

22 Thank you.

23 Q. We've got to make sure everybody hears real good.

24 Let's put that microphone right in front of you. I know
25 that's awkward. So your husband and the Defendant raced

1 cars together?

2 A. Yes, sir.

3 Q. Was there a friendship there or not?

4 A. Yes.

5 Q. What kind of friendship?

6 A. Almost like brothers.

7 Q. So they were close?

8 A. They were very close.

9 Q. Okay. How much time did the Defendant spend at your
10 house?

11 A. Almost every weekend.

12 Q. Okay. And how long had he been spending almost every
13 weekend at your house?

14 A. Years.

15 Q. Was that six or eight years before this was alleged?

16 A. Yes.

17 Q. Okay. And during that time what is it that he and
18 your husband would do when they hung out?

19 A. They would drink.

20 Q. They would drink?

21 A. They would drink. They had bonfires and go out back.

22 Q. Okay. What kind of stuff would they drink?

23 A. Liquor and beer.

24 Q. Okay. Did they do anything else at the house?

25 A. What are you talking about?

1 Q. Well, was there any sexual activity that was engaged
2 in in the house?

3 A. Yes, sir.

4 Q. Okay. Who were the participants?

5 A. Me, my husband and Justin.

6 Q. Okay. And is that something that would happen on a
7 regular basis?

8 A. Yes, sir.

9 Q. Okay. In terms of -- you said the Defendant was over
10 there just about every weekend. Was it every weekend that
11 that would happen or some?

12 A. No.

13 Q. What percentage of weekends would you say it
14 happened?

15 A. Less than half.

16 Q. Okay. And what kind of sexual acts would you and the
17 Defendant engage in?

18 A. We would, as you referred, sixty-nine position.

19 Q. Okay. And what is that?

20 A. Where you're laying end to end to each of our private
21 parts.

22 Q. And did he do anything particular that you thought
23 was different?

24 A. He would grip my butt and caress it.

25 Q. Okay. And does the Defendant have a long or a short

1 penis?

2 A. Long.

3 Q. And is the Defendant a hairy person or not a hairy
4 person?

5 A. Not very hairy at all.

6 Q. Okay. In this case how is it -- well, I'm going to
7 step back. You did this in your house?

8 A. Yes, sir.

9 Q. Where in your house would these things happen?

10 A. Mostly in our bedroom; in our bedroom on our bed.

11 Q. Okay. What about in the living room?

12 A. Sometimes in there on the floor.

13 Q. I'm going to show you a diagram that's marked as
14 State's 1. Does that seem to be about the way your house
15 is set up?

16 A. Yes, sir.

17 Q. And it's not to scale, but is that a close
18 approximation?

19 A. Pretty close.

20 MR. TOOKER: At this point, Your Honor, the State
21 would move to enter State's 1 into evidence and publish to
22 the jury.

23 THE COURT: Any objection to this?

24 MR. SUMNER: No, sir.

25 THE COURT: Mark it into evidence, please.

1 MR. TOOKER: It's marked.

2 (WHEREUPON, State Exhibit Number 1 was admitted into
3 evidence.)

4 THE COURT: All right. You may show it to the
5 jury.

6 MR. TOOKER: Thank you.

7 (WHEREUPON, State Exhibit Number 1 was published to
8 the jury.)

9 Q. Okay. So on this document ---

10 MR. TOOKER: Do you want it see it?

11 MR. SUMNER: That's fine; yeah.

12 Q. On this document there are several bedrooms; is that
13 correct?

14 A. Correct.

15 Q. And which bedroom was immediately adjacent to the
16 living room? Whose bedroom?

17 A. You mean here?

18 Q. Yeah.

19 A. Right.

20 Q. When we look at the living room whose bedroom is
21 right next to it?

22 A. You've got my son's room.

23 Q. And then what's next to the living room?

24 A. The kitchen.

25 Q. And then whose room is next to that?

1 A. My daughter's, [Victim]

2 Q. And then whose room is next to that?

3 A. Then you've got the bathroom and then ours is at the
4 end.

5 Q. Okay. Were there doors on the bedrooms?

6 A. On my son's, yes. [Victim] yes.

7 Q. On [Victim] and your son's?

8 A. Uh-huh (affirmative).

9 Q. Was there a door on your bedroom?

10 A. No.

11 Q. Was there a door to the living room?

12 A. No.

13 Q. And you said that a lot of these sex acts would occur
14 in your bedroom?

15 A. Correct.

16 Q. Did anyone ever walk in on you performing these sex
17 acts with the Defendant?

18 A. No, sir.

19 Q. Your daughter?

20 A. No.

21 Q. Your son?

22 A. No.

23 Q. Your younger daughter?

24 A. No.

25 Q. You never saw anyone see you do these things?

1 A. No, sir.

2 Q. Okay. Now, you testified that the Defendant and your
3 husband would be drinking. Would you be drinking as well?

4 A. At times.

5 Q. Okay. Despite that fact, are you still confident
6 that no one saw you?

7 A. Very.

8 Q. Okay. How is it that you knew something was wrong in
9 this case?

10 A. I saw my youngest daughter playing with her doll
11 inappropriately, sexually.

12 Q. What do you mean playing with it?

13 A. She was rubbing on their private parts.

14 Q. Okay. And what did you do when you saw this?

15 A. I asked her where she had learned that from.

16 Q. Okay. And what did your daughter indicate to you?

17 A. That her and her sister would do that to each other
18 in her grandparent's back room.

19 Q. Okay. So what did you do as a result of hearing
20 that?

21 A. I went to my daughter Victim and told her there was
22 some things I needed to talk to her, but we were going to
23 wait until after Christmas.

24 Q. Okay. So on what date is it that you go and you find
25 this stuff out initially?

1 A. It was like two days before Christmas.

2 Q. Two days before Christmas. Why would you wait until
3 after Christmas to talk to her about this kind of stuff?

4 A. I just didn't want to ruin Christmas for everybody
5 and have that reminder.

6 Q. Okay. So when did you talk to her?

7 A. January 1st.

8 Q. Where were you when you talked to her?

9 A. Inside our kitchen.

10 Q. And where was your husband?

11 A. Across the street.

12 Q. Who was he with?

13 A. Justin and some other friends.

14 Q. Okay. Justin being the Defendant, Justin Cone?

15 A. Correct.

16 Q. And the name Justin Cone has come up a lot. Do you
17 see him in this courtroom?

18 A. Yes, sir.

19 Q. Where is he?

20 A. He's sitting right there.

21 Q. Okay. What other friends were with your husband and
22 the Defendant when you talked to your daughter about what
23 happened?

24 A. Robert Odom.

25 Q. Okay. And none of them were in the kitchen with you?

1 A. No, sir.

2 Q. So when you talked to your daughter did she disclose
3 sexual abuse to you?

4 A. Yes, sir.

5 Q. Okay. Did she say where it happened?

6 A. Yes, sir.

7 Q. Where did it happen?

8 A. She told me it would be in her room.

9 Q. Okay. Did she say when it happened?

10 A. Yes.

11 Q. When did it happen?

12 A. She said between dark time and daylight time.

13 Q. Dark time and daylight, so at night?

14 A. Uh-huh (affirmative).

15 Q. After she told you these things, as her mother what
16 did you do?

17 A. I got very upset. I told her to sit there and I went
18 and called her dad.

19 Q. Your daughter, did she have a room by herself or did
20 she share a room?

21 A. She shared a room with her sister.

22 Q. Okay. Had her sister seen any of these things
23 happen?

24 A. I asked her sister and she said no.

25 Q. Okay. And after you did all that, you say you

1 contacted her dad. Where was her dad again?

2 A. Across the street.

3 Q. What did her dad do?

4 A. He come and met he halfway. I told him he had to get
5 home. And I told him what happened. I said you need to go
6 deal with him.

7 Q. All right. And where did your husband go next?

8 A. He went to **Victim** and talked to her.

9 Q. Okay. And after he talked to her what did he do?

10 A. He went to Justin and confronted him.

11 Q. Okay. Did Robert Odom ever talk to **Victim**?

12 A. Yes, sir.

13 Q. Okay. And who called the police?

14 A. Robert.

15 Q. Okay. And when you talked to **Victim** about what
16 happened in your kitchen, what was her demeanor?

17 A. She was scared.

18 Q. Okay. Was she crying?

19 A. Yes.

20 Q. Was she shaking?

21 A. Yes.

22 Q. Before these allegations came out, did **Victim** have any
23 behavioral problems?

24 A. Yes.

25 Q. And what were those behavioral problems?

1 A. She had -- she was having problems at school, and
2 having anxiety problems.

3 Q. Okay. Since these allegations have come out and
4 she's been to see Ms. Hutton, how would you describe her
5 behavioral problems?

6 A. They've got a lot better. She's more confident in
7 herself. She's not acting out. She's not scared any more.

8 Q. Before the allegations came out, how was she doing
9 academically?

10 A. She was failing.

11 Q. After she started seeing Ms. Hutton, how was she
12 doing academically?

13 A. It got better. She's doing a lot better now.

14 Q. Okay. Is there anything else that you know about
15 what happened to your daughter that you haven't told this
16 jury?

17 MR. SUMNER: Your Honor, I would object. That's
18 an improper question. It's just too open-ended. I mean,
19 there's no question.

20 THE COURT: You need to be more precise, please.

21 MR. TOOKER: Okay.

22 Q. Do you feel that you've told the jury what you know
23 about this?

24 A. Yes, sir.

25 Q. Okay. No further questions.

1 THE COURT: Cross?

2 MR. SUMNER: Thank you, Your Honor. May it
3 please the Court?

4 THE COURT: Yes, sir.

5 **CROSS-EXAMINATION**

6 **BY MR. SUMNER:**

7 Q. I'm going to ask you, if you would, to look at these
8 pictures and see if you recognize any of these? Would you?

9 A. Yes, sir.

10 Q. Now, there are ten or fifteen, and I don't want you
11 to feel rushed. I just want you to take your time and see
12 if you recognize any of those pictures?

13 A. Yes, sir.

14 Q. You do? Thank you. Did you have a chance to go
15 through all of them?

16 A. Yes, sir.

17 Q. And you do recognize all these pictures?

18 A. Yes, sir.

19 Q. Are they in fact pictures of your home?

20 A. Correct.

21 Q. And are they a true and accurate representation of
22 your home as it existed during the time of these
23 allegations?

24 A. Yes, sir.

25 MR. TOOKER: Could I see them?

1 MR. SUMNER: Absolutely. Take your time.

2 Your Honor, I would like these marked, please, as
3 Defense -- I don't know if it would be 1-A through however
4 you want to do it or 1 through the number? Just whatever
5 the reporter would like to do.

6 THE COURT: Mark them separately, please, ma'am.

7 MR. TOOKER: And I'm sorry, Your Honor. Were
8 those moved into evidence?

9 MR. SUMNER: Yes.

10 THE COURT: Do you have an objection?

11 MR. TOOKER: No, sir.

12 MR. SUMNER: I'm going to ask if I can go ahead
13 and proceed. I think we can at a break mark them.

14 THE COURT: You're not going to refer to them?

15 MR. SUMNER: Yes, I am. I'll go ahead and let
16 her mark them.

17 (WHEREUPON, Defendant Exhibit Numbers 1 through 24
18 were marked and admitted into evidence.)

19 MR. SUMNER: Thank you, madam court reporter.

20 THE COURT: Note they're in evidence.

21 MR. SUMNER: Thank you.

22 THE COURT: Was there any objection?

23 MR. TOOKER: There's no objection, Your Honor.

24 MR. SUMNER: And these would be marked as
25 Defendant's 1, for the record, through 24.

1 Q. Ms. Miller, I'm going to get you to step down with me
2 if you would, please?

3 THE COURT: I need you to keep your voice up,
4 please.

5 MR. SUMNER: Yes, sir, I will.

6 THE COURT: I'm talking to her.

7 MR. SUMNER: Okay.

8 THE COURT: Keep your voice up, please.

9 THE WITNESS: Yes, sir.

10 Q. We're going to show these pictures to the jury.
11 You've already identified these as a true and accurate
12 depiction of y'all's home. Would you briefly just describe
13 this picture? This is number 1.

14 A. This is in front of our house, our driveway where we
15 parked the car.

16 COURT REPORTER: I can't hear her. You're going
17 to have to speak up for me, please.

18 THE WITNESS: I'm sorry.

19 MR. SUMNER: I'll lay these on the bench and then
20 I'll publish them at a later time.

21 Q. We're just going to go through these. Okay? I want
22 you to speak up clear so everybody can see. What is number
23 2?

24 A. This is our living room and this is from the kitchen
25 sink.

1 Q. Okay. Now, I want to ask you about the living room.
2 Would you say that this is a big space? I mean, is it a
3 large home or would you say it's rather small?

4 A. It's small.

5 Q. Okay. How big -- I'm just going to ask you to
6 estimate for the jury. How big would the living room be?
7 I mean would it be -- would it be as wide as you and I are
8 now, about ten feet? Would it be maybe eight feet?

9 A. Little bit bigger than ten feet maybe.

10 Q. Okay. Maybe twelve feet?

11 A. Yes, sir.

12 Q. Okay. And about the same distance the other way,
13 too?

14 A. Correct.

15 Q. Okay. Twelve feet by twelve feet. And this is a
16 picture of part of the living room; is that correct?

17 A. Correct.

18 Q. Okay. Now, this -- is this the other half of the
19 living room on number 3?

20 A. Yes.

21 Q. And again, I'll let the jury see -- we'll pass all
22 these through so everybody can see the pictures. This is
23 Exhibit 4. Tell us what this is?

24 A. That's the front yard as you're getting ready to come
25 in.

1 Q. Okay. And this is number 5, if you would. Again,
2 speak up loud and clear so that lady right there can take
3 everything down.

4 A. That's the master bathroom.

5 Q. And number 6 would be a similar picture?

6 A. Correct.

7 Q. What is this? This is number 7. What is this?

8 A. That would be my son's room.

9 Q. Number 8?

10 A. Our living room.

11 Q. Okay. That's another angle of the living room that
12 you've already described?

13 A. Yes, sir.

14 Q. Now, number 9?

15 A. That's my girls' room, **Victim** and **Minor**.

16 Q. That's **Victim** and **Minor** room there?

17 A. Yes.

18 Q. And they shared a room; is that correct?

19 A. Correct.

20 Q. All right. This is a different bed?

21 A. That's mine and my husband's bedroom.

22 Q. Okay. All right. Now, is this the bedroom that you
23 talked about to the jury earlier where the sexual
24 encounters between yourself and Justin and your husband
25 would take place?

1 A. Yes.

2 Q. Now, where is that? I'm going to set this down for a
3 minute. I'm going to move back over to an exhibit that the
4 prosecutor put forward earlier. The living room -- okay.

5 And so the master bedroom is here? Is that correct?

6 A. Correct.

7 Q. And you've already testified that ---

8 THE COURT: You're blocking out some of the
9 juror. Some of them can't see.

10 MR. SUMNER: I apologize. Forgive me. I'm sorry
11 about that.

12 Q. This -- and I'm now referencing State's Exhibit 1 ---

13 THE COURT: Hold on a second. I'm apparently
14 touching something down here that's causing static.

15 MR. SUMNER: I understand. I don't hear it now.

16 THE COURT: I didn't want it to be disruptive. I
17 apologize.

18 MR. SUMNER: That's fine.

19 Q. I'm ---

20 MR. SUMNER: Just for the record, Your Honor, for
21 clarification, I'm holding State's Exhibit 1.

22 Q. And I've asked you, Ms. Miller, the master bedroom is
23 here and the living room is at the other end; is that
24 correct?

25 A. Correct.

1 Q. Now, you've already testified that there was no door
2 on the master bedroom; is that right?

3 A. Correct.

4 Q. Okay. And the master bedroom is actually past the --
5 **Victim** and I believe **Minor** bedroom; is that correct?

6 A. Correct.

7 Q. I'm just going to put this back up here. I'm going
8 to ask you to stand. I'm going to put that right back
9 where it was. And we're going to move through these.
10 We're about halfway there. This is marked as number 11.
11 Tell us what this is?

12 A. My son's room.

13 Q. And this would be?

14 A. Our hallway.

15 Q. All right. And there we can see, again, not to
16 belabor the point, that there is no door; is that right?

17 A. Correct.

18 Q. Now, would this be -- is that a door or is that
19 really more just a curtain that's kind of hanging in front
20 of that?

21 A. That is a sheet.

22 Q. A sheet? In front of ---

23 A. The girls' room.

24 Q. In front of the girls' room. Is that sheet anchored
25 or is that sheet, you just kind of walk through it and come

1 back through like that?

2 A. Yes, sir.

3 Q. Okay. This is number 13. I'm going to let you -- I
4 may be holding it incorrectly. Okay. What is that?

5 A. That is the angle from my bedroom down the hallway.

6 Q. Okay. This is -- all right. So this is from your
7 bedroom looking to the hallway. We see another sheet;
8 would that be correct?

9 A. Correct.

10 Q. Over a door frame. And then we have another sheet a
11 little bit more to the right?

12 A. Correct.

13 Q. This would be the kitchen?

14 A. Correct.

15 Q. Okay. Now, the kitchen really isn't separate from
16 the living room; is it?

17 A. Not really.

18 Q. Okay. I mean there's no door or space or anything.
19 I mean you've got the kitchen over here, it's open, and
20 there you see it there; would that be correct?

21 A. Correct.

22 Q. And that's the TV right up there?

23 A. Correct.

24 Q. I'm going to skip 15. That's the same picture that
25 we've already seen. It looks to me like I believe 16 and

1 the rest of these are duplicates that you've already
2 described. Thank you. You can have a seat. Okay. And
3 I'll publish these to the jury in just a second. Now, Ms.
4 Miller, I'm just going to go back over a couple of points
5 of your testimony just briefly as we move toward the lunch
6 hour. You've testified that for six to eight years
7 virtually every other weekend Justin would come to your
8 home?

9 A. Correct.

10 Q. And we've seen the pictures. There's no question of
11 where he would stay?

12 A. Correct.

13 Q. You've also testified that for the overwhelming
14 majority of that time you were involved in a sexual
15 relationship with him?

16 A. Correct.

17 Q. And I believe you testified that in these six to
18 eight years that almost half or a little bit less than half
19 of the times he was there that sex would occur on more than
20 one occasion in the bedroom; is that right?

21 A. Correct.

22 Q. And you've also testified that the positions or the
23 methodology or the method that you all would use would be
24 exactly as described by your daughter?

25 A. Correct.

1 Q. You spoke with your daughter after you saw her using
2 dolls that depicted the same activity that had been going
3 on in your home between yourself, your husband and Justin?

4 MR. TOOKER: Judge, I'm going to object to that.
5 That's in essence a compound question. The first question
6 would be you saw them with dolls doing something they would
7 be doing at your home?

8 MR. SUMNER: I'll rephrase it. That's fine. I
9 apologize.

10 THE COURT: All right.

11 Q. You saw your daughter, and I believe her sister,
12 playing with dolls one day around Christmas or New Year; is
13 that correct?

14 A. Correct.

15 Q. You observed her, meaning your daughter Victim using
16 the dolls in the same position that you and your husband
17 and Justin had been in for the last six to eight years?

18 A. Correct.

19 Q. You spoke with your daughter and then your husband
20 spoke with her; is that right?

21 A. Correct.

22 Q. And then a gentleman by the name of Robert Odom spoke
23 with her; is that right?

24 A. Yes, sir.

25 Q. And all of these meetings took place that day and in

1 your home?

2 A. Yes, sir.

3 Q. And in fact, it was not you who called the police or
4 your husband who called the police; it was in fact Robert
5 that called the police?

6 A. Yes, sir.

7 Q. And you have testified, and I will not go back
8 through it, that your daughter had had some significant
9 behavioral problems in school?

10 A. Yes.

11 Q. And at home?

12 A. Yes.

13 Q. And Ms. Miller, isn't it true that on more than one
14 occasion you had been told that she didn't tell the truth?

15 MR. TOOKER: Judge, I'm going to object to that.
16 That is, in essence, relying on hearsay. You've been told
17 that.

18 MR. SUMNER: I'll rephrase it.

19 THE COURT: All right. Sustained.

20 Q. Isn't it correct that you experienced a problem with
21 her telling the truth?

22 A. Yes.

23 Q. One last question. Did you ever observe your husband
24 to tell her to shut her eyes and close her ears when she
25 walked by the television set?

1 A. Yes.

2 Q. And it was because there were things on television
3 that were not appropriate for her to see?

4 A. Correct.

5 Q. I don't have any other questions.

6 THE COURT: All right. Redirect?

7 MR. TOOKER: Yes, sir, Your Honor.

8 **REDIRECT EXAMINATION**

9 **BY MR. TOOKER:**

10 Q. And I'm going to take each of those sort of in
11 reverse. When **Victim** would be told to close her eyes and
12 cover her ears, was it pornography or something else on TV?

13 A. It wasn't pornography. It was like an episode -- not
14 an episode, but something on TV that, you know, not
15 pornography videos; nothing like that, no.

16 Q. So normal television?

17 A. Correct.

18 Q. Just something that wasn't appropriate for her?

19 A. Correct.

20 Q. So y'all asked her to close her eyes?

21 A. Correct.

22 Q. Now, you said that she had been known to lie before?

23 A. Yes.

24 Q. Did she ever lie about anything like this?

25 A. No.

1 Q. Did she ever lie about anybody committing crimes?

2 A. No.

3 Q. Okay. What kind of stuff would she lie about?

4 A. Just little things, you know. She wasn't the one
5 that went and broke something or anything like that. But
6 it would not be anything this significant, at all.

7 Q. Okay. So no history of that?

8 A. No.

9 Q. Okay. He was asking you about the sex acts that you
10 performed with Justin, the Defendant?

11 A. Yes.

12 Q. Is that the only kind of sex act you performed with
13 the Defendant?

14 A. No.

15 Q. What other sex acts did you perform with him?

16 A. That was the preferable one, you know, to start out
17 with, but we would do other ones too. But that was the way
18 it all started out, always.

19 Q. Okay. But describe the other sex acts you would
20 have?

21 A. Missionary, just normal ---

22 Q. Sex?

23 A. Yes.

24 Q. But the only thing your daughter described was oral?

25 A. Correct.

1 Q. Okay. No further questions.

2 MR. SUMNER: Briefly, Your Honor.

3 THE COURT: Yes.

4 **RECROSS EXAMINATION**

5 **BY MR. SUMNER:**

6 Q. Regarding the stories that Victim would tell, did you
7 ever observe your husband discipline her for that?

8 MR. TOOKER: Judge?

9 THE COURT: Yes.

10 MR. TOOKER: I'm just going to ask that we tether
11 this per your prior order.

12 MR. SUMNER: I'll move on.

13 THE COURT: Okay.

14 Q. Would you estimate -- the solicitor had asked you
15 about sex positions. Justin Cone and your husband and you
16 were together for let's say one weekend a month for six
17 years. Let's take it on the low end. That would be
18 seventy-two times; is that right?

19 A. Yes.

20 Q. At a minimum, seventy-two up to maybe a hundred
21 twenty, hundred thirty; correct?

22 A. Yes.

23 Q. And I believe you just testified to the solicitor
24 that every single time of those times, every single time
25 the sex would include exactly what she has described to

1 this jury?

2 A. Yes.

3 Q. I don't have any other questions. Thank you.

4 THE COURT: Anything further of this witness?

5 MR. TOOKER: Just one point of clarification.

6 **RE-REDIRECT EXAMINATION**

7 **BY MR. TOOKER:**

8 Q. It's not that every time it would include, but that's
9 how it began?

10 A. Correct.

11 Q. No further questions.

12 THE COURT: Anything further of the witness?

13 MR. SUMNER: No, sir.

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

15 Call your next witness.

16 MR. TOOKER: State calls Detective Rita Burgess
17 to the stand.

18 THE COURT: Come around, please.

19 THE CLERK: Do you solemnly swear or affirm the
20 testimony you're about to give is the truth, the whole
21 truth and nothing but the truth, so help you God?

22 THE WITNESS: I do.

23 THE CLERK: Have a seat and state your name for
24 the record, please.

25 THE WITNESS: Rita Burgess.

1 **RITA BURGESS,**

2 **BEING DULY SWORN, TESTIFIED AS FOLLOWS:**

3 **DIRECT EXAMINATION**

4 **BY MR. TOOKER:**

5 Q. Detective Burgess, where do you work?

6 A. Pickens County Sheriff's Office.

7 Q. And how long have you worked there?

8 A. I'm about eight weeks shy of twenty-four years.

9 Q. Okay. And what's your role at the sheriff's office?

10 A. I'm the lieutenant over the Special Victims Unit in
11 the Detective Division.

12 Q. What does Special Victims Unit mean?

13 A. That includes criminal domestic violence, victim
14 services, juvenile crimes, whether they've been accused of
15 committing a crime or they're the alleged victim.

16 Q. All right. And that includes sex crimes against
17 children?

18 A. Sex crimes against children. I also supervise sex
19 crimes against adults.

20 Q. Okay. How long have you been investigating sex
21 crimes?

22 A. Approximately ten years.

23 Q. Ten years?

24 A. Yes, sir.

25 Q. Is the majority of your experience in juvenile or

1 adult sex crimes?

2 A. Juvenile.

3 Q. And you're aware of why you were called in this case?

4 A. Yes, sir.

5 Q. Who was dispatched to the scene initially in this
6 case?

7 A. Deputy Elijah Chapman.

8 Q. And we heard from him. How did you get involved then
9 if he was the person who went out on the front end?

10 A. They are the initial responding officer, the
11 uniformed office who would respond to any call that was
12 originally initiated by communications.

13 Q. Okay. And your role is what in this case?

14 A. I'm the follow-up investigator.

15 Q. And what does that mean exactly?

16 A. If we get a report on something of this nature that
17 may need follow-up further investigation, they may need
18 referral to other agencies, it comes down to the Detective
19 Division for us to take care of that.

20 Q. And what did you do as your follow-up investigation
21 in this case?

22 A. I made contact with the Miller family and made
23 arrangements to meet with them along with **Victim**.

24 Q. Where did you meet with the Miller family?

25 A. They requested that I meet with them at **██████**

1 [REDACTED] Lane, which was Mr. Miller's parents' residence.

2 Q. Okay. And how close is that to the incident
3 location?

4 A. It's right next door.

5 Q. Right next door. And when you met with them there
6 who was present?

7 A. His parents were present. They were there. Of
8 course, it's their residence and they were taking care of
9 the other two children. And then Doug Miller, Casey Miller
10 and [REDACTED] Victim .

11 Q. Okay. And [REDACTED] Victim , of course, is the one you wanted to
12 talk to?

13 A. Yes, sir.

14 Q. Where did you talk to [REDACTED] Victim ?

15 A. In the kitchen of her grandparents' residence.

16 Q. And who was present when you talked to [REDACTED] Victim ?

17 A. Both of her parents were present.

18 Q. Why is that?

19 A. I initially attempt to speak with the child alone.

20 But of course if they don't feel comfortable doing that, I
21 will not force a child to talk to me or spend time with me
22 alone. So if she felt more comfortable and she requested
23 that he parents stay in the room while we spoke.

24 Q. Okay. So you talked to her by herself initially?

25 A. No, sir.

1 Q. Okay. But it was at her request that her parents be
2 there?

3 A. Yes. Yes. Once I made her aware of why I was there,
4 she requested -- she asked me if her parents could stay
5 with her.

6 Q. Okay. That being the case, were there any ground
7 rules regarding your interview of **Victim**?

8 A. Yes.

9 Q. What were the ground rules?

10 A. I spoke with her mom and her dad, explained to them
11 that I needed to find out from **Victim** in her own words what
12 she was reporting. And that they were welcome to stay in
13 the room but they could not speak. They could not react to
14 anything that she may say to me. That I needed her to be
15 able to tell me on her own what took place, and I did not
16 need for them to react in any way that could influence her.

17 Q. Okay. So during your interview with **Victim** did her
18 parents react, do anything, that you noticed?

19 A. No, sir. I also had told them that if at any point
20 we began talking about something that they could not
21 handle, could not deal with her talking about, then they
22 needed to let me know so that we could stop talking and
23 they could leave the room.

24 Q. Okay. And did you talk to **Victim**?

25 A. I did.

1 Q. What was her emotional state like or how would you
2 describe her emotional state when you talked to her?

3 A. She was very shy and timid. There were several
4 occasions that she was teary eyes and would have to gain
5 her composure in order for her to continue talking to me.

6 Q. Okay. How long did your interview with **Victim** take?

7 A. We spoke maybe fifteen or twenty minutes.

8 Q. And during that interview did she disclose abuse?

9 A. Yes, she did.

10 Q. Did she say when it happened?

11 A. Yes, she did.

12 Q. When did she say it happened?

13 A. It was over a period of several years up until she
14 was age nine, which that's how old she was when I received
15 this information.

16 Q. Okay. And did she say where it happened?

17 A. Yes, she did.

18 Q. Where did she say it happened?

19 A. At her home in her bedroom, as well as in her
20 parents' bedroom.

21 Q. Okay. And after you concluded the interview with
22 **Victim** what did you have her do?

23 A. She wrote me a statement as to what had taken place.

24 Q. Okay. And did you let her write that or did you
25 write it for her?

1 A. She wrote it herself.

2 Q. And after that did you sent her along?

3 A. I did.

4 Q. What was the emotional response of Casey Miller after
5 hearing what her daughter had to say in your presence?

6 A. She was emotional. She cried some. She was upset at
7 the situation.

8 Q. What was the emotional response of Doug Miller,
9 having witnessed the interview you conducted with **Victim**?

10 A. He was angry. He actually was holding a pencil in
11 his hand and snapped the pencil in half.

12 Q. Okay. And after you conducted that interview, what
13 was the next thing you did?

14 A. I made them aware that I would be contacting the
15 Julie Valentine Center and requesting that they perform a
16 forensic interview as well as a medical exam on **Victim**.

17 Q. Okay. And is that standard practice in these cases?

18 A. It is, yes.

19 Q. Why would you want a forensic interview done if you
20 had already talked to her?

21 A. I'm not trained as a forensic interviewer. They deal
22 primarily with children or adults who may not be able to
23 communicate well. And so for purposes of proceeding with
24 an investigation we often, if they're under the age of
25 twelve, we'll refer them to the Julie Valentine Center.

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1 Q. Okay. And I'm going to show you something that's
2 been marked as State's 3, a stipulation.

3 MR. SUMNER: Okay. That's fine.

4 MR. TOOKER: And Your Honor, at this point the
5 State would like to enter State's 3 into evidence as a
6 stipulation and publish it to the jury.

7 MR. SUMNER: No objection.

8 THE COURT: May I see it?

9 MR. TOOKER: Yes, sir.

10 THE COURT: Ladies and gentlemen, I told you at
11 the outset that what the lawyers say is not evidence. That
12 there's one exception to the rule and if we came upon it,
13 I'd tell you about it. We've come upon it. That's where a
14 stipulation is entered. A stipulation is where both sides
15 through the attorneys mutually and specifically agree that
16 some fact or facts is/are a given. So they have a
17 stipulation. They've agreed they're going to read it to
18 you. Lawyers say publish. They're going to read it to
19 you. And you take the facts contained in this stipulation
20 as a given. Thank you.

21 MR. TOOKER: Thank you, Your Honor.

22 THE COURT: All right, Solicitor.

23 MR. TOOKER: Permission to read this to the jury?

24 THE COURT: Yes. No, don't stop saying publish.
25 You're a lawyer.

1 MR. TOOKER: Okay.

2 THE COURT: You're supposed to say publish.

3 (WHEREUPON, State Exhibit Number 3 was admitted into
4 evidence and published to the jury.)

5 MR. TOOKER: On 2/16/2012, Dr. Mary Fran
6 Crosswell, a board licensed pediatrician in Greenville
7 Health System health care provided performed a physical
8 examination of [Victim] at the Julia Valentine
9 Center. On that date [Victim] was brought to the appointment
10 by her mother Casey Miller. The case had been referred to
11 the Julie Valentine Center and Dr. Crosswell by law
12 enforcement as a result of allegations of sexual abuse.

13 THE COURT: Slow down a little bit. This lady's
14 got to take down everything you say.

15 MR. TOOKER: Okay. Examination: [Victim] was
16 examined by Dr. Crosswell in an examination room. For the
17 purposes of medical diagnosis Dr. Crosswell needed to know
18 what type of sexual acts were alleged to have transpired.
19 [Victim] indicated that she performed oral sex. [Victim]
20 indicated that her vagina was digitally penetrated. [Victim]
21 indicated that her rectal area was touched by a mouth. For
22 the purposes of medical diagnosis Dr. Crosswell needed to
23 know whether the events were limited in occurrence or
24 frequent. [Victim] indicated that the events were frequent.
25 For the purposes of medical diagnosis Dr. Crosswell needed

1 to know whether [Victim] was exposed to semen. [Victim]
2 indicated that she swallowed semen. For the purposes of
3 medical diagnosis Dr. Crosswell needed to know when the
4 last sexual occurrence purportedly occurred. [Victim]
5 indicated that the last occurrence was several weeks before
6 she made the allegations of abuse.

7 Testing: As a result of [Victim] alleged exposure to
8 another's genitals and seminal fluid, Dr. Crosswell ordered
9 that [Victim] be screened for gonorrhea, chlamydia, HIV and
10 cephalus. [Victim] tested negative for the aforementioned
11 diseases.

12 Diagnosis: A physical exam, quote, did not reveal any
13 acute or chronic changes of [Victim] genital area, end
14 quote. Dr. Crosswell also indicated that, quote, absence
15 of specific findings does not rule out the possibility of
16 abuse.

17 THE COURT: Let me clarify something just so I
18 don't confuse anyone. When I said it's a stipulation and
19 it specifically agrees on the facts contained in the
20 statement, that document -- which the jury will have;
21 right?

22 MR. TOOKER: Yes, sir.

23 MR. SUMNER: Yeah.

24 THE COURT: I want to make sure you understand
25 the lawyers are stipulating with regard to what the child

1 said. They're not stipulation to the underlying facts of
2 what the child alleges occurred. I just wanted to make
3 sure I didn't confuse anybody. As far as what's in that
4 document that the child told the doctor, there's no dispute
5 that the child told the doctor those things. All right.
6 I'm sorry. Go ahead.

7 MR. TOOKER: Thank you, sir.

8 Q. So there was no injury in this case?

9 A. That's correct.

10 Q. Is that uncommon in your profession?

11 A. It's not uncommon at all.

12 Q. Why is that?

13 A. In this particular case -- of course each case is
14 unique in itself -- but in this particular case she
15 indicated that it was oral sex. And of course with oral
16 sex there's likely not going to be any form of physical
17 injury.

18 Q. Okay. After you got the results back, the medical
19 results and the forensic interview, what else did you do in
20 this case? Or what further involvement did you have?

21 A. Once I spoke with everyone involved and gained the
22 probable cause that I needed, I presented the case to a
23 judge for review.

24 Q. Okay. In this case did you collect any kind of
25 physical evidence or forensic evidence, anything like that?

1 A. No, sir. I did not.

2 Q. Why didn't you collect any physical or forensic
3 evidence?

4 A. When we received this report the last time that it
5 was indicated to us that Mr. Cone had been in the Miller
6 home had been several weeks, two, maybe three weeks prior.
7 It was indicated to me that the bedding had been laundered
8 since he had been there prior to [Victim] disclosure. And
9 also with Mr. Cone having free access to the home, being
10 there regularly and of course these sex acts being
11 performed between Mr. Cone and the Millers, his DNA was
12 going to be present in that home.

13 Q. Okay.

14 A. And for us to be able to say that it was present
15 purely because of [Victim], what [Victim] was alleging, would be
16 difficult for us to do, if at all possible.

17 Q. So nothing that could have been recovered would
18 indicate that what she was saying was true or not true?

19 A. That's correct.

20 Q. Okay. Any further evidence that you did in this case
21 or investigation that you did in this case or evidence that
22 you gathered?

23 A. No, sir.

24 Q. Okay. No further questions at this time.

25 THE COURT: Cross?

1 MR. SUMNER: Just a few.

2 CROSS-EXAMINATION

3 BY MR. SUMNER:

4 Q. Actually, Ms. Burgess, [Victim] told you that there had
5 been some abuse of her that had occurred in her bedroom; is
6 that right?

7 A. She did indicate in her bedroom as well as her
8 parents'.

9 Q. Okay. Give me just one second. But it was her
10 testimony -- not her -- it was her statement to you that
11 the sheets on [Victim] bed had been laundered between the
12 time that Justin was there last and the time you were
13 there?

14 A. It was not specifically told to me that it was
15 [Victim] bed sheets, just that the bedding in general had
16 been laundered.

17 Q. Okay. So all of the sheets had been washed?

18 A. That was what was indicated to me.

19 Q. Okay. That's what she told you?

20 A. Yes, sir.

21 Q. Just take a second and look at these defense exhibits
22 and see do those -- they've already been admitted into
23 evidence. Do you -- you don't have to look at each of them
24 for ten minutes, but that's the house; isn't it?

25 A. Yes, sir, it is.

1 Q. And you recognize all those photos as being of the
2 house?

3 A. Yes, sir. To my knowledge, yes.

4 Q. That was my only question, Ms. Burgess.

5 A. Okay.

6 MR. SUMNER: Your Honor, I request permission to
7 publish these if I could.

8 THE COURT: They're in evidence. You may show
9 them to the jury.

10 (WHEREUPON, Defendant Exhibit Numbers 1 through 24
11 were published to the jury.)

12 Q. Now, just a couple more follow-up points. It was Ms.
13 Miller that told you, again, that all of the bedding had
14 been washed and laundered in the last few weeks?

15 A. Yes. Casey Miller.

16 Q. Right. Thank you. Now, and feel free to look back
17 at your notes, reports, Ms. Burgess, if you need to. But
18 [REDACTED] Victim told you that the improper touching began
19 about a year prior to your speaking with her; is that
20 right?

21 A. She told me that she remembered it first beginning
22 when she was in the second grade.

23 Q. Right. And it was -- and I believe your notes say
24 that it was fall because it was cold, there was a bonfire
25 outside?

1 A. That is correct. That's what she told me.

2 Q. Right. And also in your report when you interviewed
3 her, she was in the third grade?

4 A. That's correct.

5 Q. So it would have been a year, maybe fifteen months
6 from what she told you then as to when it started?

7 A. I believe that would be correct. Now, she -- they
8 did indicate that she had repeated second grade.

9 Q. I don't have any other questions, Ms. Burgess. Thank
10 you.

11 THE COURT: Redirect?

12 MR. TOOKER: Briefly.

13 **REDIRECT EXAMINATION**

14 **BY MR. TOOKER:**

15 Q. With regards to when she said it started, she went
16 through second grade twice?

17 A. That's correct.

18 Q. And it was in third grade when you talked to her?

19 A. That's correct.

20 Q. Okay. Thank you.

21 THE COURT: Recross?

22 MR. SUMNER: None.

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

24 You have any other witnesses?

25 MR. TOOKER: If we may approach, sir?

1 THE COURT: Yes.

2 (WHEREUPON, Messrs. Tooker and Sumner approached the
3 bench.)

4 THE COURT: All right. Ladies and gentlemen, the
5 next witness is scheduled to be at one thirty, so I need
6 you here at one thirty. Now you've got a long lunch break.
7 You're on your own for lunch. Remember those admonitions
8 once again. And I hope you have a very pleasant lunch. I
9 need you in the jury room at one thirty. Thank you.

10 (WHEREUPON, the jury exited the open Court at
11 approximately 12:05 p.m.)

12 THE COURT: All right. Please be careful that
13 you don't have any contact with the jurors at lunch. Be
14 careful that you look around and make sure no juror is
15 within earshot. Don't discuss anything that might be
16 overheard by a juror that relates to the case in any way or
17 anybody in the case. The safest thing to do is probably
18 wait a few minutes and let them have an opportunity to
19 clear out before you leave. But be really careful. You're
20 at ease until -- there's not going to be any issues about
21 the next witness; is it?

22 MR. TOOKER: Excuse me?

23 THE COURT: Is there any issue about the next
24 witness like there was with the one this morning?

25 MR. TOOKER: I don't know.

1 MR. SUMNER: Who is it?

2 MR. TOOKER: Shauna Galloway Williams. Our final
3 witness would be Ms. Shauna Galloway-Williams, who we would
4 be calling to testify as an expert, a blind expert, in the
5 field of child abuse dynamics and disclosure; something
6 that we do in these cases to describe delayed disclosure
7 and circumstances of ---

8 MR. SUMNER: Your Honor, I would feel like that
9 that witness would need to be proffered if they're going to
10 put her up as an expert. I think that would be the most
11 proper procedure. I can't think of another way really to
12 do it.

13 THE COURT: All right. She's not going to be
14 here until one thirty?

15 MR. TOOKER: Yes, sir. That's what she indicated
16 to me yesterday.

17 MR. SUMNER: I'll keep it as brief as I can on my
18 end.

19 THE COURT: You do what you need to do. It's one
20 trial. We're at ease till one thirty. Thank you.

21 MR. TOOKER: Thank you, sir.

22 (WHEREUPON, the Court stood at recess for a lunch
23 break at approximately 12:11 p.m.)

24 THE COURT: All right. I received a note from
25 one of the jurors, juror number 35 Christina Dorman, that

1 reads: Our landlord's name is Jim Odom. As far as I know
2 there is no relation to the Robert Odom that was mentioned
3 today. Am I still okay? I think this was shared with the
4 attorneys. Do either of you want me to do any inquiries?
5 I'll just tell her that everything will be fine.

6 MR. SUMNER: That gives me no -- Steve Sumner.
7 No problem from the Defense with that question or that
8 juror remaining on the panel.

9 MR. TOOKER: No problem from the State either,
10 sir.

11 THE COURT: And you're going to call a different
12 witness than what you told me before the break?

13 MR. TOOKER: Yes, sir.

14 THE COURT: You ready now?

15 MR. TOOKER: Yes, sir.

16 THE COURT: Bring them in.

17 (WHEREUPON, the jury entered the open Court at
18 approximately 1:45 p.m.)

19 THE COURT: All right. I received a note from
20 Ms. Dorman and I've read it and shared it with the
21 attorneys. There does not appear to be any issue or any
22 concern. Unless you feel there some issue or concern?

23 THE JUROR: No, sir. I was just making sure I
24 was all right, sir.

25 THE COURT: Okay. Thank you.

1 Madam Clerk, would you give that to the court
2 reporter?

3 THE CLERK: Yes.

4 (WHEREUPON, Court Exhibit Number 4 was marked for
5 identification.)

6 THE COURT: All right. Call your next witness,
7 Solicitor.

8 MR. TOOKER: Thank you, Your Honor. State next
9 calls Doug Miller to the stand.

10 THE COURT: Come over here, sir.

11 THE CLERK: Place your left hand on the bible and
12 raise your right hand. Do you solemnly swear or affirm
13 that the testimony you're about to give is the truth, the
14 whole truth and nothing but the truth, so help you God?

15 THE WITNESS: I do.

16 THE CLERK: Have a seat and state your name for
17 the record, please.

18 THE WITNESS: Douglas Miller.

19 **DOUGLAS MILLER,**

20 **BEING DULY SWORN, TESTIFIED AS FOLLOWS:**

21 **DIRECT EXAMINATION**

22 **BY MR. TOOKER:**

23 Q. Mr. Miller, who is Casey Miller to you?

24 A. She is my wife.

25 Q. And who is [REDACTED] Victim to you?

1 A. She is my daughter.

2 Q. And what is [Victim] 's birth date?

3 A. [REDACTED]/03.

4 Q. Okay. Do you have any other children?

5 A. Yes, sir. I have two more children; a son and
6 another daughter.

7 Q. Okay. And what are their names?

8 A. [Minor] and [Minor].

9 Q. Okay. And how old are they?

10 A. [Minor] will be fourteen tomorrow. And [Minor] just
11 turned seven.

12 Q. Do you know the Defendant in this case, Justin Cone?

13 A. Yes, I do.

14 Q. You've known him for a long time or a short time?

15 A. A long time.

16 Q. And would you describe your friendship with the
17 Defendant?

18 A. I'm sorry. I couldn't hear you.

19 Q. Would you describe your friendship with the
20 Defendant?

21 A. At one time we were as close as brothers.

22 Q. And y'all would drink together?

23 A. Yes, sir.

24 Q. And y'all also engaged in some sex acts?

25 A. Yes, sir.

1 Q. Regarding those sex acts, how do you know -- well, do
2 you know whether or not your kids ever saw anything?

3 A. My kids weren't home during those times.

4 Q. Your kids were not at home when that would happen?

5 A. That's correct.

6 Q. Where would your kids be?

7 A. They would either be at their grandparents or
8 sometimes at my sister's in Charlotte.

9 Q. Okay. How is it you know that every single time
10 y'all did this stuff your kids were not at the house?

11 A. Because I know I've dealt with kids in the house.

12 Q. Okay. So did you schedule it that way?

13 A. Not scheduled it. If the kids were gone then it
14 would be okay.

15 Q. Okay. And you say at your parents. How far away
16 from you do your parents live?

17 A. Three hundred feet.

18 Q. So would your children stay with your parents
19 frequently?

20 A. On the weekends.

21 Q. Okay. And the sleeping arrangement in your house,
22 did you and your wife and the Defendant always sleep in the
23 bedroom or did you ever sleep anywhere else?

24 A. In the living room.

25 Q. In the living room?

1 A. Yes.

2 Q. So your bedroom would be unoccupied?

3 A. That's correct.

4 Q. Why?

5 A. TV was in the living room. That's was just, you
6 know, usually where it happened.

7 Q. And was that something that was common?

8 A. To a point, yes.

9 Q. So would you use both rooms to sleep in?

10 A. Sometimes. Most of the time we all just crashed on
11 the couch.

12 Q. Okay. Do you remember when **Victim** first started
13 talking about this stuff?

14 A. Yes, sir. I remember that night.

15 Q. Okay. Where were you that night when you first heard
16 about this?

17 A. I was across the street at a friend's place. It was
18 like what you would call a man cave, I guess.

19 Q. Who was with you?

20 A. It was -- at the time when I first found out, it was
21 Justin Cone, Robert Odom and myself.

22 Q. And you said Justin Cone. Do you see Justin Cone
23 present in the courtroom today?

24 A. Yes, I do.

25 Q. Would you identify him by pointing him out for the

1 jury?

2 A. That is Justin Cone.

3 Q. Okay. You, Justin Cone and you said Robert Odom were
4 hanging out?

5 A. Yes, sir.

6 Q. What were you doing?

7 A. We were playing rummy.

8 Q. The card game?

9 A. Yes.

10 Q. What alerted you that something was wrong?

11 A. I received a phone call from my wife asking me to
12 come home immediately. Also she asked if Justin was still
13 there.

14 Q. Okay. Did you go and meet with your wife?

15 A. I actually met her halfway. She met me halfway.

16 Q. What was her emotional state when you encountered
17 her?

18 A. She was very agitated. Livid.

19 Q. Okay. And what did you do after you talked to her?

20 A. I told her I wanted to speak to **Victim**.

21 Q. Okay. Did you go speak to **Victim**?

22 A. Yes, I did.

23 Q. Did she disclose abuse?

24 A. Yes, she did.

25 Q. After that happened what did you do?

1 A. I went back over to where Justin and Robert were at.

2 Q. Why did you go back there?

3 A. To confront Justin.

4 Q. Okay. Did Robert ever speak to **Victim**?

5 A. After -- yes. Yes, he did.

6 Q. Okay. Now you say you confronted Justin. Describe
7 that confrontation?

8 A. When I walked in I asked him to come to the backroom
9 with me. And I asked him is there anything you want to
10 tell me? And he said no. I said anything you want to tell
11 me about my daughter and what you've been doing.

12 Q. Okay. And you can't say what other people said.

13 A. Okay.

14 Q. So you had a conversation with him?

15 A. Uh-huh (affirmative).

16 Q. After you had that conversation what did he do?

17 A. He left.

18 Q. Okay. And what did you do after he left?

19 A. I stood there for a minute until Robert come back
20 there to ask me what was wrong.

21 Q. Okay. And then what did you and Robert do?

22 A. We went back over -- well, after our conversation and
23 I told him what had been told to me, we went back over to
24 my house.

25 Q. Okay. Did anyone talk further with **Victim** about this

1 stuff?

2 A. Yes. At that time I asked her to tell Robert what
3 she just told me.

4 Q. Okay. And after that happened who called the police?

5 A. Mr. Odom.

6 Q. Why did he call the police instead of you?

7 A. After my daughter's statement and what she had just
8 told me, I guess I was just kind of gut kicked and before I
9 could -- it was bang, bang and Robert picked up the phone
10 and said I'm calling the cops.

11 Q. Okay. And did the police come out that night?

12 A. Yes, they did.

13 Q. Okay. And your daughter, did she share a bedroom?

14 A. Yes.

15 Q. Who did she share her bedroom with?

16 A. With Minor, my other daughter.

17 Q. Okay. They had regular beds or bunk beds?

18 A. Bunk beds.

19 Q. Who slept on the bottom?

20 A. Victim.

21 Q. Okay. And your other daughter slept on the top?

22 A. Yes.

23 Q. Did they sleep together in the same bed or would they
24 usually sleep on separate beds?

25 A. Every once in a while they would sleep together, but

1 ninety-nine percent of the time, [Minor] wanted that top
2 bunk.

3 Q. Okay. Did you tell [Victim] to make all this stuff up?

4 A. Absolutely not.

5 Q. Okay. Did you tell the jury the truth today?

6 A. Absolutely.

7 Q. No further questions.

8 THE COURT: Cross examination.

9 **CROSS-EXAMINATION**

10 **BY MR. SUMNER:**

11 Q. Mr. Miller, you remember giving a statement to the
12 sheriff's office on the very first day of January of 2012,
13 I guess, when this report was made?

14 A. When they come to the house; yes.

15 Q. And in fact what you told or what you wrote is that
16 your daughter had told you that Justin Cone had actually
17 performed oral sex on her; isn't that correct?

18 A. I don't recall if that was in the statement.

19 Q. I'll give you this to refresh your memory. Now, this
20 statement -- take your time for a second. This statement
21 was written by you that day; is that correct?

22 A. Yes, sir.

23 Q. Okay. And about the third or fourth line down it
24 said Justin Cone making her perform oral sex on him and he
25 was doing the same to her; is that right?

1 A. That's correct.

2 Q. Thank you. Now, is it your testimony to the jury
3 that the children -- or that **Victim** -- let's just talk about
4 **Victim** because that's who we're concerned about in this
5 trial -- she did not spend the night with you ever when
6 Justin Cone spent the night?

7 A. No, sir.

8 Q. That is not correct, I mean?

9 A. That is not correct.

10 Q. How often would she spend the night away from your
11 home when he was there?

12 A. It varied. I couldn't give you a percentage of that.
13 It really most of the time was up to the children whether
14 they wanted to go eat Nana's cooking or stay home.

15 Q. Okay. And I'm not trying to trick you with the
16 amount of days in a year or anything specific. But I guess
17 my question is, there was a good portion of the time when
18 **Victim** would stay the weekend with you and your wife when
19 Justin was there?

20 A. That's correct.

21 Q. And also wasn't there a good portion of the time when
22 you all all slept in the living room?

23 A. Define all?

24 Q. All would be, okay, you, your wife, Justin and **Victim**
25 and one or more of the other children?

1 A. All of us in the living room, no, that was not a very
2 common occurrence at all.

3 Q. But it did happen?

4 A. I would have to say probably, yes, it happened.

5 MR. SUMNER: One second, Your Honor.

6 THE COURT: Yes, sir.

7 Q. We've already talked about, outside of your presence,
8 the sexual relationship that was present between you all
9 three. But in fact, you found out that your wife and
10 Justin were actually sexually involved outside of your
11 presence?

12 A. There came a point when I found that out; yes.

13 Q. I don't have any other questions.

14 THE COURT: Redirect?

15 **REDIRECT EXAMINATION**

16 **BY MR. TOOKER:**

17 Q. When you found out your wife and the Defendant were
18 having sex outside of your presence, did you tell your
19 daughter to accuse the Defendant of molesting her?

20 A. Absolutely not.

21 Q. No further questions.

22 THE COURT: Recross?

23 MR. SUMNER: No.

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

25 All right. Ladies and gentlemen, my understanding is

1 there's some legal issues I have to address before the next
2 witness. So I'll have to ask you to step into the jury
3 room. Hopefully this won't be as long as this morning.

4 (WHEREUPON, the jury exited the open Court at
5 approximately 1:58 p.m.)

6 THE COURT: All right. Do y'all have some
7 proffers now?

8 MR. TOOKER: Yes, sir, Your Honor. The State
9 would call Shauna Galloway-Williams to the stand.

10 THE COURT: Is she in the courtroom?

11 MR. TOOKER: She is not. If you'd step out and
12 get her. She was sequestered.

13 THE CLERK: Place your left hand on the bible and
14 raise your right hand. Do you solemnly swear or affirm
15 that the testimony you're about to give is the truth, whole
16 truth and nothing but the truth, so help you God?

17 THE WITNESS: Yes.

18 THE CLERK: Have a seat and state your name for
19 the record, please.

20 THE WITNESS: Shauna Galloway-Williams.

21 **PROFFERED TESTIMONY**

22 **SHAUNA GALLOWAY-WILLIAMS,**

23 **BEING DULY SWORN, TESTIFIED AS FOLLOWS:**

24 **DIRECT EXAMINATION**

25 **BY MR. TOOKER:**

1 Q. Good afternoon, Ms. Galloway-Williams. Would you
2 provide the Court with your formal education, please?

3 A. Yes. I have a bachelor's degree in psychology from
4 Winthrop University and a master's degree in counseling
5 from Clemson University.

6 Q. Okay. Do you have any special training in any
7 particular fields?

8 A. I do. I have training in the area of forensic
9 interviewing. I've done probably over a hundred fifty
10 hours of skills based training specifically related to
11 forensic interview, which also includes child development,
12 the dynamics of child abuse or child maltreatment. As a
13 licensed professional counselor I'm required to participate
14 in continuing education requirements. We're required forty
15 hours every two years. In addition to that, I also conduct
16 training both locally and statewide, as well as nationally.

17 Q. You train other people?

18 A. That's correct.

19 Q. And you mentioned your licensure. What are you
20 licensed as, again, ma'am?

21 A. I'm licensed as a professional counselor in South
22 Carolina since 2004.

23 Q. Since 2004. And I think I missed, what year did you
24 graduate from Clemson?

25 A. 2000.

1 Q. What do you do for a living? What is your job title?

2 A. I am the Executive Director of the Julie Valentine
3 Center, which is the child abuse and sexual assault
4 recovery center that serves Greenville and Pickens
5 Counties.

6 Q. How long have you been doing that?

7 A. I've worked with the Center for ten years. I've been
8 Director of the Center for the past five years.

9 Q. Okay. And have you ever been qualified as an expert
10 in the state of South Carolina or any other state?

11 A. I have.

12 Q. How many times have you been qualified as an expert
13 in Court?

14 A. Twenty-three times in the Thirteenth Circuit.

15 Q. Okay. Is that General Sessions Court?

16 A. Yes.

17 MR. TOOKER: And Your Honor, with regards to
18 background, training and experience, that would be our
19 foundation. If you want me to proceed into the substance
20 of her direct, I can.

21 MR. SUMNER: I don't have any questions regarding
22 what her testimony has been on that.

23 THE COURT: No voir dire. You may continue.

24 MR. TOOKER: Okay. And Your Honor, just for the
25 record, the State would then seek to qualify Ms. Galloway-

1 Williams as an expert in child abuse dynamics, particularly
2 the dynamics of disclosure.

3 THE COURT: Do you still have no questions on
4 this?

5 MR. SUMNER: No, sir. I'll let you make that
6 decision.

7 THE COURT: Go ahead.

8 Q. So Ms. Galloway-Williams, what is disclosure? Let's
9 use that word. What does that mean?

10 A. We use the term disclosure to refer to when a child
11 tells about abuse or an abuse event.

12 Q. Okay. And what kind of things affect disclosure?

13 A. Well, most children who are abused don't tell right
14 away. And some of the reasons for that -- well, the main
15 reason for that is because they're generally abused by
16 someone that they know, they love and they trust. And a
17 lot of times that person is also someone that's known,
18 loved and trusted by their family. And a lot of times
19 children are fearful to tell. They're afraid of what will
20 happen to them or what will happen to the person that's
21 done this, or to their family. Children may have been
22 threatened that something will happen to them if they tell.
23 The threats could be direct or indirect threats. Sometimes
24 children have seen the person that is committing this abuse
25 be violent to other people and they internalize that, that

1 if they tell then something would happen to them. There
2 are lots of reasons. Sometimes children don't have the
3 words to tell. With younger children, you may not have the
4 words to describe sexual experiences. They may not have
5 the words to describe it. And sometimes children don't
6 tell unless someone asks them or someone observes something
7 that seems out of character or beyond what you would expect
8 for normal behavior from a child.

9 Q. Yes, ma'am. And I want to go back a little bit. I
10 think I jumped the gun throughout your testimony. Did you
11 interview anybody in this case?

12 A. No.

13 Q. Did you talk to [REDACTED] Victim ?

14 A. No.

15 Q. Do you know [REDACTED] Victim ?

16 A. I don't.

17 Q. Did you talk to her parents Doug or Casey Miller who
18 are seated here in Court?

19 A. No, I did not.

20 Q. Okay. Are you familiar at all with this case?

21 A. Only generally.

22 Q. Okay. Based on our conversations?

23 A. That's correct.

24 Q. Okay. What is a triggering event? Is that something
25 or a term that you use in your field?

1 A. A triggering event would be something that has led a
2 child to make a disclosure or has led an adult or someone
3 else to ask a child about something that may have happened
4 to them. So sometimes that is -- you know, again a child
5 is displaying some type of behavior and someone sees that
6 and asks them a question about it. It could be that the
7 person that is committing this abuse leaves the home and
8 the child feels safe to then tell; that event triggered it.
9 Sometimes it could be as simple as, you know, a family
10 argument or a disagreement between the child and the person
11 that has done this or the care giver and that leads the
12 child to disclose. There are lots of things that -- in
13 other words it's just something that happens. The child
14 wasn't necessarily planning to disclose. It wasn't a
15 purposeful disclosure. There's something that has led them
16 to make that statement.

17 Q. Okay. And what are outside influences? What does
18 that mean in your field?

19 A. Outside influences on the child or their disclosure?

20 Q. Uh-huh (affirmative). Or how would that affect the
21 child with the disclosure?

22 A. Well, you know, a lot of times when we're thinking
23 about outside influences we're talking about those
24 relationships that the child or their family has with the
25 person that may be committing the abuse.

1 Q. And like you said before, you mentioned no love or
2 trust?

3 A. That's correct.

4 Q. You said that is something you see in your field,
5 people are abused by people they know, love and trust?

6 A. Yeah. Most children are abused by someone that they
7 know, they love and they trust. It can be a family member,
8 a family friend. You know, somebody that's in a position
9 of authority in the child's life. But it's rare that it's
10 a stranger that is committing the act.

11 Q. Okay. What are core or contextual details?

12 A. Well, when a child does make a disclosure and when
13 they are sharing information about their experience, we're
14 looking for core and contextual details. Core details are
15 the who, what, when; the basic details about what happened.
16 The contextual details are those details that describe the
17 experience, the sensation, the details that really
18 distinguish the event from something that they've been told
19 about and rather demonstrates that it's something that
20 they're experienced themselves. So we're looking for
21 smells, sights, sounds, the sensory kind of experiences.

22 Q. Okay. And what are risk factors with children who
23 are abused?

24 A. Well, there are certain risk factors that are
25 associated with children and certain risk factors

1 associated with parents. For children their age might be a
2 risk factor. For instance very young children are much
3 more vulnerable to abuse and much less likely to disclose
4 because they may not have the verbal skills to do so.
5 Children who may have a disability are also more
6 vulnerable, whether that's a physical disability or a
7 developmental intellectual disability. Again, they may not
8 have the ability to disclose or to tell and may be very
9 reliant and dependent on whoever this is that is getting
10 the events. Parental risk factors include substance abuse.
11 That's one of the greatest risk factors for child
12 maltreatment is parental substance abuse. Single parent
13 households sometimes put children at risk for -- higher
14 risk for abuse. And violence in the home, domestic
15 violence.

16 Q. Okay. All right.

17 MR. TOOKER: No further questions at this time,
18 Your Honor.

19 MR. SUMNER: Yes.

20 **CROSS-EXAMINATION**

21 **BY MR. SUMNER:**

22 Q. Just a few questions, Ms. Galloway-Williams. Just to
23 clarify, you didn't provide any services in this case? You
24 don't have any -- you did not interview anybody associated
25 with the State's case in this matter?

1 A. I did not.

2 Q. Okay. Does Linda Hutton work with you? Linda Gray
3 Hutton, does she work with -- I know you direct the
4 Valentine Center.

5 A. I do.

6 Q. Does Ms. Hutton work with you all?

7 A. She doesn't. We refer clients to her often. She has
8 a private practice. She works for Bay Laurel Counseling.

9 Q. Okay. Thank you. Have you ever heard the term false
10 memory when it comes to a child and an allegation of sexual
11 abuse or sexual inappropriate contact?

12 A. I have.

13 Q. Tell us -- tell me what you -- I guess in laymen's
14 terms or the Reader's Digest version what that would be?

15 A. Well, it would refer to exactly as it states a false
16 memory. Something that may be reported that is not in fact
17 a memory.

18 Q. Okay. Have there been documented instances where
19 children actually insert themselves into things that they
20 see and it just becomes a part of their memory?

21 A. Meaning?

22 Q. I guess I'm tying into the false memory concept. I
23 mean isn't it understood, I guess, in your profession that
24 children more so than adults can actually insert themselves
25 into maybe movies that they see or things that they see and

1 it kind of creates a memory for them. Is that a fair
2 statement?

3 A. Well, in that scenario. That's why we are looking --
4 when we're talking to children and assessing their
5 statements, we are looking for things that would indicate
6 that it's something they've actually experienced rather
7 than something that they have seen or heard about.

8 Q. Okay. But that phenomenon that I just described can
9 occur?

10 A. Where a child sees something ---

11 Q. Yeah, a false memory ---

12 A. --- and internalizes that ---

13 Q. Yes.

14 A. --- as an experience that they have had themselves?

15 Q. Yes.

16 A. It is possible that that could happen.

17 Q. In fact, you all -- when I say you all I mean the
18 nice folks that work with you -- actually screen for that
19 as a part of the, I guess, interview process to try to make
20 sure that that is not going on, that this child actually
21 went through this, as best you can professionally
22 determine?

23 A. Right. And that's where the question -- type of
24 questions that we ask the child and the information they
25 share with us. Yes. That's where we're looking at the

1 type of details they're providing us.

2 Q. Okay. I don't have any other questions.

3 THE COURT: Redirect?

4 MR. TOOKER: No, sir. I just ask that she be
5 able to step down.

6 THE COURT: Thank you. You may step down. Could
7 you step back outside?

8 THE WITNESS: Yes.

9 THE COURT: Yes?

10 MR. SUMNER: Your Honor, briefly, I would ask the
11 Court to suppress her testimony in that she does not have
12 any firsthand knowledge in this case. And we've heard --
13 we heard from Ms. -- I want to say Williams?

14 MR. TOOKER: Galloway-Williams.

15 MR. SUMNER: No. Hutton. I'm sorry, Hutton. We
16 heard from Ms. Hutton who has counseled this Victim
17 twenty-three different times, saw her twice before this
18 trial started. This testimony, if it's going to be
19 offered, should come from her. Why would we be -- why
20 would we have a witness such as Ms. -- I don't mean that
21 disrespectfully -- Ms. Galloway-Williams, why would we need
22 her to come in and talk about things that she knows in
23 general? I mean wouldn't the most logical person be the
24 one that counseled her? I just think there's a real
25 problem -- a real issue here with misleading the jury.

1 This lady had no -- not intentionally. I didn't mean that
2 in an impugning way, Solicitor, but there's -- she never
3 saw her. She never counseled her. She wasn't a part of
4 any interview. She wasn't a part of anything. She simply
5 is just getting up and kind of going back -- and I may be
6 saying the name wrong, but I say violating the spirit of
7 Kromah in that it's just -- it's kind of a backdoor
8 bolstering to some degree. You know why is there delay --
9 what are the risk factors? I mean she hasn't had any --
10 and I'm sure she's qualified had she had a role in this
11 case. But the people that have had roles in this case
12 aren't offering this testimony. So I just feel like -- I
13 just don't feel like it should come in as expert testimony
14 for the reasons I've mentioned under Rule 403 and just
15 under the spirit of the fact that -- why are we going to
16 let the referee make the call that's at midfield when we're
17 got the referee right down there on the goal line and the
18 issue is whether or not the person crossed the end zone?
19 Why are we going to get this person's opinion. I mean, the
20 people that -- I'm just repeating myself now. But the
21 people that should be offering these opinions have already
22 testified. And I just feel that it should be suppressed
23 and not come in on that basis. Thank you.

24 MR. TOOKER: Thank you, sir. May it please the
25 Court?

1 THE COURT: Yes.

2 MR. TOOKER: I'm handing up to Your Honor a small
3 packet that includes three published opinions and one
4 unpublished opinion. The unpublished opinion is the first
5 one. And while it's not of precedential value, I think
6 that it certainly formed a dictum in this case. That first
7 opinion is one with which I'm familiar inasmuch as it was
8 tried here actually in this courtroom in front of Judge
9 Stilwell and Shauna Galloway-Williams testified as to the
10 exact same stuff we're talking about in this case. We used
11 her as a blind expert. And I'll say the reason we do that
12 is because as a result of Kromah and Jennings, we want to
13 avoid bolstering. So to do that, qualify the forensic
14 interviewer only -- I say qualify -- you introduce the
15 forensic interviewer only as an interviewer to introduce
16 the tape. And then call a blind expert to testify as to
17 the dynamics of child abuse and disclosure. I think it's
18 analogous to the Defense in a murder trial where there's a
19 confession introducing a blind expert who testifies in the
20 field of false confessions. You have someone with
21 specialized skill and training and experience and while the
22 person who did confess falsely can explain the pressures
23 they felt when they did it, it aids the jury inasmuch as
24 they're not familiar with those notions. And it aids the
25 jury in helping, you know, determine the facts at issue in

1 the case.

2 With the forensic interviewers, the importance, of
3 course, is that they lay the foundation. But with a blind
4 expert, it is that she's qualified as an expert and then
5 after being qualified as an expert, she then can testify as
6 to certain things about which the jury is not going to have
7 direct knowledge. You know, the jury was empaneled and
8 while being empaneled asked, have any of you been accused
9 of or do you have any close friends or family members who
10 have been victims of sexual abuse? That was one of our
11 qualifying questions. And none of the panel members
12 answered yes to that question. So clearly there's no basis
13 and personal knowledge of child sexual abuse. So because
14 that's the case, I think this kind of testimony is
15 important because it helps the trier of fact ascertain why
16 it is people behave the way they do in certain situations;
17 particularly children and why children behave the way they
18 do in certain situations.

19 Now, the Weaverling case that Your Honor has before
20 him I think is both factually and legally on point. At
21 issue in that case was admissibility of testimony from an
22 expert in the field of sexual abuse victims. The Defendant
23 contended the testimony was relevant and the prejudicial
24 effect outweighed the probative value. So the objection
25 was under 403. And that's on page 794 of Weaverling. Like

1 this manner, the expert in Weaverling did not meet with the
2 victim. And the knowledge that the expert had was limited
3 to the discussions with the solicitor. She didn't testify
4 regarding the victim or facts of the case. The Court in
5 that case held that that testimony was properly admitted
6 because it explained the effect of molestation and the
7 person's subsequent conduct. The Court further found that
8 such testimony is relevant and helps the jury understand
9 some aspects of the victim's behavior and provides insight
10 into a sexually abused child's often strange demeanor.

11 The South Carolina Supreme Court then -- and this is
12 another one of those cases I handed up to Your Honor --
13 reaffirmed the admissibility of expert testimony and
14 behavioral evidence in that White case before you; State v.
15 White. The victim in White was an adult and the Court held
16 that behavioral evidence is relevant regardless of the
17 victim's age. The Court then noted expert testimony may be
18 crucial when children are victims because their
19 inexperience and impressionability often render them unable
20 to effectively relay incidents of criminal sexual behavior.
21 And I did not read those citations. But the citations are
22 State v. Weaverling, 337 SC 460; parallel citation being
23 523 SE 2d 787. That was Court of Appeals South Carolina
24 1999. The State v. White is 361 SC 407; 605 SE 2d 540.
25 That's the Supreme Court of South Carolina 2004.

1 So I think for the foregoing, and of course subject to
2 Rules 702 and 703, which the Court of Appeals discussed
3 pretty handily in that unpublished opinion I handed Your
4 Honor and that's The State versus Bobby Albert McCann,
5 unpublished opinion number 2014-UP-355, that this expert's
6 testimony and her ability to explain some of the more
7 curious aspects of child disclosure and how it is a child
8 relays child molestation to a jury is relevant and is
9 important and is necessary for the jury to get a full
10 picture of what's happened in this case.

11 THE COURT: You have something else?

12 MR. SUMNER: Yeah, very briefly. I'm going to
13 agree with the solicitor when -- I just read over the
14 McCann decision which is right out of here, Pickens County,
15 and I understand it's not of precedential value, but
16 obviously we're discussing it just in terms of what was
17 articulated for the basis of the reasoning. And I don't
18 have a problem with that, Solicitor.

19 I would say that behavioral evidence would be -- I
20 really didn't have a problem with the delayed disclosure
21 and why a child -- because I think that's part of, you
22 know, the solicitor's burden here is why was it disclosed
23 when it was or how was it disclosed when it was. I really
24 didn't have a problem with that part of her testimony. But
25 when it went into risk factors and became more general

1 that's really the basis of my objection. I would ask for a
2 limiting ruling from the bench that her testimony regarding
3 delayed disclosure and why children -- I think she said
4 something about love, know and trust, I really don't -- I
5 think I'm saying that right.

6 MR. TOOKER: Yes, sir.

7 MR. SUMNER: I really don't have -- you know, I
8 think the case law speaks for itself on that point. But
9 when it got off to other just -- I felt like I was hearing
10 some more general comments about children in general. I
11 just would ask that it be limited to delay -- I guess
12 that's what I'm going to say. I'm going to ask that the
13 bench limit her testimony to what causes delayed disclosure
14 and ask that her direct testimony be ended with that. I
15 think that would fall in line with the McCann case law in
16 terms of behavioral evidence. I think the rest of it is
17 kind of backdoor bolstering. That's where I'm coming from
18 on that.

19 THE COURT: You have anything else, Solicitor?

20 MR. TOOKER: No, sir. Just my prior argument.

21 THE COURT: So you don't object to the witness
22 being qualified as an expert in the field of behavior ---

23 MR. SUMNER: No, sir.

24 THE COURT: --- of adolescent victims?

25 MR. SUMNER: I guess I would -- I'm probably

1 going to be clumsy with my words. I would say behavioral
2 dynamics of ---

3 THE COURT: This case refers to -- one of these
4 cases uses the term behavioral patterns of adolescent
5 victims. You're not objecting to that?

6 MR. SUMNER: I am -- let me articulate it again.

7 THE COURT: Well, let me tell you what my
8 concerns are and then ---

9 MR. SUMNER: Okay.

10 THE COURT: I'm concerned as to how this helps
11 the jury understand anything. How is this not so general
12 that it's common knowledge? She didn't testify that there
13 are research papers that show that delayed reporting occurs
14 in x number or percent of cases? She didn't testify about
15 -- she just made general statements that most children are
16 abused by people they know, love and trust. They're
17 fearful of what might happen to them or to the person.
18 There are lots of reasons for not telling. They may not
19 have the words to tell depending upon their age or their
20 experience. They may not tell unless someone asks. She
21 didn't cite any research or give any statistics or say
22 anything that was scientific in nature. It was all just
23 general. So how is that something that is scientific
24 specialized or technical knowledge that aids the jury?

25 MR. TOOKER: With regards to statistics, she does

1 have the capacity to do that. The reason I avoided those
2 questions and I talked to her about that before when we
3 pre-tried the case. Currently on appeal there is a case
4 that deals specifically and the appeal is on the
5 introduction of percentages. And I believe the percentages
6 of in seventy percent of cases children delay in disclosing
7 sexual abuse. In thirty percent of cases they disclose
8 immediately. And that was appealed and it's currently
9 pending. The brief and all have been submitted and they're
10 just waiting for oral arguments to be final.

11 My concern was introducing something that was not yet
12 -- these cases don't address percentages. These cases
13 address, from my perspective, more generalized behavior.
14 And so I actually instructed her to keep it general to
15 avoid from crossing some sort of line.

16 THE COURT: Well, the attorneys understand a per
17 curiam that you cited this unpublished opinion and
18 unpublished opinions are not precedent. They put that in
19 big bold letters. They have no precedential value.

20 MR. TOOKER: Yes, sir.

21 THE COURT: And as the lawyers know, what
22 typically happens on these are they are issued as per
23 curiam opinions. That means they're not written by a
24 particular judge on the Appellate Court -- they are
25 technically, but basically all the judges sign onto it so

1 it's an opinion of the Court and not written by a
2 particular judge or justice. And then they just will cite
3 a principal and some authority for it. And I don't take
4 issue with any of the things that are cited in -- by the
5 Court of Appeals. Not that it would matter if I did, but I
6 don't know how much guidance that gives me. If you were
7 involved directly in a case and I don't pretend to know as
8 much about this case or any of your cases that the
9 attorneys are involved in, as the lawyers know themselves.

10 The case of Weaverling -- again I'm just -- y'all
11 handed them up and I'm trying to read through them as
12 quickly as I can. But I don't disagree -- I guess I should
13 say it affirmatively. I agree that behavioral evidence
14 about rape trauma is admissible. But as they pointed out
15 in this Weaverling case, as long as it meets other
16 admissibility requirements it's relevant and helpful and
17 explains to the jury the typical behavior patterns of
18 adolescent victims of sexual assault. It assists the jury
19 in understanding some of the aspects of the behavior of the
20 victims and provides insight into the sexually abused
21 child's often strange demeanor.

22 Well, what is a strange demeanor? What is the jury
23 linking together here? Her testimony was so general and so
24 broad. You don't have to elicit from -- first of all, she
25 doesn't have to interview the child. I understand that.

1 There's no disagreement about that. The fact that she
2 didn't interview the child, his objection on that, that's
3 not my concern in admitting this or not admitting it. My
4 concern is whether what she is offered for provides any
5 assistance to the jury other than some broad concept that
6 there's an expert and she's on the stand and so it must be
7 so. And that's the exact thing that all these line of
8 cases talked about this morning are saying don't let
9 happen, Judge, don't let that come through, don't let it
10 just be that some expert's put up there and then the jury
11 says, oh, that person is an expert so they're on that side.
12 They must be supporting what the child says.

13 You're in a pickle about the case up on appeal; I
14 understand that. We all are. We were just talking earlier
15 about rescheduling a death penalty case and we're trying to
16 work things around to determine if there's a case up on
17 appeal and they're wanting to stay my case while that case
18 is on appeal. They're wanting to stay one from a judge up
19 here in your circuit, too, and one from a judge in Oconee
20 County -- these are all death penalty PCR cases -- because
21 there's some issue up on appeal and until the Appellate
22 Courts tell us, we don't know what they're going to say.
23 And if the Court of Appeals says something, they don't know
24 if the Supreme Court is going to say something different.

25 MR. TOOKER: Yes, sir.

1 THE COURT: So I mean, I empathize with you but I
2 don't know -- I don't know what to say beyond that. My
3 concern is what I've already tried to state. She said most
4 do not tell right away. I'm not sure if he's objecting to
5 that or not.

6 MR. SUMNER: I'm sorry. Forgive me. I was
7 looking ---

8 THE COURT: We're talking about the disclosure,
9 delayed disclosure.

10 MR. SUMNER: Can I say this, Judge? I didn't
11 mean to interrupt your train of thought. I object to her
12 and what you -- her entire testimony because what you're
13 articulated is what I was trying to articulate. And that
14 is it's so general it's not -- there's nothing specific to
15 this case, number one. And number two, there's no real
16 knowledge that she's bringing. You have recited a lot of
17 what she said that is going to aid this jury in reaching a
18 verdict in this case, but it does violate -- and I can't
19 get my thoughts right. But it violates the spirit of
20 Kromah, which is what you've just stated. And that is,
21 wait a minute, we're not going to let the State line up a
22 bunch of experts because you know, and I think it's even
23 cited in Kromah that once expert opinions come in the
24 juries tend to go that way, juries tend to give that more
25 weight. And we're not going to let the State -- and I

1 certainly don't mean this against -- directly against
2 Solicitor Tooker -- but we're not going to let the State
3 stack up a bunch of expert witnesses that don't really help
4 prove the case, just for the sake of bringing them in and
5 just because it's a child victim. Just because it involves
6 a child. And I didn't hear a single bit of her testimony
7 that I felt like would aid this jury in any way in reaching
8 a verdict that would be a fair due process to the Defendant
9 and to the State. I didn't hear it. I can't just echo
10 what you said again because I agree with it. I mean it's
11 just too general. There wasn't one study cited. There
12 wasn't one statistic cited. There wasn't one basis of her
13 knowledge cited. It was just these are my degrees. I'm
14 the Director of Julie Valentine and let me tell you how
15 these cases come down. You know, and that's the evil --
16 that right there is what our appellate courts are saying we
17 don't want to affect these trials. I would object to her
18 entire testimony. Thank you.

19 MR. TOOKER: If I ---

20 THE COURT: Let me say something real quick. I
21 do want to say I'm very impressed with everybody up here.
22 I've never been to Pickens County to hold court. I don't
23 know that I've ever been to Pickens, South Carolina my
24 entire life. But I'm very impressed with everybody.

25 In the old days when we talked about that pendulum

1 swinging too far it wasn't nearly as impressive. You had a
2 lot of well-meaning folks who would come into Court to
3 testify as experts. They wouldn't have nearly the degrees
4 that these folks have that you're putting up. They
5 wouldn't have them. They often came from backgrounds where
6 you suspected that they had some bias of their own that was
7 affecting objectivity.

8 And at times it was one of those situations where
9 judges basically back then were told, you let it in and
10 then the jury sorts it out. That's what the Appellate
11 Court are moving away from because it got to be so abused.
12 And everybody is sympathetic to a child victim. Everybody.
13 The jurors, the judges, everybody is sympathetic to the
14 child victims. But what they would do in a lot of those
15 cases is they would come in and they would start testifying
16 about the effects on the children and they would say their
17 grades suffered, for example. And then if it was pointed
18 out that the child had bad grades before the abuse ever
19 started it was almost sadly comical. They would say well
20 that doesn't really make any difference. And now what the
21 Courts are saying is -- in other words, they were all over
22 the place. If you put out something -- they would rattle
23 off this long thing of the children being scared, the
24 children doing this, the children doing that, the grades
25 suffered. They would go through that. And then when

1 somebody had some evidence that all that was going on
2 beforehand, they were completely discounted. So I know
3 we're not in that ball park any more. We're way past that.
4 You've got people who have degrees that they seem to be
5 very impressive folks. But what I've got to do is more of
6 a gatekeeper thing. And under counsel, I just don't think
7 this aids the jury.

8 MR. TOOKER: If I may be heard on that, sir?

9 THE COURT: Yes.

10 MR. TOOKER: With regard to -- and if I'm hearing
11 Your Honor and Mr. Sumner's concerns correctly, and they're
12 essentially two-fold. One is foundational, whether or not
13 there's the requisite underlying facts and data necessary
14 for this witness to talk about what the State would like
15 her to talk about. Second is ---

16 THE COURT: It's not limited to -- I threw out
17 statistics earlier. I'm not saying that she has to say
18 necessarily statistics. She can talk about studies. She
19 can talk about various things. She can give something that
20 a lay person sitting in the jury box would not have common
21 knowledge about. But to tell a jury there are a whole lot
22 of factors that might affect a child doing this or a child
23 doing that and then what she says just makes plain
24 commonsense, the jury has got plain commonsense.

25 MR. TOOKER: Yes, sir. And that's consistently

1 the objection to this line of testimony, is that it is not
2 necessary expert testimony inasmuch as it doesn't aid the
3 trier of fact in doing anything they couldn't do for
4 themselves. Now, it's the State's opinion that in these
5 cases that is not true, that reasonable people when they
6 hear a child has been abused they think to themselves, well
7 if my kid would abused he would come and tell me
8 immediately or she could come and tell me immediately. Or
9 when I was a kid and I were abused, I would go run and tell
10 my mom immediately. And the notion to them that a child --
11 something bad like that would happen to a child and they
12 would refrain from telling their parents that fact or
13 refrain from telling another adult that fact is still very
14 contrary with what they ---

15 THE COURT: I do not disagree with that.

16 MR. TOOKER: Okay.

17 THE COURT: What I have a problem with is that
18 the proffer you made is so general in nature. It doesn't
19 say that she's relying upon -- there have been a hundred
20 studies done on this subject and all of them came back and
21 said that delayed reporting is commonplace. She's not
22 saying that this is based on any kind of education. She's
23 just saying I've got this education and there are lots of
24 reasons for not telling. They may not have the words to
25 tell, they may not tell unless somebody else asks. She

1 said most occur -- the abuse occurs from people who know,
2 love -- who the child knows, loves, trusts. They're
3 fearful of what might happen to themselves or they may be
4 fearful of what might happen to the person. She testified
5 about what a triggering event is. I hope every jury on the
6 case knows what a triggering event would be. She didn't
7 give any specialized description of a triggering event.
8 You asked her about outside influences. I'm not really
9 sure she understood what you were talking about, but she
10 gave an answer. She did talk about core and contextual
11 details. That concerns me a little bit about just the
12 bolstering. I don't know really what that adds. I'm not
13 saying you cannot put up an expert who can say that
14 behavioral patterns of an adolescent abused person include
15 this phenomenon of delayed reporting; that it is
16 commonplace. But it has to be based on something that's
17 scientific or technical, not just generally.

18 MR. TOOKER: Yes, sir. With regard to delayed
19 disclosure I believe she can lay that foundation. Now, I
20 am not ---

21 THE COURT: Okay. Put her back on the stand and
22 let me hear it.

23 MR. TOOKER: Okay.

24 THE COURT: We need you up here. You're still
25 under oath. They're going to ask you some more questions.

1

PROFFER TESTIMONY OF

2

SHAUNA GALLOWAY-WILLIAMS CONTINUED

3

REDIRECT EXAMINATION

4

BY MR. TOOKER:

5

Q. Ms. Galloway-Williams, you talked about delayed disclosure and I know you and I talked about this before and I told you not to go into percentages. But what percentage of children who are abused delay in disclosing that information to a parent or guardian?

10

A. Well, from the research that's been done with adults who are survivors of childhood sexual abuse who then report as adults that they were abused, when we look at those numbers, about seventy percent of them delayed disclosure.

14

Q. Okay. So it's more common that people who are abused delay in disclosing?

16

A. Right. And in my experience and in my training, delayed disclosure is much more common than children telling right after something happened. And delays can be, you know, days, weeks, months, years, and many never tell at all.

21

Q. Now, you said the research. Is that research that's published in your field?

23

A. Yes.

24

Q. Widely accepted?

25

A. Yes.

1 Q. Is this the stuff that you talk about in your
2 continuing education courses and whatnot?

3 A. Yes.

4 Q. Okay. Have you presented on this stuff?

5 A. Yes.

6 Q. You have? How often or how many times have you
7 presented on delayed disclosure dynamics in sexually abused
8 children?

9 A. Well, any time I'm presenting on the dynamics of
10 child sexual abuse, we talk about delayed disclosure. We
11 talk about the reasons why children don't disclose, the
12 reasons why they don't tell. So recently I presented at
13 the South Carolina Solicitors Association Conference on
14 working with victims of child abuse and sexual assault.
15 During that one I would have presented. I've recently
16 participated in training the school district of Greenville
17 County in recognizing and responding to child sexual abuse.
18 I trained probably about seven hundred and fifty employees
19 there. That was part of the training, why children don't
20 tell right away and delayed disclosure. Pretty much any of
21 the training that I do, it's part of that. Additionally,
22 I'm an adjunct faculty member at USC Upstate and I teach
23 the child maltreatment course and we talk about delayed
24 disclosure in that course, as well.

25 Q. Okay. And to go back to your figures, that seventy

1 percent figure, that study looked at adults who were
2 complaining of ---

3 A. Right. It looked at adults who had been abused as
4 children and about seventy percent of them never told or
5 that was the first time that they had told about their
6 abuse.

7 Q. Okay. So the only people interviewed in that study
8 were people that were abused?

9 A. Yes.

10 Q. Or people who disclosed at some point?

11 A. Yes.

12 Q. And based on that study, only thirty percent
13 disclosed immediately?

14 A. Based on that information, that study, yes.

15 Q. Okay. No further questions, Your Honor.

16 MR. SUMNER: I don't have any questions.

17 THE COURT: Thank you. You may step down.

18 If that's the percentage that's on appeal, I
19 understand the issue, because the only study she quoted is
20 for people who disclosed it when they were adults. And
21 that would presumably be a higher -- I don't know that it
22 is or it isn't because she didn't tell me about any other
23 studies. People that wait until they're adults and then
24 come forward. That just -- again, I have to make a call,
25 and if I'm wrong I apologize to everybody.

1 I do not disagree that that behavioral evidence can
2 come in. But she's got to give me more to work with.
3 She's got to say, you know, she took this course on this
4 and this is a requirement that -- you know, she's got to
5 give me some meat. I don't have any. All I've got are
6 things that are so general that anybody would know them.
7 Or there are a few things -- she said in her experience
8 delayed disclosure is more common. That's as close as she
9 came and that's just not enough to meet what I think is
10 required of the Court under counsel. I'm sorry. I don't
11 know what else to do. She cannot get up and testify to the
12 things she's testified about as an expert.

13 The other issues that she testified about initially in
14 the proffer, I have more concerns with about just being so
15 generic and so general and I was really concerned when she
16 started talking about these things about violence and this
17 and that and the other, that that might confuse the jury in
18 some way because it might -- they might associate those
19 things as being something that this expert knows about that
20 they haven't heard about in this particular case. But I
21 think the core issue that you're trying to focus on is
22 delayed disclosure. And I just don't think there's enough
23 there for me to allow.

24 MR. TOOKER: Okay. And this is just me waxing
25 philosophic for a moment. I think she's testified to what

1 she can testify to based on her knowledge of that
2 particular study. And from what I've heard that's
3 consistently the ---

4 THE COURT: Is that the only study? You mean to
5 tell me in all the years of psychology that ---

6 MR. TOOKER: I, of course, can't speak to that.

7 THE COURT: Well, again, I'm asking out of
8 ignorance. And I apologize. All the years of psychiatry
9 and psychology that they don't have books, volumes, about
10 delayed disclosure. That they haven't done studies on -- I
11 interrupted you, Solicitor. I apologize. Finish your
12 statement.

13 MR. TOOKER: I was going to say I can appreciate
14 Your Honor's perspective and take on this evidence and the
15 lack of scientific foundation for that kind of testimony.
16 As an alternative I wondered if it would not be appropriate
17 to let her talk about her training, experience, background,
18 history of this kind of thing, and then testify as to,
19 based on her experience in the field, after however many
20 hundreds of forensic interviews, after counseling however
21 many hundreds of children who have been abused sexually,
22 what she knows to be true based on those experiences. The
23 same way you would ask an auto mechanic -- I mean an auto
24 mechanic is not going to come in and testify, you know,
25 these are the studies on the ignition timing of a Clarion

1 F1; right? But they can come in and they can say, you
2 know, I haven't worked on these cars. I can tell you about
3 how these cars work. So I wonder if Your Honor would
4 consider that as an alternative to the foundational
5 requirements that you mentioned?

6 THE COURT: Well, here's the thing. The whole
7 reason for the proffer is for me to maybe hear some things
8 that the jury can't hear and then say, all right, you need
9 to tailor this. You need to refine it. You need to leave
10 out this part like a minute ago I mentioned violence. If
11 there's no indication of violence in the case, don't
12 mention violence in front of the jury. Just tailor the
13 testimony. That's the whole reason that we've got the jury
14 back there waiting and we're hearing it here.

15 Now, again, from the notes that I have, I have to make
16 a determination that this will assist the trier of fact,
17 that the expert witness is qualified and that if it's a
18 scientific issue that the underlying science is reliable.
19 Now, once I let that go on, then it's a matter of cross
20 examination. That's the remedy. But again, I feel like
21 I'm beating a dead horse up here, I have to be the
22 gatekeeper right now. And I don't have enough based on
23 what y'all have presented. Now, if she wants to come in
24 here and say, I have interviewed a thousand children and in
25 my experience the vast majority of them were delayed

1 reporting situations. That coincides with the literature
2 and she has some literature, that would be helpful. Maybe
3 she doesn't have to even cite literature. Then those kinds
4 of things, I think, might be enough. But I can't
5 anticipate every single thing that she might say. I have
6 to go by what she said the first time and what she said the
7 second time.

8 MR. TOOKER: Yes, sir.

9 THE COURT: And she hasn't said enough. And I
10 don't know how much longer we're going to keep the jury
11 back there waiting while we do this. I'll send them home
12 for the day if it takes all day.

13 MR. TOOKER: Yes, sir.

14 THE COURT: The status has to be determined --
15 one of these notes talks about you determine the status of
16 the expert first. That's my job. And then I have to make
17 some initial findings. We haven't adopted Dalbert, I don't
18 think, but we have moved more toward the federal -- I think
19 some on the Supreme Court would take strong issue with that
20 statement. They ---

21 MR. SUMNER: Real strong issue.

22 THE COURT: They would take real strong issue
23 with it. Forgive me if you read this transcript. But it
24 has to assist the trier of fact. I'll give you a few
25 minutes to clear your minds. Let me know when you're

1 ready. If you've got another proffer, I guess I'll
2 consider it. But we've got to do something with this jury
3 now.

4 MR. TOOKER: Yes, sir. Thank you, sir.

5 (WHEREUPON, the Court stood at recess for a short
6 break at approximately 2:53 p.m.)

7 THE COURT: Where are we?

8 MR. SUMNER: I'm going to let my colleague
9 correct me. Ms. Galloway-Williams will be -- our proposal
10 is that she be allowed to testify as an expert but very
11 limited to -- no, not as an expert. Just limited to her
12 personal experience of interviewing adolescent victims of
13 abuse. And she can say that in her own experience delayed
14 disclosure is a common occurrence. I will cross-examine
15 her briefly regarding the information I did before of false
16 memory and a few questions along that line and then that
17 will be it.

18 THE COURT: She's going to have to be qualified
19 as an expert.

20 MR. TOOKER: I think so, too. I think that's one
21 spot we -- I think she has to be qualified as an expert and
22 that's what opens the door both for the delayed disclosure
23 testimony and then also the false ---

24 THE COURT: You're just going to limit her to
25 those two topics, those two subjects, and to her experience

1 related to delayed disclosure?

2 MR. SUMNER: Yes, sir.

3 MR. TOOKER: Yes, sir.

4 THE COURT: All right.

5 MR. SUMNER: If you're comfortable with that ---

6 THE COURT: She's got the education, she's got
7 the training, she's got the experience. I don't question
8 any of that. It's just again ---

9 MR. TOOKER: Underlying facts and ---

10 THE COURT: Well, it was so general that I don't
11 know how it aids the jury to know things that are technical
12 -- your example about the mechanic is exactly correct. A
13 guy doesn't have to go to a GM school or a Ford school.
14 They could have learned more in -- under a shade tree. I
15 don't really take issue with anything you were arguing
16 except the proffer. I don't think it met the standards.
17 But I have no problem with her being qualified by virtue of
18 education, training and experience as an expert in patterns
19 of adolescent victims of child sexual abuse.

20 MR. SUMNER: Well, to speed things along a little
21 bit, could you just go ahead and inform the jury of that
22 when they come in, that she has been established as an
23 expert in that field. And that way we wouldn't have to lay
24 the foundation.

25 THE COURT: He probably wants to lay the ---

1 MR. TOOKER: I'd like to ---

2 MR. SUMNER: Okay. Go ahead.

3 THE COURT: And if I were in his shoes I'd want
4 the jury to know something about that.

5 MR. SUMNER: Go ahead.

6 MR. TOOKER: And so I don't misquote Your Honor,
7 patterns of adolescent abuse and disclosure? Is that what
8 you said?

9 THE COURT: I'm using this language from the --
10 is it ---

11 MR. TOOKER: There's White, Weaverling and
12 Shubert, are the ones I provided Your Honor.

13 THE COURT: Weaverling. That expert was -- there
14 was -- the section from the opinion, the challenge
15 testimony is behavioral evidence concerning rape trauma.
16 And then down below that it's going through a lot of
17 citations and it states that the testimony is relevant and
18 helpful in explaining to the jury the typical behavior
19 patterns of adolescent victims of sexual assault. So I
20 thought based on what you all were telling me that you're
21 in agreement that she's an expert on behavioral patterns of
22 adolescent victims of sexual assault.

23 MR. SUMNER: That's fine by me. My main focus is
24 not really what you call her. It's just what she -- she's
25 going to testify about from her experience about delayed

1 disclosure, I can ask her about false memory and that's
2 where we're going to shut it down. That's really what I'm
3 ---

4 THE COURT: Does she understand that?

5 MR. TOOKER: I told her that, yes, sir.

6 THE COURT: Bring the jury.

7 (WHEREUPON, the jury entered the open Court at
8 approximately 3:03 p.m.)

9 THE COURT: Go ahead and bring her in, please.

10 MR. TOOKER: Yes, sir. The State calls Shauna
11 Galloway-Williams to the stand.

12 THE COURT: Would you come up to be sworn,
13 please?

14 THE CLERK: Place your left hand on the bible and
15 raise your right hand, please. Do you solemnly swear or
16 affirm that the testimony you're about to give is the
17 truth, the whole truth and nothing but the truth, so help
18 you God?

19 THE WITNESS: Yes.

20 THE CLERK: Have a seat and state your name for
21 the record, please.

22 THE WITNESS: Shauna Galloway-Williams.

23 **SHAUNA GALLOWAY-WILLIAMS,**

24 **BEING DULY SWORN, TESTIFIED AS FOLLOWS:**

25 **DIRECT EXAMINATION**

1 **BY MR. TOOKER:**

2 Q. All right. Ms. Galloway-Williams, where do you work,
3 ma'am?

4 A. I am the Executive Director of the Julie Valentine
5 Center.

6 Q. And how long have you been doing that?

7 A. I've been the Executive Director for five years.
8 I've worked with the Center for ten years.

9 Q. And what is your role, I guess, as the Executive
10 Director? What do you do there?

11 A. As Executive Director I oversee all of the general
12 operations of the Center, the financial responsibilities.
13 I also continue to do clinical work, so I conduct forensic
14 interviews. I do training in the community. And I also
15 supervise some of our clinical staff.

16 Q. You mentioned forensic interviews. I'm going to
17 first start with your education. What is your formal
18 education?

19 A. I have a master's degree in counseling from Clemson
20 and a bachelor's degree in psychology from Winthrop.

21 Q. Okay. Do you have any kind of professional licensing
22 or licensure?

23 A. Yes. I'm licensed as a professional counselor in the
24 state of South Carolina.

25 Q. How long have you been so licensed?

1 A. I've been licensed since 2004.

2 Q. Okay. And how long have you been practicing --
3 performing forensic interviews or counseling children?

4 A. I've been working as a counselor with children since
5 2001; so thirteen years. And I've been conducting forensic
6 interviews of children since 2004.

7 Q. Have you ever been qualified as an expert in General
8 Sessions Court?

9 A. I have.

10 Q. How many times?

11 A. Twenty-three times.

12 Q. Okay. How many forensic interviews have you
13 conducted?

14 A. I've conducted over eight hundred forensic interviews
15 of children.

16 Q. Okay. And how many kids have you counseled during
17 the course of your career?

18 A. Children that I have counseled or conducted
19 assessments with or done forensic interviews with, I would
20 say probably over two thousand.

21 Q. Okay. And in what percentage of the kids that you've
22 counseled and the kids that you've done forensic interviews
23 for would you say were regarding sexual abuse allegations?

24 A. Most of the children that I've worked with have been
25 referred to me or I've worked with them because they have

1 had a history or allegations of sexual abuse, physical
2 abuse, neglect or some type of traumatic experience.

3 MR. TOOKER: At this point, Your Honor, the State
4 would move to have Ms. Galloway-Williams qualified as an
5 expert in behavior patterns of adolescent victims of sexual
6 assault.

7 MR. SUMNER: No objection from the Defense, Your
8 Honor.

9 THE COURT: All right. She's so recognized. You
10 may continue.

11 Q. Okay. What is delayed disclosure?

12 A. Delayed disclosure is the title we use to refer to
13 when children don't tell right away after something has
14 happened to them. So if a child has been physically abused
15 or sexually abused, they may not tell right after the
16 incident has occurred. It may be days, weeks, months,
17 years. And many times children don't tell.

18 Q. Okay. And is that something that's common, children
19 delaying in their disclosure?

20 A. Yeah. In my experience it's much more common that
21 children do delay disclosure.

22 Q. Okay. So do children delay disclosing more often
23 than disclose immediately?

24 A. Yes. They delay disclosure more often.

25 Q. Okay. And when you say that, just so we're clear,

1 that means not going to a parent or guardian immediately
2 after being abused?

3 A. Right.

4 Q. Okay. No further questions at this time.

5 THE COURT: Cross?

6 MR. SUMNER: Yes, sir.

7 **CROSS-EXAMINATION**

8 **BY MR. SUMNER:**

9 Q. Good afternoon. Ms. Galloway-Williams, just a few
10 questions. Are you professionally familiar with the term
11 false memory?

12 A. Yes.

13 Q. And tell us what that is?

14 A. Well, it's a term to describe the possibility of
15 someone creating a memory or having a memory that didn't
16 actually happen. So believing so strongly that something
17 happened that they -- it's a false memory.

18 Q. And just one follow-up question. There are
19 recognized instances or have been recognized instances
20 where children have actually inserted themselves into
21 something that they've observed a number of times and kind
22 of become a participant to some degree?

23 A. So are you asking if there are examples of children
24 who ---

25 Q. No. I'm saying as a follow-up to false memory, it

1 would be where -- maybe where somebody observed -- an
2 example would be where a child could observe something so
3 much or to some degree that it actually somehow in their
4 mind, because they're young, they become a participant and
5 tell others -- they report to others that it happened to
6 them?

7 A. A lot of times false memory is associated with
8 repressed memories or someone trying to -- a lot of times
9 we see it with adults who may have repressed memories and
10 so a therapist may be attempting to retrieve that memory
11 with them and it may in turn be a false memory.

12 Q. You referenced to the jury earlier -- thank you for
13 that. You referenced to the jury earlier you have a lot of
14 experience in forensic interviewing?

15 A. That is correct.

16 Q. And in fact you are a forensic interviewer and have
17 the education that the solicitor received from you in that
18 field; correct?

19 A. That's correct.

20 Q. And is it a correct statement that the concerns of a
21 false memory of a child who did not actually go through
22 something as parroting, that is something that is a concern
23 in your field; is that right?

24 A. Right. So when we are conducting forensic interviews
25 we are assessing to determine whether what the child is

1 reporting to us is something that they've actually
2 experienced or something that someone has told them.

3 Q. Or somehow ---

4 A. Or something else.

5 Q. --- maybe observed or something?

6 A. Or something else.

7 Q. And that's a real concern? As you go through this
8 process that's something that you want to eliminate?

9 A. Right. Yes.

10 Q. Thank you. I don't have any other questions.

11 THE COURT: Redirect?

12 MR. TOOKER: May we approach briefly, sir?

13 THE COURT: Sure.

14 (WHEREUPON, Messrs. Tooker and Sumner approached the
15 bench.)

16 THE COURT: You may continue.

17 MR. TOOKER: Thank you, sir.

18 **REDIRECT EXAMINATION**

19 **BY MR. TOOKER:**

20 Q. Ms. Galloway-Williams, Mr. Sumner mentioned with you
21 a concept called parroting when you're conducting a
22 forensic interview?

23 A. Yes.

24 Q. Okay. What kind of things are you going to look for
25 as an interviewer to satisfy yourself that the child is not

1 parroting, it's not a false memory, they're not making it
2 up?

3 A. When we're talking to the child we are asking them
4 questions that will allow them to share core and contextual
5 details. Core details would be who, what, when. The
6 contextual details are more sensory details, the details
7 that they would share with us that would help us to see
8 that this is something that the child has experienced
9 rather than something that someone has told them.

10 Q. What do you mean by sensory?

11 A. A sensory experience is sight, smell, taste, touch,
12 things that a child would actually have experienced on
13 their own.

14 Q. So describing a taste would be a contextual detail?

15 A. Yes.

16 Q. Okay. No further questions?

17 THE COURT: Recross?

18 MR. SUMNER: No, sir

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

20 MR. TOOKER: May she be excused from her
21 subpoena, sir?

22 MR. SUMNER: No objection.

23 THE COURT: You're free to go. Thank you very
24 much.

25 All right. Do you have any other evidence, Solicitor?

1 MR. TOOKER: No, sir. At this point the State
2 rests its case.

3 THE COURT: Okay. Folks, you haven't been out
4 here long, but I told you at the beginning when I went
5 through those landmarks that when we got to this point I
6 had to talk to the lawyers about legal issues. Now, this
7 normally takes ten to fifteen minutes. And I'll make an
8 assessment of where we are in the trial and I'll bring you
9 back out here and tell you.

10 You may not believe it, but one of my pet peeves is
11 having a jury wait. It just drives me nuts. So I'm ever
12 mindful of the fact that you're back there waiting on us.
13 And we're working as hard as we can. We just want to make
14 sure we do our best -- I want to make sure I do my best to
15 try to do it right. So just bear with me, please. Let me
16 talk to the lawyers. Let me handle what I have to handle
17 and I'll bring you back out here and tell you what we're
18 going to do from this point.

19 Don't discuss the case. Follow the bailiff.

20 (WHEREUPON, the jury exited the open Court at
21 approximately 3:13 p.m.)

22 THE COURT: Are there any motions?

23 MR. SUMNER: Yes, sir, Your Honor. The Defendant
24 would move for a directed verdict of acquittal. I'll
25 provide argument -- I really wasn't planning on arguing

1 that to you. You've heard the witnesses and seen the
2 testimony -- or seen the exhibits. And I know you're very
3 familiar with the standard. So I will make that motion at
4 this time. Thank you.

5 THE COURT: There's sufficient evidence for the
6 case to go to the jury at this point.

7 All right. Mr. Cone, I have to go over some things.
8 I put you under oath yesterday. You're still under oath.
9 Do you understand?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Okay. You can have a seat. Just
12 speak out loudly, because this lady has to take down what
13 we can. You can have a seat.

14 Mr. Cone, we've reached the stage of the trial where
15 the State has rested. They've put up their case in chief.
16 And the next thing that happens is that your side is given
17 the opportunity to present evidence for the jury to
18 consider. Do you understand where we are in the trial?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Now, in that regard you may call
21 witnesses to testify. And if you yourself wish to testify,
22 you're welcome to do so. But no one can force you to
23 testify. You have an absolute right to remain silent. And
24 if you choose not to testify I'm going to tell the jury
25 they cannot hold your silence against you in any way. They

1 can't discuss it in their deliberations. It's not to enter
2 into their minds in making the decision of whether you're
3 guilty or not guilty. Do you understand all that?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: This decision about whether you
6 testify or not, it is your decision to make and yours
7 alone. Do you understand that?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: I expect that you might confer with
10 your attorney, with family members, friends, any one whose
11 opinion you value on important decisions, but ultimately
12 you're the person on trial and it's your call. You make
13 the decision about whether you testify or not. Do you
14 understand?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Now, does he have a prior criminal
17 record that the State would propose to subject him to
18 impeachment?

19 MR. TOOKER: No. It's just traffic offenses,
20 sir.

21 MR. SUMNER: I think the solicitor and I have
22 discussed, there's nothing that could be used to impeach
23 him on his testimony; is that correct?

24 MR. TOOKER: Yes, sir.

25 THE COURT: All right. So what they're telling

1 me, Mr. Cone, is that if you take the stand they cannot ask
2 you about a prior criminal record that you might have. The
3 only way that could come in is if you open the door in
4 someway, if you created the issue yourself. And you can
5 talk to your lawyer about what opening the door means. But
6 let me tell you what's happened in cases I've had over the
7 years.

8 I've had situations where I have ruled or the State
9 has agreed that they would not go into a prior criminal
10 record of a defendant, and then I've had a defendant get on
11 the stand and said, well, I've never been in any trouble
12 with the law. Well, that's a lie. And so that opens the
13 door for the State to ask about that, because that
14 defendant created the credibility issue by lying. So
15 that's what I mean in general terms. But unless you open
16 the door in someway, if you take the stand, they're not
17 going to be able to ask you about your prior criminal
18 record. Do you understand that?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Now, you did offer some sort of
21 documents; right?

22 MR. SUMNER: Yes, sir, I did. We offered, I
23 believe, about twenty-four photographs. Is that right,
24 madam court reporter?

25 THE COURT: So the State is going to make the

1 last closing argument.

2 MR. SUMNER: And Your Honor, just for the record,
3 I have discussed extensively with Mr. Cone regarding his
4 rights to testify or not testify. I fully explained the
5 procedures. I fully explained the Court's instruction to
6 him. And it is his decision to testify. And so he would
7 be our only witness. And we're ready to proceed whenever
8 the Court is ready.

9 THE COURT: All right. Mr. Cone, I need to ask
10 these questions. I ask them in every case. South Carolina
11 is unique in this, I think. I don't know of other states
12 that do it. I know I had a Court TV case years ago and the
13 only thing they really talked about was me asking the
14 defendant these question. The only air time I got was
15 asking this part right here. So it's kind of strange to a
16 lot of folks. But in South Carolina we want to make
17 absolutely sure you understand this.

18 Today are you under the influence of any type of
19 substance that would adversely affect your thinking; any
20 medicine, any substance that would adversely affect your
21 thinking?

22 THE DEFENDANT: No, sir.

23 THE COURT: You're clear headed, you know what
24 you're doing?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you suffer from any physical or
2 mental problems at all?

3 THE DEFENDANT: No, sir.

4 THE COURT: So have you understood everything
5 I've been over with you?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: You can change your mind or you can
8 stick with what your lawyer told me. It doesn't matter to
9 me. I'm not trying to suggest what you should or should
10 not do because it's your decision. Do you need an
11 additional opportunity to talk to your lawyer?

12 THE DEFENDANT: Not a bit. I wish to proceed.

13 THE COURT: All right.

14 MR. SUMNER: We're ready.

15 THE COURT: Well, I'm going to make a finding
16 that your decision, whatever it is, is your decision and
17 yours alone. That you understand you have a right to
18 testify. You have a right not to testify. If you choose
19 not to testify, I'm going to tell the jury they cannot hold
20 your silence against you in any way at all. Do you
21 understand that it is your call, your decision, you're the
22 only one that can make it? And that you've made your
23 decision freely, knowingly, voluntarily and intelligently?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: All right. Do y'all need a break

1 before we start?

2 MR. SUMNER: We're ready.

3 MR. TOOKER: Ready to go.

4 THE COURT: All right. Bring the ---

5 MR. SUMNER: And I will say that this will be the
6 only witness for the Defense. And I would ask, since we're
7 moving on toward the four o'clock hour, I would ask after
8 this witness, that the Court consider argue and charge
9 tomorrow morning.

10 THE COURT: We will. That's what the Chief has
11 basically told us to do.

12 MR. SUMNER: Okay.

13 (WHEREUPON, the jury entered the open court at
14 approximately 3:20 p.m.)

15 THE COURT: All right. Ladies and gentlemen, we
16 got through that a little quicker than normal, so we're
17 ready to continue with the case. I told you when we got to
18 this point I would tell you where we go from here.

19 The next thing that's going to happen is that the
20 Defense is given an opportunity to present evidence for you
21 to consider. This does not change the burden of proof.
22 The burden of proof remains with the State throughout the
23 trial. But the Defense is given an opportunity to present
24 evidence for you to consider in evaluating whether the
25 State has met its burden of proof or whether the State has

1 failed to meet its burden of proof.

2 So I'm going to recognize Mr. Sumner to call his first
3 witness.

4 MR. SUMNER: Thank you, Your Honor. May it
5 please the Court? We call Justin Cone to the stand,
6 please, sir.

7 THE COURT: Come around, please, Mr. Cone.

8 THE CLERK: Place your left hand on the bible and
9 raise your right hand. Do you solemnly swear or affirm
10 that the testimony you're about to give is the truth, the
11 whole truth and nothing but the truth, so help you God?

12 THE WITNESS: Yes, it is.

13 THE COURT: Have a seat and state your name for
14 the record, please.

15 THE WITNESS: Justin Cone.

16 **JUSTIN CONE,**

17 **HAVING BEEN DULY SWORN, TESTIFIED AS FOLLOWS:**

18 **DIRECT EXAMINATION**

19 **BY MR. SUMNER:**

20 Q. Justin, you are the Defendant in this case; is that
21 correct?

22 A. Yes, sir.

23 Q. I'd like you to speak up and speak clearly so that
24 the court reporter can take down all your responses and so
25 that everybody from the jury can hear you. Okay? I'll

1 just start right out with why we're here today. Are you
2 guilty of sexually abusing [REDACTED] Victim ?

3 A. No, I'm not.

4 Q. And did you threaten her in any way to tell her to
5 keep her mouth shut or to not tell anybody, anything along
6 those lines?

7 A. No, I did not.

8 Q. Now, what I'm going to do is ask you -- we're going
9 to go back over some things that the jury has already heard
10 a little bit of, bits and pieces, but we're going to hear
11 your side of the story. So I'll start at the beginning.
12 How old are you?

13 A. I'm twenty-nine years old.

14 Q. And you live in Greenville County?

15 A. Yes, sir.

16 Q. Okay. How long, roughly, have you known Doug Miller
17 and Casey Miller and that family?

18 A. I believe I met them around '03, '04.

19 Q. Okay. And how did you come to meet them?

20 A. Through the racetrack in Anderson County and
21 Greenville-Pickens.

22 Q. And just to short circuit things, you and Doug Miller
23 shared an interest in racing, stockcar racing, that type
24 thing?

25 A. That is correct.

1 Q. And did you all become friends?

2 A. Yes, we did.

3 Q. And did you become good friends?

4 A. Eventually, yes.

5 Q. And did you work with -- did he own a -- he had a
6 stockcar of some type that he would race?

7 A. Yes, he did.

8 Q. And did you, I guess, work with that ---

9 A. Yes.

10 MR. TOOKER: Judge, I'm going to object on
11 leading.

12 THE COURT: Try not to lead.

13 MR. SUMNER: All right.

14 Q. Did you work with him in any way?

15 A. Yes.

16 Q. Okay. Tell us about that?

17 A. I would go to the racetrack with him, help out with
18 small stuff. You know, change oil, tires, maintenance,
19 basic stuff.

20 Q. Okay. Did it get -- I'm going to move forward to
21 around I guess '09 or 2010, somewhere in that range. Did
22 you get -- did it come to the point where you spent time
23 over there at night and I guess on a monthly basis?

24 A. The last year prior to the allegations I would stay
25 over there quite a lot.

1 Q. Okay. And would you spend the night there?

2 A. Yes.

3 Q. And you have seen the pictures that Ms. Miller ---

4 MR. SUMNER: I don't know if that juror needs
5 some water or not.

6 Q. --- that Ms. Miller ---

7 THE COURT: You need some water, sir?

8 THE JUROR: Thank you.

9 Q. You have seen photographs that have been marked as --
10 into evidence as exhibits -- Defense Exhibits 1 through 24;
11 is that right, Justin?

12 A. Yes, it is.

13 Q. And are these pictures -- I mean they're already into
14 evidence, but are they true and accurate as to the
15 condition of the house or the home while you were there?

16 A. Yes, sir.

17 Q. Now, you did not stay there -- or did you stay there
18 every weekend?

19 A. No, I did not.

20 Q. Okay. On a typical month how often would you stay
21 there?

22 A. Maybe about two weekends a month.

23 Q. And would that be Friday to Sunday or what we would
24 all think of as a weekend?

25 A. Right.

1 Q. Now, did you, while you were there -- we heard
2 testimony this morning from Casey Miller. Did you, in
3 fact, have multiple sexual encounters with her and Doug
4 Miller?

5 A. Yes.

6 Q. Did you also have sexual encounters with just her
7 when Doug was not around?

8 A. That is correct.

9 Q. Was this something that happened very occasionally or
10 was it more in line with her testimony that it was pretty
11 frequently?

12 A. It was pretty frequent.

13 Q. Would it take place in the home?

14 A. Yes.

15 Q. Would it take place in the bedroom?

16 A. Yes.

17 Q. The pictures show no door on the bedroom. Was that
18 the way that it was?

19 A. That's the way it was.

20 Q. Were you ever -- now looking at these pictures, and I
21 know the jury has seen them, and I'm just going to use this
22 TV just because it's over here as kind of a prop for us as
23 we work through them. How far roughly would you say the
24 two seats were when you and Doug would watch television?
25 Now we've seen that on the pictures. How far away from

1 this television, just for the jury's reference, would the
2 chairs be? And you can get down if you need to get down.

3 A. Well, maybe from the edge of the stand right there to
4 the TV.

5 Q. Right about here?

6 A. That's about right.

7 Q. So roughly, I'm just going to say, seven, eight feet
8 maybe?

9 A. That's correct.

10 Q. And from the photographs we saw there were two kind
11 of easy chairs maybe there?

12 A. It was kind of like a wrap-around couch.

13 Q. Okay. Did -- in your presence did Victim ever wander
14 into the room while you all were watching things that would
15 be inappropriate for her to see?

16 A. She would.

17 Q. And tell us what would -- I left my notepad over
18 here. Tell us what Doug would do?

19 A. A lot of times when the kids would try to get his
20 attention he would just kind of snap and bark at them. Get
21 them to leave the room.

22 Q. Okay. Did he ever instruct her about don't look at
23 the TV or anything if there was something on?

24 A. He would tell them to close your eyes and hold your
25 ears.

1 Q. Was there ever any pornographic images up on the
2 television?

3 A. Yes.

4 Q. Is this something that happened once or twice while
5 you were there during the course of this two to three years
6 or would it have been more than that?

7 A. It was a lot more than that.

8 Q. Did everyone ever -- let me start again. Was there
9 ever a time that you can recall that you and Doug and Casey
10 and the children would sleep in the living room?

11 A. Yes.

12 Q. Did that happen once in a while or was that -- did
13 that happen a pretty fair amount?

14 A. That was pretty frequent, too.

15 Q. Okay. Did any type of, to your knowledge, sex occur
16 between Doug and Casey in the presence of the children in
17 the living room?

18 A. As far as I know, I don't. But that don't mean that
19 it didn't happen.

20 Q. But to your knowledge ---

21 A. No.

22 Q. --- you didn't observe it yourself?

23 A. Uh-uh (negative).

24 Q. Turning to the day that you were -- that Doug
25 approached you. Why don't you tell us about that. It was

1 something called a poker house or a house or what was that?

2 A. It was basically just an empty building attached to a
3 gas station. And they would use that as what I call a
4 poker house. They would have people come over and play
5 poker sometimes on the weekends.

6 Q. And were you there that afternoon? I'm talking about
7 when Doug came over and confronted you. Were you there
8 that afternoon?

9 A. Yes, sir.

10 Q. Okay. Who else was there? Tell us -- take your time
11 and tell us who all was in there when he came in?

12 A. There was Doug, Robert Odom, myself, my mom and my
13 step dad.

14 Q. Now, they're not going to testify, but they're seated
15 over here behind you and have been here this entire trial;
16 is that correct?

17 A. That's right.

18 Q. And they were there?

19 A. Yes.

20 Q. And what do you recall about that event when Doug
21 came in? Tell us what you recall about it, Justin?

22 A. He come through the door and I don't know if he -- I
23 can't remember if he grabbed my arm or what, but he just
24 wanted me to go around to the backroom with him. And he
25 asked me, what have you been doing to **Victim**? I'm like,

1 what are you talking about, you know? This is the first
2 I've heard about it. And he just kept saying it over and
3 over and over.

4 Q. And you spent a -- I guess a tremendous amount of
5 time around **Victim**?

6 A. No, I hadn't.

7 Q. Did Doug spend a lot of time with his daughters in
8 your presence?

9 A. No.

10 Q. I don't want to be repetitive, but were you -- I
11 guess, did you spend an unusual amount of time around
12 **Victim**?

13 A. No, I didn't.

14 Q. How close did his parents live to their home, to Doug
15 and Casey's home?

16 A. It was the lot right next door to us. Probably, you
17 know, two or three hundred feet.

18 Q. And were there, I guess, kind of a free flow of
19 people in and out of this home that we've seen pictures of
20 up to, I guess, the grandparents' house and back? Would
21 that be a fair statement?

22 A. That's correct.

23 Q. And as I come to a close, before I turn it over to
24 the prosecutor, I want to ask you again -- I know you've
25 sworn an oath. There's been terrible sexual things that

1 have been placed upon you by this testimony. Are you
2 guilty of these things?

3 MR. TOOKER: Judge, asked and answered.

4 THE COURT: Overruled. You may answer the
5 question.

6 Q. Are you guilty of these things?

7 A. No, I am not.

8 Q. I'm just going to let you answer any questions that
9 the prosecutor might have.

10 THE COURT: All right. Cross-examination.

11 MR. TOOKER: One moment, Your Honor.

12 **CROSS-EXAMINATION**

13 **BY MR. TOOKER:**

14 Q. All right. So you met about 2003, 2004, met the
15 Miller family?

16 A. Correct.

17 Q. Okay. And y'all would hang out and drink and do
18 bonfire stuff; is that right?

19 A. That is correct.

20 Q. Do race car stuff, too?

21 A. Yes.

22 Q. Okay. And when you drank, you drank both beer and
23 liquor?

24 A. Yes.

25 Q. Any drug use?

1 A. No, sir.

2 Q. Just drinking?

3 A. Yes.

4 Q. And you slept -- and I'm just going to -- I wrote
5 down what you said, so tell me if I'm misquoting you. But
6 you slept at the house quite a lot; is that right?

7 A. If you consider a lot every other weekend.

8 Q. Okay. So you slept at the house quite a lot. I'm
9 just -- I wrote down what you said. Does that sound right?
10 Does that sound like what you said on the direct?

11 MR. SUMNER: Judge, I think he answered the
12 question, that he stayed there about every other weekend,
13 and they spent the night there.

14 MR. TOOKER: Well, he asked me a question.

15 THE COURT: He's on cross. He's allowed
16 latitude. You may -- the question is proper. Go ahead and
17 ask him.

18 Q. So did you say that you slept at the house quite a
19 lot?

20 A. Yes.

21 Q. Okay. I'm not trying to trip you up here.

22 A. Okay.

23 Q. These are the things that I heard you say. I want to
24 make sure I heard them right. And that you spent the night
25 there? That's kind of redundant, I guess. But is that

1 true?

2 A. Yes.

3 Q. And that you had multiple sexual encounters with Doug
4 and Casey?

5 A. Yes.

6 Q. And that those were pretty frequent ---

7 A. Yes.

8 Q. --- when you were there? And that you did have sex
9 in the home?

10 A. Yes.

11 Q. And that you did have sex in the bedroom?

12 A. Yes.

13 Q. Okay. And that that was usually while you were
14 drinking?

15 A. No.

16 Q. You would not drink before you had threesomes with
17 these people?

18 A. Well, we would, yes.

19 Q. Okay. This is what I'm asking?

20 A. Okay.

21 Q. So you'd get a buzz, you'd get drunk, and then y'all
22 would go and fool around?

23 A. Yes.

24 Q. And you would go over on other weekends, too, get
25 drunk, get a buzz and not fool around; right?

1 A. Right.

2 Q. Okay. So there would be occasions where y'all would
3 get lit, pass out watching TV or whatever?

4 A. Right.

5 Q. And the sleeping arrangements were kind of funny in
6 that house; right?

7 A. They were.

8 Q. You sometimes would sleep in the living room,
9 sometimes in the bedroom?

10 A. Ninety percent of the time it was in the living room.

11 Q. Okay. But sometimes in the bedroom?

12 A. Sometimes.

13 Q. And the kids would sometimes sleep in the living room
14 and sometimes in their own bedrooms?

15 A. Right.

16 Q. So sometimes all the kids would be in the living
17 room?

18 A. Yes.

19 Q. Okay. And you mentioned on direct that Doug
20 confronted you when y'all were playing poker?

21 A. Yes.

22 Q. He went up to you and said, what have you been doing
23 to **Victim**, repeatedly?

24 A. Yes.

25 Q. Would you say he was upset when he said that?

1 A. He seemed very upset.

2 Q. Yeah. And reasonably so; right? Yeah. I mean his
3 daughter just told him she had been abused; right?

4 A. Apparently.

5 Q. Okay. And you said on direct that you didn't really
6 spend much time with **Victim**?

7 A. That is correct.

8 Q. But isn't it true that you used to joke with **Victim**
9 that she was your girlfriend?

10 A. She would -- that's not true, no. She, being the
11 child that she was, she would kind of think about that in
12 her head. She would say it from time to time.

13 Q. So your testimony right now, under oath, is that you
14 wouldn't joke about it, too?

15 A. No.

16 Q. And you wouldn't joke about you and **Victim** getting
17 married some day?

18 A. I don't recall that.

19 Q. Okay. Now, you mentioned pornography. So it's your
20 theory that this whole thing ---

21 MR. SUMNER: I object to that. That's an
22 improper question. That's argument. If he wants to make
23 that argument, that's fine. There's no question that's
24 proper that starts with your theory is blank.

25 MR. TOOKER: I think it's proper cross, sir.

1 THE COURT: Rephrase it, please. I don't want to
2 get into any kind of burden shifting issue.

3 Q. So you believe that she saw pornography when you were
4 at the house?

5 A. Yes.

6 Q. Okay. So then your testimony is that you would go to
7 this house where you knew kids to be and you would sit on
8 the couch and watch pornography while they were in the
9 house?

10 A. No. It was more just movies that would have
11 pornography sex scenes. And the kids would be going back
12 and forth all the time.

13 Q. So we're not talking -- you testified there was
14 pornography ---

15 A. There is pornography.

16 MR. SUMNER: I said pornography, Your Honor.
17 Images, that's exactly what I said. I'm tired of him
18 misstating what questions I asked, Your Honor.

19 THE COURT: I don't get into the facts. The jury
20 has to decide the issues of fact. There's nothing wrong
21 with the question. Go ahead.

22 Q. So your testimony on direct ---

23 THE COURT: When I said there's nothing wrong
24 with the question I mean I'm not deciding the issues of
25 fact. I'm not saying whether you said something or didn't

1 say something.

2 MR. SUMNER: Can he just ask the question? I
3 mean he doesn't need to -- I mean, just ask the question.

4 THE COURT: He's on cross. He's allowed wide
5 latitude as long as he's asking questions and not making
6 statements.

7 MR. TOOKER: May I proceed, sir?

8 THE COURT: Sure.

9 MR. TOOKER: Thank you.

10 Q. So pornography, you're watching pornography with Doug
11 Miller in the house?

12 A. Pornography images.

13 Q. Pornography images?

14 A. Yeah.

15 Q. I want to make sure this is clear. Are we talking
16 about people performing sex acts on each other?

17 A. Yes.

18 Q. Yes. So we're talking -- you said movies with some,
19 what would you say, suggestive material or something that
20 you thought was inappropriate?

21 A. Yes.

22 Q. Is that the same thing as pornography?

23 A. Yes. I suppose. I really -- I don't know.

24 Q. You don't know what pornography is?

25 A. I do know what it is.

1 Q. Okay.

2 A. Okay.

3 Q. So what I'm asking explicitly, were the movies that
4 you're saying contained these images, were they general
5 release movies; movies that were produced and released in
6 theaters or on television?

7 A. Correct.

8 Q. Okay. So these general release movies would then
9 have scenes that were inappropriate for kids; is that
10 right?

11 A. That's right.

12 Q. And that's where Doug would ask his kids to cover
13 their eyes and close their ears?

14 A. Correct.

15 Q. Okay. Pornography, and correct me if I'm wrong, but
16 -- what is pornography to you? Why don't we just say that?

17 A. Well, it's not like the triple X stuff, nothing like
18 that.

19 Q. Okay. So no penetration?

20 A. Right.

21 Q. No depiction of blow jobs?

22 A. Not to my knowledge.

23 Q. No depiction of cunnilingus?

24 A. I don't know what that is.

25 Q. Going down on a woman?

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1 A. Okay.

2 Q. No depiction of that?

3 A. No.

4 Q. No depiction of an active sixty-nine?

5 A. No.

6 Q. Okay. No further questions.

7 THE COURT: Redirect.

8 MR. SUMNER: I don't have anything, Your Honor.

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

10 THE COURT: Any other evidence from the Defense?

11 MR. SUMNER: No, sir.

12 THE COURT: Does the State wish to offer reply
13 testimony or evidence?

14 MR. TOOKER: If I may have a brief minute and a
15 half to confer?

16 THE COURT: Do you want the jury out?

17 MR. TOOKER: I can just run out in the halfway

18 ---

19 THE COURT: No. If you go out I've got -- unless
20 I've got another solicitor sitting in the chair.

21 MR. TOOKER: Okay. Then five minutes.

22 THE COURT: Folks, we're going to break for the
23 day shortly, because once we hit four o'clock the Chief
24 Justice tells us we're supposed to stop.

25 The next part of the trial is to give the State the

1 opportunity to reply to what the Defense may have brought
2 out. They can't go back through the whole trial. They can
3 only respond to what the Defense may have brought out. And
4 that'll be the conclusion of the evidence. And then
5 tomorrow the lawyers will do their closing arguments and
6 I'll tell you the law. So you'll get the case tomorrow
7 morning most likely.

8 All right. If you'll follow the bailiff. As soon as
9 they tell me whether we have any reply or not, I'll bring
10 you back out. Thank you.

11 (WHEREUPON, the jury exited the open court at
12 approximately 3:41 p.m.)

13 THE COURT: We're at ease.

14 (WHEREUPON, the court stood at recess for a short
15 break.)

16 THE COURT: You ready, Solicitor?

17 MR. TOOKER: Yes, sir.

18 MR. SUMNER: I'm ready.

19 (WHEREUPON, the jury entered the open court at
20 approximately 3:48 p.m.)

21 THE COURT: All right. Solicitor, call your
22 witness.

23 MR. TOOKER: Thank you. Brief reply, Your Honor.
24 State calls Teresa Miller to the stand.

25 THE COURT: Come around, please.

1 THE CLERK: Place your left hand on the bible,
2 raise your right hand. Do you solemnly swear or affirm
3 that the testimony you're about to give is the truth, the
4 whole truth and nothing but the truth, so help you God?

5 THE WITNESS: I do.

6 THE CLERK: Have a seat and state your name for
7 the record, please.

8 THE WITNESS: My name is Teresa Miller.

9 **REPLY TESTIMONY**

10 **TERESA MILLER,**

11 **BEING DULY SWORN, TESTIFIED AS FOLLOWS:**

12 **DIRECT EXAMINATION**

13 **BY MR. TOOKER:**

14 Q. All right. Ms. Miller, do you know the Defendant
15 Justin Cone?

16 A. Yes, I do.

17 Q. How do you know him?

18 A. He was friends with my son, visited often. My son --
19 we live next door so he also came to my house.

20 Q. Okay. And were you in the courtroom for the
21 Defendant's testimony?

22 A. No.

23 Q. You were not?

24 A. No.

25 Q. Did you ever hear the Defendant make any jokes about

1 **Victim** ?

2 A. Yes.

3 Q. What jokes did you hear him make?

4 A. He would tease her about her being his girlfriend and
5 he would kind of put his arm around her and say this is my
6 girlfriend. And said I'm going to marry you some day, huh?
7 And she would say yeah. And he'd say I'll wait on you.

8 MR. TOOKER: No further questions, Your Honor.

9 THE COURT: Cross?

10 MR. SUMNER: None.

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

12 Anything else in reply, Solicitor?

13 MR. TOOKER: Nothing else in reply, sir.

14 THE COURT: Thank you.

15 Ladies and gentlemen, you now have all the evidence
16 you're going to have to decide the case. There are two
17 stages that remain, as I mentioned to you earlier, the
18 closing arguments and the charge. The Chief Justice has
19 given us directions that we don't start those after four
20 o'clock, and we're at another point where I have to talk to
21 the lawyers about legal issues. So if this were earlier in
22 the day I'd be sending you out, going through some legal
23 issues. This one takes longer than the other one did.

24 So what's going to happen is we're going to stay here.
25 We're going to do as much of this as we can get done. And

1 I think we can do it all. And I'm going to ask you folks
2 to be here in the morning at nine thirty. And what I
3 expect to happen then is that you'll hear the closing
4 arguments of the attorneys, then I'll tell you law. Unless
5 I change what I've got now, it's going to take me sixteen
6 minutes to explain the law to you. So I'll tell you the
7 law and shortly after that you'll have the case to decide.

8 Again, if you have any type of problem, emergency,
9 that prevents you from being here, please let us know so we
10 can -- have somebody let us know so we can know what's
11 going on. Don't discuss the case. Again, as I told you
12 yesterday, we rely upon the jurors. We don't sequester
13 them hardly at all anymore; put them in motel rooms and
14 guard what access they have to different things. So I'm
15 expecting you to follow all the admonitions that I gave
16 you. And if you're inadvertently exposed to anything, that
17 you let me know about that if that relates in any way to
18 this case or anybody in it. So please do that, folks. If
19 you're inadvertently exposed to anything. And don't do any
20 type of independent investigation, as I explained to you
21 yesterday.

22 So with that, I wish you a good evening. And I look
23 to see you in the morning at nine thirty. Thank you.

24 (WHEREUPON, the jury exited the open court at
25 approximately 3:53 p.m.)

1 THE COURT: Are there any motions?

2 MR. SUMNER: I would reiterate the motions that I
3 made at the close of the State's case, Your Honor. If you
4 need argument I'll be happy to comply. But otherwise I
5 just want to put that out there.

6 THE COURT: It's an issue for the jury. The
7 motion for directed verdict is respectfully denied.

8 MR. SUMNER: Your Honor, ---

9 THE COURT: There was an issue that -- are you
10 going to ---

11 MR. SUMNER: No, sir. I'm prepared to do that
12 now. I didn't mean to interrupt you.

13 THE COURT: I was looking down. I didn't see
14 you. I'm sorry. There's an issue that was brought to my
15 attention earlier. And I've talked to the attorneys and I
16 expect them to correct me where I'm wrong.

17 The Defendant apparently was alerted to the fact that
18 there was a Facebook posting by **Victim** father last night
19 about the trial and about her testimony. There was a
20 discussion between the lawyers and I about that. We don't
21 know of anything other than a Facebook posting. And
22 certainly we have no knowledge about any of these jurors
23 being Facebook friends or friends of Facebook friends. We
24 don't know what security settings Mr. Miller has on his
25 Facebook account, so we have no way of knowing what someone

1 might access.

2 So I basically offered that we could do pretty much
3 anything. I asked them to make sure we could preserve --
4 we were talking about printing it out -- but we could
5 preserve whatever was posted. Then the lawyers came back
6 to me and apparently it's just one post and it's on the
7 smart phone and it can be read into the record. And the
8 lawyers have agreed to do that.

9 I don't have any jurisdiction over all the people in
10 the courtroom. I have jurisdiction over only one. I have
11 contempt powers as to what goes on in the courtroom.
12 Beyond that it gets a little iffy. And I don't want to
13 really get involved in things that I don't need to get
14 involved in. But I would just say that it's a far safer
15 and wiser course not to post anything until this trial is
16 over. Nobody in this room wants to try this case again.
17 So I'm just asking everybody to just refrain from -- once
18 you put something into cyberspace you don't know where it
19 goes. And it's best to avoid that.

20 All right. You have what you want ---

21 MR. SUMNER: I do, Your Honor. May it please the
22 Court? And I've shown this to my colleague, Sam Tooker.
23 And the title is Douglas A. Miller, yesterday at seven ten
24 p.m., and I'm quoting now: Day one of the trial is over. I
25 am so very proud of **Victim**. She looked the devil in the

1 face and spit in his eye. We should all have the courage
2 of one twelve year old little girl. So on to day two.
3 Thank you for all of your outpouring of prayers. It's
4 really helpful.

5 I just would like to reiterate as well, Your Honor,
6 everybody not post those type things during the trial.
7 Thank you.

8 THE COURT: Well, I'm asking and like I said I
9 can order things as to Mr. Cone, but he's the only one I
10 really have jurisdiction over. The lawyers are bound by
11 their oath and their licenses. And I have power over that.
12 But just -- I'm just asking. Just be smart about this
13 until we get through.

14 If y'all were in the courtroom, and some of you
15 weren't, when I talked to the jury initially, I explained
16 to them about we have different rules now because of
17 cyberspace. We have different rules now because of social
18 media. We have to be more attentive to that. If someone
19 were on the courthouse steps screaming things about the
20 case then everybody would see that as an issue. But nobody
21 gives a thought to posting things where you really lose
22 control of who sees them once they get posted. So just be
23 careful. That's all I'm asking.

24 I offered to do an inquiry of the jury. But, you
25 know, the concern is that you provoke some sort of

1 curiosity.

2 MR. SUMNER: That would bring more attention to
3 it than it needs to be.

4 THE COURT: So both sides declined, I think, for
5 me to do any further inquiry. They just asked me to
6 reinforce the initial instruction, which I tried to do
7 before the jury left. And told them I expect them to tell
8 me if they're inadvertently exposed or exposed in any way
9 to anything about the trial.

10 Now, that's the best way I know to do it without
11 calling attention to a specific media source or social
12 media source.

13 MR. SUMNER: Yes, sir.

14 THE COURT: And again, I don't know what -- it
15 may have just -- if he's got it set up where only friends
16 can see it, probably very few people outside of his friends
17 group would have seen it.

18 Anything else?

19 MR. SUMNER: Your Honor, the only other thing I
20 would ask is I'd like to get a copy of your charge if
21 that's fair ---

22 THE COURT: What I'm going to do in a moment ---

23 MR. SUMNER: --- to look at tonight.

24 THE COURT: I want to run over the charge with
25 you, if I can, before you go.

1 MR. SUMNER: Sure.

2 THE COURT: My practice is, I always print it out
3 for the attorneys and then we discuss it. But this one is
4 fairly short and if there's some things that you all think
5 should be added or taken away I'd like to know it tonight
6 so I can work on it tonight. So I'm going to email it to
7 the clerk and she's going to print it for me.

8 MR. SUMNER: Thank you.

9 THE COURT: But let me ask you while I'm thinking
10 about it. I don't see a lesser included offense here. Am
11 I wrong?

12 MR. SUMNER: I'm not asking for that charge,
13 Judge.

14 MR. TOOKER: I don't think there is one in this
15 case, sir.

16 THE COURT: So it's CSC with a minor first or
17 nothing?

18 MR. TOOKER: Yes, sir.

19 MR. SUMNER: I think so.

20 THE COURT: Now, again, I'm not just blowing
21 smoke here. I have been extremely impressed with the --
22 y'all being versed with all the most current decisions and
23 all the waxing and waning of precedent. There is an
24 instruction in the statute -- I'm sorry. There is a
25 statute about corroboration of a victim in a CBS case. And

1 there's a specific statute that says that it is not
2 required that the victim's testimony be corroborated. I
3 think that may be one of those things that's going to cause
4 a problem in the future. I've charged it in the past. I'm
5 not sure if it's been dealt with recently, and I just
6 forgot about it, but I didn't know if you all were
7 requesting that charge?

8 MR. TOOKER: The State was going to request that
9 specific charge. I'm not aware of any cases that have
10 dealt with that statute. And it has been the practice for
11 me, at least, in these cases to request that charge. And I
12 tend to argue that charge. I had anticipated arguing that
13 charge.

14 THE COURT: Well, I wouldn't stop anybody from
15 arguing the law regardless of whether it's stuff that I
16 repeat that's the law or not. I think it has come up
17 before and I think it's been sustained. But I will tell
18 you, I'm concerned about the one time down the road one of
19 the appellate courts is going to jump in and say quit
20 giving that charge. Just like when I started we used to
21 always give a charge about flight. And we don't do that
22 anymore. It seemed to be pretty innocuous. It didn't seem
23 to be that big a deal. But all of a sudden it warranted a
24 reversal and I think it was Judge Pyle's case. I could be
25 wrong.

1 MR. SUMNER: Well, I'm going to say this, Your
2 Honor, that -- I just want to say that I understand that
3 the State is requesting that charge. I can't really, I
4 guess, argue against the statute other than to say I would
5 request that that charge not be given. And I want to make
6 sure that the record is preserved on that point should it
7 be examined down the line. I object to that charge because
8 I think it's an improper comment on the facts from the
9 bench. And I want to make sure that's preserved for others
10 to look at should that be necessary.

11 THE COURT: All right. Well, the draft you're
12 going to get has it in there, but it has brackets around
13 it.

14 MR. SUMNER: Okay.

15 THE COURT: And I'll tell you in the morning --
16 be prepared to do it either way. But I would not stop you
17 from arguing that to the jury. It's the law and it's
18 proper to argue anything that's in the law. I won't try to
19 read everything single thing to the jury. We'll leave it
20 at that. Okay?

21 MR. SUMNER: Yes, sir.

22 MR. TOOKER: Yes, sir.

23 THE COURT: All right. Now Mr. Cone, I need you
24 here in the morning no later than nine thirty. I need you
25 to stay here until we break court. But I want to make sure

1 -- because normally at this stage I'd be taking you into
2 custody. But I don't usually do it when we have an
3 overnight break. So when you come tomorrow you need to be
4 prepared -- I always take the Defendants into custody once
5 the case goes to the jury.

6 Different counties do it different ways. Some of them
7 just let everybody sit out here. You just can't leave the
8 courtroom without a deputy. All right?

9 THE DEFENDANT: All right.

10 THE COURT: Tomorrow.

11 All right. We're at ease.

12 MR. SUMNER: Your Honor, I have one charge that
13 -- I've not seen your charge yet. I only have one charge I
14 was going to hand up. And it may already be included. I
15 haven't tried a case in front of you in a long time. It's
16 suspicion. And I would also just request State v. Manning
17 for a reasonable doubt. Other than that those are the two
18 things that I wanted to bring up to you. And I've handed
19 my colleague that.

20 THE COURT: All right. Well, I'm going to tell
21 you about reasonable doubt. I do not give the charge that
22 it's the kind of doubt that would cause a reasonable person
23 to hesitate to act. I do not -- in light vein of what I
24 just told Mr. Tooker, I do not stop you from arguing that
25 because that's valid precedent in this state. I do not

1 understand that. I have never understood that. I know
2 people who are very rational, very reasonable, and they
3 hesitate to act about all kinds of things.

4 MR. SUMNER: I love that charge.

5 THE COURT: Well, if I was a defense attorney I
6 would probably love it too. But I don't understand it. I
7 use the language of confirming convinced from the U.S.
8 Supreme Court. You'll see it in here.

9 MR. SUMNER: Oh, no, that's fine. I'm okay. I
10 just don't want to misstate something. I understand I can
11 argue it. I just want to also be able to say to the jury
12 what they will hear from you.

13 THE COURT: Well, to preserve your objection,
14 now, you're going to have to raise the objection after I
15 charge.

16 MR. SUMNER: I'll consider that -- I think it's
17 already been ruled upon.

18 THE COURT: Or either in the charge conference,
19 if that's what this is, then I'm telling you I'm not going
20 to charge ---

21 MR. SUMNER: That's fine.

22 THE COURT: --- hesitate to act.

23 MR. SUMNER: Okay. I just ---

24 THE COURT: Now this thing about suspicion I had
25 something in here and I took it out. You want to be heard

1 about that, Solicitor?

2 MR. TOOKER: I've not seen a charge like this
3 before. Based on my experience, I think the burden of
4 proof, burden of proof being beyond a reasonable doubt and
5 then the explanation of what beyond a reasonable doubt
6 means and how that applies to each element in the case and
7 if one element is not met then of course the state hasn't
8 met its burden, then the proper verdict is not guilty. I
9 just -- I worry a little bit that the charge, ladies and
10 gentlemen, I charge you that you cannot return a verdict of
11 guilty against the defendant based upon suspicion. When
12 the evidence presented raise a suspicion of guilt the
13 proper verdict is not guilty. Suspicion that the defendant
14 is not guilty is never a proper basis to justify a
15 conviction.

16 My concern is all of a sudden it's like -- there's
17 like a tier system. You know, it's like beyond a
18 reasonable doubt and firmly convinced and then a suspicion
19 and then whatever is below that. And I'm more comfortable
20 personally with just it's either beyond a reasonable doubt
21 or it's not. And if it's not beyond a reasonable doubt in
22 your estimation, jury, then the property verdict is not
23 guilty.

24 THE COURT: All right. The ruling of the Court
25 is that I have to give the charge on circumstantial

1 evidence under State versus Logan. And the State versus
2 Logan charge includes the following language: If the
3 circumstances merely portray the defendant's behavior as
4 suspicions the proof has failed. That adequately covers
5 the concept and ---

6 MR. SUMNER: I think it does. I think that's in
7 your discretion and if that's what you feel most
8 comfortable with that's fine by me.

9 THE COURT: Well, I'm not going to say -- I've
10 already made one comment about I didn't understand
11 something. This circumstantial evidence charge, as you all
12 know ---

13 MR. SUMNER: Yeah.

14 THE COURT: --- if that was one of those cases
15 where when the court changed the makeup -- the instruction
16 changed, Chief Justice Toal has always felt very strongly
17 that this extra language should be in here. Others feel
18 differently. But I try to follow the law. I know my place
19 on this totem pole and I try to fit in it.

20 MR. SUMNER: Not rock the boat one way or
21 another. Okay.

22 THE COURT: Listen, when I took that oath I took
23 it seriously. I try to do what I'm supposed to do. And if
24 I make a mistake it's an honest mistake. Let me see if I
25 can print this out for you.

1 MR. SUMNER: That'll be great.

2 THE COURT: And then I'll meet y'all in the
3 morning at nine thirty. I don't think we'll have to talk
4 about it very much.

5 MR. SUMNER: I don't anticipate it.

6 THE COURT: Thank y'all.

7 MR. SUMNER: I just anticipate we'll be ready to
8 go.

9 THE COURT: Well, I would say I'll be here a lot
10 earlier, but man there's a lot of traffic lights in this
11 county.

12 MR. SUMNER: Let me show you one other thing.

13 THE COURT: There's traffic lights everywhere.

14 MR. SUMNER: Well, we're safe up here, Judge.

15 THE COURT: I'm telling you, I'm impressed with
16 the population and how much this area has grown.

17 MR. SUMNER: Judge, I want to show this
18 demonstrative aid just because I want to make sure. I've
19 used this in argument. I want to make sure that my
20 colleague sees it. I want to make sure the Court sees it.
21 I've used it before, but, you know. And I plan on using it
22 unless I'm told not to.

23 MR. TOOKER: I'd object to that. I'll tell you
24 -- I'd say it doesn't pass the smell test for me. I've
25 actually seen this exact thing. I coach mock trial at

1 Furman and I've seen this exact thing in a mock trial
2 tournament and watched a mock trial judge keep it out. I
3 know that's not precedent in this case, but I think, again,
4 the purpose of your charge is to make plain the language of
5 the law, which is that beyond a reasonable doubt is proof
6 that leaves you firmly convinced of the Defendant's guilt.
7 This all of a sudden makes it -- I mean I think we're being
8 color coded. I mean starting into blue, going into green,
9 then black and red. It's like some sort of witness test
10 for guilt. And ---

11 MR. SUMNER: Judge, I'll ---

12 THE COURT: I'm going to allow it. Now, let me
13 tell you ---

14 MR. SUMNER: I'm not going to spend all day on
15 it.

16 THE COURT: I don't have any problem with it.

17 MR. SUMNER: Do you like it?

18 THE COURT: It's colorful and nice, yes, sir.

19 MR. SUMNER: You want me to send one back down
20 there ---

21 THE COURT: But that's not the question. The
22 question is what the jury thinks of it.

23 MR. SUMNER: I know.

24 THE COURT: But to preserve it ---

25 MR. TOOKER: Is it marked?

1 THE COURT: --- y'all will have to make a copy of
2 it

3 MR. SUMNER: If you want to make a copy of it ...

4 MR. TOOKER: I will take one with my cell phone.

5 MR. SUMNER: How about this ---

6 MR. TOOKER: I might put this on my Facebook.

7 THE COURT: All right. I think we need to wrap
8 this up.

9 MR. SUMNER: We'll keep all that off.

10 THE COURT: Y'all don't get flippant on me.

11 MR. SUMNER: I just didn't want to have a speed
12 bump come up in the morning. That's all I've got, Judge.

13 THE COURT: What are we supposed to tell the jury
14 about tomorrow, the balance of the panel?

15 All right. We're in recess until nine thirty in the
16 morning. We're off the record.

17 (WHEREUPON, the Court stood at recess for the day at
18 approximately 4:47 p.m.)

19 **NOVEMBER 19, 2015**

20 THE COURT: I received a note from Juror 156
21 Edward M. Wilkins. It reads: The Defendant Justin Cone
22 used to come to the church I attend approximately one and a
23 half years ago. Did not know him personally but know him
24 by sight.

25 This has been shown to the attorneys. What's your

1 position?

2 MR. TOOKER: Your Honor, the State requests that
3 since we do have an alternate available, the State would
4 request that the juror be removed so as we can ensure that
5 no parties have any knowledge of any person involved in
6 this matter. I think that's the surest and fairest way to
7 preserve the trial and ensure a fair trial for both of us.

8 MR. SUMNER: Briefly, Your Honor, Mr. Wilkins,
9 Juror Wilkins indicated that he does not know him
10 personally; he only knows him by sight. We live in a small
11 county in Pickens. We know a lot of people by sight. He
12 has not indicated at all in voir dire that he had any
13 personal connection that would have any effect on him at
14 all. We went through all the voir dire questions from
15 Judge Verdin. And I would feel like that he should be
16 allowed to continue as a juror.

17 THE COURT: What did Judge Verdin ask about
18 connection to the Defendant?

19 MR. TOOKER: So the Defendant stood and asked do
20 you know this person? And I guess that's another concern,
21 too. He said he didn't know him when he saw him initially
22 and now he believes he recognizes him. So she asked, do
23 you know this person? Are you familiar with him? Do you
24 have any close, personal or business relationships with
25 this person? And I believe that's about the ---

1 MR. SUMNER: Yeah, that's the standard -- she
2 asked the standard thing. She got him to stand up, face
3 the jury panel, does anybody have -- correct me if I'm
4 wrong -- close personal friendship, business relationship,
5 family relationship with Mr. Cone?

6 THE COURT: I'll have to question the juror.
7 Ask Mr. Wilkins to come in here.

8 THE BAILIFF: Mr. Wilkins?

9 THE COURT: Yeah.

10 Do y'all place them under oath at the beginning -- do
11 you place the jurors -- not the trial oath but to tell the
12 truth during voir dire?

13 THE CLERK: Yes, sir, we did.

14 (WHEREUPON, Juror Wilkins entered the open Court at
15 approximately 9:47 a.m.)

16 THE COURT: Mr. Wilkins, just have a seat there
17 anywhere. You're Edward Marshall Wilkins, sir?

18 THE JUROR: Yes, Your Honor.

19 THE COURT: And you're still under oath. I got a
20 note that has your name on it indicating -- it states that
21 you -- that Justin Cone used to come to the church you
22 attend approximately one and a half years ago. Did not
23 know him personally but know him by sight. That's what you
24 wrote?

25 THE JUROR: The time frame is probably wrong. I

1 think it was closer to four or five years ago.

2 THE COURT: Four or five?

3 THE JUROR: Yeah.

4 THE COURT: Did you recognize him when the jury
5 was qualified?

6 THE JUROR: No. You know, I knew I knew him from
7 somewhere. But whenever he got up on the witness stand
8 then, you know, I recognized him for sure.

9 THE COURT: Okay. Now, do you know roughly when
10 would have been the last time you saw him?

11 THE JUROR: I don't know, sir. I'd say it's
12 probably been four years ago.

13 THE COURT: Okay. Did you ever develop any type
14 of friendship or association with him?

15 THE JUROR: You know, I shook his hand a couple
16 of times. As far as knowing him personally, no.

17 THE COURT: Okay. How big is the church? How
18 many members?

19 THE JUROR: We have about a hundred and fifty or
20 so on Sunday morning.

21 THE COURT: Okay. Is there anything at all about
22 your experience with him or your relationship with him or
23 your relationship with the church that has any effect on
24 your ability to be fair and impartial in the trial?

25 THE JUROR: I don't think so, sir.

1 THE COURT: Do you have any doubt at all?

2 THE JUROR: No, sir.

3 THE COURT: Is there anything at all about your
4 relationship with him or your relationship with the church
5 or his relationship with the church that has any impact
6 upon your evaluation of his testimony?

7 THE JUROR: No, sir.

8 THE COURT: You have any doubt about that?

9 THE JUROR: No, sir.

10 THE COURT: So are you fully confident you can be
11 a fair and impartial juror in the case?

12 THE JUROR: I think so, yes, sir.

13 THE COURT: Do you have any doubt?

14 THE JUROR: No, sir.

15 THE COURT: None at all?

16 THE JUROR: No, sir.

17 THE COURT: Okay. All right. Thank you for
18 talking to me, Mr. Wilkins. If you'll step back in the
19 jury room, I have to talk to the lawyer a minute.

20 THE JUROR: All right.

21 (WHEREUPON, Juror Wilkins exited the open Court at
22 approximately 9:52 a.m.)

23 THE COURT: All right. What do you need to put
24 on the record?

25 MR. TOOKER: Just the same argument I articulated

1 before. Actually, Your Honor, I thought of something. I
2 apologize.

3 THE COURT: Yeah.

4 MR. TOOKER: Saying that he knew him four or five
5 years ago still puts his knowledge of the Defendant sort of
6 the midst of the time frame that we're talking about this
7 abuse having transpired. And I would just hate to see
8 anybody evaluate credibility based on prior experience with
9 a person. So if he were to go back into the deliberation
10 room after argument and charge and say, oh, he and I went
11 to church together a long time ago. I remember he never
12 sang in the pews. You know, all of a sudden that might
13 make someone say, huh, why wouldn't he sing along? Or on
14 the contrary, he was there every Sunday, participating in
15 Sunday School and seemed very enthusiastic about our
16 church. And he might end up with -- for what that's worth.
17 But that might influence another juror in that room with
18 regards to their perception of the Defendant's credibility.
19 And for those reasons, despite the fact I'll say he's one
20 of the jurors that I liked. But despite that fact, I have
21 concerns about how that prior knowledge would affect the
22 impartiality of deliberations after our argument and
23 charge.

24 MR. SUMNER: Your Honor, very briefly. I mean I
25 think those are valid concerns and they were all answered

1 by your questions. I mean you asked him everything that
2 you needed to. He has assured the Court under oath that he
3 can follow the law, that this would not have any effect on
4 him giving both sides a fair and impartial trial. I think
5 Mr. Tooker raised some good points, and you addressed all
6 those points and he answered all those points. And for
7 those reasons and for what's on the record, I would ask
8 that he not be struck from the jury.

9 MR. TOOKER: I thought of one more thing, sir.
10 Sorry. Part of my concern with the church stuff, too, it's
11 my opinion, the State's opinion, that it would be improper
12 for the Defense to, while the Defendant was on the stand,
13 ask him stuff that would bolster his character, improper
14 character evidence. You know, do you go to church, do you
15 go to Sunday School, that kind of stuff. And so having
16 somebody with that foreknowledge is even worse than having
17 the person be able to testify or having other people to
18 testify to the Defendant's good character.

19 Now, pursuant to the rules, even character for
20 truthfulness and untruthfulness, is admissible. But you
21 know, just blanket good character evidence is something
22 that is inadmissible. And so having somebody already aware
23 of those things -- and granted we don't know how he's
24 applying what he knows. But he at least has some knowledge
25 that has not been made available to the jury via testimony

1 or admitted evidence. And again, for those reasons, the
2 State has concerns about how that would affect the
3 impartiality of the delivery of the process.

4 THE COURT: Well, I think the central question is
5 whether the State would have exercised a strike had it had
6 this information during voir dire. I have the strike list
7 that was used by Judge Verdin. And it indicates that the
8 State exercised two strikes during the selection of the
9 twelve jurors. So are you telling me you would have struck
10 Mr. Wilkins had you had this information?

11 MR. TOOKER: Yes, sir. If Mr. Wilkins had stood
12 up or come up toward Judge Verdin where we talked within
13 earshot of the court reporter during the qualification and
14 said I went to church with him five years ago, I would have
15 struck him.

16 THE COURT: I'm comfortable with the responses
17 that were given by the juror. Had he any sort of intent to
18 use the relationship, whatever it may have been in some
19 fashion that was improper, he would not have done what he
20 did and that is notify the Court that he had this period
21 sometime ago where he went to the same church. I recognize
22 the concerns of the State. I'm not saying that I'm making
23 this ruling without some reservation, but he impressed me
24 as being honest about it. I think he will do everything he
25 can to be fair and impartial. I'm going to leave him on

1 the jury. I'll note the State's objection.

2 MR. TOOKER: And if I may, Your Honor?

3 THE COURT: Yes.

4 MR. TOOKER: That being the Court's ruling, would
5 Your Honor have any problem bringing Mr. Wilkins back out
6 and just instructing him not to bring up his prior
7 relationship with the Defendant during deliberations?

8 THE COURT: You want to be heard on that?

9 MR. SUMNER: I don't know. I mean I think it's
10 kind of like the earlier parts of this case, we go down
11 kind of a tough road. But I really don't have a problem
12 with it, you know. I mean I want to be -- you know, I want
13 -- unless you -- what are your thought on that?

14 THE COURT: If he discusses that in
15 deliberations, that's improper.

16 MR. SUMNER: Sir?

17 THE COURT: Were he to go in there and say, I
18 know this guy from church or anything like that, that's
19 improper. So I don't have a problem telling him ---

20 MR. SUMNER: I don't have a problem with that.

21 THE COURT: --- not to discuss that with his
22 fellow jurors. I'm not going to embellish it or go beyond
23 that. I'm just going to bring him back out here and tell
24 him we've been through it, everything's okay but not to
25 discuss that in any way with his fellow jurors.

1 MR. SUMNER: I don't have a problem with that.

2 THE COURT: Bring in Mr. Wilkins again, please.

3 Mr. Clerk, would you hand that to the court reporter,
4 please?

5 THE CLERK: Yes, sir.

6 (WHEREUPON, Court Exhibit Number 5 was marked for
7 identification.)

8 (WHEREUPON, Juror Wilkins entered the open court at
9 approximately 9:54 a.m.)

10 THE COURT: Okay. Mr. Wilkins, just have a seat
11 there. I've been through this and I'm satisfied with what
12 you told me and we're going to keep you on the jury. But
13 now do not discuss any of that with your fellow jurors.

14 THE JUROR: Okay.

15 THE COURT: Don't talk about your relationship
16 with the man with your fellow jurors at any time. All
17 right?

18 THE JUROR: Yes, sir.

19 THE COURT: Okay. Thank you very much.

20 (WHEREUPON, Juror Wilkins exited the open Court at
21 approximately 9:55 a.m.)

22 THE COURT: All right. About the charge, the
23 State was wanting to know, I think, about whether I'm going
24 to give the instruction about corroboration not being
25 necessary in a CSC case? That instruction has always

1 bothered me and that language there is from charges I have
2 given before. Basically what I do is I pull up an old
3 charge and I start cutting and pasting and moving things
4 around. And it seems like I'm developing quite a record
5 for setting new standards in the law. My cases seem to get
6 -- when they develop a new standard recently it seems like
7 a lot of times my name is at the top of it and reversed is
8 right underneath it. But it's a new standard. They've
9 been very kind in their opinions, but I don't know if I'm a
10 lightning rod for this or not, but that charge has always
11 bothered me just like the Defense has often asked for a
12 charge about believing a police officer over -- or a
13 question about believing a police officer or things like
14 that. I've never charged that. I've never thought that
15 was right. And it bothers me that I'm going to single out
16 one witness and talk about one witness. I tell the jury
17 that they may believe one witness against many or many
18 against one. Which is the same thing. It's just a lot
19 shorter and it's not specifically tailored to one
20 particular witness.

21 The last couple of times I have not charged this, I
22 believe that's my recollection is I have not charged this,
23 and my intent is not to charge it in this case. But if the
24 State objects and the State requests the charge and it's
25 denied. Now, that doesn't stop you from arguing it. It's

1 the law. You can argue it to the jury. You can tie it
2 into what I said earlier about what I am going to charge
3 the jury. Do you have any other comments, Solicitor?

4 MR. TOOKER: Just a point of clarification. That
5 being the Court's ruling, I would like permission to open
6 on the law.

7 THE COURT: Okay.

8 MR. TOOKER: And in doing so, I'd like permission
9 to reference that statute specifically and use the language
10 of the statute; 16-3-657, I believe it is.

11 THE COURT: All right. Do you object to him
12 opening on the law?

13 MR. SUMNER: I don't object to him opening on the
14 law. I would ask -- I believe he should only open on the
15 law as to the charge against Mr. Cone. So I would object
16 to him opening on that point of the law. I do respect the
17 Court's ruling that either of us can argue it, and he can
18 argue that. But I don't think that opening on the law is
19 proper for anything other than the charge against Mr. Cone.

20 THE COURT: All right. Opening on the law is an
21 interesting thing because nobody seems to know where it
22 came from. But in practice, it's been -- particularly in
23 the older days it was the standard. If you wish to open
24 and you wish to discuss the law, I'll let you do it.

25 MR. TOOKER: Okay. And then on further point of

1 clarification just so we avoid any objections during the
2 opening on the law ---

3 MR. SUMNER: I'm not going to object.

4 MR. TOOKER: Well, you don't know what I'm going
5 to say.

6 MR. SUMNER: There you go.

7 MR. TOOKER: I was going to say something along
8 the lines of, and if this is an incorrect or misstatement
9 of the law, His Honor will correct it with his jury charge.
10 And I wanted to make sure that I wasn't crossing any line
11 in saying that.

12 THE COURT: Not to me.

13 MR. TOOKER: Okay.

14 MR. SUMNER: I was going to say, I'd rather you
15 not say that. No, that's fine. I'm not going to object to
16 it.

17 THE COURT: You said it in the opening it's a
18 common thing. I think I used to say it in my openings and
19 closings, so I don't have a problem with it. And I don't
20 raise the objections anyway, so if he says he's not going
21 to object.

22 Anything else?

23 MR. SUMNER: Yes. I just want to say I'm going
24 to -- I want just for the record, I'm not going to -- I
25 don't want to waive this just purely for appellate

1 purposes. I do object to him referencing that in his
2 opening on the law for the reasons I've stated. And as
3 long as you say the records are protected, I'm not going to
4 object during his actual opening statement.

5 THE COURT: To the extent I can protect it, I'll
6 protect it. But that's not ---

7 MR. SUMNER: Okay.

8 THE COURT: I'll give you a continuing objection
9 is what you're asking for?

10 MR. SUMNER: Yes, sir.

11 THE COURT: If the Supreme Court says that's
12 okay. I don't take it upon myself to try to do anybody
13 else's job.

14 MR. SUMNER: I know that.

15 THE COURT: Anything else?

16 MR. TOOKER: And I apologize for this. But I've
17 been sitting here at counsel table since about eight
18 fifteen or so. Could I run to the bathroom ---

19 THE COURT: Certainly.

20 MR. TOOKER: --- before we begin?

21 MR. SUMNER: I'll go ahead as well just so that
22 ---

23 THE COURT: Court's at ease.

24 (WHEREUPON, the Court stood at recess for a short
25 break.)

1 MR. TOOKER: Your Honor, I've decided I'm not
2 going to open on the law.

3 MR. SUMNER: I'm ready to go, Your Honor,
4 whenever the Court is ready.

5 THE COURT: Bring the jury, please.

6 (WHEREUPON, the jury entered the open Court at
7 approximately 9:57 a.m.)

8 THE COURT: All right. Ladies and gentlemen, we
9 had a few issues to work through this morning. We've
10 worked through those. And now it's time for you to hear
11 the closing arguments.

12 Now, I told you at the outset that in their opening
13 statements attorneys are not permitted to engage in
14 argument. We have reached the point now where the
15 attorneys are permitted to use the art of advocacy to
16 attempt to get you to see things as they would like you to
17 see them on behalf of their respective positions. It
18 doesn't change the burden of proof. The burden of proof
19 remains entirely on the State.

20 The way this works is that the Defense attorney will
21 make first closing argument and the State, because the
22 State has the burden of proof, the State gets to go last.
23 And the State will make the last closing argument. So
24 Solicitor Tooker will make the last closing argument.

25 I always take a break between when the lawyers stop

1 and when I have to do my part. So I'll send you out of the
2 courtroom, get set up out here, and bring you back in and
3 give you the charge. Again, it's going to take somewhere
4 around fourteen to sixteen minutes, it's probably going to
5 be closer to fourteen, for me to tell you the law.

6 Sometimes I take a break between the closing
7 arguments. It depends on how long the lawyers talk. I
8 don't know how long that will be. But I invite your close
9 attention.

10 Mr. Sumner, you're recognized for your closing
11 argument.

12 MR. SUMNER: Thank you, Your Honor. May it
13 please the Court?

14 THE COURT: Yes, sir.

15 MR. SUMNER: Mr. Tooker.

16 MR. TOOKER: Yes, sir.

17 **CLOSING ARGUMENT**

18 **BY MR. SUMNER:**

19 Good morning. As I said -- I've got some notes here
20 written and I'll be glancing down a little bit as I take it
21 on through.

22 As I said in my opening comments and as you all have
23 heard, this is a criminal prosecution. This is not a civil
24 claim. This is not a money judgment that is being sought
25 from Justin Cone. This is not civil court. And because of

1 that a brief restatement on the rules, the ground rules of
2 this proceeding, of this trial. The burden of proof in
3 this case is entirely upon the State. Justin is presumed
4 to be not guilty. Beyond a reasonable doubt is a standard
5 of proof, and it is the highest standard of proof of any
6 court in this state, of any court in this country, and to
7 my knowledge of any court in this world. Judge Keesley
8 will tell you what a reasonable doubt is. And he will tell
9 you that if you believe that there is a real possibility
10 that the Defendant is not guilty, then your verdict must be
11 not guilty. That if you believe that there is a real or
12 fair possibility that he is not guilty, then your verdict
13 must be not guilty. Because he and anybody who sits at
14 this table, the accused, is entitled to any and every doubt
15 in their favor.

16 And those are tough rules. They're hard rules. I'll
17 be the first one to say that. I recognized those back when
18 I was a prosecutor. But it's because what is at stake with
19 a criminal conviction and what happens with a criminal
20 conviction that the rules are the way they are. Because
21 the verdict that you render is in pen; it's not in pencil.
22 You can't go back tonight and say, now that bothers me,
23 there's some things that happened, I don't know, I'm just
24 not sure, I'm just not absolutely sure. You can't change
25 that. And in civil court that's why the proof of evidence

1 is lower, that if you believe one side this much more than
2 the other then that's the person that gets the judgment or
3 that's the company or the individual that gets the
4 judgment. And that's because it's only money at stake.
5 Now, money is important to all of us.

6 But this country was founded on three things, and
7 y'all remember this was civics class, social studies, one
8 of the reasons that we told England that we were starting
9 our own country was for life, liberty and the pursuit of
10 happiness. Something that is more important than us being
11 happy, something that is very next to our lives, is our
12 liberty. And that's why the rules of a criminal
13 prosecution are the way that they are.

14 Briefly I'm going to show this chart. And I tried to
15 set this up -- it's a little bit tight up here -- where
16 everybody can see it. And I hope that everybody can see
17 it; everyone over there. Basically the only time that a
18 guilty verdict is proper is beyond a reasonable doubt. Not
19 when a juror or a jury feels like someone's guilt is highly
20 likely or likely or if you feel that someone is probably
21 guilty, they're possibly guilty, you suspect that this
22 might have happened, those are not proper -- those are not
23 a proper basis to return a verdict of guilty. All of these
24 standards from the fact if you feel like it's highly
25 unlikely that it occurred, it probably didn't occur, maybe

1 it occurred, I suspect that it occurred. And you will hear
2 Judge Keesley talk about suspicion and the fact that it is
3 not proof. I suspect that this happened, I think it's
4 possible that this happened, I think it's probable that
5 this happened. That is not guilt beyond -- that is not
6 proof beyond a reasonable doubt. And Judge Keesley will
7 charge you on the law, but you will find that it is very
8 consistent with this chart right here.

9 Now, what I want to do for a few minutes is go back
10 over some things. And I'm going to try to move around
11 here. It's a little bit tight up here. That's all right.
12 That's okay. As I mentioned Judge Keesley will tell you
13 that suspicion of guilt means that the proof has failed.
14 And he will tell you that. If you suspect that Justin Cone
15 engaged in this the verdict would be not guilty.

16 Concerns -- I put these in no particular order.
17 Everything that she describes is happening to her, every
18 single thing, from a sexual point of view, from the
19 positions, from the conduct -- and I said at the beginning
20 that this was going to be a tough case and it has been, to
21 hear this. Everything that took place that she says
22 happened to her, every sexual position used, everything
23 that occurred, took place in their own home seventy to a
24 hundred and fifty times. In a very small house -- you all
25 saw the pictures. No -- I'm now going to Defense Exhibit

1 19 -- no bedroom door. Every witness that came up here
2 regarding their home said there was no door on the bedroom
3 where all this, all this activity is going on, all three of
4 them in there. Okay. There's no door on this bedroom.
5 Okay. It's a small home. We know from Defense Exhibit 13
6 that there are no doors on the children's rooms. They just
7 have these sheets kind of tacked up. Okay? And it would
8 -- it's a concern, I submit to you that it would be a
9 concern from the level of proof, the standard of proof that
10 the State has to meet when everything that a nine, ten year
11 old girls described, she has had an opportunity, more than
12 one time, to see. It would be different if it happened
13 once or twice. That would be a little bit different.
14 Seventy to a hundred and fifty times in their home, in a
15 small home, with no door on the bedroom. And the fact that
16 that's the very same thing that she says was done to her.
17 That would concern me in terms of the proof, in the terms
18 of the proof that would concern me.

19 Then, okay, well, we've all got bedrooms, we've all
20 got doors, the doors are shut. No, there's no door.
21 There's no door. There are no doors on their room. And we
22 know -- and again, I mean, if these things weren't
23 identical, if they were not absolutely identical. They're
24 the identical things that she has had an opportunity to see
25 seventy to a hundred and fifty times. We know from the

1 testimony presented that -- I'm not sure whose parents it
2 was, the father's parents, the mother's parents, somebody
3 lived a couple hundred feet away, and the kids kind of
4 wandered back and forth. I think that was pretty much
5 understood. I think testified to. That would concern me.
6 That would be a red flag for me in terms of a verdict of
7 guilty. Now, let's take that in and of itself; okay?

8 The second thing, there is no physical evidence in
9 this case. None. Now that takes you back to the fact,
10 okay, well now wait a minute, the kids are around. We know
11 this is going on. We know the sexual acts and sexual
12 positions exactly she described. We know all the things I
13 just mentioned. Well, what about the physical evidence?
14 There isn't any. There is no physical evidence. Yet we
15 know that **Victim** told Dr. -- forgive me just one second --
16 Dr. Crosswell that she had been digitally penetrated over a
17 five year period. That would concern me as a juror.
18 There's no physical evidence. Her stipulated report is
19 that there's not anything about this thorough examination
20 that she performed. There's not anything on the physical
21 examination that is consistent with her being abused.
22 Nothing. Okay? No physical evidence. In fact, as I just
23 mentioned, the doctor's report concluded that there was no
24 physical evidence to support the allegations.

25 But that's not the end of what physical evidence can

1 be, because my colleague might say, well some of these -- a
2 lot of these sex acts don't -- did not involve penetration
3 so therefore there wouldn't be physical evidence. And I
4 agree with Mr. Tooker on that point, there wouldn't be.
5 But no evidence of digital penetration with a child of this
6 age over this five year period. That would concern -- that
7 would be a flag for me.

8 Now, but that's not the end of the physical evidence
9 that's not been presented. There -- and this is going to
10 be graphic -- but there was no semen samples from Mr. Cone
11 submitted to you as evidence. Now, how -- why is that
12 important? Well, the mother and father testified that all
13 the sex took place in the bedroom. And there wasn't
14 anything to contradict that. All the sex that they would
15 have was in the bedroom. But at various point, and I know
16 you all know what I'm going to say, **Victim** said that Justin
17 would come into her room. Okay? And that she would be
18 asked to perform oral sex on him in her room. It would
19 concern me that there's no physical evidence whatsoever
20 from that room. None.

21 Now, I agree with Ms. Burgess, I mean the DNA is all
22 over the house; I mean he was there. Okay? But it would
23 concern me that not only did the doctor not find anything
24 physically with **Victim** -- and I'm talking about in terms of
25 a criminal conviction -- but it would also concern me that

1 there was nothing from that bed. And we've seen pictures
2 of her bedroom. Okay? Well, the thing that jumps out at
3 me is there's no sheets on the bed anyway. Okay? But --
4 and I'm going to be as courteous -- and you all saw the
5 pictures and the condition of this home. It's deplorable.
6 I'm not going to go any further than that. It's tragic.
7 It breaks your heart that people would live this way. But
8 if you believe -- and there's the wash room. I don't know
9 when the last time that was used. Okay? But it would
10 really concern me that she would say to Ms. Burgess those
11 sheets have been washed and laundered. That would be a
12 concern. The one thing, the one thing physically that
13 would corroborate, the one thing other than this child, no,
14 I was washing sheets and it didn't get done. I don't know,
15 that just doesn't -- when I see the pictures of this home
16 that does not ring true to me. But again, what happens
17 then? We don't have anything from the bed. We don't have
18 anything. And we all know in our common life experience
19 that it would be there. Okay?

20 There are no -- the third point. There are no
21 witnesses to anything. Okay? There are no witnesses to
22 anything. Not a single person came forward and testified
23 that they saw a single inappropriate act. No relative, no
24 neighbor, no friends, nobody, in five years. In five years
25 this is going on.

1 Now, I would agree if you said, well, Steve, I mean
2 most of this stuff doesn't take place out there in the
3 living room. I would agree. But when you add it all up it
4 starts to become a problem in terms of a criminal
5 conviction. When you add up everything. And I'm not going
6 to go back over it again. But when you look at what she
7 was seeing and -- or could see. When you look at there's
8 no physical evidence, that there's no semen at all. That
9 she's washed the sheets. That there's no witnesses over
10 five years to anything inappropriate whatsoever. No, they
11 don't have it. The State can't produce that.

12 Also, we heard -- the fourth thing. We heard from Ms.
13 Miller that **Victim** -- forgive me, I'm sorry -- that **Victim**
14 had some significant behavioral problems in school. We
15 also heard that she told stories. No teacher, no
16 professional, from any school raised any concerns about
17 sexual abuse in five years. That would also concern me
18 when you add this up, when you add up everything that we're
19 looking at. What it comes back to is we've got not one
20 piece, not one shred of independent corroboration of any
21 type, of any type. And there are lots of different types
22 out there that could be brought before you and they haven't
23 been. The law doesn't require it. But it would be a huge
24 concern for me with the stakes as high as they are. We're
25 not talking about somebody that's been accused of running a

1 stop sign. Okay?

2 Justin Cone testified. He took the stand. He
3 testified to you that he's not guilty and he answered every
4 question that was asked of him by the prosecutor. Because
5 there's all the things that I mentioned -- you know, we
6 know about everything that I just talked about, let's go
7 ahead and talk about [REDACTED] Victim .

8 And I said in my opening comments to you that this is
9 tragic. That her upbringing and life and home life are
10 tragic. And I had seen those pictures. And I knew a lot
11 more about this before y'all came in here as jurors. And I
12 knew that it would be hard. What she was exposed to just
13 breaks your heart. Breaks mine. I promised you all that I
14 would be as respectful and as courteous of every witness as
15 I could be. And I tried to do that. And if you feel like
16 that I've gotten out of line at any point, like I said,
17 please feel free to hold it against me. That's all right.
18 Don't hold it against Justin Cone.

19 But we know this, that there were appropriately --
20 because now we're down to just, now we're down to just her
21 because we know there's nothing else there. Although there
22 could be other things, there's nothing else there. And I
23 know that you all know what I'm going to say now. There
24 were four to five, maybe six, contaminating interviews that
25 completely violated protocol according to every witness on

1 the stand that was a professional that occurred. That
2 occurred before she went to have that interview video
3 recorded. Now that's not that interviewer's fault. It's
4 not. It's not anybody's fault. But the fact is that she
5 had told her mom and then her father gets involved. And
6 then her father talks to her. And then he brings Robert
7 Odom in who did not testify. Then the father says then
8 it's me and Robert Odom together talking to her. Okay?
9 Then Ms. Burgess testifies that the parents were there,
10 they're right there in the room. Then after all this
11 happens, then the forensic interview takes place. And we
12 know that the protocol that has to be maintained was
13 totally broken. And it was broken before she went to the
14 forensic interviewer. I mean, we heard Ms. Carlberg -- I
15 was trying to come to her name -- we heard Ms. Carlberg
16 talk about how critical each component is. She talked
17 about you've got to have open-ended questions. You can't
18 have the parents in the room. All those other things. And
19 I listed; are they critical? Yes. Gotta have it, gotta
20 have it. And we heard yesterday from Ms. Galloway-
21 Williams, and absolutely, you have to maintain every single
22 thing. Why? Because it's a child and they're
23 impressionable and they may not be telling the truth. So
24 you've got to do these thing. And it's not anybody's
25 fault. But protocol was entirely broken. And there was no

1 way Ms. Carlberg could fix it. And I didn't hear any
2 testimony, frankly, that Ms. Carlberg even knew about it.

3 And **Victim**, we heard her story yesterday. We heard and
4 saw her interview with Ms. Carlberg. Again, she's talked
5 with her mom, her dad. You know, then they come in both
6 and talk to her. This is just what we know about, you
7 know. And I believe she might have spoken to another
8 police officer besides Ms. Burgess. And, you know, again
9 protocol was entirely broken and there wasn't any way to
10 change that.

11 So that is what kind -- what kind of faith -- can I
12 put my whole faith in this for a criminal conviction when,
13 by their own -- by the State's witnesses that none of that
14 was followed with a witness like this, when there's no
15 other evidence. None of that was followed.

16 There are some things that changed. And I know that
17 you all picked up on this. The length of time of this
18 changes. **Victim** said to some people that it was five years
19 from the time she was four to nine. She told other people
20 it might have been a year; yesterday, second grade to third
21 grade. That's a pretty big difference, you know. She told
22 the doctor -- the only person that she told that she was
23 digitally penetrated was the doctor. She didn't say it to
24 anybody else.

25 I'm not trying to beat up on her. I'm not. But I'm

1 trying to bring out the points that would concern a jury.
2 She told Ms. Burgess that it was in the living room and her
3 bedroom. And I think that's what prompted Ms. Burgess to
4 say, what about the sheets, let's get this going. Okay.
5 Told everybody else it was just the living room. Okay.
6 She tells Ms. Carlberg, I think my daddy saw us three
7 times. Didn't tell anybody else that she thinks that her
8 dad has witnessed any of this. She also, yesterday -- I
9 didn't ask Mr. Miller any questions, but I said, isn't it
10 true that on that day she told you that Justin had
11 performed oral sex on her? He said, yeah, I guess so;
12 yeah. Didn't say it to anybody else. Didn't say it to Ms.
13 -- didn't say it on the forensic interview. It's the only
14 time she says that.

15 Ms. Carlberg asked, did he make you do anything to
16 him? And **Victim** just shakes her head no. There's a lot of
17 real major inconsistencies here. I'm not beating up on
18 her. This is tough, you know. But I'm going to do my job.
19 And there are some major inconsistencies because -- and why
20 is that so important? Because of what I've already said.
21 There's no physical evidence, there's no other
22 corroboration. There's no nothing for us to try to get to
23 a criminal conviction unanimously in this case.

24 Critical elements of her story change, and I, you
25 know, candidly, you know, her body language was terrible in

1 that interview. She's looking all over the place, she's
2 looking down. She's doing all the things -- when I say
3 terrible, I'm not beating up on her. She's doing all the
4 things that we do in our customary, normal, everyday
5 existence; that's assess credibility. And when somebody is
6 doing this and doing that, you become concerned that the
7 person isn't telling you the truth. Okay? I mean if that
8 happens when somebody is showing you an apartment you may
9 rent or a home that you're looking to purchase, you go, uh,
10 something isn't quite right here. Okay?

11 Not any -- here's another thing about the police. And
12 you know what, we have fine law enforcement. I can tell
13 you that I am not beating up on them whatsoever. But not
14 any of the police or the interviewers or the counselors
15 were told about all the sex that was going on in this
16 house. They weren't. Not a single person came up here and
17 testified and said, yes, I was made aware that there was a
18 threesome in the bedroom in the home she's living in with
19 no door on it for seventy to a hundred and fifty times.
20 No, they weren't told that. They didn't know. It's not
21 their fault. They didn't know.

22 As I come to a close, Ms. Williams yesterday said that
23 false memory can occur. It's a professionally recognized
24 problem. Y'all heard her when I asked her those questions.
25 And that is the concept of children inserting themselves

1 into something that they see and somehow making it a
2 memory. Now, I'm fifty years old. I wouldn't do that
3 probably. I don't believe I would. But we know that a lot
4 of special things, a lot of special precautions, protocol
5 have to be followed with children because children do
6 things like that. How many times as a child -- I mean, I
7 used to have a horse I'd ride all over the place. Every
8 neighbor would say I didn't have a horse. If I had one I'd
9 ride all over town, you know. And these are protections
10 that have to be there with children. And it's such a
11 concern that Ms. Williams said that a good forensic
12 interview screens for it specially, screens for that
13 because you're concerned about this type thing. Y'all
14 heard her say that. Yeah, you've got to make sure that
15 that's filtered; that's not there. And we know that there
16 was not one mention or question about that from anybody
17 that interviewed her. They didn't know and it's not their
18 fault.

19 In summary, I've talked about the number of times that
20 there's no question that the same sex that she described as
21 occurring in her home, there's not one single piece of
22 corroboration, not a shred. I've talked about the protocol
23 that unfortunately was broken time and time again. A child
24 with behavioral problems and a child whose mother said had
25 a history of telling stories. And during the investigative

1 phase of this case the parents withheld this from the
2 authorities. They withheld what was going on in that
3 house. And there was no way for Ms. Burgess or any of the
4 other professionals to be looking for that when they didn't
5 know. And not a single witness that testified to you all
6 testified that they took that into account.

7 I am at the conclusion of my comments and under the
8 rules of court I want to get back up but I can't. Mr.
9 Tooker has the last argument. I'll be over there kind of
10 stomping a little bit wanting to get up, what about this,
11 what about that, and I'm not allowed to do that. But I
12 want to say this, do not be reluctant to tell your fellow
13 jurors why you feel that a not guilty verdict is proper in
14 this case simply because of the lack of proof. It doesn't
15 mean that Ms. Burgess or anybody else did a bad job. It
16 doesn't mean that you don't support law enforcement. It
17 simply means in this case, for the things mentioned and
18 things I didn't mention, I cannot criminally convict
19 someone if this is what's put before me.

20 And I hope that you will have the strength to tell
21 your fellow jurors why your vote is not guilty. Thank you.

22 THE COURT: Thanks you, Mr. Sumner.

23 May I see the attorneys on this side of the bench,
24 please?

25 (WHEREUPON, Messrs. Tooker and Sumner approached the

1 bench.)

2 THE COURT: You want to go ahead, Solicitor, with
3 your argument now?

4 MR. TOOKER: Yes, please, sir. May it please the
5 Court?

6 THE COURT: You're recognized.

7 MR. TOOKER: Mr. Sumner.

8 MR. SUMNER: Yes, sir.

9 **CLOSING ARGUMENT**

10 **BY MR. TOOKER:**

11 Mr. Foreman, ladies and gentlemen of the jury, we've
12 got a lot to talk about. And like Mr. Sumner said, I'm
13 certainly not disputing that this is not an unpleasant
14 case, this is not a tragic situation. But I think it is
15 interesting how two people can see the same evidence in
16 very different ways.

17 Mr. Sumner is latching onto the fact that there were
18 all these threesomes going on in the house and saying,
19 well, that indicates that she must not be telling the
20 truth; right? My perspective of that evidence is that this
21 man has grown accustomed to a particular behavior at that
22 house; right, for five years going over there, getting
23 drunk, hooking up, getting oral sex, giving oral sex,
24 getting other kinds of sex, so there's a lot of stuff that
25 happens on a regular basis in this house with this man

1 while he's intoxicated over a five-year span.

2 And what was the testimony? The testimony was, well,
3 it wasn't every single time. It wasn't every single time
4 that he came over that this would happen. So they go out
5 at the bonfire, they get drunk, they hang out and they go
6 back in and because the kids aren't at grandma and
7 grandpa's or aren't at the aunt's house, well nothing funny
8 is going to happen and everybody passes out in the living
9 room or they pass out in the master bedroom. So this
10 fellow all of a sudden, having grown accustomed to every
11 single weekend he's over there getting drunk and getting a
12 little action, decides to go take it out on this child.
13 This child who he calls his girlfriend; right, that he's
14 going to marry some day. He goes into her bedroom. She
15 sleeps on the bottom bunk; remember? Goes into her bedroom
16 and performs these sex acts on her. Or they're sleeping in
17 the living room, the master bedroom is unoccupied, like she
18 said, he takes her into the master bedroom; right? So we
19 have a man who has done many things in a very particular
20 way. What was the testimony? He started every single time
21 receiving oral sex and giving oral sex. And that he licked
22 anus. And I don't know how to say that in a way that does
23 not sound offensive, but that is a very specific sex act.
24 That is a common scheme. That is a notion, a behavior,
25 that somebody only does if they have that predilection, if

1 they have that desire, if that is the thing that they are
2 into. And in this case he does it with the mom and he
3 starts doing it with the kid.

4 Mr. Sumner talked about the law a little bit and I'd
5 like to talk about the law, too, because ultimately what
6 you have to conclude, members of the jury, is whether or
7 not the elements are satisfied. So the idea in any kind of
8 prosecution is there are certain elements, legal elements,
9 and we have to meet those elements with the presentation of
10 facts and evidence. So for criminal sexual conduct with a
11 minor in the first degree, a person is guilty if, they
12 engage in a sexual battery with a victim less than eleven.
13 Now sexual batter is fellatio, which is oral sex performed
14 on a man, and cunnilingus, the performing of a type of oral
15 sex on the genitals of a female, or any kind of intrusion
16 into the body of the female or of the victim, however
17 slight. So that is sexual battery. And then the victim
18 has to be less than eleven. So those are the two elements
19 for this offense.

20 Now, I'll give you this in a minute but if you
21 determine that she's telling the truth, that **Victim** is
22 telling the truth, the elements are satisfied. So your
23 decision then becomes is she telling the truth? So there
24 was sexual batter, as is testified, and she was less than
25 eleven years of age at the time as the testimony shows.

1 Now, there's another section in our law, Section 16-3-
2 657, criminal sexual conduct, testimony of a victim need
3 not be corroborated. The testimony of the victim need not
4 be corroborated in prosecutions under Section 16-3-652 to
5 658, which are the sections governing criminal sexual
6 conduct. And I've said this before and I'll say it again,
7 if anything I've misstated, His Honor will correct me. If
8 I've said something wrong about the law, His Honor will
9 correct me. But if I'm not mistaken, he will make plain to
10 you that you can believe one person over many. You can put
11 whatever weight on any piece of testimony you want to put.
12 That's your prerogative. That's what you're permitted to
13 do as jurors. And that's what we expect you to do.

14 Burden of proof. I'm going to go back a little bit.
15 Mr. Sumner mentioned some history. He said at the
16 beginning of our nation's history when we were founded
17 about life, liberty and pursuit of happiness, and that
18 comes from the Declaration of Independence. Those are
19 three words penned by Thomas Jefferson; life, liberty,
20 pursuit of happiness. And if your pursuit of happiness
21 involves breaking the law then liberty is forfeited.
22 That's how it works. If you break the law while pursuing
23 your own happiness, well, you don't get liberty anymore.
24 Okay? So let's not misinterpret what that language means.
25 He also talked about burden of proof and the burden of

1 proof being on the State. And that's how it is in every
2 case. And we accept that burden, we gladly accept that
3 burden. It's on the State, beyond a reasonable doubt.
4 That's been the case since our nation was founded -- well,
5 I said our nation was founded -- Constitutional Convention,
6 1789, Constitutional Convention 1789, the burden is on the
7 State. Our judicial system is created, the State's got the
8 burden beyond a reasonable doubt. And that's proof that
9 has to leave you firmly convinced. So if you're firmly
10 convinced of the Defendant's guilt, then it is your
11 obligation as jurors in this case, having been sworn to
12 take this oath, it is your obligation to find him guilty.
13 So remember that. If you go back in the jury room and you
14 are firmly convinced, you must find him guilty.

15 Now, I say back to 1789, because that's important too,
16 because every single time somebody has been found guilty in
17 this country, be it in Federal Court or State Court,
18 they've been found guilty beyond a reasonable doubt. So do
19 not think that that is some sort of insurmountable burden
20 because it's not.

21 And while we're talking about burden, I want to look
22 at this thing, which I thought was rather interesting. So
23 I'm not sure how accurate a statement of the law that is.
24 Inasmuch as the law is proof beyond a reasonable doubt is
25 proof that leaves you firmly convinced, but I want to talk

1 about what we saw in this case.

2 So, we start at the bottom. Right? I mean any type
3 of criminal prosecution you start at the bottom and you
4 start presenting evidence because we've got the burden of
5 proof, we go first and start calling witnesses and
6 presenting evidence. And that evidence is supposed to
7 bring you all the way to the top to not guilty.

8 So first, what do we have? And again, let me say this
9 too. The question seems to be is the victim telling the
10 truth? I mean that's what this boils down to, is the
11 victim telling the truth in this case? Like I said before
12 your verdict has got to speak the truth. Veritas dico, to
13 speak the truth. So is the victim telling the truth? What
14 did her emotions say? When she talks to her mom she's
15 crying, she's trembling, she's communicating things
16 physical that people don't communicate with words. She's
17 not saying, oh, yeah, this happened, he did this to me. I
18 mean people lie in courts, but people don't lie with
19 emotions. She's crying and she's trembling. And then when
20 she talks to Rita Burgess she's trembling, she's upset, she
21 doesn't make eye contact, she seems reserved.

22 That forensic interview and her testimony on the
23 stand, and I think this is important, too, and this is
24 another area where it seems Mr. Sumner and I disagree.
25 That body language is the body language of somebody who

1 does not want to have to talk about something so vile and
2 embarrassing and terrible with a stranger. Her testimony
3 on the stand when I asked her what happened to you, what
4 did he do to you? What did she say? She said, do I have
5 to tell? Do I have to tell? She didn't want to share that
6 with y'all. Y'all are stranger to her. She doesn't want
7 to tell you this happened to her. She said, do I have to
8 tell? That's what somebody who's been through this kind of
9 thing does. That's how they talk. They don't talk freely
10 about it, like, oh, no big deal. I performed a blow job on
11 a grown man. No big deal. No. She said, do I have to
12 tell? They cross their legs. They try to like hold
13 themselves away because what's coming out is so painful
14 that they have to protect themselves.

15 That she had had behavioral problems before when this
16 was going on; right? She started around four or five,
17 going to nine, she's got behavioral problems. And then all
18 of a sudden the allegations come forward. She starts
19 getting counseling. She's not around him anyway. And she
20 gets better. Her school work improves. She does better.
21 In regards to that time frame thing he mentioned, what did
22 we hear? We heard that she repeated second grade twice.
23 So that's three years. Second grade, second grade, third
24 grade. So let's not confuse that either. But she got
25 better. She improved. She talked about what happened.

1 She said what happened since the beginning of these
2 allegations consistently. She told her mom. She told her
3 dad. She told Detective Burgess. She told Christine
4 Carlberg. She told Dr. Crosswell. And she told Ms.
5 Hutton. Now, what's important about all these things,
6 because I'm a little confused as to the Defense's theory
7 regarding why she would lie. Initially I got the
8 impression it was, well, the parents were making her do it.
9 And then it turned into, well, no, she's just making this
10 up on her own. I don't know what the theory is. But if
11 the theory is the parents are making her do it, well, she
12 tells us mom when she's by herself; right? When she tells
13 her dad, it's her dad and her mom. Now, I'm a parent. I'm
14 a recent parent. My baby is still a baby. He doesn't talk
15 and we don't -- I mean, I don't have that kind of
16 experience of having raised small children. Some of y'all
17 may have. And I would imagine that if your small child
18 came to you and told you that he or she had been abused,
19 you would want to talk to that person, you know, with your
20 spouse, with your significant other. I mean that's what
21 families do. When bad things happen they circle up. You
22 know, they circle wagons and they try to protect each
23 other. Then she talked to Christine Carlberg; right? And
24 she did that by herself. Y'all saw the tape of that. She
25 was in that room by herself. She wasn't coached, she

1 wasn't led. Nobody corrupted her. She wasn't
2 contaminated. She did it by herself. And she did the same
3 thing with Dr. Crosswell; right? And then finally she goes
4 and see Ms. Linda Hutton. And she sees Ms. Linda Hutton
5 like twenty-three times. So twenty-three times. And in
6 twenty-three times did Ms. Hutton say, yes, she recanted,
7 she said it didn't happen? No. The story stays the same.
8 Things she said that were there in the file. And this is
9 what -- she describes a few things in that tape that her
10 own mother can verify. She says the Defendant has a big
11 penis; right? She uses her hands to describe it. What did
12 the mom say? That he has a long penis. When asked what
13 was around it? She said his legs. What did mom say? He's
14 not hairy. And again she describes him licking her anus.
15 Now if this is something that was seen, was seen by other
16 people; right, if the kids came in and saw this stuff all
17 the time because it's happening so often and they're not at
18 their grandparents' house like their parents testified to,
19 then why aren't the other kids saying the same thing?
20 We've got one child, one child saying this, because if it's
21 been seen by lots of people, lots of people say it. If
22 it's been happening to one person, one person says it. So
23 the long penis, not hairy, and licking of the anus.
24 And then finally, and again this is not -- I'm using
25 this because he used it, and I'll talk to you about it.

1 This is a demonstrative. What did he do? He took the
2 stand; right? He took the stand and lied. He lied to you.
3 He took the stand, was under oath, promised to tell the
4 truth, and lied. And he lied about something minuscule;
5 right? I mean I grew up in a neighborhood where there were
6 kids all over the place. I mean absolutely all over the
7 place. My sister and I were the oldest two kids in the
8 neighborhood. We babysat like half the neighborhood.
9 Anyhow, one kid would say, yeah, that's my boyfriend, my
10 girlfriend; you joke about that kind of thing; right? Oh,
11 we're going to get married one day. That's something that
12 people do. I mean, that's not uncommon and that's not
13 necessarily bad. And an innocent person wouldn't lie about
14 that fact. Somebody who is ashamed of what they've done,
15 who has a guilty conscience, would not feel free to tell
16 you what actually happened. They would feel like if they
17 said the truth, that it would even indicate further their
18 guilt. So after he's lied to you -- and you heard from the
19 victim's grandmother who said, yes, she overheard those
20 same comments being made by the Defendant. After he's lied
21 to you how can you believe anything he says? You can't. I
22 mean, once a liar, always a liar. Under oath, under oath,
23 on trial, lied.

24 Now, like I said, this case boils down to one of two
25 things. Either he was molesting her or she made it all up.

1 Either he molested her or she made it up. And that's your
2 choice. If he molested her, he's guilty, if you're firmly
3 convinced of that fact. If she made it up, then he's not
4 guilty.

5 You have to look at a couple of things. There are two
6 types of evidence, what we call direct evidence and
7 circumstantial evidence. Now, direct evidence is
8 eyewitness testimony. Direct evidence in this case is the
9 testimony of **Victim**. The testimony of **Victim** that he had her
10 perform oral sex on him; right, that something went into
11 her mouth and it was nasty. The videotape, the interview
12 with Christine Carlberg, that is direct evidence of the
13 fact at issue, whether or not he molested her. With
14 regards to that interview, too, I'll say this, the reason
15 we have these things, these video interviews, you know, I'm
16 not going to be good at talking to a child like that;
17 right? I mean, I don't have the training or experience or
18 background to make a child like that open up about
19 circumstances like these. She does. Christine has that
20 training. And so Christine sits down in a room, and in
21 that room there's a camera, and there's a microphone, and
22 it records what happened. It records what happened so that
23 y'all can see it and so that y'all can look at her demeanor
24 in that safe environment, in that environment where she
25 feels protected and where she feels like she can tell the

1 truth freely. And that she doesn't have to look at the
2 person who had been molesting her for five years in that
3 same room while telling about what he did.

4 Circumstantial evidence is evidence of circumstances
5 that indicate a fact at issue in the case. Now, like I
6 touched on, emotions are circumstantial evidence. The
7 emotions of people don't lie. People can lie with words.
8 People do lie with words. The Defendant lied with words.
9 But what does not lie are feelings. People don't fake
10 crying. They don't fake trembling. They don't fake
11 reservation when having to relay horrible events. If y'all
12 think **Victim** was lying when she was on the stand or she was
13 lying in that video, then she is the best child actress on
14 the face of the earth. Because what I saw was a girl so
15 thoroughly broken and so thoroughly beat down by what had
16 happened to her that she had to articulate these gross and
17 vile things while ensuring her own emotional safety or
18 closing in up on herself, and while explaining things that
19 no child that had not been exposed to that kind of thing
20 would be able to explain.

21 The Defense arguments -- so if my understanding is
22 correct, if the best they've got is we wish there was more.
23 Well, great. I mean, I wish there was more in every single
24 case. That doesn't mean that the burden hasn't been met.
25 The burden is whether or not you're firmly convinced. So

1 great, it would be wonderful if there was a smoking gun in
2 every case. But like I said in opening, these are crimes
3 of shame and secret. These are crimes that happen behind
4 closed doors. These are crimes for which there is not
5 eyewitness testimony. These are crimes that occur in
6 environments where the perpetrators can guarantee free
7 access to the victim.

8 The Defendant actually deny they were friends. I mean
9 we presented a case that contained a great many facts
10 starting with knowledge of the family back in 2003/2004 and
11 going up until 2009. So can't deny that they were friends.
12 Can't deny that he went over to their house all the time.
13 Can't deny he spent the night all the time. Can't deny
14 that they got drunk, that they had parties, that they did
15 bonfires. Can't deny that he had threesomes with the
16 victim's father and the victim's mother. Can't deny any of
17 those facts. The only thing he can try to deny is that he
18 made this child perform oral sex on him. That's all he can
19 deny because that's the only thing that wasn't witnessed by
20 other people. The other people at issue or involved in
21 this case can testify to everything else. The only thing
22 he can deny is the one thing that makes him guilty; right?
23 And how can you believe the denial when he's already lying
24 to you?

25 We talked about how she told lots of people. And she

1 told these people in different circumstances. And Mr.
2 Sumner would have you believe that you can't believe the
3 forensic interview because she told her parents first and
4 she told the police officer first; right, if I'm
5 understanding that argument correctly. I'm not sure how
6 else these allegations in cases like this will be brought
7 to life? I mean the child doesn't just hitchhike to the
8 Julie Valentine Center and say I want to speak to a
9 forensic interviewer and then talk to them. They tell
10 somebody. They tell a parent, they tell a teacher, the
11 teacher talks to them about it, the parent talks to them
12 about it. They then call the police. The police come.
13 They tell the police. The police then schedule the
14 forensic interview. The forensic interviewer then talks to
15 them. And the reliability of the interview is based on the
16 methodology employed by the forensic interviewer; right,
17 the questions she asks, the way she asks them, the
18 utilization of dolls with anatomically correct organs. I
19 mean this is how we can ensure reliability in these cases.
20 Because there is never going to be a case where a child who
21 is abused takes it upon herself to get transportation to
22 the Julie Valentine Center where she will then be
23 forensically interviewed, having not spoken to anyone else
24 beforehand. I mean that is ludicrous.

25 Shauna Galloway-Williams took the stand, the Director

1 of the Julie Valentine Center. And I think her testimony
2 was super important with regards to two points. First, of
3 course, delayed disclosure. And this is a case of delayed
4 disclosure. You know, for years the abuse is going on and
5 she doesn't come forward. And I think a lot of time we as
6 people like to think, well if it was my kid, I hope my kid
7 would come to me as soon as something bad happens to him or
8 something bad happens to her and would tell me that this
9 thing happened. I mean that's sort of how we would
10 rationalize this stuff. We say well it wouldn't go on for
11 me because my kids knows better. My kids knows to tell.
12 But what did she say? She said in most of these cases
13 that's what happens. In most of these cases disclosure is
14 delayed. People don't come forward. It takes time. A
15 person's got to build themselves up. They become older.
16 They become more confident. They become stronger. And a
17 lot of times we've got to have something else. We've got
18 to have something that breaches it; right? I mean it stays
19 under here, like under the surface. It's like water
20 retention. You know, there's no way that it's going to
21 come out unless there's something that pierces that
22 tension. And in this case what did we have? In this case
23 we had **Victim** and her sister playing with dolls
24 inappropriately; right? **Victim** showing her sister how to do
25 the same things the Defendant had done to her, playing with

1 the dolls inappropriately and mom talks to her and says,
2 what is going on? Why would you do this? And she tells
3 her. She tells her well this is what Justin did to me.
4 Broke the tension. Inserted herself into the inner-
5 workings of her daughter.

6 And I'll say this too. I partially blame the parents
7 in this case. Had the parents been more attentive and more
8 responsible and had they paid more attention to what was
9 going on with their daughter when she started doing poorly
10 in school, when she started having those behavioral
11 problems, well maybe somebody would have asked her at that
12 point what's wrong? Why is this happening? But they
13 didn't. They didn't. But their failure as parents does
14 not make him not guilty. Their failure as parents does not
15 mean that he is not responsible for his own actions.

16 Shauna Galloway-Williams also talked about, and Mr.
17 Sumner brought this up, talked about false memories or
18 something like that. And I think there's some general
19 testimony that people can believe things that didn't
20 happen. I'm sure that can happen in some circumstances.
21 But what did Shauna Galloway-Williams say? Shauna
22 Galloway-Williams said the thing that you look for when
23 you're trying to ascertain credibility, trying to figure
24 out the truth in any one of these circumstances are those
25 core and contextual details. She said core details, those

1 are details about what happened; who, what, when, where,
2 why; right? Who? The Defendant, Justin Cone. Been the
3 case the entire time. She hasn't come back and said, no it
4 wasn't Justin, it was Timmy or Johnny or Billy or Bobby.
5 It's always been Justin. What? He had her perform oral
6 sex on him and did stuff to her backside; right? That's
7 the what. Oral sex and either -- and I don't even know if
8 this is the right word, but like anal cunnilingus and
9 potentially touching her vagina; right? These are the
10 things that are the what. When? For four or five years of
11 my life. Four or five years it's been going on until I'm
12 nine years old. Where? At my house. At her house where
13 she should feel safe, where she should feel protected,
14 where her parents should protect her. That's where it's
15 happening.

16 Now, those things are the core details. Shauna
17 Galloway-Williams said the things that give those details
18 credibility are the context, the contextual details. The
19 sensory perceptions; right? What are sensory perceptions?
20 Smell, sight, touch, taste. Things that you only know had
21 you been there.

22 Contextual details in this case. She described how
23 the clothes were. Did you see what she did on those dolls?
24 She pulled down the little girl's panties. She pulled down
25 the little girl's panties that were under her dress and she

1 pulled off the Defendant's pants and underwear. What did
2 she say on the stand? That he would take off both his
3 pants and his underwear. And what did she do with the
4 dolls? I mean, how does a child know how to reposition
5 dolls? And again, I feel like I'm using so much vulgar
6 language in this case but I have no other words to describe
7 a sixty-nine position, a position where they're opposite
8 one another performing oral sex. How does she know that
9 unless she did it? She described holding onto his penis?
10 If a kid walks in and sees mom and dad doing it, how is a
11 child in childlike terms going to describe mom and dad
12 doing it or mom and somebody else doing it? Say they were
13 like naked wrestling or they were, you know, tickling and
14 they were doing that naked. Or they were fighting naked.
15 Or something like that. That's how a child using childlike
16 terms would describe what they had seen. In this case,
17 using those same childlike terms, what does she say? She
18 says she grabbed onto his tee-tee and he made her put his
19 (verbatim) mouth on it. Grabbed onto her tee-tee, made her
20 put his (verbatim) mouth on it. What is that? That is a
21 blow job. That is oral sex. That is fellatio. And had
22 she seen her parents doing this kind of stuff it would have
23 been, oh, they're having naked tickle time or naked
24 wrestling. But no, she says, I grabbed his tee-tee, I put
25 my mouth on it. And again, those contextual details,

1 taste. Something came out and it tasted yucky. Even if
2 she had seen her parents engage in some sort of sexual
3 activity, had watched it and internalized it, how would she
4 know that it tasted yucky? How? Unless he molested her,
5 unless this is real, unless this is what happened to her on
6 these occasions as she's described to you. Sound. Another
7 sensory perception. Sound. What did she hear? She heard
8 him say, damn, like damn; right? And again, I hate to be
9 too graphic, but he's enjoying himself. He's enjoying
10 himself as she's doing this to him. She also says that she
11 heard him say something else; right? She says that she
12 accidentally bit it one time. She said she accidentally
13 bit it. And he said be careful. Be careful. Again, how
14 would a child know that that region of a man is so
15 particularly sensitive that if she accidentally bit it, he
16 would tell her to be careful? Now, if a child were to come
17 up and bite a grownup on the knee or on the arm, they would
18 say don't do that, that's bad. They wouldn't say, oh, be
19 careful. Be careful indicates, well don't bite me more but
20 keep doing whatever it is you're doing. Again, because
21 what she's saying is true. Because those contextual
22 details indicate the truth in this case.

23 She describes the penis. She described it the same
24 way her mom did. And the only way she would be able to do
25 that is had she seen it, had she been exposed to it, had

1 she swallowed that yucky stuff and went down into her
2 tummy. Just like she said.

3 One more thing, too. They talked about like DNA or
4 something at the house, no DNA at the house. There's sex
5 going on in the house the whole time. Detective Burgess
6 testified that because she knew that sex was going on in
7 the house she would not get any benefit if she did recover
8 DNA because that would make no case -- no fact in this case
9 more or less likely. Had she gone through the house and
10 found DNA all over the place, what would that indicate?
11 The same stuff that all these people have already said;
12 that threesomes are happening. It doesn't indicate
13 innocence. It doesn't indicate guilt. Mom said the sheets
14 got washed. But ultimately, too, what is the daughter --
15 what does the victim explain? She explains that she
16 swallowed it. She swallowed his semen and it went into her
17 tummy. Swallowed his semen. She didn't spit it out on the
18 carpet. She didn't spit it onto the sheets. She swallowed
19 it and it went into her stomach and it's gone. And it's
20 gone.

21 I've talked a lot and I'm about to sit down. The
22 Judge will bring you back out here in a moment and will
23 charge you on the law in this case. And the law is
24 important and you've got to apply the law to the facts as
25 you saw them.

1 But before he does that I'd like to charge you, too.

2 And I'd like to charge you to do what's right in this case.

3 I'd like to charge you to protect innocence and to punish
4 guilt and to say to that little girl that won't happen to
5 you again. No further questions.

6 THE COURT: Thank you, Solicitor.

7 Ladies and gentlemen, I'm going to ask you to step
8 into the jury room. I'll bring you back out here in about
9 five minutes and tell you the law. Don't discuss the case.

10 (WHEREUPON, the jury exited the open court at
11 approximately 10:59 a.m.)

12 THE COURT: I discussed with the attorneys at the
13 sidebar the issue about if the jury were to convict Mr.
14 Cone that there needs to be a finding related to whether
15 there was any penetration of the vaginal or anal openings.
16 I don't recall any testimony about penetration of the anal
17 opening. There is a stipulation which refers to
18 penetration of the vaginal opening. The law provides that
19 the jury is to make a determination whether the State has
20 proven beyond a reasonable doubt that the sexual battery
21 involved penetration. And the purpose of that is that on
22 the second offense of this type a person can receive the
23 death penalty if the prior offense was one which involved
24 penetration.

25 So we had not discussed that previously and what we're

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1 going to do is I have an interrogatory prepared. The
2 verdict form will be submitted to the jury. If the jury
3 comes back with a guilty verdict then I would bring the
4 jury back out and let each attorney make a brief argument
5 about that issue and then submit the interrogatory. Just
6 tell the jury -- I won't tell them anything about why I'm
7 asking the question. I'll just tell them that I need them
8 to answer the question. So you have the draft there. You
9 can look at it during the break and tell me any comments
10 you may have.

11 All right. We're at ease for a few minutes.

12 MR. SUMNER: Your Honor, I'm going to run down to
13 get an aspirin out of my car, so ---

14 THE COURT: Sure.

15 (WHEREUPON, the Court stood at recess for a short
16 recess.)

17 THE COURT: During the jury charge stay still and
18 stay quiet. Absent an emergency don't be moving around.
19 Don't be making sounds that might distract the jury.

20 Bring the jury in.

21 (WHEREUPON, the jury entered the open court at
22 approximately 11:11 a.m.)

23 **CHARGE**

24 **BY THE COURT:**

25 Members of the jury, all the evidence has been

1 presented. You've heard the arguments of counsel and now
2 it's time for me to instruct you on the law that applies to
3 the case. Please continue to pay close attention during
4 this next stage.

5 Now, first you need to understand some basic grounds.
6 You, the jury members, are the sole judges of the facts.
7 You decide all the issues of fact. You alone determine the
8 truth of the evidence, its effect, its value and its
9 weight. You alone judge the credibility of the witnesses.
10 In other words whether or not a witness's testimony is
11 believable. In that regard you may believe all that a
12 witness said or none of it. You may believe part of what a
13 witness said and not believe the balance. You may believe
14 one witness against many or many against one. You may
15 consider any interest, bias or prejudice that you feel that
16 a witness has in the case. You may consider the demeanor
17 and the opportunity for knowledge and the appearance that
18 the witness had. You may consider the lack of evidence
19 presented by the State. But you're not to exercise these
20 considerations arbitrarily. What I want you to do is to
21 use your sense of logic and reason. Use your common sense,
22 your good judgment.

23 During the trial of the case testimony has been
24 presented by someone designed as an expert witness. The
25 rules of evidence allow for someone by virtue of education,

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1 training and experience to render opinions as expert
2 witnesses. You may accept or reject the testimony of an
3 expert witness just as you may with any other witness in
4 whole or in part.

5 It's not proper for me to give you a charge on the
6 facts of the case. I cannot discuss the facts with you.
7 I'm not permitted to convey to you an impression as to what
8 personal opinions I may develop about the facts of the
9 case. So if during any stage of this trial you developed
10 an impression that I have a personal opinion about the
11 facts, you must remove that totally from your mind. You're
12 the sole judges of the facts.

13 I am the judge of the law that applies to the case,
14 and under your oath you must accept and apply the law as I
15 give it to you. That means you have to abandon any
16 conflicting ideas you may have about what the law is or
17 what it should be. I give you the law, you apply it to the
18 facts as you determine them to be and in that way you reach
19 your verdict.

20 It's also my job to decide what evidence is
21 admissible. If I have ruled something inadmissible or
22 instructed you to disregard something, you're not to
23 consider those things in arriving at your verdict. Base
24 your verdict on the competent evidence before you.
25 Consider the testimony of the witnesses, the exhibits

1 admitted and the stipulation of counsel.

2 Now, I need to explain to you that there are two types
3 of evidence that are generally presented during a trial.
4 There's direct evidence and there's circumstantial
5 evidence. Direct evidence directly proves the existence of
6 a fact and does not require a deduction. Circumstantial
7 evidence is proof of a chain. It's proof of a chain of
8 facts and circumstances indicating the existence of a fact.
9 Crimes may be proven by circumstantial evidence. The law
10 makes no distinction between the weight or the value to be
11 given to either direct evidence or circumstantial evidence.
12 However, to the extent that the state relies on
13 circumstantial evidence, all the circumstances must be
14 consistent with each other and when taken together point
15 conclusively to the guilt of the accused beyond a
16 reasonable doubt. If these circumstances merely portray
17 the Defendant's behavior as suspicious, the proof has
18 failed. The burden of proof in this case is to prove the
19 Defendant guilty beyond a reasonable doubt. That burden
20 rests with the State regardless of whether the State relies
21 on direct evidence or circumstantial evidence or a
22 combination of both.

23 The Defendant in the case, Mr. Cone, is presumed to be
24 innocent. This is no mere legal theory. It is a
25 fundamental and substantial right to which everyone is

1 entitled. It's been described as being like a robe of
2 righteousness that's placed around an accused and remains
3 with him through every stage of the trial. It continues to
4 exist after you go back to your jury room to deliberate.
5 So that he is presumed to be innocent unless and until you
6 the jury determine that the State has proven him guilty
7 beyond a reasonable doubt. A Defendant is not required to
8 prove his innocence. He is not required to prove anything.
9 The burden is on the State to prove the guilt of the
10 Defendant beyond a reasonable doubt and it is required that
11 every essential element of an offense charged be proven by
12 the State beyond a reasonable doubt.

13 Now, that does not mean that the State has to prove
14 the guilt of the Defendant beyond all doubt or beyond every
15 doubt. The appropriate standard is proof beyond a
16 reasonable doubt.

17 Some of you may have served as jurors in civil court
18 and if you have you know that the burden of proof there is
19 a lesser standard. It requires establishing that something
20 is more likely than not; that it's probable. We call that
21 the greater weight or preponderance of the evidence. But
22 in a criminal court setting such as we're in now, the
23 standard is much higher and the proof must be much stronger
24 than what is required in civil court.

25 I've told you repeatedly and I'll keep saying it, the

1 burden of proof in a criminal case such as this one is
2 proof beyond a reasonable doubt. So what do I mean by that
3 term? Proof beyond a reasonable doubt is proof that leaves
4 you firmly convinced of the Defendant's guilt. There are
5 few things in the world that we know with absolutely
6 certainty. And in criminal cases, the law does not require
7 proof that overcomes every possible doubt. If, based on
8 your consideration of the evidence, you are firmly
9 convinced that the Defendant is guilty of the crime
10 charged, then you are to find him guilty of that crime.
11 If, on the other hand, you think there is a real
12 possibility that he is not guilty, you must give him the
13 benefit of the doubt and find him not guilty. There is no
14 obligation on the part of the Defendant to raise any doubt
15 or any other possibility. He is presumed to be innocent
16 and the State has the entire burden of proof and has to
17 prove that he is guilty to the exclusion of any other real
18 possibility.

19 All right. Now, let's turn to the specific charge
20 that's made in this case. The Defendant is charged with
21 criminal sexual conduct with a minor in the first degree.
22 It is alleged that in Pickens County between the dates of
23 January 1, 2010 and January 1, 2012, Justin Ryan Cone
24 wilfully and unlawfully committed a sexual battery on a
25 minor child designated in the indictment who was less than

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1 eleven years of age. I remind you that an indictment has
2 no evidentiary value. It's not evidence. It's merely a
3 charging paper, the formal means by which someone is
4 charged and brought to trial.

5 Now, let me explain to you the law related to the
6 charge of criminal sexual conduct with a minor in the first
7 degree. A person is guilty of criminal sexual conduct with
8 a minor in the first degree if he engages in sexual battery
9 with a child who was less than eleven years of age at the
10 time. Sexual battery is a defined term. It includes
11 sexual intercourse, cunnilingus, fellatio and anal
12 intercourse. It also includes any intrusion, however
13 slight of any part of a perpetrator's body into the genital
14 or anal openings of a child. So to prove the Defendant
15 guilty the State must prove beyond a reasonable doubt that
16 during the time frame alleged in the indictment and in
17 Pickens County Justin Cone committed a sexual battery
18 against Victim and that she was under the age of
19 eleven years at the time. Sexual battery includes sexual
20 intercourse, cunnilingus, fellatio and anal intercourse, as
21 well as including any intrusion, however slight, of any
22 part of a perpetrator's body into the genital or anal
23 openings of the child.

24 And the final thing I have to tell you on the law is
25 that the Defendant is entitled to every reasonable doubt

1 arising in the whole case. If upon any issue of fact
2 essential to a conviction you have a reasonable doubt as to
3 how that should be resolved, you must resolve that doubt in
4 favor of the Defendant. If upon reviewing the entire case
5 you have a reasonable doubt as to whether the State has
6 proven Mr. Cone guilty of the offense charged, then he is
7 entitled to that doubt and a verdict of not guilty on that
8 charge. On the other hand, if upon reviewing the entire
9 case you find that the State has proven every essential
10 element of the offense charged against this Defendant
11 beyond a reasonable doubt, it is equally your duty to find
12 him guilty.

13 That's the law.

14 Now, ladies and gentlemen, when you go back to the
15 jury room to decide the case, you're going to have with you
16 all the exhibits that have been admitted in the trial and
17 you're going to have this verdict form. On this verdict
18 form you're going to tell us your decision in the case.

19 Now, I'm supposed to tell you that you're not to infer
20 anything by the order in which I state these possible forms
21 of verdict. I have to put one thing first and one thing
22 second. You have two possible forms of verdict. The
23 verdict form reads: As to the charge of criminal sexual
24 conduct with a minor in the first degree, we, the jury,
25 unanimously find the Defendant -- and you have two options

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1 -- you may find him not guilty or you may find him guilty
2 of criminal sexual conduct with a minor in the first
3 degree.

4 Mr. Foreman, part of your job is to record the verdict
5 of the jury. I think you'll find this form self-
6 explanatory. Just check the response chosen by the jury
7 and sign your name on the signature line.

8 Now, ladies and gentlemen, with regard to the
9 evidence, I did not think to discuss this with the
10 attorneys, I will get them to provide you with some means
11 to watch that DVD, if they haven't already made the
12 arrangements. I'll try to get a -- if any of you need any
13 help -- I'm assuming that some of you on the jury are
14 computer literate, if not all, and that you can do it
15 without any trouble, but if there is any problem with
16 running a DVD, either on a player or on a computer, just
17 send a note by the bailiff and we'll have somebody take
18 care of that.

19 Now, how you go about your deliberations, how you go
20 about taking your votes is all in your discretion, subject
21 to this requirement, the verdict has to be unanimous. All
22 twelve of you have to agree before the foreman can record
23 your verdict. Verdicts are unanimous. If it's not
24 unanimous it's not a verdict.

25 Now, what will happen at this point is that it's not

1 quite time for you to talk about the case. I have to go
2 over with the attorneys what I discussed with you. That's
3 just common sense. We don't want you back there deciding
4 the case using the wrong law. So if I said something
5 wrong, they don't get a chance to stand up and object while
6 I'm talking. They have to wait until I ask them if they
7 have an objection. And so they have to be given a chance
8 to point out to me anything I may have said wrong. The
9 truth is that I printed this out for them before we left
10 yesterday. We talked about it some yesterday. We talked
11 about it some this morning. We're already been through it.
12 But sometimes I say things I don't even know I said. So
13 here's the signal you need to look for. If I'm satisfied
14 with what I told you, I will send the exhibits into the
15 jury room and the verdict form. I'll have the alternate
16 brought out. When it's just the twelve of you in that
17 room, the bailiff's out, the alternate's out, you've got
18 the exhibits, you do not have to wait one more second. You
19 can start talking about the case. But don't do it until
20 then.

21 Thank you so much for your attention. You may retire
22 to your jury room.

23 (WHEREUPON, the jury exited the open Court at
24 approximately 11:27 a.m.)

25 THE COURT: Please state for the record

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1 exceptions, additions or objections to the charge; from the
2 State?

3 MR. TOOKER: Nothing from the State, sir.

4 THE COURT: Do you want to preserve the objection
5 about not charging the corroboration?

6 MR. TOOKER: Yes. I'd like to preserve that
7 objection.

8 THE COURT: From the Defense?

9 MR. SUMNER: No objection.

10 THE COURT: Do you want to preserve any
11 objections you raise yesterday in the conference?

12 MR. SUMNER: I do. I just object to my colleague
13 referencing that statute, corroboration statute in his
14 closing, but I'm just reiterating that.

15 THE COURT: All right. Gentlemen, regardless of
16 the outcome, and everyone else, I appreciate the respect
17 you've shown for the Court. These are the most difficult
18 cases we try. They are. They're just very, very difficult
19 on everyone and the jury has the most difficult job in the
20 courthouse. I appreciate the respect you've shown to me.
21 The attorneys were well prepared. They did a great job as
22 far as I could see. We'll put it in the jury's hands and
23 see what happens.

24 Check the verdict form, check the exhibits. Do y'all
25 have something for them to play the DVD?

1 MR. TOOKER: I was going to send a TV with a DVD
2 player.

3 THE COURT: That's better.

4 MR. TOOKER: Okay.

5 MR. SUMNER: That's fine by me. If they want to
6 look at it, they can.

7 THE COURT: Mr. Bailiff, I forgot to tell them to
8 knock on the door when they had a verdict. Y'all don't
9 have a light system or anything like that, do you?

10 THE CLERK: No, sir.

11 THE COURT: Make sure you tell them to knock on
12 the door. They're going to use the TV for the DVD.

13 MR. TOOKER: Judge, I've just got a little folder
14 where I wrote exhibits on top if that's okay?

15 MR. SUMNER: That's fine by me.

16 THE COURT: Suits me.

17 MR. TOOKER: Okay.

18 THE COURT: Check that verdict form and make sure
19 it's not the interrogatory. That's not the interrogatory,
20 is it?

21 MR. TOOKER: (Quietly read the interrogatory.)

22 THE COURT: How do y'all get the TV back around?

23 THE CLERK: Follow it around. Do you want me to
24 take it on back now?

25 THE COURT: Yeah, please.

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1 (WHEREUPON, the verdict form and all exhibits were
2 presented to the jury and deliberations were
3 commenced at approximately 11:28 a.m.)

4 THE COURT: You can bring the alternate in when
5 all that's in there.

6 (WHEREUPON, the alternate entered the open Court at
7 approximately 11:29 a.m.)

8 THE COURT: Are you Ms. Barr?

9 THE JUROR: Yes, sir.

10 THE COURT: Your service on this jury is over.
11 As you've seen, I use alternates -- in about half the cases
12 I wind up having to use one or both of the alternates. So
13 you're through with this case. And the last word I have is
14 they haven't turned the jury loose yet. So I think they
15 may bring everybody back tomorrow. So you need to call
16 that number that was given to you and follow the
17 instructions. Call after six tonight. Okay?

18 Since you might serve on another jury, I need to ask
19 you to go ahead and leave the courthouse. Normally I would
20 say you can stay around and you can talk to people. But
21 since there's a possibility you might get picked again, I
22 need to ask you to just call tonight after six. All right?

23 THE JUROR: All right.

24 THE COURT: Thank you so much.

25 (WHEREUPON, the alternate juror was dismissed at

1 approximately 11:30 a.m.)

2 THE COURT: Mr. Cone is in custody now?

3 MR. SUMNER: He's not living the courtroom.

4 THE COURT: We're at ease pending a verdict.

5 Thank you.

6 MR. SUMNER: Yes, sir.

7 (WHEREUPON, the Court stood at recess awaiting the
8 verdict of the jury at approximately 11:31 a.m.)

9 THE COURT: I've been informed the jury has a
10 verdict. Obviously I have no way of knowing what the jury
11 decided. I say this in every case, so please don't think
12 I'm singling anyone out. I have no reason to. Please
13 don't show any sign of approval or disapproval of the
14 verdict. Don't shake your head in agreement or
15 disagreement. Don't make any sounds. Stay still, stay
16 quiet, please.

17 Bring the jury.

18 (WHEREUPON, the jury entered the open Court at
19 approximately 1:46 p.m.)

20 THE COURT: Mr. Foreman, has the jury reached a
21 verdict?

22 MR. FOREMAN: Yes, sir.

23 THE COURT: Pass it to the clerk, please.

24 Publish the verdict, please.

25 THE CLERK: This is case number 2012-GS-39-660;

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1 State versus Justin Ryan Cone. As to the charge of
2 criminal sexual conduct with a minor in the first degree,
3 we the jury unanimously find the Defendant guilty of
4 criminal sexual conduct with a minor in the first degree.

5 Is this your verdict and still your verdict, so say
6 you all by raising your right hand.

7 (WHEREUPON, all jurors raised their right hands.)

8 THE CLERK: Thank you very much.

9 THE COURT: All hands were raised.

10 Are there any matters to take up prior to the jury
11 being discharged? From the State?

12 MR. TOOKER: No, sir.

13 THE COURT: From the Defense?

14 MR. SUMNER: No, sir.

15 THE COURT: All right. Ladies and gentlemen,
16 before I let you go, I need you to step in the jury room
17 and let me check on something with the attorneys and I'll
18 get to you as quickly as I can. Thank you. Follow the
19 bailiff.

20 (WHEREUPON, the jury exited the open Court at
21 approximately 1:48 p.m.)

22 THE COURT: All right. My law clerk indicated
23 that you all had mentioned something that I had just
24 forgotten about. The U.S. Supreme Court in your view
25 basically declared the statute unconstitutional or

1 violative of the Constitution in some way with regard to
2 that death penalty issue we talked about. So both sides do
3 not deem it necessary to send in any interrogatory or have
4 that procedure; is that right?

5 MR. TOOKER: Yes, sir.

6 MR. SUMNER: I would agree with my colleague on
7 that, Your Honor. I don't think an interrogatory finding
8 is necessary based on what you just articulated.

9 THE COURT: Okay. Do you have any motions, Mr.
10 Sumner?

11 MR. SUMNER: Your Honor, I would just reiterate
12 the motion -- I put a motion on the record for the verdict
13 to be set aside as against the weight of the evidence and
14 not meaningful. I will provide argument for that if you
15 want it. Otherwise, I'd just put it on the record.

16 THE COURT: The motion for a new trial is denied.
17 And having reconsidered all of the motions previously made,
18 the motion to set aside the verdict is also denied.

19 MR. SUMNER: We are ready. I don't know what the
20 Solicitor -- I don't know if the Solicitor needs time prior
21 to sentencing. I have my comments ready. I don't know if
22 the Solicitor needs time or not.

23 MR. TOOKER: No, sir.

24 THE COURT: Well, let's see -- how do y'all want
25 to handle this?

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1 MR. SUMNER: Sir?

2 THE COURT: How do y'all want to handle this? Do
3 you have the sentence sheet ready?

4 MR. TOOKER: I do, sir.

5 MR. SUMNER: He does. And I don't know ---

6 THE CLERK: I don't have that filled out at the
7 bottom yet.

8 THE COURT: Hold on a minute.

9 What's his prior criminal record?

10 MR. SUMNER: I think it's just mainly -- I think
11 there's a habitual offender; is that right, Sam?

12 MR. TOOKER: Driving under suspension.

13 MR. SUMNER: Driving under suspension. That's
14 the extent of it.

15 MR. TOOKER: Nothing worth noting.

16 THE COURT: Does any of the victim's family wish
17 to be heard?

18 MR. TOOKER: The victim advocate has something
19 written that the victim's family has prepared that she
20 would just like to read to the Court on their behalf. Her
21 name is Brittany Roper.

22 THE COURT: Where do you want her, Madam Court
23 Reporter?

24 COURT REPORTER: She's fine. She'll speak up for
25 me.

1 THE COURT: Okay.

2 MS. ROPER: Yes, Your Honor. The family of **Victim**
3 has asked me to address the Court on their behalf. Your
4 Honor, we would like for you to take into consideration how
5 much the Defendant took from **Victim**. He stole her
6 innocence. She will live with this for the rest of her
7 life. While we are taking steps to get her the help that
8 she needs, we know that him being convicted and sentenced
9 will allow her some closure. We feel that the Defendant
10 showed her no leniency and we respectfully ask that Your
11 Honor do the same for him. Thank you.

12 THE COURT: Thank you, ma'am. Anything else from
13 the State?

14 MR. TOOKER: No, sir, Your Honor. It's our
15 understanding the sentencing guidelines are twenty-five to
16 life.

17 THE COURT: Okay. Mr. Sumner?

18 MR. SUMNER: Your Honor, you've heard really --
19 you've been here, of course, through the entire time of the
20 trial. Mr. Cone has been present -- Justin has been
21 present for every roll call. I appreciate the leniency you
22 showed him during the course of this trial in allowing him
23 to remain out on bond. I would ask for a sentence at the
24 low end of twenty-five years considering his age and
25 considering the fact that he does not have a record for any

State of South Carolina -vs- Justin Ryan Cone (2012-GS-39-00660)
Verdict

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1 of this type conduct in the past. I'm not going to go back
2 through the kind of house that was being run over there.
3 But I think taking all those factors into consideration, I
4 would ask for the Court to consider a sentence at twenty-
5 five years.

6 THE COURT: Thank you. Mr. Cone, do you want to
7 say anything?

8 THE DEFENDANT: No, sir.

9 THE COURT: You're twenty-nine years old?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: What type of work do you normally do?

12 THE DEFENDANT: Well, up to now I was in --I was
13 in warehousing work.

14 MR. SUMNER: And I would say his family is very
15 supportive. They have been behind him. You've seen them
16 in Court. They've made it to every meeting at my office.
17 They've stood behind him from day one and will continue to
18 stand behind him right now.

19 THE COURT: Did you spend any time in jail on
20 this when they arrested you?

21 THE DEFENDANT: I was there about two weeks.

22 THE COURT: Two weeks?

23 THE DEFENDANT: Yes, sir.

24 MR. TOOKER: The State won't argue that.

25 MR. SUMNER: That sounds about right to me, Your

1 Honor.

2 THE COURT: All right. Mr. Cone, if you wish to
3 appeal anything from this proceeding, it has to be done in
4 writing. You have a very narrow time frame in which for
5 that to be done. If you do not file your appeal, you're
6 going to lose the right to appeal. So you need to instruct
7 your lawyer to file your notice of intent to appeal if you
8 have any desire whatsoever to appeal. You can always
9 abandon an appeal, but you can't do the other way. So the
10 smart thing to do is to file a notice of appeal. Not my
11 call. You talk to your lawyer about that. But don't wait
12 around. Don't wait till you get to the Department of
13 Corrections because by the time you get set up down there,
14 the time might have run.

15 The mandatory minimum is twenty-five years. The
16 sentence of the Court is that you be committed to the South
17 Carolina Department of Corrections for thirty years plus
18 costs and assessments. Give him credit for jail time under
19 Section 24-13-40 to be calculated and applied by the
20 Department of Corrections. Pay your court costs at the
21 rate of a hundred and fifty months -- fifty dollars a
22 month, beginning a hundred and eighty days after you're
23 released from actual incarceration in prison.

24 Good luck to you, sir.

25 All right. We're in recess till ten a.m.

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Verdict

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1 [END OF REQUESTED TRANSCRIPT OF RECORD]

1 CERTIFICATE OF REPORTER

2

3 I, the undersigned Danette P. Hanks, Official Court
4 Reporter for the Thirteenth Judicial Circuit of the State
5 of South Carolina, do hereby certify that the foregoing is
6 a true, accurate, and complete transcript of record of all
7 the proceedings had and evidence introduced in the
8 trial/hearing of the captioned case, relative to appeal, in
9 the Court of General Sessions for Pickens County, South
10 Carolina, on the 17th day of November, 2014.

11 This transcript may contain quoted material. Such
12 material is reproduced as read by the speaker.

13 I do further certify that I am neither of kin,
14 counsel, nor interest to any party hereto.

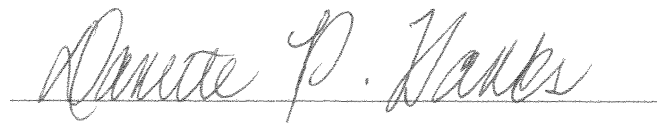
15 November 13, 2017

16

17

18

19

A handwritten signature in cursive script, reading "Danette P. Hanks", is written over a horizontal line.

Circuit Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)
 County of Pickens)
JUSTIN RYAN CONE # 362238)
 Full name and prison number (if any) of Applicant)

IN THE COURT OF COMMON PLEAS

v.

2017-CP-39-928

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA

2017 AUG 1 PM 3 04

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Broad River Correctional Institute
Murray 119 - 4460 Broad River Rd. Columbia, SC 29210
2. Name and location of Court which imposed sentence Pickens County
General Sessions - Pickens, SC 29671
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2012 GS 3900660 - case # I677752
 - (b) _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 11-19-14 30 yrs. pay court cost \$50 a month beginning 180 days after release
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty N/A
- (b) after a plea of not guilty Yes
- (c) after a plea of nolo contendere N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. Date filed - 11/25/14
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) N/A

- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of trial counsel
- (b) Ineffective assistance of appeal counsel
- (c) Prosecutor misconduct / Juror misconduct
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) (See attached sheets)
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? N/A
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? N/A
- (d) any other petitions, motions or applications in this or any other Court? N/A
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(c) the disposition thereof:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(d) the date of each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. N/A
- iii. N/A
- iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) THIS IS initial PCR
 (b) _____
 (c) _____

17. 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? NO
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
NO

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:
 i. Steve Wayne Sumner
1088 N. Church St. Greenville, SC 29601
 ii. _____
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. Trial and sentencing
 ii. _____
 iii. _____

19. State clearly the relief you seek in filing this application:

For conviction and sentence vacated and to be released
from custody or conviction and sentence reversed and
remanded for new trial.

20. Are you now under sentence from any other court that you have not challenged?

No

Petitioner believes he has additional claims for PCR, but does not yet have collateral counsel, access to the discovery process, or funds for expert services to investigate these claims, as such I, the petitioner, would respectfully reserve the right to amend application for further issues.

STATE OF SOUTH CAROLINA)

County of Pickens)

VERIFICATION

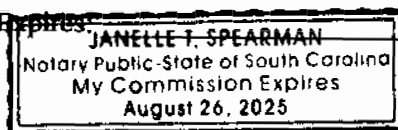
I, Justin Ryan Cone #362238, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Justin Cone 7/11/17

SWORN to and subscribed before me this 12th
 day of July, 2017

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

My Commission Expires:



2017 AUG 1 PM 3 04
 CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Justin Ryan Cone #362238, 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 of 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 said proceeding or give security thereof.

Justin Cone 7/11/17
Applicant

SWORN or affirmed to and subscribed before me this
day of July 2017.

[Signature]
Notary Public

My Commission Expires



2017 AUG 1 PM 3 04
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Honorable Clerk,

I am writing you today to request the right to proceed with a late appeal because of July 5th, 2017 I became aware that my original appeal was dismissed due to my deficient trial attorney.

I was convicted on November 19, 2014 as you will see with the enclosed paperwork, and an appeal was filed just six (6) days after. Once the trial was over, I haven't spoke to my former lawyer, Steve Sumner, and I was under the impression that since my appeal was filed, I would be assigned an appellate attorney sometime in the near future. After nearly three (3) years and numerous letters to Mr. Sumner and the appellate office, nothing has been done and I just found out my original appeal was dismissed because —

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

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my lawyer was insufficient in filing the proper paperwork and caused time to lapse.

With that being said, I am filing a Post-conviction Relief (PCR) form with you today with the understanding that I am requesting to proceed with a late appeal based on my circumstances.

As I said before I retained a private attorney during my trial because I held a full-time job and was able to afford one. Now that I've been in the Department of Corrections, I am no longer able to do so. So I am in need of an appellate attorney to represent me as I am truly innocent in this case as I have evidence proving so that was not ever used during my trial due to my unsuitable lawyer. —

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PICKENS COUNTY
SOUTH CAROLINA

(2)

My family stands by me one-hundred percent (100%) and they possess the mentioned evidence showing my innocence and you may contact my mother, Sara Madler, at 864-770-3995 with any concerns. I would like to have a stamped, clocked filed copy returned to me with the name of the attorney that is assigned to handle my case. I have enclosed a self addressed envelope to be used for this purpose. Thank you in advance for your time and consideration in this matter.

Sincerely,

Justin Cone

Justin R. Cone #362238

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PICKENS COUNTY
SOUTH CAROLINA

Attachment - Ineffective Assistance of Trial Counsel

1. Trial counsel failed to motion for a new trial when the trial court declared that the jury's verdict was a compromise verdict and that the trial court's sentence would not serve justice.
2. Trial counsel failed to motion for an acquittal when the trial court declared that the jury's verdict was a compromise verdict and that the trial court's sentence would not serve justice.
3. Trial counsel failed to file for a sentence reconsideration after sentencing, when the trial court declared that the jury's verdict was a compromise verdict and the trial's court sentence would not serve justice.
4. Trial counsel failed to motion for a new trial on the grounds that evidence was insufficient to support conviction.
5. Trial counsel ineffective for making improper comments during closing arguments.
6. Trial counsel failed to object to prosecutor's unconstitutional, burden shifting, and prejudicial closing argument and motion for a mistrial.
7. Trial counsel failed to object to prosecutor, victim and witness perjured testimony.

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8. Trial counsel failed to pretrial interview victims and witnesses that testified.
9. Trial counsel failed to contact, interview and subpoena potential witnesses.
10. Trial counsel failed to present character witnesses.
11. Trial counsel failed to present evidence of petitioners good character.
12. Trial counsel failed to impeach witnesses and victims.
13. Trial counsel failed to present favorable evidence in support of defenses.
14. Trial counsel failed to file pre-trial motion to suppress prejudicial evidence.
15. Trial counsel failed to object to prejudicial evidence.
16. Trial counsel failed to submit favorable evidence into evidence.
17. Trial counsel failed to investigate backgrounds of victims and witnesses.
18. Trial counsel failed to motion for mistrial due to erroneous and prejudicial jury instructions which were burden shifting and denied petitioners of a mistrial.

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19. Trial counsel failed to investigate and test evidence.
20. Trial counsel failed to object to hearsay testimony.
21. Trial counsel failed to investigate facts and circumstances of case.
22. Trial counsel failed to prepare for case
23. Trial counsel failed to argue favorable evidence during closing arguments.

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I, petitioner, respectfully reserve the right to amend application for further issues.

Attachment - Constitutional Rights

- A. The Constitutional right to the effective assistance of Counsel.
- B. Petitioner was denied the right to effective assistance of Appellate Counsel guaranteed by the sixth and fourteenth Amendments of the United States Constitution during the appeal phase of Petitioner's case. This violated the Petitioner's 5th, 6th and 14th Amendment rights of the US Constitution; and violated the Petitioner's SC Const. Art. 1, 3 and 1, 14 rights.
- C. Trial Counsel ineffective for not objecting to erroneous, prejudicial, unconstitutional, burden shifting jury instructions. This violated the Petitioner's 5th, 6th and 14th Amendment rights of the US Constitution; and violated the Petitioner's SC Const. Art. 1, 3 and 1, 14 rights.
- D. Trial counsel failed a pre-trial interview and investigate the witnesses and victims. This violated the Petitioner's 5th, 6th and 14th Amendment rights of the US Constitution; and violated the Petitioner's SC Const. Art. 1, 3 and 1, 14 rights.

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- E. Trial counsel failed to present, cross-examine, and impeach witnesses and victims with relevant evidence. This violated the Petitioner's 5th, 6th and 14th Amendment rights of the US Constitution; and violated the Petitioner's SC Const. Art. 1, 3 and 1, 14 rights.
- F. Trial counsel failed to present, submit into evidence and argue favorable evidence during the trial and closing arguments. This violated the Petitioner's 5th, 6th and 14th Amendment rights of the US Constitution; and violated the Petitioner's SC Const. Art. 1, 3 and 1, 14 rights.
- G. Trial counsel failed to investigate and test evidence. This violated the Petitioner's 5th, 6th and 14th Amendment rights of the US Constitution; and violated the Petitioner's SC Const. Art. 1, 3 and 1, 14 rights.
- H. Trial counsel failed to file a pre-trial motion to suppress prejudicial evidence and object to prejudicial evidence during the trial. This violated the Petitioner's 5th, 6th and 14th Amendment rights of the US Constitution; and violated the Petitioner's SC Const. Art. 1, 3 and 1, 14 rights.

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- ±. Trial counsel failed to present character witnesses and evidence of Petitioner's good character. This violated the Petitioner's 5th, 6th and 14th Amendment rights of the US Constitution; and violated the Petitioner's SC Const. Art 1, 3 and 1, 14 rights.

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CLERK OF COURT
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SOUTH CAROLINA

Attachment. - Prosecutor misconduct

1. Prosecutor expressing personal opinions about Petitioner's guilt and credibility.
2. Prosecutor made unfair and improper remarks about Petitioner
3. Prosecutor vouching for credibility of victims and witnesses.
4. Prosecutor vouching for credibility of government witnesses.
5. Prosecutor presenting and failing to correct perjured testimony of victims and witnesses.
6. Prosecutor appealing to jurors to act as the conscience for the community.
7. Prosecutor made remarks to inflame the passions of the jurors, which lead to a compromised verdict conviction.
8. Prosecutor making misstatements of law.
9. Prosecutor making misstatements of facts.
10. Prosecutor made unfair, prejudicial, biased and burden shifting statements during trial.
11. Prosecutor made made unfair, prejudicial and biased statements during closing arguments.
12. Prosecutor violated Petitioner's due process right to a fair trial and made Petitioner's conviction a miscarriage of justice.

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Attachment - Juror misconduct

1. The jury's verdict was a compromise verdict based on passion and prejudice, making the jury's verdict unfair and not impartial to Petitioner; which makes Petitioner's conviction a miscarriage of justice.

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CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	IN THE THIRTEENTH JUDICIAL CIRCUIT
	)	
Justin R. Cone, #362238,	)	Case No.: 2017-CP-39-0928
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on August 1, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. In May of 2012, the Pickens County Grand Jury indicted Applicant for criminal sexual conduct with a minor in the first degree (2012-GS-39-0660). The indictment was amended in August of 2014 by the Pickens Grand Jury. Steve Sumner, Esquire, represented Applicant. Starting on November 17, 2014, Applicant proceeded to trial before the Honorable William P. Keesley. The trial concluded on November 19, 2014. The jury found Applicant guilty as indicted. Judge Keesley sentenced Applicant to imprisonment for thirty years for the charge of criminal sexual conduct with a minor in the first degree. Applicant did not appeal his conviction or sentence.

Attached to this Return are the records of the Pickens County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the trial transcript. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Attached pages 11-13
2. Ineffective Assistance of Appellate Counsel
 - b. Attached pages 14-16
3. Prosecutor Misconduct/ Juror Misconduct
 - c. Attached pages 17-18

III.

Respondent submits Applicant's allegation of ineffective assistance of counsel is without merit. 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, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process" that the proceeding "cannot be relied upon as having produced a just result." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective

assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

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

IV.

Applicant also alleges ineffective assistance of appellate counsel. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective

assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

Respondent contends that the Applicant's appellate attorney rendered effective assistance of counsel. However, this ground for relief may raise factual issues that are not conclusively refuted by the record. Respondent requests an evidentiary hearing on this allegation.

V.

Respondent construes Applicant's juror misconduct as prosecutorial misconduct as well. Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at the plea hearing or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised the alleged discovery violation on appeal. The failure to do so has waived this allegation as grounds for relief. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989).

To the extent Applicant is claiming prosecutorial misconduct has been discovered post-trial, and could not have been discovered, in the exercise of due diligence, prior to trial, in evaluating post-trial Brady¹ claims, the applicant must show (1) the prosecution suppressed evidence, (2) the evidence would have been favorable to the accused, and (3) the suppressed evidence is material. United States v. Wolf, 839 F.2d 1387 (10th Cir. 1988). The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. State v.

¹ Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963).

Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194 (1963)). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985).

“Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). “A ‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’” Bagley, 473 U.S. at 678, 105 S.Ct. at 3381. A Brady violation does not warrant reversal if the evidence is merely cumulative or impeaching. See Clark, 315 S.C. 385.

Applicant has failed to make the requisite *prima facie* showing to warrant an evidentiary hearing that the State withheld any evidence that would have produced a different outcome at his trial. Therefore, Respondent submits this allegation should be summarily dismissed for failing to specifically set forth the facts upon which the application is based.

VI.

Applicant must specify any claims she intends to raise at the PCR evidentiary hearing. Any claims not specifically laid out in this PCR application or in amendments will be opposed by the State at an evidentiary hearing pursuant to §§ 17-27-10 to -160 of the South Carolina Code of Laws and Rule 71.1 of the South Carolina Rules of Civil Procedure. See also Rules 15(a)-(b), SCRPC. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. See Rule 11, SCRPC. Pro se filings

will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent. See Rule 15(a), SCRCP.

VII.

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

VIII.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of plea counsel and ineffective assistance of appellate counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

DESHAWN H. MITCHELL
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

January 16, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	
	)	
	)	2017-CP-39-0928
	)	
JUSTIN R. CONE, 362238	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

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

R. Mills Ariail, Jr., Esquire
11 North Irvine Street; Suite 11
Greenville SC 29601

DATED this 16th day of January, 2018.


 Judy A. C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Justin R. Cone, #362238,

Case No.: 2017-CP-39-928

Applicant,

v.

State of South Carolina,

Respondent.

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

AMENDED RETURN AND MOTION
TO DISMISS

Respondent, making its amended return and motion to dismiss to the application for post-conviction relief filed by Justin R. Cone (Applicant) on August 1, 2017, would respectfully show this Court:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County Clerk of Court. During its May 2012 term, the Pickens County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor (2012-GS-39-0660). The indictment was amended during the August 2014 term to include additional dates. Steve W. Sumner, Esquire, represented Applicant on this charge. On November 17-19, 2014, Applicant proceeded to a jury trial before the Honorable William P. Keesley. Following deliberations, the jury convicted Applicant as indicted. Judge Keesley sentenced Applicant to a term of imprisonment of thirty years. Applicant did not appeal his conviction or sentence.

II. Current Application

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

1. Ineffective assistance of trial counsel;
 - a. I am writing you today to request the right to proceed with a late appeal because of July 5th, 2017 I became aware that my original appeal was dismissed due to my deficient trial attorney;
 - b. Trial counsel failed to motion for a new trial when the trial court declared that the jurys [sic] verdict was a compromise verdict and that the trial court's sentence would not serve justice;
 - c. Trial counsel failed to motion for an acquittal when the trial court declared that the jurys [sic] verdict was a compromise verdict and that the trial court's sentence would not serve justice;
 - d. Trial counsel failed to file for a sentence reconsideration after sentencing, when the trial court declared that the jurys [sic] verdict was a compromise verdict and the trials [sic] sentence would not serve justice;
 - e. Trial counsel failed to motion for a new trial on the grounds that evidence was insufficient to support conviction;
 - f. Trial counsel ineffective for making improper comments during closing arguments;
 - g. Trial counsel failed to object to prosecutor's unconstitutional, burden shifting, and prejudicial closing argument and motion for a mistrial;
 - h. Trial counsel failed to object to prosecutor, victim and witness perjured testimony;
 - i. Trial counsel failed to pretrial interview victims and witnesses that testified;
 - j. Trial counsel failed to contact, interview and subpoena potential witnesses;
 - k. Trial counsel failed to present character witnesses;
 - l. Trial counsel failed to present evidence of petitioners [sic] good character;
 - m. Trial counsel failed to impeach witnesses and victims;
 - n. Trial counsel failed to present favorable evidence in support of defenses;
 - o. Trial counsel failed to file pre-trial motion to suppress prejudicial evidence;
 - p. Trial counsel failed to object to prejudicial evidence;
 - q. Trial counsel failed to submit favorable evidence into evidence;
 - r. Trial counsel failed to investigate backgrounds of victims and witnesses;
 - s. Trial counsel failed to motion for mistrial due to erroneous and prejudicial jury instructions which were burden shifting and denied petitioner [sic] of a mistrial;

- t. Trial counsel failed to investigate and test evidence;
- u. Trial counsel failed to object to hearsay testimony;
- v. Trial counsel failed to investigate facts and circumstances of case;
- w. Trial counsel failed to prepare for case; [and]
- x. Trial counsel failed to argue favorable evidence during closing arguments.
- 2. Ineffective assistance of appeal counsel; [and]
- 3. Prosecutor misconduct/Juror misconduct.
 - a. Prosecutor expressing personal opinions about Petitioner's guilt and credibility;
 - b. Prosecutor made unfair and improper remarks about Petitioner;
 - c. Prosecutor vouching for credibility of victims and witnesses;
 - d. Prosecutor vouching for credibility of government witnesses;
 - e. Prosecutor presenting and failing to correct perjured testimony of victims and witnesses;
 - f. Prosecutor appealing [sic] to jurors to act as the conscience for the community;
 - g. Prosecutor made remarks to inflame the passions of the jurors, which lead [sic] to a compromised verdict conviction;
 - h. Prosecutor making misstatements of law;
 - i. Prosecutor making misstatements of facts;
 - j. Prosecutor made unfair, prejudicial, biased and burden shifting statements during trial;
 - k. Prosecutor made made [sic] unfair, prejudicial and biased statements during closing arguments;
 - l. Prosecutor violated Petitioner's due process right to a fair trial and made Pctitioner's conviction a miscarriage of justice; [and]
 - m. The jury's verdict was a compromise verdict based on passion and prejudice, making the jury's verdict unfair and not impartial to Petitioner; which makes Petitioner's conviction a miscarriage of justice.

III. Statute of Limitations

Respondent submits this application should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the Act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes this Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was convicted as indicted on November 19, 2014, and he did not pursue a direct appeal. The application was, therefore, due on or before November 20, 2015. This application was filed on August 1, 2017, *nearly two years* after the requisite filing period had expired. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act, particularly in light of the fact Applicant has failed to allege any known ground entitling him to equitable tolling. *See Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 619-20 (Ct. App. 2008) (equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the

defendant's misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim).

IV. *White v. State*¹

Applicant alleges he was denied his right to a direct appeal based on ineffective assistance of trial counsel. The one-year limitations period in which to file a petition for post-conviction relief does not apply where the defendant alleges he was denied a direct appeal due to ineffective assistance of counsel. *Wilson v. State*, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002).

Applicant claims he was denied effective assistance of counsel because his trial counsel did not appeal his conviction. The decision of the South Carolina Supreme Court, in *White v. State*, holds even though the post-conviction relief court finds the applicant had never voluntarily and intelligently abandoned his appeal, the court has no jurisdiction to grant a belated appeal. However, where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected. *Id.* at 119, 108 S.E.2d at 39-40.

Respondent submits Applicant cannot meet his burden showing he is entitled to a belated appeal pursuant to *White*. However, because this allegation probably raises questions of fact not conclusively refuted by the record, Respondent requests an evidentiary hearing solely on this issue. Should Applicant prevail on his allegation counsel was ineffective for failing to file an appeal and establish he did not timely file this current application due to the ineffective assistance of counsel, Respondent requests an evidentiary hearing to address the remaining

¹ 263 S.C. 110, 119, 108 S.E.2d 35, 39 (1974).

issues raised in the application for post-conviction relief. See *Toney v. State*, Op. No. 2019-MO-006 (S.C. filed February 6, 2019) (where an applicant for post-conviction relief has established he did not knowingly and voluntarily waive his right to a direct appeal, the applicant is entitled to a full evidentiary hearing on the merits of his application).

V. Ineffective Assistance of Counsel

Should this Court find Applicant was denied his right to a direct appeal, Respondent submits Applicant's remaining allegations of ineffective assistance of counsel are without merit. In a post-conviction relief action, Applicant bears the burden of proving the allegations in his 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 "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. *Id.*; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). The applicant must overcome this

presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. 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. Respondent contends Applicant cannot meet his burden; however, the allegations of ineffective assistance of counsel probably raise questions of fact the record does not conclusively refute. Accordingly, should this Court find Applicant was denied his right to a direct appeal, Respondent requests an evidentiary hearing to fully resolve this issue. *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI. Prosecutorial Misconduct

Should this Court find Applicant has established he was denied his right to a direct appeal, Respondent submits his allegations of prosecutorial misconduct are without merit. It is Applicant's burden to prove actual prosecutorial misconduct. *Alabama v. Smith*, 490 U.S. 794 (1989). Respondent submits Applicant cannot meet his burden, particularly in light of his complete failure to identify the alleged misleading or inflammatory statements made by the solicitor and in light of his failure to specifically identify exactly what testimony was "perjured."

To the extent Applicant alleges the solicitor vouched for the victim and the State's witnesses in his closing argument, Respondent submits this allegation is wholly without merit. . "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." *Von Dohlen v. State*, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) (citing *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). Furthermore, a closing argument should stay within the content of the record and the reasonable inferences to be drawn therefrom and must not be intended to arise the passions or prejudices of the jury. *Id.* at 609-10, 602 S.E.2d at 744 (citing *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998);

Copeland, 321 S.C. at 324, 468 S.E.2d at 624). A solicitor must also not vouch for a witness' credibility. *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (citing *State v. Shuler*, 344 S.C. 604, 630, 545 S.E.2d 805, 818 (2001)). A solicitor vouches for the credibility of a witness by placing "the government's prestige behind a witness by making personal assurances, or indicating that information not presented to the jury supports the testimony." *Id.* However, "[a] solicitor's argument concerning the credibility of the State's witnesses based on the record and its reasonable inferences is not error." *State v. New*, 338 S.C. 313, 319-20, 526 S.E.2d 237, 240 (1999) (quoting *State v. Caldwell*, 300 S.C. 494, 505, 388 S.E.2d 816, 822 (1990) (finding the solicitor's remarks referencing credibility of State witnesses permissible and directly related to the evidence where biases of the witnesses were apparent from the record)). *See also State v. Raffaldi*, 318 S.C. 110, 456 S.E.2d 390 (1995) (the State may comment on the credibility of witnesses in argument). Respondent submits there is nothing in the solicitor's closing argument to suggest he was vouching for the credibility of the State's witnesses or the victim. However, Applicant's allegations of prosecutorial misconduct probably raise questions of fact the record does not conclusively refute. Accordingly, should this Court find Applicant was denied his right to a direct appeal, Respondent requests an evidentiary hearing to fully resolve this issue. *Sharper v. State*, 279 S.C. 264, 305 S.E.2d 247 (1983).

VII. Denial of All Other Claims

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

VIII. Conclusion

WHEREFORE, Respondent requests an evidentiary hearing be held solely on the claim of ineffective assistance of trial counsel in failing to file an appeal. Should this Court find

Applicant has failed to establish he did not knowingly and voluntarily waive his right to appeal, Respondent further requests all other allegations raised or potentially raised in Applicant's application be dismissed as barred by the statute of limitations. In the alternative, should this Court find Applicant did not knowingly and voluntarily waive his right to a direct appeal, Respondent requests an evidentiary hearing be held on Applicant's allegations of ineffective assistance of trial counsel and prosecutorial misconduct.

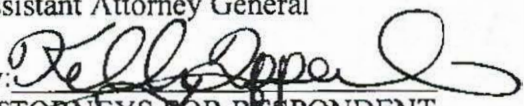
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

KELLY OPPENHEIMER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

February 14, 2019

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS

FILED FEB 22 2019

2017-CP-39-0928

JUSTIN R. CONE, 362238

Applicant,

**CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA**

vs

AFFIDAVIT OF SERVICE BY MAIL

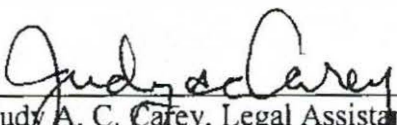
STATE OF SOUTH CAROLINA,

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 **Amended Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**R. Mills Ariail, Jr., Esquire
11 North Irvine Street; Suite 11
Greenville SC 29601**

DATED this 14th day of February, 2019.


Judy A. C. Carey, Legal Assistant
For Respondent

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF PICKENS	)	2017-CP-39-00928
	)	
	)	
	)	
JUSTIN RYAN CONE,	)	
APPLICANT,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA,	)	
RESPONDENT.	)	
_____	)	

ORIGINAL

February 21, 2019
Greenville, South Carolina

B E F O R E:

THE HONORABLE ALEX KINLAW, JR., JUDGE.

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

R. MILLS ARIAIL, JR., ESQ.
Attorney for the Applicant

KELLY OPPENHEIMER, ESQ.
Assistant Attorney General

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(AW) - Denotes Applicant's Witness
 (RW) - Denotes Respondent's Witness

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<u>(AW) STEVEN WAYNE SUMNER:</u>	
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E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

THE COURT: Yes, ma'am.

MS. OPPENHEIMER: May it please the Court, Your Honor.

THE COURT: All right.

MS. OPPENHEIMER: This is Justin Cone v. the State of South Carolina, docket #2017-CP-39-928. During its May 2012 term, the Pickens County Grand Jury indicted Applicant for first degree criminal sexual conduct with a minor. The indictment was amended during the August 2014 term to include additional dates. Steven -- or Steve W. Summer -- Sumner -- excuse me -- represented the Applicant on this charge.

On November 17th through 19th, 2014, the Applicant proceeded to a jury trial before the Honorable William P. Keesley. Following deliberations, the jury convicted the Applicant as indicted. And Judge Keesley sentenced the Applicant to a term of imprisonment of 30 years. The Applicant did not appeal.

On August 1st, 2017, the Applicant filed an application for post-conviction relief alleging various grounds of ineffective assistance of counsel, including failure to file an appeal, ineffective assistance of appellate counsel, prosecutorial misconduct, and juror misconduct. The State made its return on January 16th,

1 2018, requesting an evidentiary hearing be held.

2 Thereafter, the State made its amended return and
3 motion to dismiss on February 14th, 2019, requesting a
4 hearing be held solely on the claim of ineffective
5 assistance of trial counsel for failing to file an appeal.

6 The Applicant is present today and is represented by
7 Mills Ariail.

8 And, Your Honor, based on a recent unpublished
9 opinion that came out from the Supreme Court this year,
10 Ernest Toney v. the State of South Carolina, we would --
11 this application was filed three years late. But Mr. Cone
12 did raise an allegation of ineffective assistance of
13 counsel for failing to file an appeal.

14 We would request a hearing solely on the issue of
15 whether Applicant knowingly and voluntarily waived his
16 right to appeal. And then should this Court find that he
17 did not knowingly and voluntarily waive his right, we
18 would ask for a hearing on the remaining issues.

19 THE COURT: All right. Mr. Ariail.

20 MR. ARIAIL: Your Honor, I think I can make -- make
21 this a little briefer. I've talked with Mr. Cone in
22 regards to this. He is willing -- wants to go forward
23 with trying to get a belated appeal. I talked to
24 Mr. Sumner about that. I can put him on the stand and
25 present the testimony on that. I think if we get that,

1 then I think you'll -- you'll see that, hopefully, we
2 will -- that he is willing to withdraw his remaining
3 claims that he has.

4 And I've spoken with him in regards to this. He's
5 got some newly discovered evidence, which Mr. Sumner
6 didn't have. I told him -- I know I've explained to him
7 how to pursue that and get in touch with Pickens County to
8 be able to have that explored. But that's not really a --
9 an issue here at the PCR.

10 So I'm trying to kind of get him -- I've, also,
11 explained to him he's filed this after one year. So we've
12 got to kind of go through these steps to be able to get
13 him this appeal. And I think once we get that appeal,
14 then he's willing to withdraw the rest of it.

15 THE COURT: All right. So do you want to put some
16 testimony up?

17 MR. ARIAIL: I will. I'll put testimony up, if I
18 can, Your Honor.

19 Mr. Sumner, I'll call him to the stand.

20 THE COURT: All right. Madam Clerk.

21 THE CLERK: Mr. Sumner, please raise your right hand.

22 WHEREUPON,

23 STEVEN WAYNE SUMNER,

24 after first having been duly sworn, testified as follows:

25 THE CLERK: Thank you.

1 You may be seated.

2 And please state your full name for the record.

3 THE WITNESS: Steven with a "V," Steven Wayne,
4 W-A-Y-N-E, Sumner S-U-M-N-ER. I'm an attorney in
5 Greenville.

6 Yes, sir.

7 DIRECT EXAMINATION

8 BY MR. ARIAIL:

9 Q Mr. Sumner, how are you doing today?

10 A Good morning. I'm fine.

11 Thank you.

12 Q Good.

13 And you represented Mr. Cone; correct?

14 A I did.

15 Q Okay. And y'all went to trial, I think, on his
16 charge sometime in November of -- let me pull up the
17 transcript here -- 2014; is that correct?

18 A That's correct.

19 I'm not -- I don't remember the dates, specifically,
20 Judge. But it was somewhere in that range, whatever the
21 transcript says.

22 Q I think it was November 17th, 18th, and 19th, of
23 2014. That was --

24 A That sounds about right.

25 Q -- in front of Judge Keesley; is that correct?

1 A Yes, sir.

2 Q And the charge was criminal sexual conduct with a
3 minor in the first degree; is that correct?

4 A It was, yes.

5 Q Okay. Now, during that -- and I -- I believe
6 Mr. Cone was convicted and was sentenced to 30 years; is
7 that correct?

8 A That is right.

9 Q Okay. As part of that -- and I want to go through a
10 little bit of what kind of happened after the sentence.

11 A Sure.

12 Q You represented him during this --

13 A I did.

14 Q Did y'all have any discussions or any -- I guess any
15 discussions about an appeal in this case?

16 A We did.

17 After the verdict, he was led out extremely quickly,
18 Judge. And he did make some reference to me about an
19 appeal. I said, Sure.

20 His parents had, actually, hired me. He didn't have
21 any financial role in retaining my services. So at the
22 conclusion of that, I went out in the hallway.

23 I don't remember all of the details of the
24 conversation because it was about five years ago, Judge.

25 But we talked about just reviewing kind of where we

1 were and going ahead, Mr. Ariail, and starting that
2 process.

3 Q Okay.

4 A I will say this. His mother, at the time, had become
5 increasingly hostile towards me during the trial. We were
6 having a very difficult go of it. His dad and I were
7 still getting along okay. But the mother and I had some
8 difficulties.

9 We did touch on an appeal in the hallway after the
10 conviction was read and Justin was then taken on back for
11 incarceration at that point. But we did touch on it, yes.

12 Q Okay. And did he, specifically, request you to file
13 an appeal, I guess, during that time?

14 A I took it this way. I mean, I -- he said when he was
15 leaving the courtroom, I want to file -- something to the
16 effect of an appeal.

17 I would want to give it to his benefit, Judge.

18 He referenced an appeal to me. I said, Yes, we --
19 you know, we will look at that, or words to that effect.
20 And then I spoke with his parents.

21 Q Okay. And then his mom, I guess, kind of told you to
22 stop doing stuff. You --

23 A Well, she did. I'm just -- just going to throw this
24 out. I had already spoken to Ms. Oppenheimer about it
25 earlier this week.

1 There's really nothing I -- I'll give you everything
2 I can remember, Judge.

3 She had been very -- she had blown up our office
4 phone for the -- the year prior to this trial. Okay.
5 Well, she did ask me very early the next day about the
6 appeal. She was -- she was very angry toward me.

7 Ultimately, very quickly, within a day or two after
8 his conviction, she said, Do not touch this file again.
9 She was very angry with me. She said, Don't touch it.
10 Don't do anything with it. I had given her the names, I
11 want to say, Rauch Wise, probably Jeff Wilkes, a few
12 people that do a lot of criminal appeals. And I said,
13 Well, that -- I'm glad to work with them.

14 She had, initially, told me -- she had backed off the
15 statement at the courthouse in Pickens and said, I don't
16 want you to do the appeal. But she didn't say she didn't
17 want me to have any role. She just said, I think we're
18 going to go in another direction.

19 I said, That's fine. No problem with that. I'll
20 work with them in my office. They can come to my office.
21 We'll sit down in the conference room.

22 And, Judge, I was very candid.

23 As I've told all clients, if I've made mistakes, I'm
24 fine with that. Somebody else can look at it. And, you
25 know, I'm glad to work with them. I gave her the names, I

1 know, of -- of -- like I said, Rauch Wise, Jeff Wilkes,
2 maybe one or two others.

3 At that point, she was more like, we would like you
4 to be -- will you work with them? And I said, Yes. But
5 she wasn't like, don't have any role.

6 Then she called back very shortly thereafter -- or my
7 next conversation with her -- again, this was within
8 probably 72 hours, to the best of my memory, of him being
9 convicted, and said, Don't touch it. Don't do a thing. I
10 don't want you anywhere near it.

11 I said, Well, I understand, you know. We've all been
12 there. I said, Well, you know what, I hate it's come to
13 this. But I'm still glad to work in the capacity that I
14 mentioned yesterday. And I never heard another -- never
15 heard another word from her.

16 So I wrongly made a presumption that she had hired
17 one of the other attorneys.

18 Q Okay.

19 A And I did not -- I want to get this very clear to
20 Judge Kinlaw. I initiated the process of the appeal. My
21 contract is -- is specific that there was not -- you know,
22 the new agreement needed to be taken into. I understand
23 from the Bar rules that's not exactly how things are
24 viewed. And I did not perfect the appeal within 10 days.

25 Q Okay. And you have no issue today, based upon

1 everything with him, with letting him proceed with an
2 appeal?

3 A No. I would want -- I would want Judge Kinlaw to
4 give him the relief, you know. He's a seasoned, veteran
5 trial lawyer prior to his new career. And I would want
6 him to do what he feels is right. And I have no objection
7 at all to somebody looking at this for him to see if I
8 made any mistakes and to get a direct appeal, do anything
9 I didn't do right.

10 MR. ARIAIL: Okay. I have no further questions, Your
11 Honor.

12 THE COURT: All right. Cross-examination, Counsel.

13 MS. OPPENHEIMER: Very briefly.

14 THE WITNESS: Yes, ma'am.

15 CROSS-EXAMINATION

16 BY MS. OPPENHEIMER:

17 Q Did Mr. Cone ever indicate to you that he did not
18 want to proceed his -- or want to go forward with his
19 appeal?

20 A Did he ever -- did he ever let me know he did not
21 want to go forward?

22 Q Yes.

23 A No, no. He never -- no. I never recall him saying
24 he did not want to file an appeal. So, no, ma'am, I don't
25 believe he did.

1 MS. OPPENHEIMER: No further questions, Your Honor.

2 THE COURT: All right. I don't have any questions.
3 Anything else?

4 MR. ARIAIL: No, Your Honor.

5 THE COURT: All right. Thank you, Mr. Sumner.

6 THE WITNESS: Sure.

7 MR. ARIAIL: That is our case in regards to that.

8 THE COURT: All right. Counsel, do you want to
9 present anything in regards to -- to just that one issue?
10 Because I think --

11 MS. OPPENHEIMER: We have no witnesses.

12 THE COURT. -- what I -- what I decide on that issue
13 is going to be dispositive of what you go forward on.

14 MS. OPPENHEIMER: That's correct, Your Honor.

15 THE COURT: Based upon what I've heard, certainly, I
16 think that Mr. Cone should be given every benefit of -- of
17 the fair processes that can be.

18 And, certainly, I -- and Counsel was exactly right,
19 Mr. Cone, before I took this job a few years ago, I -- I
20 did a number of criminal trials. As a matter of fact,
21 more than I can count over 20 some odd years that I've
22 done this. And -- and I can tell you this. That along
23 the way I can't tell you that everything that I've done
24 over those years was perfect. And I can't tell you I
25 didn't make a mistake. Because that's just human nature.

1 So, certainly, I understand your circumstances. And
2 I understand what Mr. Sumner has said. And I will say
3 this about Mr. Sumner. I don't think you could find a
4 finer lawyer than him. I mean, I've -- I've known him
5 for -- for a long time. As a matter of fact, during the
6 days that I practiced law, he and I handled a case
7 together.

8 MR. SUMNER: We did.

9 THE COURT: As a matter of fact, we handled -- we
10 handled a death penalty case together side by side.
11 And -- and I've got to know him over the years.

12 So, based upon what I've heard, I'll be more
13 inclined -- I don't have any problems in granting you to
14 the right to file a belated appeal, based upon what I've
15 heard today.

16 Now, in terms of who would do that, Mr. Ariail, I'm
17 assuming that that's another -- is he going to -- who
18 would handle that process?

19 MR. ARIAIL: I'm appointed for the PCR. The Office
20 of Appellate Defense would handle that.

21 THE COURT: Appellate Defense.

22 MR. ARIAIL: Once they get an order, what I -- I'll
23 work with Ms. Oppenheimer in regards to that. Normally,
24 I'd just send it over to them and say that he's been
25 granted a belated appeal. They will help him with that

1 and handle that for him.

2 THE COURT: All right.

3 MR. SUMNER: Whatever I can do to help, I will. I
4 will be available. I don't think it would be good for me
5 to continue in any kind of role from what's come out
6 today.

7 THE COURT: And, Counsel, make sure you put in the
8 order that whoever is -- whoever from Appellate Defense is
9 assigned to handle his appeal that they make direct
10 contact with him. I think it's important -- you know, I'm
11 not a proponent of this contact by mail thing. I think
12 that they need to go see him. They need to go sit down
13 and talk to him, provide all of the information that they
14 have to him. So he'll be on the same page they are.

15 So I just want to make sure that happens. I don't --
16 here again, I don't like this -- this contact by mail or
17 contact by phone. I like to get in the car, go sit and
18 talk to him.

19 MS. OPPENHEIMER: Yes, Your Honor.

20 And just to clarify, "him" being Mr. Cone, not
21 Mr. Sumner?

22 THE COURT: "Him" being Mr. Cone.

23 MS. OPPENHEIMER: Okay. I just wanted to clarify.

24 THE COURT: Where -- where are you housed at right
25 now, Mr. Cone?

1 MR. CONE: Broad River Correctional.

2 THE COURT: All right. So that's in -- that's in
3 Columbia.

4 MR. SUMNER: That's in Columbia.

5 THE COURT: And he's going to be there.

6 You're going to be there for a minute?

7 MR. CONE: I don't plan on leaving any time soon.

8 THE COURT: All right. So that's a pretty -- pretty
9 central location.

10 All right. Anything else?

11 MS. OPPENHEIMER: Your Honor, as to the other
12 allegations, we just ask that Mr. Cone waive them on the
13 record.

14 THE COURT: All right. Very well.

15 And that's the allegations of ineffective
16 assistance --

17 MR. ARIAIL: Correct.

18 MS. OPPENHEIMER: Yes. There's a slew of allegations --

19 THE COURT: Slew of allegations under that topic.

20 MS. OPPENHEIMER: Yes, sir.

21 THE COURT: All right. Mr. Cone, would you raise
22 your right hand the best you can?

23 WHEREUPON,

24 JUSTIN RYAN CONE,

25 after first having been duly sworn, testified as follows:

EXAMINATION

BY THE COURT:

Q All right. Now, obviously, you know -- what I just heard just now was testimony regarding whether or not to grant you a belated right to appeal. And I've done that.

But, also, part of your application of post-conviction relief is you allege ineffective assistance of counsel. And, I think, under that, you've got a number of different things that you've alleged?

A That's correct.

Q Your lawyer, Mr. Ariail, has indicated that you are now willing to waive pursuing those allegations; is that correct? In other words, you're willing to give those allegations up at this time?

A Correct.

Q And not pursue them; is that correct?

A That is correct.

THE COURT: All right. Now, let me make sure that -- Counsel, that I understand this. He's -- he's waiving his right to pursue ineffective assistance of counsel as to his trial lawyer. But does that forego his right to pursue ineffective assistance of counsel as to his appellate attorney?

MS. OPPENHEIMER: Your Honor, it's -- it's my understanding --

1 THE COURT: I'm just asking. I'm just asking.

2 MS. OPPENHEIMER: -- that we have to dispose of all
3 of the allegations now, that he cannot file a -- another
4 PCR in the future. That's always been my understanding.
5 If I'm incorrect --

6 MR. ARIAIL: Well, I mean --

7 THE COURT: Well, typically -- typically, what
8 happens, Counsel, is a lot of times you'll have the trial
9 lawyer and then the PCR is centered around the trial
10 lawyer and the appellate lawyer at the same time.

11 MR. ARIAIL: Correct.

12 THE COURT: But in this instance, it's a little bit
13 different in that he's getting an appeal after the fact.
14 And -- and I guess what happens if -- if -- and heaven
15 forbid if he doesn't. But what happens if he gets an
16 appellate attorney who for some reason doesn't do what he
17 or she's supposed to do, what is his remedy?

18 MS. OPPENHEIMER: I understand what you're asking,
19 Your Honor. So what happens when a White appeal is
20 granted, the -- Mr. Ariail would file the notice of
21 appeal, indicate that he was appointed, and that the
22 Office of Appellate Defense should assume responsibility
23 for the appeal. The PCR appeal from this hearing today
24 and the belated appeal go up at the same time.

25 So Appellate Defense would have to file their brief

1 pursuant to the White -- pursuant to White v. State and
2 the petition for writ of certiori as to this PCR at the
3 same time. So then after the conclusion of the PCR
4 appeal, the next step would be federal habeas.

5 THE COURT: I see.

6 MR. ARIAIL: That sounds appropriate, Your Honor.

7 THE COURT: Okay.

8 MR. SUMNER: And, again, I'll -- whatever attorney is
9 appointed to you, Justin, I'm happy to sit down and visit
10 with them in Greenville at any point in time.

11 THE COURT: All right. Let me just finish this
12 colloquy.

13 CONTINUED EXAMINATION

14 BY THE COURT:

15 Q So you're waiving that portion of the application
16 that seeks the latest ineffective assistance of counsel as
17 to Mr. Sumner; is that correct? You're giving up all --
18 all those allegations up. You're waiving that on the
19 record and giving -- giving up -- giving up all that on
20 the record; is that correct?

21 A That is correct.

22 Q And are you doing that freely and voluntarily?

23 A Yes, sir.

24 Q And you spoke with Mr. Ariail about that; is that
25 correct?

1 A That is correct.

2 Q And y'all have had sufficient time to discuss this
3 back and forth; is that correct?

4 A That is correct.

5 Q And you're satisfied with the services of counsel
6 that he's given you today; is that correct?

7 A Yes, sir.

8 Q You don't have any complaints against your lawyer,
9 Mr. Ariail; is that correct?

10 A No.

11 Q All right. And how far did you go in school, Justin?

12 A I graduated high school.

13 Q You graduated high school. So you understand what's
14 going on?

15 A Right.

16 Q All right. And do you have any questions of me?

17 A No, sir, Your Honor.

18 Q All right. Do you have any questions of your lawyer,
19 of Mr. Ariail?

20 A (There was no verbal response.)

21 Q Do you got any questions of Counsel for the State?

22 A No.

23 THE COURT: Okay.

24 MR. SUMNER: Thank you, Your Honor. Thank you, sir.

25 THE COURT: All right. Do me an order that

1 encompasses all of it.

2 MS. OPPENHEIMER: Yes, Your Honor.

3 THE COURT: Okay.

4 *****END OF TRANSCRIPT OF RECORD*****
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CERTIFICATE OF REPORTER

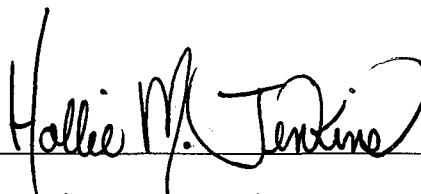
STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Pickens County, South Carolina, on the 21st day of February, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

April 22, 2019

A handwritten signature in black ink, reading "Hollie M. Jenkins", is written over a horizontal line.

Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS
FOR THE THIRTEENTH JUDICIAL CIRCUIT

Justin Ryan Cone, #362238,

2019 MAR 12

A 11:24

Case No. 2017-CP-39-928

Applicant,

v.

State of South Carolina,

Respondent.

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

**ORDER GRANTING BELATED
APPELLATE REVIEW PURSUANT
TO *WHITE V. STATE* AND
WITHDRAWING ALL OTHER
ALLEGATIONS WITH PREJUDICE**

This matter comes before this Court by way of an application for post-conviction relief filed August 1, 2017, by Justin Ryan Cone (Applicant). The State (Respondent) made its return on January 16, 2018, requesting an evidentiary hearing be held. Thereafter, Respondent made its amended return and motion to dismiss on February 14, 2019, requesting a hearing be held solely on the claim of ineffective assistance of trial counsel for failing to file an appeal. An evidentiary hearing into the matter was convened on February 21, 2019, at the Greenville County Courthouse before the Honorable Alex Kinlaw, Jr. Applicant was present at the hearing and represented by R. Mills Ariail, Jr., Esquire. Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office represented Respondent.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has met his burden, such that this Court shall grant him a belated appeal pursuant to *White v. State*.¹ This Court further finds Applicant withdrew, with prejudice, all of his remaining allegations knowingly and voluntarily.

PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Pickens County

¹ 263 S.C. 110, 208 S.E.2d 35 (1974).

[Handwritten signature] #1

Clerk of Court. During its May 2012 term, the Pickens County Grand Jury indicted Applicant for first-degree criminal sexual conduct with a minor (2012-GS-39-0660). The indictment was later amended during the August 2014 term of the Grand Jury. Steve W. Sumner, Esquire, represented Applicant on this charge. On November 17-19, 2014, Applicant proceeded to a jury trial before the Honorable William P. Keesley. Following deliberations, the jury convicted Applicant as indicted, and Judge Keesley sentenced Applicant to a term of imprisonment of thirty years. Applicant did not appeal.

STATEMENT OF FACTS

Applicant was a friend of Victim's family and spent almost every weekend at Victim's family's home. Tr. 54, 148-49, 167, 192. Applicant and Victim's mother and father were also engaged in a sexual relationship. Tr. 150-51, 163, 167, 192. Around Christmas of 2011, Victim's mom noticed that Victim was playing with her dolls in a sexually inappropriate manner. Tr. 154, 168. Victim's mom confronted Victim about this on January 1, 2012, and Victim disclosed she had been sexually abused in her room during the night. Tr. 156. Victim later disclosed the abuse to her father and to Detective Rita Burgess, of the Pickens County Sheriff's Office, on the same day. Tr. 175, 178, 195. During her disclosure, Victim indicated the abuse happened frequently, in her bedroom or her parents' bedroom, for a period of several years, until she was nine years old. Tr. 178, 181-82, 185. Victim also indicated she swallowed semen during the abuse. Tr. 182.

At trial, Victim testified Applicant made her perform oral sex on him. Tr. 55. Victim would not be wearing any clothes when the abuse occurred, and Applicant's pants and underwear would be pulled halfway down. Tr. 57-58. Victim was about four or five years old when the abuse started happening, and it ended when she was nine years old. Tr. 56. The abuse



would occur in either Victim's room or her parents' room when her parents were gone. Tr. 57.

When the abuse would happen, Applicant told Victim not to tell anyone. Tr. 58.

CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following allegations:

1. Ineffective assistance of trial counsel;
 - a. I am writing you today to request the right to proceed with a late appeal because of July 5th, 2017 I became aware that my original appeal was dismissed due to my deficient trial attorney;
 - b. Trial counsel ailed to motion for a new trial when the trial court declared that the jurys [sic] verdict was a compromise verdict and that the trial court's sentence would not serve justice;
 - c. Trial counsel failed to motion for an acquittal when the trial court declared that the jurys [sic] verdict was a compromise verdict and that the trial court's sentence would not serve justice;
 - d. Trial counsel failed to file for a sentence reconsideration after sentencing, when the trial court declared that the jurys [sic] verdict was a compromise verdict and the trials court [sic] sentence would not serve justice;
 - e. Trial counsel failed to motion for a new trial on the grounds that evidence was insufficient to support conviction;
 - f. Trial counsel ineffective for making improper comments during closing arguments;
 - g. Trial counsel failed to object to prosecutor's unconstitutional, burden shifting, and prejudicial closing argument and motion for a mistrial;
 - h. Trial counsel failed to object to prosecutor, victim and witness perjured testimony;
 - i. Trial counsel failed to pretrial interview victims and witnesses that testified;
 - j. Trial counsel failed to contact, interview and subpoena potential witnesses;
 - k. Trial counsel failed to present character witnesses;
 - l. Trial counsel failed to present evidence of [Applicant's] good character;
 - m. Trial counsel failed to impeach witnesses and victims;
 - n. Trial counsel failed to present favorable evidence in support of defenses;

- o. Trial counsel failed to file pre-trial motion to suppress prejudicial evidence;
 - p. Trial counsel failed to object to prejudicial evidence;
 - q. Trial counsel failed to submit favorable evidence into evidence;
 - r. Trial counsel failed to investigate backgrounds of victims and witnesses;
 - s. Trial counsel failed to motion for mistrial due to erroneous and prejudicial jury instructions which were burden shifting and denied [Applicant] of a mistrial;
 - t. Trial counsel failed to investigate and test evidence;
 - u. Trial counsel failed to object to hearsay testimony;
 - v. Trial counsel failed to investigate facts and circumstances of case;
 - w. Trial counsel failed to prepare for case; [and]
 - x. Trial counsel failed to argue favorable evidence during closing arguments.
2. Ineffective assistance of appeal counsel; [and]
3. Prosecutor misconduct/Juror misconduct.
- a. Prosecutor expressing personal opinions about [Applicant's] guilt and credibility;
 - b. Prosecutor made unfair and improper remarks about [Applicant];
 - c. Prosecutor vouching for credibility of victims and witnesses;
 - d. Prosecutor vouching for credibility of government witnesses;
 - e. Prosecutor presenting and failing to correct perjured testimony of victims and witnesses;
 - f. Prosecutor appealing [sic] to jurors to act as the conscience for the community;
 - g. Prosecutor made remarks to inflame the passions of the jurors, which lead [sic] to a compromised verdict conviction;
 - h. Prosecutor making misstatements of law;
 - i. Prosecutor making misstatements of facts;
 - j. Prosecutor made unfair, prejudicial, biased, and burden shifting statements during trial;
 - k. Prosecutor made unfair, prejudicial and biased statements during closing arguments;
 - l. Prosecutor violated [Applicant's] due process right to a fair trial and made [Applicant's] conviction a miscarriage of justice; [and]
 - m. The jury's verdict was a compromise verdict based on passion and prejudice, making the jury's verdict unfair and

not impartial to [Applicant]; which makes [Applicant's] conviction a miscarriage of justice.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant presented the testimony of Steve W. Sumner, Esquire (Counsel). This Court also had before it the transcript from Applicant's jury trial, Applicant's records from the South Carolina Department of Corrections, the records from the Pickens County Clerk of Court regarding the subject conviction, and the records from this current post-conviction relief action.

Counsel testified he represented Applicant. He testified after Applicant was convicted at trial, he and Applicant discussed an appeal. He further testified Applicant requested him to file an appeal as Applicant was leaving the courtroom. Counsel testified Applicant's mother asked about an appeal the following day, and Applicant's mother instructed Counsel not to touch Applicant's file again. He explained he gave Applicant's mother the names of several appellate attorneys who could handle Applicant's appeal and also told Applicant's mother he would be happy to work with the appellate attorney on this case. He further explained he never heard another word from Applicant, or his mother, and assumed Applicant's mother had hired someone else. Counsel testified because of this, he did not perfect the appeal. He also testified Applicant never told Counsel he did not want Counsel to pursue an appeal on his behalf.

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


Page 5 of 9

testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove 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.

After careful review based on the standard discussed above, this Court finds Applicant has establish he did not knowingly and voluntarily waive his right to an appeal. This Court

further finds Applicant knowingly, voluntarily, and intelligently withdrew the remainder of his allegations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, prosecutorial misconduct, and jury misconduct with prejudice. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel's failure to appeal

Applicant alleges he was denied the effective assistance of counsel when trial counsel failed to properly initiate his direct appeal. Trial counsel must ensure a criminal defendant is made fully aware of his appeal rights. *White*, 263 at 118, 208 S.E.2d at 39. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure required by *Anders v. California*, 386 U.S. 738 (1967). *Id.* Where the post-conviction relief judge determines the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to *White v. State*. Rule 243(i)(1), SCACR; *see also Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986) ("Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the applicant must petition this Court for a *White v. State* review.").

Here, Counsel testified Applicant asked him to appeal his conviction at trial, but presuming Applicant's mother had hired someone else to handle the appeal, after being told not to touch Applicant's file any further, Counsel failed to perfect Applicant's appeal within the mandated time limits. Counsel further testified Applicant never told Counsel he did not want Counsel handling his appeal. Based on the foregoing, this Court finds Applicant's allegation he was denied a direct appeal is meritorious. This Court affirmatively finds Applicant did not

knowingly and voluntarily waive his right to a direct appeal. This Court further concludes Applicant is entitled to a belated review of his convictions.

All Other Allegations

After having found Applicant did not knowingly and voluntarily waive his right to appellate review of his trial and, therefore, was entitled to a belated appeal, Applicant, through his counsel, informed this Court of his desire to withdraw his remaining allegations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, prosecutorial misconduct, and juror misconduct. Respondent consents to the dismissal with prejudice of all remaining allegations. Applicant informed this Court he had discussed this decision with his counsel and understood the risks and advantages of post-conviction relief. Applicant also informed this Court he was aware the voluntary dismissal of the post-conviction relief application would be with prejudice and he would not be able to file another application at any time.

Applicant indicates his decision is made freely and voluntarily. Applicant indicates he has not been promised anything or threatened, coerced, or induced into withdrawing the application. Applicant further indicates he has had sufficient time to review this decision with counsel, and he is satisfied with counsel. Applicant also indicates he has no complaints of counsel.

It appearing that counsel for both parties and Applicant consent to the dismissal of all remaining allegations, and in light of the fact this Court has not been made aware of any violations of Applicant's constitutional rights, the remaining allegations of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, prosecutorial misconduct, and juror misconduct shall hereby be dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

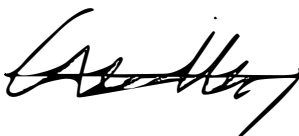
This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if Applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

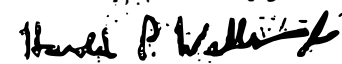
IT IS THEREFORE ORDERED:

1. That Applicant be granted a belated appeal pursuant to *State v. State*;
2. That this application for post-conviction relief must be denied and dismissed with prejudice; and
3. Applicant must be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED this 6th day of March, 2019.

ALEX KIMLAW, JR.
Presiding Judge
Thirteenth Judicial Circuit

 South Carolina

Certified Copy

Clerk of Court MB
Pickens County, SC
Dated March 12, 2019

STATE OF SOUTH CAROLINA

456
COUNTY OF Pickens
STATE VS.

Justin Ryan Cone

AKA:

Race: WHITE Sex: M Age: 29

DOB: 1985 SS#: [REDACTED]

Address: [REDACTED]

City, State, Zip: Travelers Rest, SC 29690

DL#: [REDACTED] SID#: [REDACTED]

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

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

TO: Sex / Criminal sexual conduct with minor or Attempt - victim under 11 yrs of age - First degree

in violation of § 16-03-0655(A)(1) of the S.C. Code of Laws, bearing CDR Code # 0385

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

SC Bar# Defendant Attorney for Defendant SC Bar#

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 _____ days/months/years and/or payment

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

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 (Carrying a Firearm or Ammunition in a Motor Vehicle in Connection with Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

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

Payment Terms:

☐ Set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %)

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

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ 100.00

§ 56-5-2995 (DUI Assessment) \$12 \$ 12.00

§ 56-1-286 (DUI Breath Test) \$25 \$ 25.00

Proviso 47.9 (Public Def/Prob) \$500 \$ 500.00

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

§ 14-1-213 (Drug Court Surcharge) \$150 \$ 150.00

§ 50-21-114 (BUI Breath Test Fee) \$50 \$ 50.00

§ 56-5-2942(J) (Vehicle Assessment) \$40/ca \$ 40.00

Proviso 90.5 (SCCJA Surcharge) \$5 \$ 5.00

3% to County (if paid in installments) \$ 3.90

TOTAL \$ 133.90

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2012GS3900660

A/W#: 1677752

Date of Offense: 12/16/2011

S.C. Code § : 16-03-0655(A)(1)

CDR Code #: 0385

SENTENCE SHEET

25 - LIFE

☐ CONVICTED OF or ☐ PLEADS

Certified Copy

Handell P. Walker

Clerk of Court

Pickens County, SC

Dated Aug 2017 me

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job _____

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: Pay COURT COSTS @ \$50/mo.

BEGINNING 180 DAYS AFTER RELEASE

FROM ARREST IN CARCERATION.

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Clerk of Court/ Deputy Clerk

Court Reporter: Danette Hunter

SCCA/217 (03/2011)

Presiding Judge

Judge Code: 2050

Sentence Date: Nov. 19, 2014

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS)

AMENDED INDICTMENT FOR
 CRIMINAL SEXUAL CONDUCT WITH A MINOR FIRST DEGREE

At a Court of General Sessions, convened on

AUG 19 2014

the Grand Jurors of Pickens

County present upon their oath:

That JUSTIN RYAN CONE did in Pickens County, between the dates of January 1, 2010 and January 1, 2012, commit a sexual battery on M.D.M., who was less than eleven years of age. This is in violation of §16-3-655(A)(1)[formerly 16-3-655(1)] of the South Carolina Code of Laws (1976) as amended

Certified Copy

Harold P. Walker

Clerk of Court

Pickens County, SC

Dated *Aug 20 2014*

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

Brian Hunter
 SOLICITOR

458

WITNESSES

Rita Garner Burgess

Pickens County Sheriff's Office

2/1/2012

ARREST WARRANT NUMBER

1677752

ACTION OF GRAND JURY

1003 PMS

AUG 19 2014

Foreperson of Grand Jury

VERDICT

Guilty

Foreperson of Petit Jury

Date:

11-19-14

AMENDED

DOCKET NO. 2012-GS-39-0660

BMB

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

AUG 19 2014 TERM 2014

THE STATE

vs.

JUSTIN RYAN CONE

Amended Indictment for

0385

CRIMINAL SEXUAL CONDUCT WITH A MINOR
FIRST DEGREE

VIOLATION § 16-03-0655(A)(1)

Certified Copy

Theresa P. Williams

Clerk of Court

Pickens County, SC

Dated 7/28/2012 MB

ARREST WARRANT 2012
1-677752 0002
STATE OF SOUTH CAROLINA
County/ Municipality of
Pickens 2014055001

THE STATE PCSO#2012-00072
against

Justin Ryan Cone
Address: [REDACTED]
Piedmont, SC 29673-
Phone: [REDACTED] SSN: [REDACTED]
Sex: M Race: W Height: 5'7" Weight: 140
DL State: SC DL #: [REDACTED]
DOB: [REDACTED] Agency ORI #: SC03900000
Prosecuting Agency: Pickens County Sheriff's Office
Prosecuting Officer: R G Burgess - 611
Offense: Sex / Criminal sexual conduct with minor or
Attempt - victim under 11 yrs of age - First degree
Offense Code: 0385
Code/Ordinance Sec: 16-03-0655(A)(1)

This warrant is CERTIFIED FOR SERVICE in the
County/ Municipality of
The accused
is to be arrested and brought before me to be
dealt with according to the law.
(L.S.)
Signature of Judge

RETURN
A copy of this arrest warrant was delivered to
defendant Justin Ryan Cone
on 2-1-2012
Signature of Constable/Law Enforcement Officer
RETURN WARRANT TO:
Easley - Pickens County Summary Court
135 Folger Avenue
Easley, SC 29640

STATE OF SOUTH CAROLINA)
County/ Municipality of)
Pickens)
Personally appeared before me the affiant R G Burgess who
being duly sworn deposes and says that defendant Justin Ryan Cone
did within this county and state on or about 12/16/2011 violate the criminal laws of the
State of South Carolina (or ordinance of) County/ Municipality of Pickens)
in the following particulars:

DESCRIPTION OF OFFENSE Sex / Criminal sexual conduct with minor or Attempt - victim under 11 yrs of age - First degree

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:
The defendant, Justin Ryan Cone, did on or about 12/16/2011 commit Sexual Battery upon the body of M. D. M. less
than eleven (11) years of age. He would awaken her, during the nighttime, remove her undergarment, have her lie on his stomach
with her head toward his feet. He would then place his penis in her mouth and have her "suck it" until he would ejaculate in her
mouth. He would, all the while, be licking and fondling her vagina and rectum. The event occurred at the child's home where he
was allowed to spend the night because he was thought to be a friend. His actions were solely for the purpose of satisfying his
sordidly prurient sexual desires.

1- Victim's statement 2- Witnesses' statements 3- Incident Report PCSO#2012-00072

STATE OF SOUTH CAROLINA)
County/ Municipality of)
Pickens)
Signature of Affiant
Affiant's Address
Affiant's Telephone (864)898-5500

ARREST WARRANT
TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:
It appearing from the above affidavit that there are reasonable grounds to believe that
on or about 12/16/2011 defendant Justin Ryan Cone
did violate the criminal laws of the State of South Carolina (or ordinance of
County/ Municipality of Pickens) as set forth below:
DESCRIPTION OF OFFENSE: Sex / Criminal sexual conduct with minor or Attempt - victim under 11 yrs of age - First degree
Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before me
on 01/16/2012
Signature of Issuing Judge
E. David Forrest
Judge Code: 5878

ORIGINAL ORIGINAL ORIGINAL ORIGINAL ORIGINAL
Signature of Constable/Law Enforcement Officer
RETURN WARRANT TO:
Easley - Pickens County Summary Court
135 Folger Avenue
Easley, SC 29640
FEB - 8 2012

BAIL set by

460

Judge

on

Type and Amount:

Name of Surety:

PRELIMINARY HEARING held by

Judge

on

Defendant Attorney:

Decision:

DISPOSITION before

Judge

on

by

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition:

Sentence:

JURORS

CODEFENDANTS

WITNESSES

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Certified Copy

Harold P. Walker

Clerk of Court

Pickens County, SC

Dated Aug 2017 ms

1677752

STATE OF SOUTH CAROLINA)
)
 COUNTY OF PICKENS) INDICTMENT FOR
) CRIMINAL SEXUAL CONDUCT WITH A MINOR FIRST DEGREE

At a Court of General Sessions, convened on **MAY 22 2012** the Grand Jurors of Pickens
 County present upon their oath:

That JUSTIN RYAN CONE did in Pickens County, on or about the 16th day of December, 2011,
 commit a sexual battery on M.D.M., who was less than eleven years of age. This is in violation of §16-
 3-655(A)(1)[formerly 16-3-655(1)] of the South Carolina Code of Laws (1976) as amended

Certified Copy

Harold P. Walker

**Clerk of Court
 Pickens County, SC**

Dated *Aug 2017*

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

Gloria K. Katsen
 SOLICITOR

462

WITNESSES

Rita Garner Burgess

Pickens County Sheriff's Office

2/1/2012

ARREST WARRANT NUMBER

1677752

ACTION OF GRAND JURY

RUE BILL

1st

MAY 22 2012

Foreperson of Grand Jury

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 2012-GS-39-0660

BMB

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

MAY 22 2012 TERM 2012

THE STATE

vs.

JUSTIN RYAN CONE

0385

Indictment for

CRIMINAL SEXUAL CONDUCT WITH A MINOR
FIRST DEGREE

VIOLATION § 16-03-0655(A)(1)

Certified Copy

Handwritten signature

Clerk of Court

Pickens County, SC

Dated 5/22/12

PICKENS COUNTY

VICTIM INFORMATION/NOTIFICATION FORM

Date 1/1/12	Time 2356	Incident Report # 2012-00072	Offense CSC
Defendant's Name JUSTIN RYAN CONE			

VICTIM INFORMATION

Victim's Name M. D. M.		Home Phone #		Work Phone #	
Victim's Address			Marital Status		Spouse's Name
City Easley, SC	Zip 29642	D.O.B. [REDACTED] / 2002		Race W	Sex F
Employer	Occupation	Employer's Address		City	Zip
Can we call you at work? ☐ Yes ☐ No		Alternate Phone # ☐ Pager ☒ Mobile		Name of Family or Neighbor Doug and Teresa M.	

WAIVER

I certify that I have received a copy of this form from a police officer, and my rights and duties as a victim of a crime have been explained to me.

☐ I DO choose to waive my rights as a victim of crime.

Victim's Signature

Date

PLEASE ANSWER THE FOLLOWING IF YOU CHOOSE NOT TO WAIVE YOUR RIGHTS

1. ☒ YES ☐ NO I do wish to be notified when an arrest is made in this case.
2. ☐ YES ☐ NO I do wish to be notified when the person(s) arrested in this case appears for a bond hearing.
3. ☐ YES ☐ NO I do wish to be notified when the person(s) arrested in this case appears for a preliminary hearing.
4. ☐ YES ☐ NO I do wish to be notified when the person(s) arrested in this case appears for any plea, trial, or sentence.
5. ☐ YES ☐ NO I do wish to make a written impact statement for the court to consider.
6. ☐ YES ☐ NO I do wish to make an oral impact statement for the court to consider.
7. ☐ YES ☐ NO I do wish to be notified when the person(s) arrested in this case are transferred to the jail facility.
8. ☐ YES ☐ NO I do wish to be notified when the person(s) arrested in this case are transferred to the jail facility.
9. ☒ YES ☐ NO I do wish to be notified when the person(s) arrested in this case are transferred to the jail facility.

Certified Copy

Clerk of Court

Pickens County, SC

Dated: Aug 2012

Victim's Signature

Date

NOTICE OF BOND HEARING

The bond hearing for the person(s) arrested in this case will be at
☐ 9:00 a.m. or ☐ 4:00 p.m. on _____ at the L.E.C.

Officer's Signature

Date

FB - 8 2012

Name of Defendant

Warrant/Ticket No. County of Pickens

Charges: CSC w/a minor 1st degree

Trial Court:

General Sessions

CHECKLIST FOR MAGISTRATES AND MUNICIPAL JUDGES

Directions: Magistrates and municipal court judges must use this checklist for ALL GENERAL SESSIONS and for ALL MAGISTRATE AND MUNICIPAL COURT CASES IN WHICH BOND HAS BEEN SET BY A JUDGE. The judge shall attach this checklist to the charging document (arrest warrant or uniform traffic ticket) when the defendant first appears before a judge for a bond hearing or first appearance, and complete the appropriate sections. **Defendant must be provided a completed copy of this form.**

BAIL PROCEEDING

1. Form used at bail proceeding ☐ Bond Form I (personal recognizance) ☐ Bond Form II (surety, cash, percentage) ☒ None (Non-Bailable Offense)
2. For cases in which bond was set, defendant was informed:
 - ☒ a. Warrant for arrest will be issued for violation of any condition of bail bond order.
 - ☒ b. His right and obligation to be present at trial and that trial will proceed in his absence if he fails to attend.
 - ☒ c. Failure to appear in court as required will result in institution of additional criminal charges. For failure to appear in connection with a felony, or while awaiting sentence after conviction, additional charge has penalty of fine not more than \$5,000 or imprisonment for not more than 5 years, or both. Failure to appear in connection with a charge for a misdemeanor for which the maximum possible sentence was at least one year, additional charge has penalty of not more than \$1,000 or imprisonment for not more than one year, or both. Failure to appear in court as required on any charge not specified above will result in the issuance of a warrant for defendant's arrest, as well as loss of any posted bond.
3. For cases to be tried in Court of General Sessions, defendant was informed of right to preliminary hearing if requested within ten (10) days:

☒ Orally ☒ In writing (NOTE: Defendant must be informed of right both orally and in writing.)
- ☒ 4. Defendant was informed of the right to trial by jury.
5. In all general sessions cases, in all criminal domestic violence cases, and in all magistrate or municipal cases in which a prison sentence is likely to be imposed, defendant was informed of the following:

Certified Copy
Harold P. Walker
Clerk of Court
Pickens County, SC
Dated Aug 2017 MB

 - ☒ a. Charges against defendant and nature of the charges.
 - ☒ b. Right to counsel and right to court-appointed counsel if financially unable to employ counsel.
 - ☒ c. Defendant was informed orally and provided a copy of this form advising him of his right to obtain court appointed counsel if indigent (must meet federal poverty guidelines) and instructions on how to obtain court appointed counsel. In order to apply for court appointed counsel, defendant is required to appear before Clerk of Court located at Pickens County Courthouse, 214 E. Main St. Pickens S.C. for indigency screening. Defendant is responsible for a statutory fee of \$40.00 for indigency screening.
- ☐ 6. In all criminal domestic violence cases and any case where defendant is subject to an Order of Protection or Restraining Order, defendant signed and was provided a document explaining that entering the grounds or property of a domestic violence shelter in which the person's household member resides constitutes an additional misdemeanor charge and, if in possession of a dangerous weapon, an additional felony charge.
- ☒ 7. If the charges that have been brought against you are discharged, dismissed, or nolle prossed or if you are found not guilty, you may have your record expunged.

Appearance or
Hearing Date:

2/1/2012

JSR

Judge's Signature