

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Cherokee County

Honorable Brian M. Gibbons, Circuit Court Judge

JASON S. SIMMONS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000447

APPENDIX

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1 State of South Carolina)
) Court of General Sessions
2 County of Cherokee) 2017-GS-11-00580

3

4 State of South Carolina)
)
5 vs.) Transcript of Record
)
6 Jason S. Simmons)

7

8

January 8-10, 2020
Chester, South Carolina

9

10

11 B E F O R E:

12 The Honorable Roger M. Young, Judge, and a jury.

13

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18 Michael Morin, Esq.
Attorney for the Defendant

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21

22 Nadine M. Capps, CVR
23 Court Reporter

24

25

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10	NO.	DESCRIPTION	MARK	OFR	ADMT
11	State's 1	DVD marked Confidential	96	96	96
	State's 2	Panties (silver)	106	107	107
12	State's 3	Panties (blue)	106	107	107
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13	State's 5	Photo	118	119	119
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	State's 10	Photo	118	120	121
16	State's 11	Photo	120	120	121
	State's 12	Photo	120	120	121
17	State's 13	Photo	120	120	121
	State's 14	Photo	120	120	121
18	State's 15	Photo	123	123	124
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19	State's 17	Photo	125	131	131
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24	State's 27	Paper bag	169	223	223
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25	State's 29	Envelope for drawn blood	169	204	204
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E X H I B I T S C O N T I N U E D

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NO.

DESCRIPTION

MARK OFR ADMT

3

State's 31

Report

211

211

243

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CD

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Court 1

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

2 (The matter was heard in open court.)

3 THE COURT: You are Jason Scott Simmons?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: Well, Mr. Simmons, you're here today, ready
6 to go to trial on criminal sexual conduct with a minor in
7 the first degree. Just want to put on the record that you
8 are looking at 25 years, minimum, if you get convicted of
9 this charge.

10 We had some discussions earlier about a plea that would
11 be a plea to a substantially less term than that. I'm told
12 you do not want to accept that plea. It was for ten years,
13 an Alford plea. I'm not trying to convince you, one way or
14 the other, to except it. I just want it to be on the record
15 that if you get convict you understand that the minimum
16 sentence of the Court will be 25 years and there's no parole
17 and you would likely be put into the Sexually Violent
18 Predator Program. Twenty-five is the minimum. You could
19 get life on it. It's your choice, but that's a big old
20 chunk of sentence right there if you lose on this.

21 THE DEFENDANT: Yeah, I know, sir.

22 THE COURT: All right. Do you need more time to
23 discuss this with your lawyer?

24 THE DEFENDANT: No, sir.

25 THE COURT: You sure?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: You got anything you want to say?

3 MR. MORIN: No, sir.

4 THE COURT: How are we doing with the jury?

5 Can I see the lawyers up here for a second?

6 MR. MORIN: Yes, sir.

7 (A conference was held at the sidebar between counsel
8 and the Court.)

9 THE COURT: Back on the record. Before we begin,
10 Mr. Simmons, I'd like to go over this for people in the
11 court before we start the trial. As I told you, you're
12 facing 25 to life.

13 You do have some rights that you need to -- I know your
14 lawyer has spoken to you about it, but I want it to be on
15 the record, that I want to make sure you understand.

16 You pled not guilty, and you have the right to testify
17 if you want to when we go to trial. You also have the right
18 to not testify, if you don't want to. If you want to get up
19 and tell your side of the story to the jury, you can do
20 that. You'd be placed under oath. You are obligated to
21 tell the truth. And your lawyer will be able to ask you
22 some questions, and then the State would be allowed to
23 cross-examine you about your testimony.

24 Now, if you don't want to testify, you don't have to,
25 and I will instruct the jury that they are not to hold that

1 against you while they are deliberating the verdict. You
2 don't have to tell me right now if you want to testify or
3 not. I'll be telling the jury that basically I don't know
4 whether or not you're going to testify, but that isn't --
5 under the law, they are obligated not to hold that against
6 you. And I like to put that right up front. I don't even
7 know whether or not you plan to, but if you don't, they are
8 not to hold that against you while they are deliberating
9 their verdict.

10 As I said, you don't have to tell me now, but it's
11 something that at some point in the trial you will have to
12 make a decision, so I want you to be thinking about it and I
13 want you to discuss it with your lawyer. I'm sure you have,
14 but you should continue those discussions with him. And if
15 you have any family members or something like that you take
16 their advice on, well, discuss it with them as well. But
17 it's your trial and you're facing 25 years, so you may very
18 well ---

19 THE DEFENDANT: It might take me some time.

20 THE COURT: --- want to testify or not, and give it a
21 go. It deserves serious thought. Because the consequences
22 are likely to be that if it goes against you, you're never
23 going to see the outside of a prison again. Do you
24 understand that?

25 THE DEFENDANT: Yes.

1 THE COURT: Okay.

2 THE DEFENDANT: It might take me time ---

3 THE COURT: Do we have any other pretrial matters we
4 need to take up before the jury comes up?

5 MR. KENDALL: I don't know we -- before they come up --
6 or just before they're sworn, Your Honor, we have three
7 motions that I think I gave the Court. Let me make sure.
8 One is a third-party guilt motion, just to exclude the
9 testimony of third-party guilt.

10 Mr. Morin has indicated that there's some stuff on the
11 DNA about multiple individuals -- DNA on there. Certainly,
12 he could say I inquired about that. But if we're looking
13 for a specific individual, I don't think he would do -- he'd
14 be able to do that without a pretrial motion.

15 We have a motion for admission of the out-of-court
16 statement of the child under 17-23-175, basically, to play
17 the CAC video. And a standard rape shield law. I don't
18 think it's even -- I kind of filed it with this. I don't
19 think there's anything that would -- as far as to my
20 knowledge it would be. Yeah, she's a very small child, so I
21 don't think that that is likely to come up, but...

22 THE COURT: All right. Mr. Morin, do you want to chime
23 in on any of these?

24 MR. MORIN: Even if a 4-year-old did have sexual
25 activity, I wouldn't bring it up in this trial.

1 THE COURT: Okay.

2 MR. MORIN: So that's not a problem.

3 The third-party guilt, I understand, as Mr. Kendall has
4 stated, there is sort of some DNA kind of thing, but there
5 is no -- we have no intention of alleging someone else did
6 it. And the third thing is, is the CAC video, which I've
7 tried to figure out how to keep out, but I don't have an
8 argument for that. So that would be my answer to those
9 three.

10 THE COURT: All right. Well, then it sounds like you
11 can have the out-of-court statement played. He gets to
12 cross-examine the DNA person. You know, certainly, on
13 statistics and how to read those and what they mean. But if
14 he intends to offer a name of some third person, he would
15 need to bring that to the Court's attention ahead of time.
16 He represents that that's not going to be an issue. And the
17 same with the rape shield law. It doesn't look like that's
18 an actual issue, but if it does present itself, y'all let me
19 know.

20 MR. MORIN: Yes, Your Honor.

21 THE COURT: All right. Let's see. We've got the
22 witness list, voir dire. Anything else?

23 MR. KENDALL: No, sir, Your Honor.

24 THE COURT: Okay. Anybody else have any problem with
25 ID evidence or voir dire?

1 MR. MORIN: No. I don't have any with it.

2 THE COURT: So before we bring the jury up, I just
3 wanted to inquire this morning. Do you have a question
4 about mental capacity or ability to assist you ---

5 MR. MORIN: I do not, Your Honor. I do not.

6 And just for the record, Your Honor, for the last --
7 probably for five of the last seven Saturdays, I've been to
8 the defendant's home to discuss various aspects of the case
9 and how the trial would go and met with both him and his
10 wife, who's present in the courtroom, and there hasn't been
11 any issues about not understanding or being able to assist
12 me.

13 THE COURT: Thank you. Well, I think we're ready,
14 then. Bring the jury up.

15 (The jury entered the courtroom at 10:35 a.m.)

16 THE CLERK: Is juror 111 here? Calandra Surratte?
17 Juror 111? Thirty-eight, Your Honor.

18 THE COURT: All right. Well, welcome folks. My name's
19 Roger Young. I am the judge that is presiding over this
20 term of court this week here in Cherokee County. I'm from
21 Charleston. This is the first time I've held court of up
22 here in Cherokee County. It's been a wonderful week so far.
23 I've been to Gaffney before. And I actually discovered a
24 few years ago the best doughnut place in the world is
25 actually located in Gaffney; that being Sunny's Donuts right

1 down the road, so I was really excited when I got assigned
2 here because I thought I get to go to Sunny's Donuts that
3 week.

4 But one of the things that is a great thing about being
5 a circuit court judge in this state is you travel all over
6 the state. We've got 46 counties in this state, and as of
7 this week, I've now held court in 44 of them. And it's the
8 best part of the job, if you ask me. And being able to go
9 all over and see this wonderful state, seeing the different
10 ways of doing things. Every place is different, every place
11 has its charm. There are things that are common, but there
12 are things that are different as well.

13 And one of the things I just noticed is different about
14 Gaffney is y'all have the speaker seats in your audience and
15 everybody is sitting in a pattern like this, and I've never
16 seen that before. But I hadn't really noticed until y'all
17 came in that they weren't just benches, they were actually
18 what I call "theater seats," and that's kind of interesting
19 to see. Probably one of the things aside from Sunny's
20 Donuts that I remember about Gaffney.

21 But here what we are going to do: We've got one case
22 left on the docket this week and so we are doing jury
23 trials. Everything that we do in the court system seems
24 have big, fancy words. So I like to sit down and explain to
25 you what we're doing and why we're doing it and take some of

1 the mystery away, at least, as far as the big, fancy words
2 go.

3 Circuit Court, which is what this level of the court
4 is -- we are divided into two different sections. We have
5 civil and criminal. And we have big, fancy words for civil
6 and criminal. The civil side we call "Common Pleas Court"
7 and criminal court we call "General Sessions Court," so this
8 week is a term of General Sessions Court. In other words,
9 we're doing a criminal case today. And so we go through the
10 process of qualifying the jury. And then we go through some
11 exemptions that people might be entitled to exercise and ask
12 to be moved to another time. That sort of thing. And then
13 we actually will, in the third phase, ask you questions
14 specific to the case that we will be starting in a little
15 while, just determine if you can be fair and impartial --
16 because you don't know anything about the case -- that would
17 prevent you from being a fair and impartial juror.

18 So there's really three basic phases to what we'll be
19 doing. They ought to move by pretty quick. We don't have a
20 real large jury panel, so it shouldn't take us that long,
21 but it's important. And it is required that we have you
22 under oath.

23 So have they been placed under oath yet?

24 MADAME CLERK: No, Your Honor.

25 THE COURT: Okay. So would stand and raise your right

1 hand while the clerk administers the oath.

2 (The jurors were duly sworn for voir dire examination.)

3 THE COURT: All right. So the qualification phase --
4 the first thing I want to tell you is we are not trying to
5 pry into anything and cause you to be embarrassed. So if
6 there's any response that you feel like, oh, I should tell
7 something but I don't want to because I don't want to stand
8 up in front of a bunch of strangers and tell my business,
9 please don't just sit there. Feel free to just stand up,
10 ask to come here, and we'll move over here so the court
11 reporter can hear what you have to say, as well as me. So
12 that's first and foremost.

13 The second thing is all these questions that I'm asking
14 you are required by state law to be asked, so they're all
15 pretty straightforward. It's really easy to be qualified as
16 a juror in this state. And you have met the two biggest
17 qualifications in that you are breathing and you showed up,
18 so just let that be said. If you are here -- and there's a
19 good chance that all of you are going to fly through and
20 become qualified. Then we'll get to exceptions, and again,
21 then we'll get to the phase of where we ask questions about
22 this. And then we'll go to straight into picking a jury.

23 So as far as qualifications go, is there anybody here
24 who is not yet at least 18 years old? You've got to be at
25 least 18 to service as a juror in South Carolina. If that

1 applies to anyone, would you please stand. I find none.

2 Is there anybody here who is not a citizen of the
3 United States? If so, would you please stand. I find none.

4 Is there anybody here who is not a resident of
5 Cherokee County? If so, would you please stand. I find
6 none.

7 Is there anybody here who is not able to read, write,
8 or understand the English language, would you please stand.
9 And I know somebody out there is thinking, well, if you
10 don't understand English, how could you respond to that
11 question. It's a good question, and that's why I don't ask
12 these without being told to ask them. That statute says
13 that's a question. But if you've been sitting next to
14 somebody and it doesn't look like they're understanding
15 what's going on because of a language issue, it would be
16 great if you brought that to my attention. But if that
17 applies to anyone, would you please stand. I find none.

18 Is there anybody here who does not have at least a
19 sixth grade education or its equivalent? If so, would you
20 please stand. I find none.

21 Does anybody have any kind of physical or mental
22 conditions which would keep you from serving as a juror this
23 week? This is probably the first one where you go, well, I
24 don't want to talk about my medical conditions in front of
25 the judge or in front of a bunch of strangers. So again,

1 feel free to ask to come forward on this. I'll tell you
2 that normally what I do, my practice is we'll go about an
3 hour and 15 minutes, hour and a half, and we break. If you
4 need to stand or stretch or use the bathroom before that or
5 anything, just feel free to stand or stretch. But if you
6 need to go to the restroom, I always say just wake one of
7 the bailiff's up and he'll get my attention and we'll call a
8 break. That's usually when we go. So if you don't think
9 you could sit for that period of time or maybe you're hard
10 of hearing. I am. I wear hearing aids, and that's why I
11 get a little bit closer if I can. What we usually do is --
12 the jury box or the witness box is right here and this is
13 the jury box and so if you're a little hard of hearing,
14 we'll put you closer to the witness stand. That sort of
15 thing. But sometimes people have back issues and they say,
16 well, I can sit for a long time. That's why I say stretch
17 if you need to. But if anybody needs to talk to me about
18 any kind of physical or mental condition that might keep you
19 from serving as a juror, would you please stand. I find
20 none.

21 Is there anybody here who was convicted of a crime in
22 either federal or state court and is a crime that is
23 punishable by more than a year in prison and you have not
24 had your civil rights restored to you by either a pardon or
25 an amnesty from a president or governor? Let me break that

1 down. Conviction means you either pled guilty or maybe you
2 went to trial and the jury found you guilty or might have
3 pled no contest. Those all count as convictions. Second,
4 the crime for which you were convicted carries a penalty of
5 more than a year in prison. It doesn't mean that you did
6 more than a year; it just means you could have gotten more
7 than a year and you may have just gotten fined or something
8 along those lines. But that's what we're talking about. It
9 doesn't necessarily have to be the State of South Carolina.
10 It can be any state. It can also be federal court. And
11 there's no time limit on that, so it goes back to the
12 longest -- probably a juvenile record, if you got it back
13 then. And then, finally, you didn't get your civil rights
14 restored to you through either a pardon or amnesty from
15 either a governor or a president. So if that applies to
16 anyone, would you please stand.

17 Yes, sir. Your name and number?

18 THE JUROR: Calvin Gilliam; 49.

19 THE COURT: Okay. Was it simple possession of
20 marijuana? That's what it says. Is that what you are
21 talking about?

22 THE JUROR: That, and I did two years in prison.

23 THE COURT: Oh, you did? For what?

24 THE JUROR: Yes, sir. When I was a juvenile, they
25 charge me as an adult, so I did two years in prison.

1 THE COURT: Okay. Well, that would disqualify you.
2 That was showing up. Appreciate you. Where was that at?

3 THE JUROR: Here, in Cherokee County.

4 THE COURT: Okay. Well, then you're free to go. Thank
5 you. Take him off the list.

6 Yes, your name and number?

7 THE JUROR: 114. Yes, sir.

8 THE COURT: Let's see what we've got. You had a
9 possession of marijuana.

10 THE JUROR: Uh-huh.

11 THE COURT: And that was just simple possession?

12 THE JUROR: Uh-huh.

13 THE COURT: CDV. How long ago was that?

14 THE JUROR: Back in the '90s.

15 THE COURT: Do you know what the penalty was?

16 THE JUROR: Oh, no. Me and my girlfriend had got into
17 it when my daughter was a baby.

18 THE COURT: Was it handled in this court or down in
19 magistrate court?

20 THE JUROR: I think in magistrate court.

21 THE COURT: And assault by a mob. What happened with
22 that one?

23 THE JUROR: That was over back in -- with my -- no,
24 that was just -- it got dismissed on me.

25 THE COURT: Okay. Well, then you're still good.

1 THE JUROR: Okay.

2 THE COURT: Thank you. Anyone else?

3 THE CLERK: You can come on down, sir.

4 THE BAILIFF: Your Honor, it's 28.

5 THE COURT: Thomas Dale?

6 THE JUROR: Yes, sir.

7 THE COURT: Okay. What do you have?

8 THE JUROR: I was arrested like three years ago for
9 breach of peace and aggravated, but I never went to trial
10 for it.

11 THE COURT: So it just got dismissed?

12 THE JUROR: I have no idea.

13 THE COURT: But you didn't get convicted?

14 THE JUROR: No, sir.

15 THE COURT: There's nothing showing up on here, so
16 you're good. Thank you for bringing it to our attention.
17 anyone else?

18 (A conference was held at the sidebar between counsel
19 and the Court.)

20 THE COURT: Is there anybody here who is a clerk or
21 deputy clerk of court, a constable, sheriff, a commissioned
22 law enforcement officer -- in other words, you took an oath
23 when you began the job -- a probate judge, county
24 councilman, magistrate, or county officer or employee within
25 the walls of courthouse? If so, would you please stand. I

1 find none.

2 Is there anybody here who already did jury duty this
3 calendar year in a court of record? Court of record would
4 be a court where there was a court reporter present, like
5 here. It wouldn't be magistrate court or municipal court,
6 because even though a lot of them now have recording
7 devices, for purposes of this question, they're not
8 considered courts of record. So it would either be here or
9 it would be in federal court. They draw theirs from
10 sometimes a statewide panel, sometimes sections of the
11 state. But if you've already served as a juror in a court
12 of record this calendar year, would you please stand. I
13 find none.

14 Anybody serve on the Cherokee County grand jury in the
15 last ten years? Grand jury is a court that meets -- there's
16 18 that meet probably about once a month or view
17 indictments. If you served on the grand jury, you'd know
18 what I was talking about. Everybody else is probably going,
19 I have no idea what he's talking about. But if you were on
20 a grand jury, you would know. If that's so would, you
21 please stand. I find none.

22 Well, congratulation. You are all qualified. I told
23 you it's really easy to get qualified as a juror in this
24 state.

25 Now we move to exemptions, and exemptions say even

1 though you have been qualified as a juror, you may ask to be
2 transferred or in a couple of instances, you could be
3 excused from jury service entirely. Most of them are just
4 transferring you to another time sort of exemptions. Now,
5 this is kind of where I put in my pitch for jury service.

6 The jury service is a unique thing that we do. It's
7 not done around the world like some people might just take
8 it for granted. We take it for granted because we do it all
9 the time. We do this week in, week out, all over the State,
10 all of this country. But really, in the world, there's only
11 about 12 countries in the entire world of over 200 countries
12 that even have a jury trial for people that are accused of a
13 crime, where their guilt or innocence is determined by a
14 jury of their fellow citizens. And in most of the countries
15 around the world, to the extent that they have anything
16 resembling an actual trial, it's done by a judge or a panel
17 of judges. But it was thought by our founding fathers of
18 the country to be so important of a right, to have the right
19 to have your guilt or innocence determined by fellow members
20 of the community, they found it to be so important, they put
21 it in the United States Constitution three times. They put
22 it in the State constitution as well. So the right to a
23 jury trial is a pretty big deal. There are people all over
24 this world that were charged with crimes and wished they had
25 the right to have it determined by their fellow citizens, as

1 opposed to somebody who is paid by the government. So,
2 again, it's a big deal to us. We take it for granted, so it
3 doesn't seem like a big deal to us, but, trust me, it is a
4 big deal. It's like everything else that you do all the
5 time. You take it for granted and you kind of lose sight of
6 the significance of it. But I understand the reluctance of
7 people to show up for jury duty. They go, well, I got the
8 notice, and I would really rather do it some other time.
9 Maybe someday. But when the people get here and they
10 actually serve on the jury, it's my experience they really
11 do enjoy it. They feel like they participated in their
12 community, and they learned something about it. It's not
13 like TV, where we break for commercials every 12 minutes.
14 You know, we have a flow to it, and I try to explain to you
15 along the way why we do what we do so that it's
16 understandable to you. But it's a pretty good system. And
17 we've been doing it, by and large, the way we do it right
18 now for several hundred years in this country. It's been
19 around for a while now. But we are always trying to do
20 better.

21 But my feeling is that juries get it right. I run and
22 into people from time to time when I've presided over a
23 trial, the served on the jury, and they come back and
24 they'll recognize me in the grocery store or something.
25 They say, hey, you were the judge where we served on the

1 jury. And the first thing they want to know is: Did we get
2 it right? And I always tell them, look, 12 people all heard
3 the same evidence, and they all came to the same conclusion.
4 That's a pretty good indication that you got it right. When
5 you stop and think how hard it is to get 12 people to agree
6 to anything in this day and age. The sun rises in the east.
7 People will argue about that. But to get 12 people that all
8 agree on what the outcome of a trial will be is a pretty
9 impressive accomplishment. And so I tell them you should
10 feel confidence in that. To me the magic of a jury verdict
11 being so good is the diversity of the jury panel. If you
12 look around and say, well, we've got people from -- you
13 know, you've got men, women, people of different races,
14 people of different income levels, people of different
15 educational levels, different experiences in life. No two
16 people are really alike, and yet they all come here. They
17 all listen to the same evidence. They all agree to apply
18 the law that the judge tells them applies to that kind of
19 case. And if 12 people come up with that same outcome,
20 well, I'm feeling pretty good about that outcome. And I
21 hope you would too.

22 But it's my experience that people do enjoy the
23 experience, and they are glad they did it. And so I tell
24 you, I understand why people find it's a burden. I
25 understand they think, oh, it's a responsibility. I have to

1 show up. But it's actually a privileged to serve on a jury,
2 if you ask me. And I hope that you will think of it that
3 way. Because this is your government at work this week.
4 Right? You know we have three branches of government:
5 Legislative, executive, and judicial. Well, this is the
6 judicial branch and you are participating in your
7 government. I'll tell you the 12 of you that get picked
8 will be judges for the week. I presided over the trial, but
9 you all will determine what the outcome of it is, so it's a
10 big deal. And I hope that you will feel about it that way.
11 That's my pitch for jury service. Okay. Because we need
12 you to make it work -- the wide, diverse group of people.
13 That's the way I feel the outcomes are valid. And I think
14 you will feel the same way after you've participated.
15 People really get invested in being in a jury once they get
16 picked. And so if you have an exemption -- and I guess I
17 get a little long winded sometimes -- but if you have an
18 exemption and you want to exercise it, when I call it, stand
19 up and just let me know what it is. I'm not going to
20 browbeat you or try to talk you out of it. But if you don't
21 want to exercise an exemption, well, you just stay seated.
22 Okay? If you -- you are not required to exercise the
23 exemption is where I'm going on that. Okay?

24 So first exemption is, is there anybody here that is
25 not -- or that is 65 or older. If you're 65 or older, you

1 are entitled to be exempt from jury service, if you don't
2 want to do it. If that applies to anyone, would you please
3 stand. I find none.

4 Is there anybody here who served on a jury in the
5 previous three calendar years. I told you earlier, if you
6 served on a jury -- you really wouldn't be able to serve on
7 a jury. We're in the first week of jury trial. So that
8 really wouldn't apply, I guess, when you stop and think
9 about it. But if you served on a jury in 2019, '18, or '17,
10 you are entitled to be excused, because we don't want to
11 overwork you. But if you enjoyed it and you want to stay,
12 feel free. But if anybody served on a jury in a court of
13 record in 2019, '18, or '17, would you please stand. I find
14 none.

15 Is there anybody here who is the caregiver and
16 custodian of children under the age of seven, and you don't
17 have anybody that can help you take care of them this week,
18 you are entitled to be excused from jury service. If that
19 applies to anyone, would you please stand.

20 Yes. Your name and number?

21 THE JUROR: Alfred Charles Edmundson, 36.

22 THE COURT: Twenty-six?

23 THE JUROR: Thirty-six.

24 THE COURT: Thirty-six. Okay. And you are the
25 caregiver and custodian of children under the age of seven?

1 THE JUROR: Yes, Your Honor. I have a 3-year-old and a
2 9-year-old, but I do work. I have discussed it with -- I
3 can't remember her name.

4 THE COURT: The clerk of court.

5 THE JUROR: Yes. I discussed it with her yesterday. I
6 do have a job, so I'm -- she said I'm not considered an
7 actual primary caregiver. But my wife's mother is deceased,
8 and her father is incarcerated. My father is deceased, and
9 my mother has been deemed by the State as mentally
10 incompetent. She's a store manager, and I'm a warehouse
11 supervisor. She sets her schedule up to where she can get
12 them in the mornings, and I get them in the afternoons. And
13 I really have no other family or support system to help with
14 that.

15 THE COURT: All right. Well, then I will excuse you
16 for this week. Thank you.

17 THE JUROR: Thank you, Your Honor.

18 THE COURT: You're free to go. Anyone else?

19 We also have an exemption for people on the other end
20 of the age spectrum. So if you are the caregivers for
21 somebody who is 65 or older and they can't take care of
22 themselves, can't be left alone, and you can't find anybody
23 else to help you this week, you are also entitled to be
24 dismissed from jury service. So if that applies to anyone,
25 would you please stand. Okay. I find none.

1 Is there anybody here who's a full-time student, school
2 teacher, work at school, school bus driver, a school
3 crossing guard, any kind of school-related function, and
4 because of that, you cannot serve this week? This is one
5 where we transfer you to another time. Can't excuse you
6 entirely. We'll just transfer you to a time that doesn't
7 interfere with school. If that applies to anyone who wishes
8 to be transferred, would you please stand.

9 Yes, ma'am? Your name and number?

10 THE JUROR: Donna Childers; 16.

11 THE COURT: Okay. And what's your situation?

12 THE BAILIFF: I'm a behavioral interventionist at
13 Limestone Central, I mean, I -- in the regular class --

14 THE COURT: Do you want to stay.

15 THE JUROR: I can stay.

16 THE COURT: Okay. Well, good. Thank you. Anyone
17 else?

18 All right. Anybody have any work related issues that
19 would keep you from serving this week, like, you know, you
20 own the business, and there's nobody to take care of it or
21 are you -- we have a lot of seasonal workers. I know a lot
22 of aquaculture. Maybe summer is more of the problem than it
23 is -- you know, we have late crops. And I don't know a lot
24 about farming anyway, but if you have a work-related issue,
25 I can't excuse you entirely. The most I can do is transfer

1 you to another time. And what I can tell you about moving
2 to another time is you don't know what you will get. This
3 right now is a case that is going to go forward. I imagine
4 it's going to go into tomorrow. I don't know that it will
5 go into Friday. But the most you would be asked for would
6 be into Friday, but that's the worst-case scenario. It will
7 not go into next week. I can assure you of that. But if
8 you come another week, you might be here for a whole week.
9 But today -- this week, most you will be here is Wednesday,
10 Thursday, Friday. I can only transfer you usually one time,
11 unless there has been an issue about a last-minute
12 emergency. But if you want to talk about transfer for
13 work-related, business-related issues now is the time. If
14 that applies to anyone, would you please stand. Okay. I
15 find none.

16 Is there anybody who is employed as a guard with the
17 department of corrections at a penitentiary? If so, would
18 you please stand. Okay. I find none.

19 Well, is there anybody you know of any reason why you
20 couldn't serve as a juror from extreme or compelling
21 circumstance that I haven't covered but you want to discuss
22 with me as to maybe transferring you to another time?
23 You've rethought your position on an earlier question or
24 just didn't get covered by an earlier question, but if
25 you've got some kind of extreme hardship or compelling

1 circumstances, you are welcome to stand.

2 Yes? Your name and number?

3 THE JUROR: William Rosado; 103.

4 THE COURT: One hundred three?

5 THE JUROR: Yes, sir.

6 THE COURT: All right. Do you want to come up. What

7 would you like to tell me?

8 THE JUROR: I don't feel right doing this.

9 THE COURT: Why is that?

10 THE JUROR: Judging people is against my beliefs.

11 THE COURT: And?

12 THE JUROR: I told her about it yesterday.

13 THE COURT: You don't think you could serve on the jury

14 because of that? How do you think -- pardon?

15 THE JUROR: It's Biblical.

16 THE COURT: Oh, I understand that there are verses in

17 the Bible that say don't judge people. But it says judge

18 like you'd be judged, you want to be judged.

19 THE JUROR: I just don't...

20 THE COURT: All right. Well, I'll excuse you, then.

21 THE JUROR: Okay. Thank you.

22 THE COURT: Now what we will do is we will move to the

23 last part, where we pick a jury for a case that we're going

24 to preside over.

25 A couple things I want to tell you about this process.

1 It's important to understand. This, just as I told you, is
2 a criminal case. We're doing General Sessions Court, so a
3 person has been charged by the State of South Carolina with
4 committing a crime. He's pled not guilty to it. And it
5 then puts a burden on the State to prove to the 12 of you
6 that he is guilty of this crime that he's been charged with
7 beyond a reasonable doubt. He doesn't have to prove he's
8 innocent. The state has to prove that he is guilty, and
9 that is a fundamental right that he has, that I have, and
10 that you have, as a result of being United States citizens.
11 No person charged with a crime in this country has to prove
12 they're innocent.

13 If the State charges you with a crime, they have to
14 prove you are guilty. All right. So that's something that
15 I want you to keep in mind. Because I'm going to tell you
16 about the case. I'm going to tell you about the parties
17 that are involved, these names, asked if you know them. But
18 the bottom line is when all is said and done, 12 of you,
19 plus an alternate or two will sit up here, listen to this
20 evidence. I will tell you what the law is, and then you
21 will make a decision about guilt. All right. But you have
22 to remember that the State has to prove that he is guilty.
23 He doesn't have to prove he's not guilty. All right. So if
24 you don't think you can do that, I need to know that.
25 Because that's an important constitutional right. It's not

1 just one of those things where you talk about it or you
2 learned about in civics or anything like that. It's a
3 Constitutional Right. I have it, you have it, and the
4 defendant in this case has it. All right.

5 Now, how do we get here? Well, we get here because of
6 an indictment. Remember I asked you a little bit ago if
7 anybody served on a grand jury? Nobody had. Grand juries
8 are one of those things that -- they are around for a
9 reason, and the reason goes back really almost 1000 years.
10 If you ever heard of the Magna Carta. Back when they had
11 The Northern Conquest in 1066. It used to be the king --
12 those kings that they had for a long, long time were not the
13 nicest people that you see, like the lady that's the queen
14 of England right now. We get all of our legal system from
15 England. But you see Queen Elizabeth, she seems like a nice
16 lady. You watch the TV shows, and she seems charming. But
17 her job is a lot of different than it used to be, and the
18 world was a lot different place. King's, if they decided
19 they didn't like you and they didn't like what you did, they
20 basically could have you pulled up off the street, put you
21 on trial, and you didn't even know why you were on trial.
22 You just found out. And then he originally would sit as the
23 jury. Later on, they had judges, and finally, we came up
24 with this system of having individuals decide the outcome.
25 But as a result of the conflicts that we have over hundreds

1 of years, we came up with this system. It's a two-part
2 system, where you have the grand jury, and then we have the
3 petit jury, or the smaller jury. Well, y'all are in the
4 petit jury.

5 But the grand jury was designed to keep them from
6 having the king just grab you up off the street, put you
7 in -- on the docket for the trial, and start a case without
8 you even knowing why you were there. So we had this buffer.
9 And the way it's devolved over hundreds of years is that we
10 have 18 citizens that are brought in, approximately once a
11 month -- depends on where you're from and how often they
12 meet -- the 12 to 18 jurors listen to somebody from the
13 State read to them usually some incident reports, stuff like
14 that, and then 12 of those 18 jurors have to make a decision
15 as to whether or not a crime was probably committed and that
16 it's a possibility that a particular person should be
17 charged with that crime. All that does is it results in an
18 indictment, which is a twofold document. It puts the person
19 who is charged with a crime on notice. This is what you
20 were charged with and this is what you will state trial for.
21 Also gives this court jurisdiction to try the case.

22 So in this case we have an indictment. I bring this up
23 because it's important for you to understand that like all
24 the other rights I've told you about throughout this, the
25 fact that somebody's charged with a crime does not mean that

1 they are guilty of something. All right. The fact that
2 they are charged with a crime is not to be considered by you
3 as evidence. And so this indictment, it serves the purpose
4 of putting them on notice with knowing what he's charged
5 with, and again, gives this court jurisdiction, but it's not
6 evidence. It's the only piece of paper that is going to go
7 back in this trial other than the jury charges, if I send it
8 back, that say -- that is the only piece of paper that will
9 go back that is not to be considered by you as evidence.
10 The only reason why it goes back, really, is because on the
11 back of it is a place for the jury foreman to write what the
12 verdict is. Okay.

13 So indictment is not evidence, but it's a charging
14 document to let them know what he's charged with. So in
15 this case, the State has alleged -- and I'm just going to
16 read you what this indictment is, because we need to find
17 out if anybody knows anything about this case. That's all
18 the purpose of all these questions are. Do you know about
19 the case, do you know any of the witnesses, and if you can
20 be a fair and impartial juror.

21 The indictment in this case is against
22 Jason Scott Simmons. So this is indictment
23 2017-GS-11-00580, and it's the State of South Carolina
24 versus Jason Scott Simmons. And it alleges that
25 Jason Scott Simmons did, in Cherokee County, between

1 January the 8th, 2017, and January the 9th, 2017, commit the
2 crime of criminal sexual conduct with a minor in that the
3 defendant engaged in sexual battery with the victim,
4 A.F., who is less than 11 years of age at the time
5 of the said incident and is in violation of 16-3-655A1 of
6 the South Carolina Code of Laws as amended. So he's charged
7 with criminal sexual conduct with a minor in the first
8 degree. He's pled not guilty to this. Pleading not guilty
9 to this charge is why we are here. And, again, he now has
10 the right to a jury trial and the State has to convince 12
11 of you that he is guilty of this charge.

12 The fact that he's discharge, again, is not to be
13 considered by you as evidence. So once that indictment gets
14 issued and he pleads not guilty, that starts things
15 happening.

16 And in this state, our prosecutors are known as
17 solicitors. And the State is divided up into 16 judicial
18 circuits. This is the Seventh Judicial Circuit, and
19 Cherokee County is part of this circuit. And each circuit
20 elects a solicitor and your solicitor is Barry Barnett. All
21 right.

22 Now, Mr. Barnett has people that work for him. He
23 can't try every case. And in this case, he has elected to
24 have these two folks right over here -- if you would
25 stand -- handle the case for him. This is Mr. Matt Kendall

1 and Ms. -- and I'm going to butcher her name because I've
2 done it so many times this week already -- she has a
3 difficult last name, but it's Kimberly Leskanic.

4 MS. LESKANIC: Yes, sir.

5 THE COURT: I got it. All right.

6 Now, these are the two people that work for
7 Mr. Barnett. He is assigned to them to prosecute this case
8 this week on behalf of the State of South Carolina. So what
9 I want to ask is, is there any member of the jury panel who
10 is related by blood or marriage or acquainted in any way
11 with either Mr. Barnett or Mr. Kendall or Ms. Leskanic? If
12 so, would you please stand. Okay. I find none.

13 Now, Mr. Jason Scott Simmons. Would you stand real
14 quick. That's the one in the white sweater with black
15 stripes. This is Mr. Jason Scott Simmons. He is the
16 defendant in this case. Is there any member of the jury
17 panel who is related by blood or marriage or acquainted with
18 him in any way? If so, would you please stand. Okay. I
19 find none.

20 Now, he is represented by Mr. Michael Morin, who is
21 this gentleman standing right in front of you right now. Is
22 there any member of the jury panel who is related by blood
23 or marriage or acquainted with him in any way, or perhaps
24 you have been represented by him, either you or a member of
25 your immediate family? If so, would you please stand.

1 Okay. I find none. You may be seated.

2 Now, I'm going to call out the names of some people who
3 might be called as witnesses in this case. And, again, what
4 I'd like you to do is if you are related by blood or
5 marriage or acquainted in any way with any of these people,
6 when I call out your name, would you please stand. In
7 addition to Mr. Simmons is Melisa Simmons. I find none.

8 **MINOR** . I find none. Danielle Ward, with the
9 Cherokee County Sheriff's Office. I find none.
10 Dana Fortner -- and I'm spelling -- F-o-r-t-n-e-r.
11 Stephen Anderson with the Cherokee Detention Center. I find
12 none. Jacob Mullinax with the sheriff's office. I find
13 none. Billy Anthony with the sheriff's office. I find
14 none. Jimmy Henson with the sheriff's office. I find none.
15 Richard Burgess with the sheriff's office.

16 Yes, ma'am? Your name and number?

17 THE JUROR: Sixty-nine. It's Kimberly Lanier. And I
18 attend church with Richard Burgess.

19 THE COURT: Okay. So you see him on a fairly regular
20 basis? How well would you say you know him?

21 THE JUROR: Fairly well.

22 THE COURT: If he is called as a witness in this case,
23 do you think that would affect your ability to be fair and
24 impartial ---

25 THE JUROR: No.

1 THE COURT: --- in this case, either for or against the
2 State or for or against the defense?

3 THE JUROR: No, sir.

4 MR. KENDALL: Your Honor, may I approach real fast?

5 (Whereupon, a bench conference was held off the record
6 in the presence of the jury but out of the hearing of the
7 jury.)

8 THE COURT: Oh, okay. So that's Mr. Burgess. I don't
9 know anybody from around here. I know the lady down at
10 Sonny's Donuts.

11 All right. Verona Herrera with SLED or state law
12 enforcement; South Carolina Law Enforcement. All right. I
13 find none. Kelly Clune; C-l-u-n-e. I find none.
14 Tricia Austin, CAC. I'm not sure what CAC stands for.

15 MR. KENDALL: Children's Advocacy Center, Your Honor.

16 THE COURT: Okay. Child advocacy. Anybody?

17 Samuel Stewart with SLED. Brian Hudak; H-u-d-a-k, with
18 SLED. I find none. Erin Bowles. I find none.
19 Tempest Bryant, B-r-y-a-n-t. I find none. Ann Manning. I
20 find none. Stephen Anderson. I find none.

21 Now, I read you out the indictment. Is there anybody
22 that knows anything about this case? If so, would you
23 please stand. I find none.

24 Is there anybody who has -- either you or one of your
25 immediate family members ever been employed by the

1 solicitor's office for the Seventh Circuit? If so, would
2 you please stand. Okay. I find none.

3 Is there anybody -- either you or one of your immediate
4 family members ever been prosecuted by the
5 Seventh Circuit Solicitor's Office? If so, would you please
6 stand? I find none.

7 Any member of the jury panel have an immediate family
8 member or one of your close, personal friends employed by a
9 law enforcement agency? Could be anywhere.

10 Okay. Let's start here on the front row, and we'll
11 work our way back. Your name and number?

12 THE JUROR: Matthew Barnes; 117. My cousin,
13 Manolo Gonzalez works in Spartanburg; he's a cop there.

14 THE COURT: All right. Would that affect your ability
15 to be fair and impartial in this case, for or against the
16 State or for or against the defense?

17 THE JUROR: No, sir.

18 THE COURT: Thank you. Your name and number?

19 THE JUROR: Teresa Fuller; 44.

20 THE COURT: Okay.

21 THE JUROR: I have a cousin that's with the sheriff's
22 office and a nephew that's with the sheriff's office.

23 THE COURT: Local?

24 THE JUROR: Yes.

25 THE COURT: All right? And with Cherokee? And what's

1 their name?

2 THE JUROR: Stephen Wright and John Fuller.

3 THE COURT: Have you had any discussions with them
4 about this case?

5 THE JUROR: No, sir.

6 THE COURT: Would that affect your ability to be fair
7 and impartial in this case, either for or against the State
8 or for or against the defense?

9 THE JUROR: No, sir.

10 THE COURT: All right. Thank you.

11 What is your name and number?

12 THE JUROR: Karoline Kenneth; 68. I have a
13 brother-in-law who's retired from being a detective in
14 Pinellas County, Florida. My sister worked at the jail,
15 retired from there, and my nephew currently serves there.

16 THE COURT: Would that affect your ability to be fair
17 and impartial in this case, for or against the State or for
18 or against the defense?

19 THE JUROR: Honestly, sir, yes. By brother-in-laws
20 were...

21 THE COURT: All right. You may be seated. Thank you.
22 Your name and number, please?

23 THE JUROR: Mackenzie Davis; 29. I have a --

24 THE COURT: Ninety-nine?

25 THE JUROR: Twenty-nine.

1 THE COURT: Oh.

2 THE JUROR: I have a distant cousin that works for the
3 sheriff's office. I don't really talk to him at all.

4 THE COURT: Would it affect your ability to be fair and
5 impartial in this case, for or against the State or for or
6 against the defense?

7 THE JUROR: No.

8 THE COURT: All right. Thank you, ma'am.
9 Your name and number?

10 THE JUROR: Terry McCluney; 79.

11 THE COURT: Seventy-nine. Okay.

12 THE JUROR: When you say "prosecuted" -- I have a son
13 in 2017, I'm thinking, he had to come to court. He was
14 innocent, whatever.

15 THE COURT: With what?

16 THE JUROR: He did do court.

17 THE COURT: Okay.

18 THE JUROR: But he was innocent. So I don't know if
19 that would affect me.

20 THE COURT: So he was prosecuted by the local
21 solicitor's office?

22 THE JUROR: He came here. I don't know -- he came
23 here.

24 THE COURT: He came here?

25 THE JUROR: Uh-huh.

1 THE COURT: Would that affect your ability to be fair
2 and impartial, for or against the State or for or against
3 the defense?

4 THE JUROR: No.

5 THE COURT: All right. Thank you. Anyone else?

6 Any member of the jury panel ever serve as a juror or
7 been a witness in a court case? I find none.

8 Any member of the jury panel, either you or immediate
9 family member or close, personal friend been a victim of an
10 assault of any type, including a sexual assault, but not
11 just a sexual assault.

12 Again, if you want to come forward and talk to me about
13 this more privately, you're welcome to.

14 THE BAILIFF: One hundred fourteen, Your Honor.

15 THE COURT: Okay. Yes, ma'am. What would you like to
16 tell me?

17 THE JUROR: It was my granddaughter.

18 THE COURT: Okay.

19 THE JUROR: I don't know what they did, but DSS took
20 over the case. But it never made it to Court with the guy.

21 THE COURT: So it was a sexual assault?

22 THE JUROR: Yeah. Is what it's supposed to have been.

23 THE COURT: And how old ---

24 THE JUROR: She's 4 years old.

25 THE COURT: And how long ago was that?

1 THE JUROR: Just last year.

2 THE COURT: Is that local here?

3 THE JUROR: Uh-huh.

4 THE COURT: So that's ongoing? Were they -- nobody ---

5 THE JUROR: They looked at it. She was under
6 investigation for it, and now they -- they done dropped it.

7 THE COURT: Do you think that would affect your ability
8 to be fair and impartial in this case, for or against either
9 party?

10 THE JUROR: No, sir.

11 THE COURT: Okay. Thank you.

12 MR. MORIN: What was it, Your Honor?

13 THE COURT: One hundred fourteen.

14 MR. MORIN: A relative was being prosecuted?

15 THE COURT: She said it was investigated, but no
16 charges. Looks like they've dropped the investigation.

17 MR. MORIN: Okay. Was she the subject of it?

18 THE COURT: Her 4-year-old granddaughter was.

19 Yes?

20 THE BAILIFF: Twenty-seven, Your Honor.

21 THE COURT: Yes. 27.

22 THE JUROR: Yes, sir.

23 THE COURT: What would you like to tell me?

24 THE JUROR: I was sexually molested by my grandfather.

25 THE COURT: And this was when you were how old?

1 THE JUROR: Ten.

2 THE COURT: And was he prosecuted?

3 THE JUROR: No.

4 THE COURT: Do you think that would affect your ability
5 to be fair and impartial in this case?

6 THE JUROR: Yes.

7 THE COURT: All right. Thank you.

8 THE BAILIFF: Twenty-two, Your Honor.

9 THE COURT: Yes, what would you like to tell me?

10 THE JUROR: My older brother was sexually molested as a
11 kid.

12 THE COURT: Speak up for me.

13 THE JUROR: My older brother was sexually molested as a
14 kid.

15 THE COURT: Okay. What happened as a result? Was he
16 prosecuted or somebody prosecuted for --

17 THE JUROR: He didn't come out with it until later in
18 life, so nothing ever came of it.

19 THE COURT: And so how old was he when that happened?

20 THE JUROR: Maybe 7 or 8 years old. Somewhere around
21 in there.

22 THE COURT: And where was that at?

23 THE JUROR: I think it was in South Carolina. I'm not
24 sure where we were living at the time.

25 THE COURT: Would it have been here?

1 THE JUROR: It's possible. We did live in Gaffney back
2 then, but I'm not sure. It might have been Chester. It was
3 a small town in South Carolina. I don't know where it was.

4 THE COURT: Do you think that would affect your ability
5 to be fair and impartial in this case, for or against the
6 State or for or against defense?

7 THE JUROR: I do.

8 THE COURT: Okay. Thank you.

9 THE BAILIFF: Twenty-nine, Your Honor.

10 THE COURT: Yes, ma'am, what would you like to tell me?

11 THE JUROR: My sister was involved in a domestic
12 violence case. Her husband held a knife to her.

13 THE COURT: Okay. And how long ago was that?

14 THE JUROR: Maybe a year.

15 THE COURT: And where was that?

16 THE JUROR: Gaffney.

17 THE COURT: Local here?

18 THE JUROR: Yes.

19 THE COURT: Was it prosecuted by the ---

20 THE JUROR: I'm not really sure. Maybe.

21 THE COURT: Is it an ongoing investigation, or did
22 anybody get arrested?

23 THE JUROR: He was in jail and he got bailed out.

24 THE COURT: So did he ever go to trial?

25 THE JUROR: I really don't know.

1 THE COURT: Do you know, would that affect your ability
2 to be fair and impartial in this case, for or against the
3 State or for or against the defense?

4 THE JUROR: No, sir.

5 THE COURT: Okay. Thank you.

6 THE BAILIFF: Sixty-three, Your Honor.

7 THE COURT: Yes, ma'am.

8 THE JUROR: I was actually interviewed here with my
9 kids. My ex-husband molested my daughter.

10 THE COURT: Who did?

11 THE JUROR: My ex-husband.

12 THE COURT: Okay.

13 THE JUROR: And I was too when I was little.

14 THE COURT: And how old was your daughter?

15 THE JUROR: When it started? Nine.

16 THE COURT: Pardon?

17 THE JUROR: Nine.

18 THE COURT: And where was that at?

19 THE JUROR: New Hampshire.

20 THE COURT: Okay. Do you think that would affect your
21 ability to be fair and impartial in this case?

22 THE JUROR: Oh, yeah. Yeah.

23 THE COURT: Okay. Thank you. You can be seated.

24 THE JUROR: Okay.

25 THE BAILIFF: Six, Your Honor.

1 THE COURT: Six. All right. What would you like to
2 tell me?

3 THE JUROR: My grandfather molested my younger
4 cousin -- not the first case -- in Ohio.

5 THE COURT: And how long ago was that?

6 THE JUROR: He was convicted, I think, it was about
7 2014 or 2015. And it happened previously, back in the early
8 2000s.

9 THE COURT: So your cousin was roughly how old?

10 THE JUROR: She was about eight.

11 THE COURT: Okay. And that was your grandfather?

12 THE JUROR: Yes, sir. He's currently in prison in
13 Ohio.

14 THE COURT: Do think that would affect your ability to
15 be fair and impartial in this case, for or against the State
16 or for or against the defense?

17 THE JUROR: No, sir.

18 THE COURT: You'd be okay?

19 THE JUROR: Yes, sir.

20 THE COURT: Okay. Thank you.

21 THE BAILIFF: Eighty-two, Your Honor.

22 THE COURT: Yes, ma'am. What would you like to tell
23 me?

24 THE JUROR: I was just being honest about being
25 molested as a child.

1 THE COURT: You were?

2 THE JUROR: I was.

3 THE COURT: Okay. By who?

4 THE JUROR: A family member. But there was never

5 anything come of it. I was just being honest because I was

6 never ---

7 THE COURT: I'm sorry?

8 THE JUROR: I never told anyone. I was never in

9 therapy.

10 THE COURT: So nobody was charged with --

11 THE JUROR: I was being honest.

12 THE COURT: So nobody got charged?

13 THE JUROR: I didn't tell anyone.

14 THE COURT: Do you think that would affect your ability

15 to be fair and impartial in this case.

16 THE JUROR: No. Absolutely not.

17 THE COURT: Okay. Thank you.

18 THE BAILIFF: Ninety-seven, Your Honor.

19 THE COURT: Okay, sir.

20 THE JUROR: My daughter was sexually assaulted.

21 THE COURT: Pardon?

22 THE JUROR: My daughter was sexually assault when she

23 was younger.

24 THE COURT: By who?

25 THE JUROR: I'd rather not say his name.

1 THE COURT: A family member or ---

2 THE JUROR: Oh, no. It was my daughter -- my sister's
3 boyfriend at the time.

4 THE COURT: So who was molested?

5 THE JUROR: My daughter.

6 THE COURT: Your daughter?

7 THE JUROR: Yes.

8 THE COURT: And how old was she?

9 THE JUROR: She's 31 now.

10 THE COURT: Okay. How old was she at that time?

11 THE JUROR: Thirteen. And I still got a sore taste in
12 my mouth about this.

13 THE COURT: So do you think it would affect your
14 ability to be fair and impartial?

15 THE JUROR: I do. Yes, sir.

16 THE COURT: Okay. Thank you.

17 THE BAILIFF: One seventeen, Your Honor.

18 THE COURT: One seventeen. Yes, sir?

19 THE JUROR: Between the ages of 10 to 12 I was molested
20 by a family friend of ours who had died before anything
21 happened.

22 THE COURT: How old were you?

23 THE JUROR: I was 10 to 12 years old.

24 THE COURT: Do you think it would affect your ability
25 to be fair and impartial this case, for against the State or

1 against the State ---

2 THE JUROR: I think so.

3 THE COURT: Okay. Thank you.

4 THE BAILIFF: Fifteen, Your Honor.

5 THE COURT: Yes, sir.

6 THE JUROR: Yeah. I'm going to be biased. I have
7 three kids. I'm a foster parent, and I have three kids that
8 I've adopted. And each one of those cases there was a
9 sexually assault, where one of the parents was found guilty
10 and one of them got -- pretty much get away with it. And
11 I've adopted these kids, and they been in my life for
12 nine years. And we've been having to still go to therapy.

13 THE COURT: Do you think this would affect your ability
14 to be fair and impartial in this case?

15 THE JUROR: Yeah.

16 THE COURT: All right. Thank you.

17 THE BAILIFF: Two, Your Honor.

18 THE COURT: Yes.

19 THE JUROR: My grandfather used to touch me when I was
20 younger.

21 THE COURT: He molested you?

22 THE JUROR: Yes.

23 THE COURT: And how old were you?

24 THE JUROR: Eight.

25 THE COURT: All right. Do you think this would affect

1 your ability to be fair and impartial in this case?

2 THE JUROR: Yes.

3 THE COURT: Okay. Thank you. Anyone else? All right.

4 Is there any member of the jury panel who either you or
5 one of your family members ever been charged with or
6 convicted of any crime involving sexual -- criminal sexual
7 conduct with a minor or any other such crime and you did not
8 already bring it to my attention just now? Okay. I find
9 none.

10 Anybody have any kind of experience with a police
11 officer, a state trooper, a federal or state law enforcement
12 agent or agency that might affect your ability to be fair
13 and impartial in this case? I find none.

14 Any a member of an organization that seeks to prevent
15 sexual assaults against children or has any kind of purpose
16 of supporting law enforcement, like Mothers Against Drunk
17 Driving; Students Against Drunk Driving; CAV, Citizens
18 Against Violent Crime, those sorts of things? I find none.

19 Anybody have any reason that they know of that they
20 haven't already brought to my attention that may keep you
21 from being a juror in this case for any reason? It could
22 be, well, anything really. Sometimes you get people that
23 say it's against their religious beliefs. Sometimes you get
24 people that say that they belong to organizations that say,
25 well, if somebody gets convicted -- or somebody gets

1 arrested, well, they must be guilty of something, so I'm
2 going to convict them, no matter what. You have people in
3 groups that are on the opposite end of that spectrum, where,
4 they believe like, "You know what, I don't believe you can
5 trust the government and if somebody gets arrested, I'm not
6 convicting somebody, no matter what." You find people that
7 have all kinds of beliefs in this world. I'm just giving
8 you some examples of things that I've had people say in the
9 past, but it's not limited to that.

10 Here's my position on that: It's America. I really
11 don't really care what you believe as long as you're not
12 advocating the violent overthrow of the government, you can
13 believe what you want. All right.

14 But this is a serious charge. This is a serious case.
15 It's seriousness on both sides. Both sides deserve their
16 day in court. They deserve a fair trial. They deserve to
17 have 12 jurors who can come in with an open mind and listen
18 to the evidence. First of all, take an oath that says they
19 can listen to the evidence that is presented in this
20 courtroom. And they will make their decision based on the
21 evidence that was presented in this courtroom. And whatever
22 prejudices and beliefs that you might have, you put them
23 aside. And you will base your decision, your verdict, on
24 what you hear in this courtroom and you can apply the law
25 that I tell you applies to this kind of case. Even if you

1 don't think that's what the law is or what the law ought to
2 be. But you can take an oath that says, you know what, I
3 may disagree with what the law is, but this is what the
4 judge says I have to make my decision on and I will except
5 it. That's what I'm looking for. So I'm not going to try
6 to talk you out of your beliefs or embarrass you. I just
7 need to know it, and the lawyers need to know it so that we
8 can then make a decision as to whether or not you can be a
9 fair and impartial juror in this case. That's my sole
10 purpose in asking the question. It's not to argue with you
11 or embarrass you, but if you have some reason why you think
12 you can't be a juror, any reason, please stand up and just
13 come forward and talk about it privately. All right.

14 THE BAILIFF: Thirteen, Your Honor.

15 THE COURT: What was your number again?

16 THE JUROR: Thirteen.

17 THE COURT: Thirteen. Okay. What would you like to
18 tell me?

19 THE JUROR: Well, I've got three daughters at home, and
20 I don't think I could be nonbiased, to be quite honest.
21 Because if it was one of my children, I'd be -- I don't know
22 what I would think would be my --

23 THE COURT: Is it just the nature of the charges would
24 lead you to believe he's guilty?

25 THE JUROR: Well, I don't think I can be honest with

1 it.

2 THE COURT: Okay. Well, that's what I'm asking you to
3 do, is be honest with me. Okay. Thank you. All right.

4 Bear with us just a second. I'm going to take the
5 lawyers to the back and have a discussion with them.

6 If y'all need to take a restroom break, don't talk to
7 each other about the case in any way and just be back in
8 ten minutes. Okay. Thank you.

9 (The jury exited the courtroom at 11:35 a.m.)

10 (A conference was held in chambers off the record.)

11 (The jury entered the courtroom at 11:50 a.m.)

12 THE COURT: All right. Have we got everybody back in,
13 then.

14 Do you have a list for me?

15 THE CLERK: Yes, sir. I'm pulling it now.

16 THE COURT: Anything from the State?

17 MR. KENDALL: No, sir, Your Honor.

18 THE COURT: From the defense?

19 MR. MORIN: No, sir.

20 THE COURT: All right. Madame clerk?

21 THE CLERK: When I call your name, please come forward.
22 Please bring all of your personal belongings with you. You
23 will stand in front of me, face back out to where you can
24 see the clock on the back wall. If I tell you to take a
25 seat in the jury box, you'll take a seat over here. If I

1 tell you you've been excused, you'll take a seat back where
2 you're at.

3 (The jury was selected.)

4 THE COURT: All right. Anything from the State?

5 MR. KENDALL: No, sir, Your Honor.

6 THE COURT: From the defense?

7 MR. MORIN: No, sir.

8 THE COURT: Okay. Well, folks, you will be our jury
9 now, and we will start this case after lunch. It's
10 12:00 p.m. right now. So I'm going to let you go back with
11 the bailiffs right now. They will show you where the jury
12 room is and you will see where the jury room is, and they
13 will show you how to go in and out. I don't think you come
14 back through here to go in and out, but you don't come
15 straight back to the jury box after lunch. You'll go down,
16 and they will show you how to get in and how to get out.

17 When you go to lunch, you can go to lunch with anybody
18 you want to, including other members of the jury, but you
19 can't talk about the case. I know you don't really know
20 that much about it, but at this point it's a standard
21 instruction that I give people. Don't talk about the case.
22 When you go back, the first thing we'll do is give you an
23 oath and you'll promise that you'll make your decision based
24 on what you hear in this courtroom and not anywhere else.
25 That's why I don't want you to talk to anybody else about

1 the case, because their influence. As soon as you tell them
2 what kind of case that you're involved in, they're going to
3 want to talk to you about it, and that poisons your mind,
4 one way or the other, and that's not good.

5 These days, we have to have people -- I have to
6 instruct you not to post things on social media during the
7 trial. Now, once the trial is over with, you can put it on
8 Facebook, Twitter, or whatever you want to, whatever you
9 want to about the case. But during the case, it's not fair
10 because, I'll tell you, you make up your mind at the end of
11 the trial, not at the beginning of the trial. And you're
12 going to probably change your mind more than once throughout
13 the trial. The bottom line is you don't make your decision
14 until you've heard all of the evidence. But it's only the
15 evidence that you will make your decision on, and that's
16 what we tell people, not to talk to everybody else. The
17 same thing holds true with social media. If you post
18 something on Twitter or Facebook about your jury service
19 about that case, I guarantee you somebody's going to comment
20 on it. And that's the same as if you went up and talked to
21 a stranger or anybody else off the street. There's no
22 difference. Don't do that while you're on this trial. When
23 the case is over with, you can put whatever you want to to
24 your heart's content about the trial, but not during the
25 trial, so stay off of social media posting about this case.

1 I'm not prohibiting you from looking at your Facebook or
2 anything like that. I will tell you, don't go and try to
3 find out anything about the case because now, once people
4 get on the jury, they kind of get invested and they want to
5 go find out about -- see if there's anything in the media
6 about the case or online about the case or they want to
7 start doing research on the law. Again, whatever you need
8 to know to make a decision in this case, we will tell you in
9 this courtroom: Evidence and laws. Just go enjoy your
10 lunch. You can tell the family member or work you got
11 picked on the jury. You're not allowed to talk about the
12 case, and that will just have to suffice for a couple of
13 days. Okay.

14 So go with these folks, and they will show you how to
15 get in and out. If you would be back at a quarter to 2:00,
16 and we will get started shortly thereafter.

17 Okay. See you in a few minutes.

18 (The jury exited the courtroom at 12:06 p.m.)

19 THE COURT: Okay. Now, the rest of you, you're
20 finished for today. There's a pretty fair possibility
21 you're done for the rest of the week, but we won't know
22 until the end of the day probably, I'm sure.

23 So what I want you to do is call the telephone number
24 after 6:00, and it will tell you whether or not you're
25 finished for the week or whether or not you need to report

1 back tomorrow or whether or not you just need to call back
2 tomorrow night after 6:00. I don't know that just yet. So
3 just bear with us on that.

4 You're free to go. You can talk to anybody you want to
5 about the case, except for those folks that just got picked
6 as a juror, of course. And you're welcome to go come back
7 and watch the trial, if you want to. But you're free to go.
8 I thank you so much for showing up and helping us to draw a
9 jury this week. We cannot do it without you.

10 And, again, I hope you will one day get to be on the
11 jury. Because in my experience, people really do enjoy it
12 once they get picked on a jury and they learn about the
13 process. And I'm telling you, I've never had anybody tell
14 me they've regretted serving on a jury. It's always just
15 the opposite -- of how much they enjoyed it and what they
16 learned about our system. Because we need people to have a
17 positive jury experience. That's why people show up.

18 Ultimately, they believe in their government. They
19 believe in our system, and we need them to go back out and
20 say, "Yeah, I served on the jury, and you know what, I
21 enjoyed it and I'm glad I did it." That's the kind of
22 message we hope you'll walk away with. If you don't feel
23 that way about anything after your jury experience, even
24 this week, please just let us know. Because I can tell you,
25 you know, you've got a good clerk of court staff here. Your

1 clerk does a good job. I know she's like everybody else;
2 she wants to do a better job. If somebody has a problem,
3 please bring it to her attention and to my attention, and
4 we'll see what we can do to fix it. All right. You're free
5 to go. Thank you very much.

6 (The jury exited the courtroom at 12:08 p.m.)

7 THE COURT: Okay. Well, why don't we meet back here at
8 1:30 p.m. If there's anything we need to take up at that
9 time, we'll do it. Otherwise, be ready to start up at
10 1:45 p.m. Okay?

11 MR. MORIN: Thank you.

12 MR. KENDALL: Your Honor, one thing: His bond
13 situation.

14 THE COURT: He is in no custody of the sheriff's
15 department.

16 MR. MORIN: Your Honor, if I may be heard on that, just
17 briefly.

18 THE COURT: Sure.

19 MR. MORIN: My client's been on electronic monitoring,
20 home detention for three years. He has no violations, and I
21 have a statement from the bondsman saying that they're
22 willing to remain on the bond.

23 THE COURT: Well, there is 25 years to life he's facing
24 and we're at trial, and so, sorry, I can't accommodate you.
25 All right.

(A.F. ██████████) DIRECT BY MR. KENDALL)

1 MR. MORIN: Okay. Thank you, Your Honor. Thank you
2 for hearing me.

3 (A recess was taken.)

4 (At 1:30 p.m., the court was reconvened.)

5 (Counsel conferred briefly.)

6 (The following took place without the presence and
7 hearing of the jury.)

8 THE COURT: Let's bring her on up.

9 A.F. ██████████, after being duly sworn, testified
10 as follows:

11 DIRECT EXAMINATION

12 BY MR. KENDALL:

13 Q A.F. ██████████ how old are you right now?

14 A Seven.

15 Q And where do you go to school?

16 A ██████████ school.

17 Q And A.F. ██████████ do you know if it's good or bad to tell the
18 truth or a lie? Is it good or bad to tell the truth?

19 A Good.

20 Q Is a good bad to tell a lie?

21 A Bad.

22 Q Now, A.F. ██████████ if I told you that I had a pink tie on,
23 would that be the truth or would that be a lie?

24 A Lie.

25 Q What if I told you that you had a star on your shirt --

(A.F. ██████████ DIRECT BY MR. KENDALL)

1 a sparkly star on your shirt, would that be the truth or
2 would that be a lie?

3 A. The truth.

4 Q Now, A.F. ██████████ what happens in court if somebody asks you
5 a question that you don't know the answer to? What do you
6 say?

7 A I don't remember.

8 Q Okay. So what if I asked you how many dogs I had at
9 home, what would you say?

10 A I don't know.

11 Q All right. And what happens if something happened a
12 long time ago and you might have noted it at some point, but
13 you don't know it then?

14 A I don't remember.

15 Q All righty. And is it bad to tell a lie?

16 A Bad.

17 Q What happens if you tell a lie in court?

18 A You will get in trouble.

19 Q Okay. So when you're in court, you're only going to
20 tell the truth; is that right?

21 A Yes.

22 Q All right.

23 MR. KENDALL: Your Honor, if there's any other
24 questions Your Honor has as well.

25 THE COURT: All right. I'm the judge. He probably

(A.F. [REDACTED] DIRECT BY MR. KENDALL)

1 told you that, right? So when we start the trial, I won't
2 really be asking you any questions. But the lawyers will be
3 asking you questions, and that was one of the lawyers there.
4 He's with the State, and then the other fellow over there
5 with the black suit on and the glasses who's just waiving,
6 he's another lawyer, and he gets to ask questions, too, so
7 you'll get to hear questions from both sets of lawyers.

8 Are you okay with that?

9 THE WITNESS: Yes.

10 THE COURT: All right. So you understand you're
11 supposed to tell the truth to both of those lawyers asking
12 you questions.

13 Do you understand?

14 THE WITNESS: Yes.

15 THE COURT: Don't just tell them what they think they
16 want to hear. You tell them what the truth is. Okay?

17 THE WITNESS: Okay.

18 THE COURT: All right. Do you have any questions that
19 you want to ask me?

20 THE WITNESS: No.

21 THE COURT: All right. And you think you'd be okay
22 with talking to the jurors -- the people that are sitting in
23 those chairs over there, we call those the jurors, and they
24 make up what we call the jury. And they are ultimately
25 making the decision on this case. But all your job is, is

(A.F. [REDACTED] DIRECT BY MR. KENDALL)

1 just to provide them with information. And you do that by
2 answering the questions that the lawyers ask you, and you
3 just tell the truth.

4 THE WITNESS: Okay.

5 THE COURT: You can do that?

6 THE WITNESS: Yes.

7 THE COURT: So you tell them what you know; and if you
8 don't know, you tell them you don't know.

9 THE WITNESS: Okay.

10 THE COURT: Okay. You can handle that?

11 THE WITNESS: Yes.

12 THE COURT: You won't be too scared to do that?

13 THE WITNESS: No.

14 THE COURT: There will be a lot of people in here and
15 they're all looking at you, but you think you'll be able to
16 answer the questions?

17 THE WITNESS: Yes.

18 THE COURT: Okay. Did you want to ask anything right
19 now?

20 MR. MORIN: No, sir.

21 THE COURT: No. Okay. Well, I want you to go over
22 there and sit back down, and they're going to get started.
23 And then we'll call you as a witness in a little bit.

24 (The witness was excused temporarily.)

25 MR. MORIN: Thank you, Your Honor. Before we bring the

(A.F. ██████████ DIRECT BY MR. KENDALL)

1 jury in, do you mind if we set up the CAC -- just the
2 computers in here? Because it usually takes a second to
3 boot up and get everything on there. I was going to go
4 ahead and load it up. I mean, she's -- as you can watch the
5 video. Okay. That would just save the time.

6 THE COURT: Tell the jury that I would like them, when
7 they all get in there, to pick a jury foreman, and it can be
8 anybody except for the alternate.

9 THE BAILIFF: Yes.

10 THE COURT: Okay.

11 (A recess transpired.)

12 (At 1:40 p.m., the court was reconvened.)

13 THE COURT: All right. Well, we did examine
14 A.F. ██████████ and she, in my opinion, does know the
15 difference between telling the truth and telling a lie. And
16 despite her tender years, seems to be ready to testify
17 truthfully in court. You'd be allowed to cross-examine her.
18 All right. We've got everybody here and we've got a jury
19 foreperson, Ms. Sierra Hamilton, 52. So if we are ready --
20 do you have anything?

21 MR. MORIN: No, sir. I'm ready.

22 THE COURT: All right. Bring the jury back in, then.

23 (The jury entered the courtroom at 1:46 p.m.)

24 THE COURT: Okay. Folks welcome back. You're

25 Ms. Hamilton?

(CHARGE OF THE COURT)

1 THE JURY FOREMAN: Yes.

2 THE COURT: Okay. It sounds like you got selected to
3 be the jury foreperson, so congratulations. You don't get
4 any extra pay. Just when we go to do deliberations, you
5 conduct the deliberations, make sure everybody gets a chance
6 to have their say, asking questions they want to ask. You'd
7 take the vote, and you let us know what the verdict is.

8 During the course of the trial, we don't let jurors ask
9 questions, but during deliberations, if you have a question,
10 I ask that you have a foreperson write it down, and then
11 pass it to the bailiff, who's going to let me know. And
12 then if there's anything that comes up during the course of
13 a trial, it's just easier to pass the note through the jury
14 to the foreperson.

15 Okay. So we're ready to begin. The first thing I need
16 to do is place you under oath, so if you would, stand and
17 raise your right hand.

18 Will the clerk of court administer the oath.

19 (The jurors and alternates were duly sworn to try this
20 case.)

21 THE COURT: All right. Folks, just wanted to give you
22 limited remarks, just to let you know what we do in a trial,
23 explain some of the things that you might be unfamiliar with
24 if you've never been a juror, and reiterate some of the
25 things that we did talk about earlier when were qualifying

(CHARGE OF THE COURT)

1 you. We told you this is a criminal case.

2 And so the State has charged Mr. Jason Scott Simmons
3 with criminal sexual conduct with a minor, first degree. He
4 pled not guilty to that charge and therefore that casts a
5 burden upon the State to provide him with a jury trial and
6 to provide enough evidence to convince 12 people -- you --
7 that he is guilty of this charge beyond a reasonable doubt.
8 He is not required to prove his innocence; the State is
9 required to prove his guilt. You must remember that in this
10 state and in every state in the United States, no defendant
11 is required to prove they're innocent. The state always --
12 or the government always has the burden of proof. That fact
13 that somebody has been arrested or indicted does not cast
14 any presumption of guilt. He is presumed to be innocent of
15 these charges as he sits here throughout the trial, from the
16 time he was arrested, throughout the trial, and unless and
17 until; the State provides enough evidence to convince all
18 12 jurors that he is guilty beyond a reasonable doubt, he
19 remains innocent of these charges.

20 Now, that's not one of those legal theories that we
21 just talk about in law school. As I told you, that's a
22 constitutional right that he has, I have, and you have. So
23 we don't take it lightly. It's part of your oath. You must
24 believe in your mind that he is innocent of these charges
25 right now and that the State, again, has the burden of

(CHARGE OF THE COURT)

1 proving beyond a reasonable doubt his guilt of these
2 charges.

3 Now, we talk about the burden of proof. What does
4 burden of proof mean? It simply means the amount of
5 evidence that the State has to provide. It's a concept or a
6 term that we use. It's easier to understand it sometimes in
7 relation to the burden of proof in a civil case, which I'll
8 go over in a minute.

9 But basically, proof beyond a reasonable doubt means
10 that after you've heard all of the evidence, you are firmly
11 convinced of his guilt. At the end of the trial, if you are
12 not firmly convinced of his guilt, you have to give the
13 benefit of the doubt to the defendant and find him not
14 guilty. The state has to prove every element of the crime
15 to your satisfaction beyond a reasonable doubt. In other
16 words, you have to be firmly convinced he's guilty in order
17 to convict. You're going to have to prove, again, that he
18 is innocent.

19 I'm speaking in English and a lot of times, people are
20 still thinking "I understand what you've heard, I understand
21 the words, but I'm still not quite sure what it means, proof
22 beyond a reasonable doubt." Well, a lot of times -- you've
23 seen the scales of justice before, you know, where you have
24 the old fashioned scales and weights. You know there's two
25 pans and sometimes you see Lady Justice holding it,

(CHARGE OF THE COURT)

1 sometimes you see it out on a chain with an old fashioned
2 scale. That helps people understand things a little bit
3 better to see it. But for most of us -- I am -- I'm a
4 visual learner, and I have to see something in order to
5 really grasp it. So imagine that set of scales. And at the
6 beginning of a trial like this, you have the State on one
7 hand and the defendant on other hand. Those scales at the
8 beginning of the trial are even. In order to prove guilt
9 beyond a reasonable doubt, the State has to tip those scales
10 quite a bit in their favor in order to prove guilt beyond a
11 reasonable doubt. I give you that example to contrast it
12 with the burden of proof in a civil case. In other words,
13 somebody gets in a car wreck or there's a breach of contract
14 or something along those lines, burden of proof in a civil
15 case is what we call a preponderance of the evidence, which
16 is often defined as the greater weight of the evidence or
17 whatever everybody is trying to prove more often true than
18 not true. See how those things kind of sound impressive,
19 but you really are still kind of going "Well, I don't want
20 to say anything because I really don't know what it means
21 still."

22 Well, take that same set of scales. At the beginning
23 of the trial, you have the person that brought the lawsuit,
24 being the plaintiff. The defendant is the person who got
25 sued. You start off with even scales. In a civil case,

(CHARGE OF THE COURT)

1 where, say the alleged victim, the defendant who caused the
2 car wreck, they only have to tip the scales just a little
3 bit during a civil case. And that's met a preponderance of
4 the evidence or a greater weight of the evidence. The
5 example I just gave you about a criminal case, where proof
6 beyond a reasonable doubt, those scales, have to tip quite a
7 bit -- which it's a much heavier burden of proof because
8 they're charging somebody with a crime. And so the law says
9 if you're going to charge somebody with a crime, you're
10 going to have a heavier burden of proof. Hopefully, that
11 will help you understand that just a little bit.

12 Now, we have duties in this course of the trial. We
13 all have duties. Everybody that's in the courtroom has some
14 role that they're playing. You are the jury. You're going
15 to be the judges of the fact. You are in fact judges during
16 the trial. We don't give you a black robe, but you're still
17 the judges. In fact, you're the ultimate judges of the
18 outcome of the case.

19 You're going to hear evidence. Evidence is presented
20 to you in the form of people getting up on the witness
21 stand. They're under oath and they tell you what they
22 heard, they saw, they touched, they showed, they smelled.
23 That's a form of evidence. Sometimes you have documents.
24 Sometimes you have photographs. Sometimes you might have a
25 recording. Those are all forms of evidence.

(CHARGE OF THE COURT)

1 All right. There's often a conflict in evidence.
2 Sometimes you hear something from one witness and then
3 another witness will contradict what that person says. As
4 the jury, you have to weigh all of the evidence that you
5 hear, and you determine what to believe and what is true and
6 what is not true. It's not me that determines that; it is
7 you.

8 All right. You are not going to get any little eye
9 signals or winks or nods from me. If you think I'm trying
10 to signal to you what you ought to rule in this case or
11 don't believe this person or do believe that person, you are
12 reading it wrong. Okay. That means I probably had
13 something in my eye, and I'm wiping something. I am not
14 trying to tip you off as to how I think you ought to rule on
15 something.

16 Believability or credibility of a witness is completely
17 your job. My job as the judge of the trial -- I'm called
18 the judge of the law; you're the judge of the facts. My job
19 is really two-fold. First of all, it's to preside over the
20 trial. Make sure that the rules of procedure are followed,
21 all the rules of evidence are followed. And then second, at
22 the end of the trial, I tell you what the law is that
23 applies to this kind of case. And then you take that law,
24 and then you go back and figure out what the facts are that
25 you believe. And you take the law and apply it to those

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1 facts. That's how you come up with the verdict. Okay.

2 It's really not a whole lot more complicated than that.

3 That's, in essence, what we're trying to do.

4 Now, because the State has the burden of proof, the
5 State calls their witnesses first, and you will hear from --
6 wherever a party calls a witness, they get to ask the
7 witness questions first. That's called direct examination.
8 But then our rules say, well, the other side will get to ask
9 questions of that witness as well, so after the witness
10 answers questions under direct examination, the other side
11 gets to ask questions. That's called cross-examination.

12 All right. So they'll get to ask questions. And then I
13 usually allow a follow-up round or re-direct, and then
14 re-cross. So re-direct and re-cross are usually a lot
15 shorter than the direct and the cross. But once you've
16 heard it from a witness, then we go on to the next witness.

17 Now, every time we take a break, I'm going to tell you
18 don't begin your deliberations or discussions for one very
19 important reason: You haven't heard all the evidence until
20 the end of the trial, so it's improper for you to make up
21 your mind. If you start deliberating and start discussing
22 things like credibility of the witnesses and things like
23 that -- very often a trial is just like in life. There's
24 usually two sides to every story and until you hear both
25 sides, it's improper for you to begin to make up your mind,

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1 certainly, in a court of law in a case. But what you can
2 learn the hard way in life is, you know, somebody will come
3 in and tell you something, and then you'll find out
4 something a little bit later. And that might change the way
5 you view something. It might be that you end up believing
6 exactly what your first impression was. But, then again,
7 you might change your mind. So if we had you -- allowed you
8 to deliberate along the way, well, it's only natural that
9 once people start voicing what they're opinions are, then
10 they start digging their heels in. Because nobody likes to
11 admit they're wrong. So that's why I say don't begin
12 deliberations. Keep an open mind until you've heard all of
13 the evidence in the trial. All right.

14 So to get back to how we do this trial. And I told you
15 the lawyers are going to be presenting evidence to you. And
16 evidence is, again, people telling you what they heard, saw,
17 touched, told, smelled, pictures, documents photographs.
18 What evidence is not is lawyers talking. And you're going
19 to hear from the lawyers a lot. You probably hear more from
20 the lawyers in whole than you do from me and from any of the
21 witnesses. All right.

22 So why is that important? Well, the lawyers aren't the
23 witnesses. They weren't there. They didn't see anything,
24 and they can't tell you anything. If they were there and
25 could see something and tell you something, then they would

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1 not be allowed to act as lawyers in the case. They would
2 put on the witnesses, put under oath, and tell you what they
3 heard, saw, touched, felt, smelled. That sort of thing. So
4 in the course of the trial, when a lawyer asks a question to
5 a witness, that's not evidence; but the answer to the
6 question is evidence. Okay. So keep that in mind.

7 But when you hear these lawyers talking, they are not
8 testifying and what they say should not be regarded by you
9 as evidence. Because in a minute, when we start the trial,
10 the very first thing you're going to do is hear from the
11 lawyers before you hear from anything of the witnesses. We
12 start out with opening statements in which the lawyers get
13 up and they kind of give you what I call the "Reader's
14 Digest condensed version of the case." I realize I'm going
15 to have to come up with a better example than that because
16 as we get older, I don't even know if they make
17 Reader's Digest condensed version of books anymore. More
18 and more people have no idea what I'm talking about, and the
19 younger crowd, when they -- most people, if they've ever
20 seen a Reader's Digest condensed version any more is when
21 they go to the mountains or some lake cabin or something and
22 there's one above the fireplace. Very few people have ever
23 looked at one.

24 So the bottom line is that they get to tell you a
25 little brief overview of what this case is about from their

(CHARGE OF THE COURT)

1 perspective so that it will help you follow the evidence a
2 little bit better. Okay. But it's important for you to
3 remember that what they say is not evidence. And if it gets
4 contradicted by something that somebody says on the witness
5 stand -- you will see -- you don't even consider what the
6 lawyers said. Because what's evidence is what I told you:
7 What people told you, pictures, documents that are allowed
8 into evidence.

9 Now, during the course of the trial, sometimes there's
10 a question asked and another lawyer might stand up and say
11 "Objection." Objection is kind of like -- I call it our
12 little code word for, "Judge, you need to pay attention here
13 and you've got to make a ruling." Because at that point, I
14 have to make a decision as to whether or not it's proper for
15 you to hear the evidence that's about to be presented
16 sometimes, when it's a document. But sometimes it might be
17 what the witness is getting ready to say.

18 And I don't really know that much more about this case
19 than you do at this point. I've had a little bit of
20 dealings with them this morning, but really not a whole lot.
21 So when somebody says something from the witness stand,
22 you're hearing it for the first time. I'm probably hearing
23 it for the first time as well. And so the point I'm trying
24 to make is, I have to sometimes make a decision as to
25 whether or not it's proper for you to hear something or see

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1 something. Because my job as the trial judge is to rule on
2 admissibility of evidence. I've got to know if it's proper
3 for you to hear something or not hear something. Sometimes
4 I can make that decision based on -- the lawyer might stand
5 up and say "Objection. Hearsay." And because of the context
6 of whatever is being said, I can say "sustained" or
7 "overruled." Sometimes I might even need to get them to
8 come up here, out of your earshot, just to give me a little
9 argument on what it is so that I can rule. Sometimes it
10 might be necessary for me to send you back to the jury room
11 and hear what the witness is going to say so that I can hear
12 it and make a decision as to whether or not you can hear it.
13 The point is that we have to have evidence presented to you
14 in a form that we call "legally competent evidence." The
15 point being, like in any case, if there is a decision that
16 one of the parties didn't like and it gets appealed, if
17 there's any factual evidence in the record to support your
18 decision, the appellate courts are bound to accept that.
19 What they aren't bound by are my rulings. And they say,
20 well, that judge should not have let that jury hear that
21 question or the judge should have let them hear that
22 question or hear the answer to the question. That's on me.
23 Or if I charge the law incorrectly in the trial, well that's
24 on me. And then we have to come back and do it all over
25 again, not with you, but with a different jury. Well,

(CHARGE OF THE COURT)

1 nobody wants to come back and do that twice. So we're
2 really just trying to do it correctly and on time. Nobody's
3 trying to hide anything from you. When a lawyer stands up
4 and says "objection," they're just doing their job. Okay.
5 So don't hold it against them for doing their job. We are
6 all just trying to do it right, the best we can, and let you
7 make the decision based on the best evidence that's supposed
8 to come in at a trial like this.

9 So the hardest part about this, again, is as I said:
10 Keep an open mind throughout the trial. I know it's going
11 to be human nature to start getting impressions, but again,
12 don't rush to judgment on this. There will be plenty of
13 time for you to talk about the case with each other, stuff
14 like that.

15 After we have the opening statements, we'll get into
16 evidence. After the evidence is over, we'll have closing
17 arguments, where the lawyers get up and review the evidence
18 that you've heard, review what they know I'll be charging on
19 the law, and in attempting to persuade you to come up with a
20 verdict. After that, I'll go over the law with you and give
21 the entire consideration of what the verdict is.

22 Procedurally, as I've told you, I think, earlier, we
23 usually take a break about every hour and 15 minutes, hour
24 and 30 minutes so that you can use the restroom. It might
25 be a little bit before that or a little bit after, just

1 depending on where we're at with the witnesses. But we'll
2 probably go to about 5:00, if anybody needs to make
3 transportation arrangements or child care or something like
4 that, let me know when we go to our next break. But that's
5 generally what we'll do. We'll probably go to about
6 5:00 p.m. today, come back tomorrow morning, and start back
7 up at 9:30 a.m. And, again, go throughout -- hopefully, you
8 know, we'll finish tomorrow or come very close to it
9 tomorrow. We might have to finish up Friday morning, just
10 depends on how things go.

11 Trials are -- you try, you plan, and then they just --
12 they just happen. Sometimes they go faster; sometimes they
13 go slower. So I know this: They won't make any progress if
14 I keep talking all afternoon, so I'm going stop and we'll
15 start with the State making their opening statement.

16 MR. MORIN: Thank you, Your Honor. May it please the
17 Court?

18 THE COURT: What do you want? A notepad? Okay.
19 That's fine. Do we have note pads available?

20 THE CLERK: I can get some. Just need one?

21 THE COURT: It's fine to take notes during trial. It's
22 important to be sure to listen and not get distracted. And
23 ultimately, when you go back and deliberate, I don't let you
24 take your notes back because then somebody will get into an
25 argument about, "Well, this is what my notes say" verses

(OPENING STATEMENTS-MR. KENDALL)

1 that. If you have any questions about evidence, you can
2 come back, we'll play you back the transcript or read back
3 the transcript, but we don't let you say, "Well, this is
4 what my notes said." Okay. But you're certainly free to
5 take them. That helps people a lot of times, to be
6 notetakers, but you're not required to.

7 All right. Mr. Solicitor?

8 MR. KENDALL: Thank you, Your Honor. May it please the
9 Court, Counsel.

10 Ladies and gentlemen of the jury, my name is Matt
11 Kendall, and I represent the State of South Carolina. Thank
12 you all very much for coming here today. We are all here
13 because on the night of January 8th and January 9th, 2017,
14 the defendant, Jason Simmons, sexually assaulted 4-year-old
15 A.F. This happened at the home of Mr. Simmons,
16 here, in Cherokee County. A.F., the 4-year-old, was
17 related to Mr. Simmons' wife, Missy, was over there to spend
18 the night. These were family friends, ladies and gentlemen.
19 That night Missy went to bed early and left A.F. alone
20 with Jason. They sat on the couch and watched TV. And
21 there, in his living room, he inappropriately touched her.
22 All this going on while Missy was asleep in the other room.
23 The next day, ladies and gentlemen, Jason brought A.F.
24 home and acted very odd while dropping her off. He insisted
25 on taking her clothes straight to the laundry room. He also

(OPENING STATEMENTS-MR. KENDALL)

1 started crying, pondering what would happen to Missy, his
2 significant other, if something happened to him. This was
3 very odd behavior and very out of the ordinary and not
4 something that, Dana, A.F.'s mother was used to.

5 Later that day, A.F. went to Walmart with her mother
6 and while using the restroom, A.F. broke down and told her
7 mother that she had been touched Jason's the night before.
8 Her mother then called the police and took her to the
9 emergency room. There a nurse performed a sexual assault
10 kit and swabbed part of her private area to preserve the DNA
11 from these parts.

12 Subsequently, A.F. was interviewed with the
13 Children's Advocacy Center and identified and described the
14 assault perpetrated by the defendant, Jason Simmons. Law
15 enforcement also executed a search warrant at the home of
16 Mr. Simmons, and they found that is hard drive to his
17 extensive camera system was gone. They also found multiple
18 pairs of underwear of A.F.'s hidden in his attic. The DNA
19 they had collected from A.F. was sent to SLED and compared
20 the DNA with Jason Simmons'. And on these swabs, ladies and
21 gentlemen, they found in the swabs taken from A.F.'s
22 private areas Mr. Simmons' DNA.

23 Now, at the end of the trial, I'm going to ask you to
24 return the verdict of guilty. But for right now, I'm only
25 going to ask you three things: First, listen to the

(OPENING STATEMENTS-MR. MORIN)

1 instructions of the judge. That will ensure a fair trial in
2 this case; second, you listen carefully to all of the
3 evidence that's presented over the course of this trial,
4 ladies and gentlemen; and finally, in this case, you use
5 common sense. Thank you.

6 THE COURT: Mr. Morin?

7 MR. MORIN: My name is Michael Morin, and I represent
8 Jason Simmons. I understand that no doubt when you heard
9 these statements and the charges you felt a certain way.
10 I've felt that way for 25 years on both sides in dealing
11 with these cases.

12 This case is going to come down to what did the
13 4-year-old tell and is it true. Those of you that have
14 4-year-olds will know that 4-year-olds believe the things
15 they're saying, whether they're true or not. But you're
16 going to have to decide if the 7-year-old is telling you
17 what happened when she was 4 years old, three years ago, if
18 that's what happened.

19 As to laundry that was dropped off by the client in the
20 laundry room, watch what happens with that line that
21 they're -- that Mr. Kendall's very excited about. And as
22 far as the DNA goes, well, I've got questions about the DNA.
23 I've been doing this a long time. And this DNA I definitely
24 have questions about. And you'll see when I'm asking him
25 the questions about the DNA. And you will have to decide

(OPENING STATEMENTS-MR. MORIN)

1 whether or not what they're saying, basically, if they have
2 proof of it or not. Because at the end of the day, this is
3 about what 4-year-old said.

4 So that's where I'm going to leave that for right now.
5 I'm not going to address any of the other things he said,
6 but I will tell you this: I've got questions about the DNA
7 and I have questions about this laundry thing. Can't wait
8 to talk about it. But most of all -- and the hardest thing
9 about these -- in any case is deciding whether or not
10 someone is telling the truth or not. And it's going to be
11 particularly difficult for you because 4-year-olds believe
12 what they say. They believe it. And 7-year-olds believe
13 it. There are things that they will tell you and they will
14 believe for 100 percent. And those of you that have
15 children -- and I have four myself. Mr. Kendall has two.
16 When they're that age, they believe something, no matter how
17 outrageous, they believe it.

18 So I'm going to ask you to look at all the evidence and
19 not just hear the charge and have that reaction. You can't
20 help it. I'm not telling you you can't, but I'm telling you
21 this is about a 4-year-old and what they said three years
22 ago. Thank you.

23 THE COURT: You may call your first witness.

24 MR. KENDALL: Your Honor, the State will call

25 A.F. .

(A.F. ██████████) DIRECT BY MR. KENDALL)

1 (The witness returned to the stand.)

2 A.F. ██████████, after being duly sworn, testified as
3 follows:

4 DIRECT EXAMINATION

5 BY MR. KENDALL:

6 Q Hi, A.F. ██████████. Can you please tell us your full name?

7 A A.F. ██████████, Cheyenne.

8 Q All right. And, A.F. ██████████, how old are you?

9 A Seven.

10 Q And where do you go to school?

11 A ██████████ School.

12 Q All right. And what grade are you in?

13 A Third grade.

14 Q Okay. And, A.F. ██████████, who is in your family?

15 A My dad, my mom, two brothers, and my one sister.

16 Q Okay. And do you have any pets?

17 A I got three cats and one dog.

18 Q All right. And, A.F. ██████████, do you know Jason and Missy?

19 A Yes.

20 Q And how do you know Jason and Missy?

21 A Because I went to their house.

22 Q Okay. You used to spend the night with them?

23 A Yes.

24 Q Okay. Do you see Jason in the courtroom?

25 A Yes.

(A.F. ██████████ DIRECT BY MR. KENDALL)

1 Q All right. Where is Jason sitting?

2 A Over there.

3 Q Is he in the white striped shirt?

4 A Yes.

5 MR. KENDALL: Okay. If we can let the record reflect
6 that she identified the defendant.

7 THE COURT: So ordered.

8 Q Now, A.F. ██████████, do you remember if you spent the night
9 with Missy on January 8, 2017?

10 A Yes.

11 Q And where did you spend the night that night?

12 A In the living room.

13 Q Of Jason and Missy's house?

14 A Yes.

15 Q And other than Jason, who else was there?

16 A Missy.

17 Q Okay. And earlier in the afternoon, did you hang out
18 with both of them?

19 A Yes.

20 Q And when it came to nighttime, who went to sleep first?

21 A Missy.

22 Q And where did she go to sleep?

23 A In her room.

24 Q And what did you do after Missy went to sleep?

25 A Watched TV in the living room.

A.F. [REDACTED] DIRECT BY MR. KENDALL)

1 Q Was anybody else in the living room with you at that
2 time?

3 A Jason.

4 Q Was there anybody other than Jason or just you and
5 Jason?

6 A It's me and Jason.

7 Q And what happened to you when you all were sitting and
8 watching TV in the living room?

9 A The thing happened.

10 Q All right. Could you tell the jury what took place?
11 What happened when you were watching TV?

12 A The thing.

13 Q It's okay. It's all right. And what was "the thing"?

14 A The thing with my privates -- area.

15 Q Okay. When you say "the thing" with the private areas,
16 did somebody touch you in the private areas?

17 A Yes.

18 Q Okay. And who touched you in the private areas?

19 A Jason.

20 Q Now, when he touched you, when you're talking private
21 areas, are you talking about the areas you go to the
22 bathroom out of?

23 A Yes.

24 Q And you used to call that your "nu-nu;" is that right?

25 A Yes.

(A.F. ██████████ DIRECT BY MR. KENDALL)

1 Q Okay. And where did Jason touch you? Where did this
2 happen?

3 A In the living room.

4 Q And where were y'all sitting?

5 A On the couch.

6 Q And how did he touch you? What happened when he
7 touched you? It's okay.

8 A We what -- what was it --

9 Q So what -- how did he touch you or what happened when
10 he touched you?

11 A He -- he -- he...

12 Q It's okay. Just take a deep breath.

13 A I don't remember.

14 Q Okay. Did he touch you on the outside of your nu-nu or
15 on the inside of your nu-nu?

16 MR. MORIN: Your Honor, may I approach?

17 THE COURT: Yeah.

18 (A bench conference was held off the record, in the
19 presence of the jury, but out of the hearing of the jury.)

20 Q All right. A.F., you testified a couple of minutes
21 ago he touched you in the private area; is that right?

22 A Yes.

23 Q Did he touch you on the inside of the private area,
24 outside, or both?

25 A Both.

(A.F. ██████████ DIRECT BY MR. KENDALL)

1 Q And what did he use to touch you?

2 A A toothbrush.

3 Q A toothbrush?

4 A Yes.

5 Q All right. Could you describe this? What kind of
6 toothbrush was it?

7 A Electric one.

8 Q Okay. One that goes "errrr," makes a noise?

9 A Yes.

10 Q And how did that make you feel?

11 A It kind of -- it kind of feels like it was shocking,
12 but it was just a thing moving.

13 Q And what else happened? So this happened when Missy
14 was asleep? Is that what you testified to?

15 A Yes.

16 Q All right. And what happened after that?

17 A I went to bed.

18 Q And where did you go to bed?

19 A On the sofa.

20 Q And where was Jason?

21 A I don't know.

22 Q All right. If you don't know, it's okay to say you
23 don't know. All right.

24 And what were y'all -- before this touching happening,
25 what was going on in there? What were you guys doing in the

A.F. [REDACTED] -DIRECT BY MR. KENDALL)

1 living room?

2 A I don't know.

3 Q All right. Did Jason give you anything while this was
4 going on?

5 A A chocolate bunny.

6 Q A chocolate bunny?

7 A Yes.

8 Q And after this happened, did you tell anybody that it
9 happened?

10 A My mom.

11 Q Do you remember where you were when you told your mom?

12 A In Walmart bathroom.

13 Q And how old are you now?

14 A Seven.

15 Q And do you remember how old you were when this
16 happened?

17 A Four.

18 Q And after you told your mom, did you talk to other
19 people?

20 A No.

21 Q Do you remember talking to the interviewer at CAC?

22 A Yes.

23 Q And do you remember going to the hospital?

24 A No.

25 Q Okay. "No," you just don't remember?

([REDACTED]) -CROSS BY MR. MORIN)

1 A I don't remember going to the hospital.

2 Q Did Jason tell you -- say anything about talking to
3 anybody or telling anybody or anything like that?

4 A He told me he will get in trouble.

5 Q . If you told anybody?

6 A My mom.

7 BY MR. KENDALL: Please answer any questions Mr. Morin
8 may have.

9 CROSS-EXAMINATION

10 BY MR. MORIN:

11 Q A.F., you said you have two brothers and a sister?

12 A Yes.

13 Q And who's the oldest?

14 A My sister.

15 Q And are both of your brothers younger than you?

16 A One of them's -- one of them's younger, but the other
17 one's my big brother.

18 Q Okay. So you're the third, right?

19 A Yes.

20 Q Okay. Now, your brothers and your sister, do they
21 always tell the truth?

22 A Sometimes my brother tells a lie and sometimes he tells
23 the truth.

24 Q Okay. Now, Mr. Kendall asked you if you stayed over at
25 Jason and Missy's house on January 7th. Do you remember

(A.F. [REDACTED] CROSS BY MR. MORIN)

1 that?

2 A Yes.

3 Q And you said "yes." Do you know if that's the date it
4 happened?

5 A Yes.

6 Q And who told that that was the date it happened? Did
7 Mr. Kendall tell you that? You don't remember who told you?

8 A No.

9 Q But somebody told you, didn't they?

10 A Yeah.

11 Q Now, when you first told your mama -- well, let me
12 actually back up.

13 Do you remember if it was daytime or nighttime when you
14 got to Missy and Jason's house?

15 A It was still daytime.

16 Q Still daytime. Okay. And where did you -- Missy and
17 Jason took you to their house?

18 A Yes.

19 Q And where did they pick you up at?

20 A They picked me up from my house.

21 Q And did you go in -- did Missy and Jason have separate
22 cars or -- what kind of car did they go in?

23 A I think Missy -- Missy was the only one that came.

24 Q Okay. Just Missy came.

25 A Yeah.

(A.F. [REDACTED] -CROSS BY MR. MORIN)

1 Q All right. And did Missy have a car seat in her car,
2 or did your mama give her a car seat?

3 A I don't know.

4 Q You rode in a car seat, though, right?

5 A Yes.

6 Q Okay. Now, when you went, did your mama give you a
7 backpack or something to take with you?

8 A She gave me a backpack.

9 Q And what kind of backpack was it?

10 A It was a polka-dotted little backpack.

11 Q And when you got to Missy and Jason's house, was Jason
12 there?

13 A Yes.

14 Q Now, did you have dinner over there?

15 A No.

16 Q You didn't. Did you eat before you went?

17 A I don't remember.

18 Q Now, when you got over there, did you go outside or did
19 you just stay where they lived?

20 A I don't remember what I did at the time.

21 Q Well, tell me, when you went there, tell me about their
22 house. Where was it? Do you remember?

23 A It was at the end of the street.

24 Q And did they live upstairs or downstairs?

25 A They had a house but was -- they had a downstairs and

(A.F. ██████████ -CROSS BY MR. MORIN)

1 an upstairs.

2 Q Did they live in both places or were there other people
3 there?

4 A They lived in both places.

5 Q I see. Now, when you say he was in the living room, is
6 that downstairs or upstairs?

7 A Upstairs.

8 Q And the bedroom that Missy went to sleep in, is that
9 downstairs or upstairs?

10 A Upstairs.

11 Q And this thing that you've told us about, did that
12 happen upstairs or downstairs?

13 A Upstairs in...

14 Q Now, who was with you when you went to Walmart that
15 day?

16 A My mom and I think my little brother, too.

17 Q Okay. Now, did -- just a minute.

18 If I -- and you tell me if I'm wrong, okay? Are you
19 saying that Jason touched you with a toothbrush or his hands
20 or both?

21 A A toothbrush.

22 Q Just the toothbrush. Okay.

23 Do you remember telling anyone that Jason has shaved
24 your legs?

25 A No.

A.F. [REDACTED] -CROSS BY MR. MORIN)

1 Q You don't remember that. Okay.

2 Now you had stayed over Jason's and Missy's before?

3 A Yes.

4 Q And when you stayed over there before, where did you
5 sleep?

6 A With Missy.

7 Q With Missy. Okay. Do you remember what -- do you
8 remember if your mom asked you if he had -- you tell me --
9 did she ask you if he put the toothbrush in the hole where
10 you pee? Do you remember her asking you that?

11 A No.

12 Q You don't remember? Okay.

13 Now, you say that you don't remember going to the
14 hospital, right?

15 A Yes.

16 Q But you do remember -- and maybe you remember her name.
17 Her name was Tracy. Do you remember talking to Tracy?

18 A Yes.

19 Q Well, let me ask you this: You told your mom at
20 Walmart, right?

21 A Yes.

22 Q And who else did you tell -- and if you -- if anybody?

23 A We what?

24 Q Who else did you tell?

25 Well, let me ask you this: Mr. Kendall -- you told

(A.F. ██████████) -CROSS BY MR. MORIN)

- 1 Mr. Kendall what happened, right?
- 2 A (Nodded head up and down.)
- 3 Q And when you did, your mom was present, wasn't she?
- 4 A What?
- 5 Q Your mom was there when you told Mr. Kendall?
- 6 A Yes.
- 7 Q And you told your dad about it, right?
- 8 A Uh-huh.
- 9 Q Yes. And did you tell Ms. Leskanic? This nice lady
- 10 right here; did you tell her?
- 11 A Yes.
- 12 Q All right. Now, you kind of had to talk about this a
- 13 lot, haven't you?
- 14 A Yeah.
- 15 Q A lot of people have been asking you questions about
- 16 it, haven't they?
- 17 A Yes.
- 18 Q A.F. ██████████, have you ever seen your mom shave her legs?
- 19 A Yes.
- 20 Q And the thing that she uses to shave her legs, does it
- 21 make a noise?
- 22 A No.
- 23 Q And how about Missy? Have you ever seen Missy shave
- 24 her legs?
- 25 A No.

(A.F. [REDACTED] RE-DIRECT BY MR. KENDALL)

1 Q And have you ever seen Missy put lotion on?

2 A No.

3 Q Has Missy ever put lotion on you?

4 A No.

5 Q And how about your brothers and sisters? You ever see
6 your mom put lotion on any of your brothers or sisters?

7 A No.

8 Q No. Okay.

9 MR. MORIN: May I have just a moment, Your Honor. If
10 you'll hold on just a minute for me. Okay. That's all the
11 questions I have. Thank you.

12 MR. KENDALL: I'll be real brief, Your Honor.

13 THE COURT: Okay.

14 RE-DIRECT EXAMINATION

15 BY MR. KENDALL:

16 Q Just sitting there at the table is Ms. Leskanic.

17 When we met in the past, was there another woman that
18 was there with me sometimes?

19 A Yes.

20 Q All right. Take a look.

21 MR. KENDALL: Ms. Leskanic, if you would stand up a
22 minute.

23 Q Is this the same one?

24 A Yes.

25 Q Are you sure?

(A.F. [REDACTED] RE-DIRECT BY MR. KENDALL)

1 A Yes.

2 Q If you don't -- well, think about it hard.

3 A Yes.

4 Q I don't think you ever met Ms. Leskanic before, A.F. .

5 Do you remember there being another woman that would
6 come with me that had dark hair?

7 A Yes.

8 MR. KENDALL: Don't want to mislead the jury. Okay.

9 Q All right. Now, Mr. Morin asked you when this took
10 place.

11 Did you tell your mom about it? How long after this
12 happened did you tell your mom about it? Was it weeks
13 later? Was it the next day? Was it...

14 A I think it was -- I think it was the next day.

15 Q And so that's how you know the dates, the next day from
16 what it happened? Is that ---

17 A Yeah.

18 Q A.F. , did anybody tell you what to say or try to tell
19 you what you had to say or what was the right answer or
20 wrong answer?

21 A No.

22 MR. KENDALL: Nothing further, Your Honor.

23 MR. MORIN: I have no further questions.

24 THE COURT: All right. You can step down. Thank you.

25 (The witness left the stand.)

(TRICIA AUSTIN-DIRECT MR. KENDALL)

1 Just a little bit less than an hour. Why don't we take
2 a restroom break so you can get ready for your next witness.
3 All right. So go back to use the restroom. Be back in
4 about ten minutes.

5 (The jury exited the courtroom at 2:37 p.m.)

6 THE COURT: Who is your next witness going to be?

7 MR. KENDALL: It's going to be the
8 Children's Advocacy Center forensic interview, Your Honor.

9 THE COURT: Okay.

10 MR. KENDALL: Tricia Austin.

11 THE COURT: All right. Do you have the witness ready?

12 MR. KENDALL: Yes, sir, Your Honor.

13 THE COURT: Let the record reflect the defendant's in
14 the courtroom, plus the clerk of court.

15 (The jury entered the courtroom at 2:49 p.m.)

16 THE COURT: Okay. Folks, we will resume.

17 The State, call your next witness.

18 MR. KENDALL: Your Honor, at this time, the State will
19 call Tricia Austin.

20 TRICIA AUSTIN, upon first being duly sworn,
21 testified as follows:

22 DIRECT EXAMINATION

23 BY MR. KENDALL:

24 Q Would you please state your name for the record.

25 A Yes. My name is Tricia Austin.

(TRICIA AUSTIN-DIRECT MR. KENDALL)

1 Q And Ms. Austin -- were you -- not Tracy?

2 A No, not Tracy.

3 Q And, Ms. Austin, where are you currently employed?

4 A I conduct forensic evaluations for the
5 Children's Advocacy Center in Spartanburg, South Carolina.

6 Q Okay. And, without going into the details of this
7 case, what, generally speaking, is a forensic interview?

8 A A forensic interview is an objective and a
9 child-friendly way of understanding about a child's
10 experiences, particularly experiences that are under
11 investigation at the time. This is done in a way that's
12 done at a good pace for the child and that adapts to the
13 child's developmental levels and abilities to communicate.

14 Q And did you conduct a forensic interview of
15 A.F. [REDACTED]?

16 A Yes, I did.

17 Q And do you recall what day that was?

18 A That was January the 18th of 2017.

19 Q And how was she referred to you?

20 A She was referred from the Cherokee County Sheriff's
21 Office.

22 Q And do you recall how old she was at the time?

23 A She was four at the time.

24 Q And was this video audio -- or video-recorded?

25 A Yes. All of our interviews are both audio and

(TRICIA AUSTIN-DIRECT MR. KENDALL)

1 video-recorded.

2 (State's Exhibit 1 was marked for identification.)

3 Q I'm going to show you what is marked as

4 State's Exhibit 1.

5 I believe we have it preloaded. This is just the case.

6 Myself and Mr. Morin have loaded it in there. But have you

7 had the opportunity to view it before I put it in there?

8 A Yes, I did.

9 Q Was that a fair and accurate representation of those
10 interviews?

11 A Yes, it was.

12 MR. KENDALL: Your Honor, we would offer
13 State's Exhibit 1 into evidence and request permission to
14 publish at this time.

15 MR. MORIN: No objection.

16 THE COURT: All right. It's admitted in. You may
17 publish.

18 (State's Exhibit 1 was played for the Court and jury.)

19 MR. KENDALL: Your Honor, something is going on with
20 the computer. If we could just have a couple minutes.

21 THE COURT: Okay. Let me send you back to the jury
22 room while we try to work out those audio/visual problems.
23 And don't enter deliberations or discussions about the case.

24 (The jury exited the courtroom at 3:08 p.m.)

25 (The jury entered the courtroom at 3:18 p.m.)

(DANA FORTNER-DIRECT BY MR. KENDALL)

1 THE COURT: All right. Do you have it ready yet?

2 MR. KENDALL: Yes, sir, Your Honor.

3 THE COURT: Okay.

4 MR. KENDALL: I think we've got it.

5 (State's Exhibit 1 was played for the Court and jury.)

6 MR. KENDALL: I believe we placed State's Exhibit 1
7 into evidence. If it's not, we request it be placed in
8 there.

9 No further questions, Your Honor.

10 THE COURT: Any cross?

11 MR. MORIN: I have no questions of this witness.

12 THE COURT: All right. You may stop down.

13 (The witness left the stand.)

14 May I have the lawyers up here for a second.

15 (A bench conference was held off the record in the
16 presence of the jury but out of the hearing of the jury.)

17 MR. KENDALL: At this time the State will call
18 Dana Fortner.

19 DANA LINDSEY FORTNER, upon first being duly sworn,
20 testified as follows:

21 DIRECT EXAMINATION

22 BY MR. KENDALL:

23 Q Hi. Could you please state your full name for the
24 record.

25 A It's Dana Lindsey Fortner.

(DANA FORTNER-DIRECT BY MR. KENDALL)

- 1 Q Ms. Fortner, where are you currently employed?
- 2 A I work a Valley Falls Terrace.
- 3 Q And, Ms. Fortner, what is your relationship to A.F.?
- 4 A A.F. is my daughter.
- 5 Q Okay. When was she born?
- 6 A Where was she born?
- 7 Q When.
- 8 A When? Oh, [REDACTED], 2012.
- 9 Q And do you know Jason and Missy?
- 10 A Yes.
- 11 Q How do you know them?
- 12 A Missy is my husband's cousin and Jason is her husband.
- 13 Q And you do see him in the courtroom today?
- 14 A Yes.
- 15 Q And is he the gentleman wearing the white and gray
- 16 stripped shirt?
- 17 A Yes.
- 18 Q Does your family have any biological relationship to
- 19 Jason and ---
- 20 A No.
- 21 Q Okay. Prior to this all taking place, what was y'all's
- 22 relationship with them?
- 23 A They would come to the house and see us and hang out
- 24 with the kids and hang out with us. We'd go out to dinner,
- 25 to like the Mexican place down the street -- I mean, kind of

(DANA FORTNER-DIRECT BY MR. KENDALL)

1 the same with a lot of his family.

2 Q How would you characterize it, just overall?

3 A Friendly. I mean...

4 Q Okay. So friendly family relationship?

5 A Yeah.

6 Q Was there anything that happened over the course around
7 this time that changed that, outside of this?

8 A No.

9 Q Any, you know, falling out amongst family? Any
10 divorces that are ---

11 A No.

12 Q --- causing problems? So anything just between the
13 group that caused to everybody to have some sort of falling
14 out at all?

15 A No, not at all. No.

16 Q No, like, great aunt that died and left a million
17 dollars so somebody in the family was squabbling over it?
18 Something like that?

19 A No, nothing.

20 Q And on this night of January 8th -- it was the 8th; is
21 that ---

22 A Yes.

23 Q -- that correct? What was going on? Where were they
24 staying?

25 A Well, it had snowed, and we had been in the house for a

(DANA FORTNER-DIRECT BY MR. KENDALL)

1 few days and Missy volunteered to take **A.F.** with her
2 because **A.F.** was getting kind of stir crazy being in the
3 house, so she stayed at their house for the night.

4 Q And had you been to their house before?

5 A Had she been?

6 Q Had you been?

7 A Yes.

8 Q Do you know where it's located?

9 A It's on -- well, that was Quarter Round Road in
10 Cherokee County.

11 Q And so it's located in what county and state?

12 A Cherokee County, South Carolina.

13 Q And could you sort of describe the residence? Are they
14 the only ones that live there, or what's the ---

15 A No. I think his parents lived downstairs, and they
16 lived in an upstairs apartment, like above the garage. We
17 never went to his parents' house; only to theirs.

18 Q So it's all one house? There's ---

19 A Yes. They both ---

20 Q His family lives upstairs and downstairs, but ---

21 A Yes.

22 Q --- Jason kind of had a separate apartment upstairs?

23 A Yes.

24 Q Is that fair to characterize it? Okay. And who lived
25 up there with him?

(DANA FORTNER-DIRECT BY MR. KENDALL)

1 A Missy.

2 Q Do they at that time have any other children?

3 A No. Not anybody lived in there, just them.

4 Q And had they stayed over there before?

5 A **A.F.** had not spent the night. She'd been over there
6 before, but she had not spent the night. My other kids had.
7 At one point both of them had -- my older ones.

8 Q Okay. All right. And so they went over there on the
9 8th. I'm assuming they came back, then, how many days
10 later?

11 A It was the next day.

12 Q And who brought them home?

13 A Well, it was just her, and Jason brought her home.

14 Q And so you say "it was just her." And you're referring
15 to **A.F.**?

16 A Yes. It was just -- it was only her that spent the
17 night with them.

18 Q All right. And what happened when he brought **A.F.**
19 home?

20 A Well, it was strange for him to be bringing her home,
21 because usually it was Missy. That was kind of our
22 understanding, you know, but I just always wanted to know
23 when she was not with them, that, you know, Missy was with
24 her just because she's family, and I just, you know...

25 So he was just -- it was strange that he brought her

(DANA FORTNER-DIRECT BY MR. KENDALL)

1 home. And then he came and wanted to take her back to the
2 laundry room. And she was only gone one night. My daughter
3 packed -- my oldest daughter packed her bag, packed up all
4 her clothes. She just always over-packs. He said
5 everything was dirty and he give me two pair of pants and
6 insisted on taking it to the laundry room, which was fine,
7 and he took that. And then he came in the living room --
8 out from the laundry, went into the living room, kind of
9 stood against the TV stand, and was just -- started talking
10 about what if something happened to him and his health isn't
11 good and he needed to go to Charleston and see his doctor,
12 if something happened to him, then what would happen to
13 Missy and she couldn't pay the bills. And he got really
14 emotional and started crying, which was strange, but ---
15 Q Did you do anything to elicit this?

16 A No. It was just strange. You know, I was feeding the
17 baby during -- at the time. My 3-year-old was, what?
18 One -- or not even one. And so I was feeding him. I just
19 thought it was weird. I mean, I listened to him. You know,
20 any time -- I just listen. I just thought it was weird.

21 Q Okay. So this wasn't something you elicited? You
22 weren't, you know ---

23 A No, no, no.

24 Q --- asking about this? He just sort of came back,
25 wanting to drop the clothes off, and then started kind of

(DANA FORTNER-DIRECT BY MR. KENDALL)

1 breaking down, crying?

2 A Yeah. Just started talking about what if something
3 happened to him and how would -- you know. And I was just
4 like, well, I guess you need to try to get in touch with
5 your doctor, and just trying to reassure him, you know. But
6 he was just emotional.

7 Q Did he indicate at all what they'd done the night
8 before?

9 A He said she stayed up late and he stayed up with her.

10 Q Did he allude to any behavioral problems or anything
11 like that?

12 A No. Just that she wouldn't go to sleep.

13 Q Okay. And he said they stayed up and he stayed up with
14 her?

15 A Yeah. He said that.

16 Q While this was going on, was Missy employed?

17 A Yes.

18 Q And do you have any idea if she worked the next day?

19 A She was at work. That's why he brought her home is
20 what he said.

21 Q Okay.

22 A Yes. Because that's what I asked. Because normally
23 Missy drove and not him, so I just wondered why.

24 Q And so what happened after **A.F.** came home? Where did
25 you all go?

(DANA FORTNER-DIRECT BY MR. KENDALL)

1 A We had been in the house for a few days. I'm not
2 comfortable driving in the snow or ice. So the roads were
3 finally clearing up, and I took the kids to Wade's to eat.
4 Because we just needed to get out of the house. So the four
5 kids and I went to Wade's, and then we went to Walmart. And
6 I don't remember what we went there for, but we went to get
7 some stuff. And then we went to the bathroom. I had to go,
8 and she went in a separate stall.

9 Q Okay. And without going into ---

10 A Yes.

11 Q --- what happened, did she tell you that something had
12 occurred of a sexual nature?

13 A Yes.

14 Q Did she tell you when and where that took place?

15 A Yes.

16 Q And where and when did that take place?

17 A At Missy and Jason's house the night before.

18 Q And this was on January 9th, when she told you this?

19 A Yes.

20 Q Okay. Following that, what did you all do?

21 A What did we -- what did I do?

22 Q Yeah.

23 A Well, she had knocked on the stall and asked to come
24 in, and then that's when she told me ---

25 Q And after that, did you all call the police or anything

(DANA FORTNER-DIRECT BY MR. KENDALL)

1 like that?

2 A Well, we were -- I called my husband and I called Missy
3 and had her meet me and my husband at the house. And then I
4 called the police once we got there. And I didn't -- I
5 mean, there's not -- nobody tells you what to do. So I
6 didn't really know. So I went outside in the snow. I
7 remember the snow and my feet. And I called the police.

8 Q So Missy was aware that this happened ---

9 A Yeah.

10 Q --- the next day?

11 A Because I was just trying to clarify what was going on,
12 you know.

13 Q Okay. And once you called the police, what did they
14 tell you to do?

15 A They told me to have her go home. The police officer
16 told me to have her go home, you know, not to -- no more
17 contact with her, since she was his wife. And then to take
18 **A.F.** to the hospital.

19 Q And did you take her to the hospital?

20 A I did. I took her to Spartanburg Regional.

21 Q And what happened at Spartanburg Regional?

22 A They did a rape kit.

23 Q And subsequent to this, did you take her anywhere? The
24 Children's Advocacy Center?

25 A Before?

(DANA FORTNER-DIRECT BY MR. KENDALL)

1 Q No, no. After.

2 A After. I took her to the Children's Advocacy Center, I
3 think, the next week.

4 Q And you've been with your daughter through our meetings
5 and things like that? Is that fair to say?

6 A Yes, yes.

7 Q And just to clarify something, Ms. Leskanic wasn't
8 there; is that ---

9 A No, no.

10 Q She works in our office. We have a small office.
11 She's been around, but she didn't actually sit through any
12 of the meetings?

13 A No, no.

14 Q I'm going to show you some other things that will kind
15 of come up later.

16 A Okay.

17 MR. KENDALL: Could you mark these as
18 State's Exhibits 2, 3, and 4.

19 (State's Exhibit 2, 3, and 4 were marked for
20 identification.)

21 Q I'm going to show you what is marked as
22 State's Exhibit 2. Do you recognize these?

23 A Yes.

24 Q And what are these?

25 A Those are A.F.'s panties.

(DANA FORTNER-DIRECT BY MR. KENDALL)

1 Q Okay.

2 A They have the shiny liner. We had two pair like that.

3 Q A shiny liner?

4 A Yeah, yeah. But different from any I've ever seen.

5 Q And State's Exhibit 3. You recognize that?

6 A Yes. Those also are hers.

7 Q And State's Exhibit 4.

8 A Yes. Those are hers -- her panties.

9 MR. KENDALL: Your Honor, we would offer
10 State's Exhibits 2 through 4 into evidence at this time.

11 MR. MORIN: No objection.

12 THE COURT: They're admitted.

13 MR. KENDALL: And we will publish those at the
14 appropriate time.

15 Q When you went over to Jason's -- you'd been to Jason's
16 in the past, correct?

17 A Yes.

18 Q Would he have anything, I'll say, out of the ordinary
19 there, as far as security-type stuff?

20 A He had a security system because he said that you could
21 login and see. You know, he would show us things on his.
22 phone all the time and said you could login and see what's
23 going on at his house.

24 Q So is there cameras or is there a surveyla- ---

25 A Yeah, cameras. And login and see who's pulling in the

(DANA FORTNER-CROSS BY MR. MORIN)

1 driveway and all that stuff.

2 Q All right. Were they outside or inside as well?

3 A Both; outside and inside.

4 MR. KENDALL: Please answer any questions that
5 Mr. Morin has.

6 CROSS-EXAMINATION

7 BY MR. MORIN:

8 Q Ma'am, did I understand that this is the first time
9 that **A.F.** spent the night there?

10 A Yes, it's the first time.

11 Q And you said some of your other children have spent the
12 night there?

13 A Yes. From what I remember **M.F.** once and **L.F.** once.

14 Q How old was **M.F.** then?

15 A Well, she's 14 now, so she would have been 11.

16 Q Okay. And she's the one that packed the bag; is that
17 correct?

18 A Yes. She's my organizer.

19 Q Now, the bag that he came and, you say, he took into
20 the laundry room, did you ever wash those clothes?

21 A No. They were still in the bag, in the laundry room.
22 I didn't -- our laundry room is small. Stuff gets thrown in
23 there. And I just -- he set it in there, and I left it. I
24 didn't mess with it.

25 Q And did you do anything else with it?

(DANA FORTNER-CROSS BY MR. MORIN)

1 A No.

2 Q Did you ever take it to law enforcement?

3 A When I -- I did. I did, eventually.

4 Q Okay.

5 A I talked to them and they took it, because -- when I
6 realized it was still there. But the clothes that she had
7 on ---

8 Q Right.

9 A --- those went to the hospital.

10 Q Yeah. That was -- I understand.

11 A But that -- I just called them and said I have this
12 bag. I didn't realize it was still there, and I did. They
13 met me, and they took it.

14 Q Now, when you were at Walmart and she told you this,
15 what was her demeanor?

16 A Oh, she -- at first, she was just -- I was asking, you,
17 know, I've missed you and tell me what you've done and
18 what's this -- she had stuff on her -- red stuff on her
19 fingers, and I was asking what that was. And then when she
20 said about what happened, you know, I kind of had looked
21 down on my shoes. And that's one of those moments where
22 your feet hit the floor. And I looked up, and I said, "What
23 did you say?" And, you know, she has a really strong
24 personality, and she backed into the corner and did this --
25 and it was like "Nothing. It's okay mama. It's nothing."

(DANA FORTNER-CROSS BY MR. MORIN)

1 You know, and then I tried to stimulate her to tell me and
2 when she told me again -- but she was afraid that I guess I
3 was mad at her and ---

4 Q Right.

5 A --- she was going to be in trouble.

6 Q Well, do you remember telling the police that she was
7 just hopping and skipping along and you were trying to keep
8 her from becoming upset?

9 A When?

10 Q When you wrote the statement that you gave to law
11 enforcement.

12 A I read the statement. I know what I gave.

13 Q Right.

14 A Spent four hours writing it.

15 Q Yeah. It's long. But do you remember writing that her
16 attitude was ---

17 A She was fine when we came out of the stall.

18 Q Sure.

19 A She was hopping and her normal self.

20 Q Okay.

21 A But when I asked her a second time and she saw my face
22 change, it scared her.

23 Q I see. And ---

24 A Because she said that -- she was told she'd be in
25 trouble if she told, so...

(DANA FORTNER-CROSS BY MR. MORIN)

1 Q Right. And then -- correct me if I'm wrong -- but then
2 there was another conversation at your house with your
3 husband present and Missy present ---

4 A Yes.

5 Q --- and it was brought up again.

6 A Yes.

7 Q And, again, we just basically see the same child -- I
8 think we saw in the video, where she's kind of -- she's 4
9 and ---

10 A And she was a little more focused. I mean, even in the
11 bathroom, she was a little more focused. But she was just
12 trying to explain to us what happened.

13 Q All right.

14 A You know, and then we just told her to go back to her
15 room. We won't talk about it anymore.

16 Q Now, two things: I asked her if she had told anybody
17 about shaving her legs. Did she tell you that he had shaved
18 her legs?

19 A Yes.

20 Q Okay. And I asked her if she had told you or if you
21 had asked her if anybody put her -- put anything in -- or if
22 he put anything in -- and you used the word "pee pee hole."

23 A Just in her private area.

24 Q Right. Private area. And she denied that, didn't she?
25 You did ask?

(DANA FORTNER-CROSS BY MR. MORIN)

1 A I did ask her.

2 Q And she denied it?

3 A And she didn't know, yeah. She didn't. I mean, she
4 didn't really understand what I'm asking. You know, I just
5 tried to -- because at first, when she first started telling
6 me, she was trying to show me, you know.

7 Q Okay.

8 A Yeah.

9 Q Now, this was -- it was snowing around this time?

10 A It had been snowing. It was icy. It wasn't as much
11 snow as it was ice. Because I wouldn't let them go outside
12 and play. That's why they were frustrated.

13 Q Okay. And A.F. came home on the 9th, and then it was
14 a few days after that that this happened. I don't know. I
15 didn't hear that correct.

16 A No. It happened the same day.

17 Q Same day. Okay.

18 A She told me within three hours.

19 Q All right. So I was trying to follow the snow ---

20 A No.

21 Q --- and that. Okay.

22 A And she told me -- because it -- I don't drive on ice,
23 and the weather had finally cleared up. And I -- but I felt
24 safe enough to take them, get them out of the house, took
25 them to Wade's. We ate, then we went to Walmart because we

(DANA FORTNER-RE-DIRECT BY MR. KENDALL)

1 needed stuff. We'd been in the house a few days.

2 Q All right. Now Jason's health is not good, is it?

3 A It's not great, no. But he -- he's also worked in my
4 yard all day long on cars.

5 Q I understand. But he did have some health issues?

6 A Uh-huh.

7 Q And he did have to go to see doctors about that?

8 A Yeah.

9 MR. MORIN: That's all the questions I have of this
10 witness, Your Honor.

11 THE COURT: Re-direct?

12 MR. KENDALL: I actually need to go approach on
13 something real fast, Your Honor.

14 MR. MORIN: May we approach, Your Honor.

15 THE COURT: Yes.

16 (A bench conference was held off the record in the
17 presence of the jury but out of the hearing of the jury.)

18 RE-DIRECT EXAMINATION

19 BY MR. KENDALL:

20 Q Ms. Fortner, I'll be very brief. I just wanted to
21 clear something up, because it was a bit confusing.

22 In your conversation with A.F. about what had
23 happened, did she indicate if anybody had had -- what was
24 the nature of the inappropriate touching that she told you?

25 A It was the front of our nu-nu and the back of her

(DANA FORTNER-RE-DIRECT BY MR. KENDALL)

1 nu-nu.

2 Q Okay.

3 A He showed her the front and the back.

4 Q So you did indicate that somebody did touch the front
5 and the back ---

6 A Yeah.

7 Q --- of her nu-nu; is that correct?

8 A And he told her this is your front; this is your back.

9 Q All right. So she didn't -- did she deny that there
10 was any touching?

11 A No. She said he touched her in her nu-nu.

12 MR. MORIN: Okay. Nothing further.

13 THE COURT: Re-cross?

14 MR. MORIN: No, sir.

15 (The witness left the stand.)

16 THE COURT: All right. Okay. Folks, I think this is
17 where we will break for the afternoon. So I'm sending you
18 home. Don't forget no deliberations or discussions with
19 anybody, including other members of the jury panel.

20 If you go home, when you talk to people, first thing
21 they will ask is did you get picked, if you haven't already
22 talked to them. If they asked if you got picked, you can
23 say "Yes, I did. It's a criminal sexual conduct case, and
24 that's all the judge said that I was allowed to talk to you
25 about." Again, as soon as you start saying anything, people

1 are going to want to know more. And then they are going to
2 give you their comments on it. And, again, it's completely
3 inappropriate. It's not fair to the parties. They're
4 entitled to a fair trial. And it's based on what you hear
5 in here. So don't talk to anybody about the case. Don't
6 post anything on social media. And if anybody does approach
7 you about the case, please report that first thing in the
8 morning.

9 Which we will start back up at 9:30 a.m. So if you
10 could be back in here a little bit before 9:30, we should be
11 able to get started and hopefully get all the rest of the
12 evidence in tomorrow. Okay? See you tomorrow.

13 (The jury exited the courtroom at 4:00 p.m.)

14 THE COURT: Okay. The clerk's got a copy of some
15 proposed jury instructions. I'll have my law clerk draw up
16 an email in the afternoon for you to take. Some of them may
17 or may not apply, depending on what comes in. Take them
18 home, look at them, and if there's something that you want
19 to add, bring that with you tomorrow morning. And if y'all
20 want to meet back at 9:15 a.m. in the morning, we'll handle
21 anything that comes up.

22 Otherwise, madame clerk, we'll be sure to be here at
23 9:30 a.m.

24 MR. KENDALL: Thank you, Judge. Can I just say every
25 time we do these trials that they always say that we don't

1 know what you guys said at the bench. I could just very
2 briefly kind of explain it for the record.

3 THE COURT: Oh, absolutely. I'm sorry.

4 MR. KENDALL: We had a brief conversation at the bench
5 regarding the testimony of what she said **A.F.** told her
6 about what Jason said. I approached because I was concerned
7 because of, quite frankly, case law and bolstering and stuff
8 like that. We had a conversation. There was kind of some
9 question about how -- what she said, and we kind of all
10 agreed it would be okay on a very limited scope to address
11 that. And that's what we did. I just wanted to complete
12 the record, because they -- as I said, they always get on us
13 about that.

14 THE COURT: Anything you wanted to add to that?

15 MR. KENDALL: No, sir.

16 (On Wednesday, January 8, 2020, at 4:02 p.m., court was
17 recessed until Thursday, January 9, 2020, at 9:30 a.m., and
18 after such recess, the following proceedings were had before
19 the Court and jury:)

20 THE COURT: We will bring the jury in.

21 (The jury enters the courtroom at 9:35 a.m.)

22 THE COURT: All right. Folks, welcome back. Juror
23 Zachary Whisonant -- I'm not sure how to pronounce that --
24 anyway, called in with food poisoning, so he will not be
25 returning. And so that makes Mr. Tate -- which of you is

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 Mr. Tate? Okay. You are now a regular juror. You are no
2 longer the alternate. Okay?

3 All right. We are going to proceed now with the State
4 calling the next witness.

5 MR. KENDALL: Your Honor, at this time the State would
6 call Jacob Mullinax.

7 JACOB MULLINAX, after being duly sworn, testified as
8 follows:

9 DIRECT EXAMINATION

10 BY MR. KENDALL:

11 Q Mr. Mullinax, could you please state your name for the
12 record.

13 A Yes, sir. It's Jacob Mullinax.

14 Q Mr. Mullinax, and where are you currently employed?

15 A I'm currently employed with the Cherokee County
16 Sheriff's Office.

17 Q And how long have you worked there?

18 A I've been at the sheriff's office about four and half
19 years.

20 Q And what are your responsibilities at the sheriff's
21 office?

22 A I am a crime scene investigator.

23 Q And what do you do as a crime scene investigator?

24 A We respond out to scenes and collect evidence and
25 process scenes for any evidence that may need to be

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 collected.

2 Q And did you do a search warrant on the residence of
3 Jason Simmons on, I believe, January 20th, 2017?

4 A Yes, sir, I did.

5 Q And who was with you when you executed this search
6 warrant?

7 A At the time of this search warrant,
8 Detective Billy Anthony was with me, as well as
9 Detective Richard Burgess, and Captain Daniel Ward.

10 Q Okay. I'm going to show you ---

11 MR. KENDALL: I need these marked. I'm sorry.

12 (State's Exhibits 5 through 10 were marked for
13 identification.)

14 Q --- State's Exhibits 5, 6, 7, 8, 9, and 10. If you
15 could take a look through these and let me know if you
16 recognize these.

17 A Yes, sir. These are pictures obtained during the
18 execution of a search warrant.

19 Q And how do you recognize those?

20 A As far as?

21 Q How do you recognize them?

22 A Oh, I obtained those photographs.

23 Q Okay. Are those a fair and accurate representation of
24 Mr. Simmons' home on or about January 20th, 2017?

25 A Yes, sir.

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 MR. KENDALL: Your Honor, we would offer
2 State's Exhibits.

3 MR. MORIN: Thank you. Have a moment to see them,
4 Your Honor. No objection.

5 THE COURT: Admitted.

6 MR. KENDALL: At this time we would request permission
7 to publish, Your Honor.

8 THE COURT: You may.

9 Q All right. Detective Mullinax, what is this?

10 A This is the exterior of the residence, leading up to
11 the living area that was identified as belonging to
12 Mr. Simmons.

13 Q And what is this, if you can sort of explain it to the
14 jury? If you can just step down.

15 (The witness left the stand and went to the screen.)

16 A Yes, sir, if you don't mind.

17 That is one of the interior rooms of the residence.

18 Q Okay. And this is State's Exhibit 6.

19 And if you could identify State's Exhibit 7.

20 A Yes, sir. That is another interior room of the
21 residence; the living room area.

22 Q All right. And off of that -- can you identify where
23 the bedroom would be off of that?

24 A Yes, sir. If you're looking at the picture where the
25 television is, the bedroom, it's that doorway that's

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 directly behind it.

2 Q And are there any other doorways in this room?

3 A In this particular photograph, where the couch is, you
4 see the -- there's a coatrack, back -- at the back -- the
5 right corner of the room. There is a small doorway that
6 leads into an attic-type area there.

7 Q Okay. And then State's Exhibit 8.

8 A That is just a different view of the living room area.

9 Q All right. And State's Exhibit 9.

10 A That appears to be a picture of the -- in kitchen area,
11 leading into the bathroom, which leads into a bedroom.

12 Q Okay. If you would have a seat.

13 (The witness returned to the stand.)

14 A Yes, sir.

15 (State's Exhibits 11 through 14 were marked for
16 identification.)

17 Q Now I'm going to show you State's
18 Exhibits 10 through 14. If you would take a look at these.

19 Do you recognize those?

20 A Yes. These are photographs that I obtained inside the
21 residence.

22 Q All right. Is that a fair and accurate representation
23 of what you obtained inside the residence?

24 A Yes, sir.

25 MR. KENDALL: All right. We would offer

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 Exhibits 10, 11, 12, 13, and 14 into evidence at this time.

2 THE COURT: Without objection and admitted.

3 MR. KENDALL: And request permission to publish these
4 to the jury.

5 THE COURT: You may.

6 Q Could you please explain to the jury what this is.

7 A Yes, sir. That is the doorway that was previously
8 viewed in the picture of the interior of the living room of
9 the residence, the small doorway that leads into the attic
10 area.

11 Q All right. And on State's Exhibit 11, what is this?

12 A Do you mind if I step down, sir?

13 Q No, not at all, if it's all right with the Court.

14 (The witness left the stand and went to the screen.)

15 A Sir, that is inside of the attic area. You see the
16 insulation there.

17 Q And what is this back here? Are you able to tell?

18 A Yes, sir. That was observed to be a pair of -- a small
19 pair of underwear.

20 Q And State's Exhibit 12.

21 A Again, inside of that same area, a pair of what's
22 identified as children's underwear.

23 Q All right. Was it just one pair or are there multiple
24 pairs?

25 A There were multiple pairs found in there, sir.

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 Q Okay. And State's Exhibit 13.

2 A And more pictures of the underwear that was found
3 inside the attic area.

4 Q And then, subsequently, State's Exhibit 14.

5 A These were the underwear after they were recovered from
6 inside of the attic area; that were brought out to be
7 photographed; that showed what was located in there.

8 Q Could you go ahead and have a seat.

9 (The witness returned to the stand.)

10 I am now going to show you what have previously been
11 marked States Exhibit's 2, 3, and 4, that had been
12 previously submitted into evidence.

13 A Yes, sir.

14 Q You need a glove. Could you please take a look at
15 those. And what were those?

16 A Those were the underwear that were collected from
17 inside the attic area of the residence.

18 Q And those were previously identified as **A.F.**'s; is
19 that correct in Court yesterday?

20 A Yes, sir. That's correct.

21 Q At this time would you go ahead and show those to the
22 jury?

23 A Sure.

24 (The witness left the stand and went to the jury box.)

25 THE WITNESS: Your Honor?

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 THE COURT: You may.

2 (The exhibits were handed to the jury)

3 A This is one pair here. This is size 4T. This was the
4 second pair. Those were Faded Glory, size 6. And these
5 were Berry size 4T.

6 Q So to be clear: The underwear that was found in the
7 attic, are those the ones that were photographed today?

8 A Yes, sir.

9 Q Those are the same underwear as from the photograph
10 that were found in the attic?

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

12 Q And previously identified as A.F.'s?

13 A Yes, sir.

14 (State's Exhibits 15, 16 were marked for
15 identification.)

16 Q I'm going to show you what is marked
17 State's Exhibits -- at this time, I'm going to show what is
18 marked State's Exhibits 15 and 16.

19 Could you identify what those are?

20 A Yes, sir.

21 Q And what are those?

22 A The first photograph here is of a desk area where a --
23 the surveillance system was set up. And the second photo is
24 the interior of the box for the recorder.

25 MR. KENDALL: Your Honor, at this time we would offer

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 State's Exhibits of 15 and 16 into evidence?

2 MR. MORIN: No objection.

3 THE COURT: Admitted.

4 MR. KENDALL: And request permission to published.

5 THE COURT: You may.

6 Q So what is this?

7 A That is the area where the surveillance system was set
8 up in the living room area of the residence.

9 Q All right. And over the course of your search warrant,
10 were you able to find the hardware for that?

11 A Yes, sir. The box that was -- that everything was
12 running from? Yeah.

13 Q I'm going to show you what is marked
14 State's Exhibit 16.

15 A Yes, sir.

16 Q What is that?

17 A That is the interior of the box of the surveillance
18 system. The -- I guess it would be the control box.

19 Q All right. And was anything missing from the interior
20 of that control box?

21 A It appeared from the -- from being able to look at it
22 that there was something missing from the right side of it.
23 There was a cord that was not -- that did not appear to be a
24 hooked up, and that is usually where the hard drive is for
25 the system.

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 (State's Exhibits 17, 18 was marked for identification.)

2 Q All right. And I'm going to show you

3 State's Exhibit 17. If you would take a look at that.

4 A Yes, sir.

5 Q And what is that?

6 A This is the control box for the surveillance video
7 system.

8 Q And if you could step down and sort of show the jury
9 the interior of that. And where would the hard drive
10 typically go?

11 A It would typically go in this area.

12 Q And what does a hard drive do, just generally speaking?

13 A Just records the data. That's where they're recorded.

14 Q That's where things are stored. Is that fair to say?

15 A Yes, sir, that would be fair to say.

16 Q And on this model -- or on this date, that hard drive
17 was not there; is that accurate?

18 A That's correct, sir.

19 Q So you were not able to recover any of the recordings
20 off the hard drive of what took place; is that fair?

21 A Yes, sir, that would be fair to say.

22 Q Okay. All right. I am now going to show you
23 State's Exhibit 18.

24 Do you recognize this?

25 A Yes, sir. This was taken inside the residence.

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 Q And what is that?

2 A It's a photograph of a shelf. Inside the residence, it
3 has different things on a shelf, including a -- what appears
4 to be some type of a chocolate bunny.

5 MR. KENDALL: All right. We would offer
6 State's Exhibit 18 into evidence.

7 MR. MORIN: No objection.

8 THE COURT: Admitted.

9 Q Now, over the course of this search, was there anything
10 you were looking for specifically?

11 A As far as?

12 Q Any items had been mentioned that you all were curious
13 about?

14 A Yes. We were looking for any type of recording device
15 or any type of evidence of a sexual assault.

16 Q Okay. Had you heard word yet of the toothbrush -- the
17 allegation of the toothbrush?

18 A I had. In preparing for the search warrant, I had been
19 told that there was a possibility of a toothbrush, yes, sir.

20 Q Okay. And did you all look for that?

21 A Yes, sir, we did.

22 Q Were you able to locate an electric toothbrush anywhere
23 inside the residence?

24 A No, sir, we were not.

25 Q Was that an item you were specifically looking for?

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 A Yes, sir.

2 (State's Exhibits 19, 20, and 21 were marked for
3 identification.

4 Q Okay. I'm going to show you what is marked
5 items 19 through 21. And what are those?

6 A Those are photographs of the bathroom counter and the
7 drawers there in the residence.

8 Q And those are a fair and accurate representation of
9 what you found?

10 A Yes, sir.

11 MR. KENDALL: Your Honor, at this time we would offer
12 19, 20 and 21 into evidence.

13 MR. MORIN: No objection.

14 THE COURT: Admitted.

15 Q And what is this?

16 A That is the right side of the bathroom counter and the
17 sink.

18 Q And what is this?

19 A And that is just a drawer that was there as part of the
20 vanity in the bathroom.

21 Q And what is this?

22 A That would be the other side of the countertop there
23 for the sink.

24 Q And what is that thing up in the -- where the
25 toothbrushes are stacked? Is that an electric toothbrush?

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 A It appears to be some type of flosser or something in
2 that -- I'm not real familiar ---

3 Q A WaterPik?

4 A Yeah. Yes, sir. Some -- I'm not really familiar with
5 it, but that is what it appears to be, yes, sir.

6 Q So nowhere in the home did you all collect an electric
7 toothbrush. Is that fair to say?

8 A That's fair to say, yes, sir. That's correct.

9 (State's Exhibit 22, 23, 24 were marked for
10 identification.)

11 Q I'm going to show you what's been marked as
12 State's 22 through 24. And what are those?

13 A Those are photographs of different lotions and scented
14 items, hygiene items that were located in the bathroom of
15 the residence.

16 Q And are some of these strawberry in nature?

17 A Yes, sir.

18 MR. KENDALL: We would offer State's 22 through 24 into
19 evidence.

20 MR. MORIN: No objection.

21 THE COURT: Admitted.

22 Q And would you recall where this was taken?

23 A Yes, sir. That was taken in the bathroom, again, right
24 there at the sink area. There was a cabinet that was
25 elevated above the sink.

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 Q And what is that?

2 A That is some type of -- I can't tell from the
3 photograph -- body wash or lotion that was strawberry
4 scented.

5 Q And State's Exhibit 24?

6 A Is a spray that is strawberry scented.

7 Q So there were strawberry things in the house. Is that
8 fair to say?

9 A Yes, sir.

10 (State's Exhibit 25 was marked for identification.)

11 Q I'm also going to show you what is marked
12 State's Exhibit 25. Do you recognize this?

13 A Yes, sir. This is one of the flash drives that was
14 recovered from the residence?

15 Q Do you recall where it was recovered?

16 A If I could refer to my notes for just a second, sir.

17 That particular flash drive was located on the
18 entertainment center in the living room of the residence.

19 Q And I would offer State's Exhibit -- does this appear
20 to be the same flash drive?

21 A Yes, sir.

22 MR. KENDALL: We would offer State's Exhibit 25 into
23 evidence.

24 MR. MORIN: No objection.

25 THE COURT: Admitted.

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 Q And with the exception of this flash drive, did you all
2 discover any recordings, anything else from that video
3 system?

4 A No, sir, not that I'm aware of.

5 Q Okay. So the only thing he had was -- and this was not
6 in the video system; is that correct?

7 A That's correct, sir.

8 Q So this was burned separately, conceivably?

9 MR. MORIN: Objection calls for speculation.

10 MR. KENDALL: I'll reword, Your Honor.

11 Q This wasn't in any way attached to that system; is that
12 correct?

13 A No, sir, it was not attached.

14 Q This was something that was stored separately?

15 A Yes, sir.

16 Q And did this appear to be hooked up to the Internet in
17 any way or is it just a drive sort of sitting by itself or
18 sitting with other stuff?

19 A To the best of my recollection, it was just there on
20 the entertainment center, yes, sir.

21 Q And is this like an internet-capable thing, or is this
22 just a storage device?

23 A A storage device.

24 Q When you all found the camera system, like on the
25 camera system itself, that hard drive, were you able to

(JACOB MULLINAX-DIRECT BY MR. KENDALL)

1 extract any data whatsoever from that?

2 A From the box that was collected there?

3 Q Yeah. Did you know any way to do that?

4 A I did not, sir.

5 Q But no information could be or was extracted straight
6 from that, correct?

7 A To the best of my knowledge, no, sir, there was not.

8 Q What do you typically get the information off of when
9 you're doing these things?

10 A As far as the...

11 Q Well, where is the information typically stored?

12 A It would be stored on a hard drive.

13 Q And that was missing in this case?

14 A Yes, sir.

15 MR. KENDALL: And just -- I believe I've already
16 admitted them, but if not, we admit all State's 1 through 25
17 at this point. I believe they're all admitted.

18 THE COURT: I think everything was admitted.

19 MR. MORIN: I think so.

20 THE COURT: If not, it is.

21 Q When you -- since this happened, once you took all this
22 evidence into custody, what do you do with it?

23 A Once all the evidence is taken into custody, it's taken
24 to the Cherokee County Sheriff's Office and stored in the
25 evidence vault there at the sheriff's office.

(JACOB MULLINAX-CROSS BY MR. MORIN)

1 Q And who has access to that?

2 A Our evidence custodian is Billy Anthony.

3 Q Did you all collect any communications devices from
4 him?

5 A I believe -- if I can reference my notes for just a
6 second -- yes, sir. There was a Samsung smartphone that was
7 collected as part of the search warrant.

8 Q Were you ever able to get into that in any way?

9 A Not to my knowledge, sir. I would not be the one that
10 would do that.

11 MR. KENDALL: Please answer the questions Mr. Morin may
12 have.

13 CROSS-EXAMINATION

14 BY MR. MORIN:

15 Q Mr. Mullinax, I think you mentioned that once you took
16 all these things, you put them in the evidence and that was
17 the end of your involvement in this; is that correct?

18 A As far as the evidence?

19 Q Yes.

20 A Yes. Yes, sir.

21 Q This was the first time that you had been in this
22 house; is that correct?

23 A Yes, sir. That's correct.

24 Q And it was the first time that you saw this computer
25 equipment; is that correct?

(JACOB MULLINAX-CROSS BY MR. MORIN)

1 A Yes, sir. That would be correct.

2 Q So you don't know how long the computer equipment was
3 in that condition, do you?

4 A No, sir.

5 Q You didn't move anything when you took these pictures,
6 did you?

7 A I'm not sure which pictures you would be referring to,
8 sir.

9 Q Well, when you took the pictures inside the house that
10 we have seen -- 8. I mean, you tell me, how long have you
11 been doing evidence --

12 A I've been in crime scene for four years.

13 Q Four years. Okay.

14 A Yes.

15 Q Well, I'm just going to give you 6 -- 5, 6, 7, and 8.
16 Just if you will look at those.

17 A Yes, sir. Yes, sir.

18 Q Now, in your training and experience in doing crime
19 scene investigation, do you take pictures as you find them?
20 Or do you move things around and then take the picture?

21 A We take pictures as we find them. When I first went
22 into the residence, I took overalls of the entire residence
23 to get an accurate representation of the residence as I saw
24 it.

25 Q And then after you did that, did you manipulate or move

(JACOB MULLINAX-CROSS BY MR. MORIN)

1 anything and then take pictures?

2 A Yes, sir.

3 Q And what did you do?

4 A As far as?

5 Q What did you move?

6 A I would have to go back to my pictures to be able to...

7 Q I'm also giving you -- all right -- so let me -- so we
8 can have the record clear, 5, 6, 7, 8, 9. Excuse me for a
9 moment. The pictures, I want to get in the order that they
10 came. I've got 5, 6, 7, 8 and then 9, 18, 19, 20, 21, 22,
11 23, 24. I'll hand you the house. And if you'll just hold
12 on just a second because I'm not sure about these two. And
13 then 15 and 16 -- couldn't read the handwriting on there.

14 So if you will look and you tell me on each one of
15 them -- if you will look at each one. And the ones where
16 you've taken something after you've moved stuff, if you
17 could tell me what those are and which photographs you've
18 moved and then took another picture.

19 A Okay. Sir, from the photographs themselves, it appears
20 that these are. However, because they're not time stamped
21 on the photograph, I cannot say for sure whether these were
22 taken before or after.

23 Q But they may have been moved -- things may have been
24 moved and then the picture taken?

25 A Yes, sir. That's correct.

(JACOB MULLINAX-CROSS BY MR. MORIN)

1 Q Okay. And when you went out there, there was a search
2 warrant that said we're looking for some lotion bottles; is
3 that correct?

4 A I'm not sure exactly. I would have to look at the
5 search warrant again to be able to tell you exactly what
6 were on the search warrants.

7 Q Well, I don't want to step out of bounds.

8 Did you do the inventory of it or the search warrant,
9 or were you just there collecting as you went? Because it's
10 different --

11 A Well, I executed the search warrant, and then the
12 return was completed by me.

13 Q Okay. And do you have a copy of that in your file?

14 A I do not have one with me, sir.

15 MR. MORIN: For identification purposes. May I
16 approach?

17 THE COURT: Yes.

18 (Defendant's Exhibit 1 and 2 were marked for
19 identification only.)

20 Q I'm going to show you what's been marked for
21 identification as Defendant's 1 and 2 and ask if this
22 refreshes your memory about -- or if this document -- these
23 documents refresh your memory about serving the search
24 warrant, what were you looking for, and what you collected.

25 A Yes, sir.

(JACOB MULLINAX-CROSS BY MR. MORIN)

1 Q All right. And in the search that you executed, you
2 were looking for those bottles; is that correct?

3 A Yes, sir.

4 Q Did you collect those bottles?

5 A No, sir, we did not.

6 Q So the ones that you moved and took pictures of, can we
7 just talk about those for a moment.

8 A Sure.

9 MR. MORIN: I guess what I -- if the Court would permit
10 me -- I'd just have him come down and he can post it and
11 tell us what he's moved. Is that all right?

12 THE COURT: Tell us what?

13 MR. MORIN: Rather than me come over here, if he -- I
14 want him to publish and explain to the jury the things that
15 were moved and what he took pictures of.

16 THE COURT: Okay.

17 MR. MORIN: And I think that might be the most
18 efficient way.

19 THE COURT: All right.

20 (The witness left the stand and stepped over to the
21 screen.)

22 Q Okay. So just the ones that have moved items.

23 A Okay.

24 Q So we don't need the ones unmoved.

25 A This -- this photograph here, as previously stated, I

(JACOB MULLINAX-CROSS BY MR. MORIN)

1 don't know whether this was taken before or after -- there
2 was another photograph where the bunny was laying down. I'm
3 not sure because of the timestamps that are being -- missing
4 from these still photographs that were printed, whether that
5 was moved. But things were moved on that -- on that shelf.

6 Q That's 18.

7 A Yes, sir.

8 Q This photograph here -- what appears to have been moved
9 here, again, it's either before or after. There were some
10 items on the -- if you will look right here. This is the
11 countertop for the bathroom sink, and there was things that
12 had been moved from other photographs. In this photograph
13 here: This is State's Exhibit 23. This is a -- I was
14 holding one of the bottles to take a photograph of it.

15 Q Okay. That's your hand.

16 A Yes, sir. This is State's Exhibit 24. This was me
17 holding the bottle of spray. And then this photograph is of
18 the DVR system, and I'm not sure who is holding it.

19 Q Right. It's after you took the cover off.

20 A If -- I cannot recall completely, but the cover may
21 have already been off. I would have to look at
22 more photographs.

23 Q Okay. So the only thing we know is somebody is
24 holding -- it might be you -- but that's what -- that's been
25 moved, obviously ---

(JACOB MULLINAX-CROSS BY MR. MORIN)

1 A Yes.

2 Q --- because you're holding it?

3 A Yes, sir.

4 Q Okay. Thank you. When you collected the evidence and
5 put it into the evidence the vault, all that we've seen
6 you've testified to as having -- that you collected, was
7 anything -- was it packaged this way and simply put into
8 a -- into the vault? There wasn't anything else done to it?
9 You collected it. You're wearing blue gloves, right?

10 A Yes.

11 Q Just like you are today, and you put it into those
12 things and you put it into the vault?

13 A Yes, sir. It's ---

14 Q And the vault -- excuse me. I didn't mean to cut you
15 off.

16 The vault is not temperature controlled or -- I mean,
17 is it connected to the sheriff's office in a way that the
18 air condition would affect what's in it or not or what?

19 A It is in a climate-controlled environment, yes, sir,
20 downstairs.

21 Q Okay. And you put that stuff into evidence. Other
22 than getting ready to come to court today, was there
23 anything else you did or -- with this evidence?

24 A Not that I can recall, with this evidence.

25 MR. MORIN: That's all the questions I have,

(JACOB MULLINAX-RE-DIRECT BY MR. KENDALL)

1 Your Honor.

2 RE-DIRECT EXAMINATION

3 BY MR. KENDALL:

4 Q When you were photographing the crime scene, could you
5 very briefly describe for the jury how you do that? Like,
6 what your procedure is in actually photographing the scene?

7 A Yes, sir. Anytime we go into a scene, we always try to
8 take overall photographs of the scene to get an accurate
9 representation of the scene as we found it, without moving
10 anything, to be able to show what the scene was when we
11 arrived on scene. Once we get those overalls, we begin our
12 investigation, as we go on through, collecting evidence,
13 marking evidence, things of that nature. We get photographs
14 of the evidence as we're collecting it.

15 Q Okay. And do you just photograph the stuff you think
16 is important?

17 A No, sir. We try to get a full picture of everything
18 that's inside of the scene to, again, give an accurate
19 representation of the scene itself.

20 Q Okay. So in this case, these were all the pictures
21 that got taken at the scene?

22 A No, sir. At any given scene, I mean, there could be
23 hundreds of photographs.

24 Q And at any time of this, did you add stuff into the
25 mix? In other words, did you bring the chocolate bunny

(JACOB MULLINAX-RE-DIRECT BY MR. KENDALL)

1 yourselves or anything like that?

2 A No, sir.

3 Q So when you said you moved stuff, why are you doing
4 that?

5 A To examine it, to see -- to see if there's anything
6 that I need to see on it, whether I need to read it, you
7 know, to see what it is or to get a closer picture of it to
8 get the camera in focus.

9 Q And do you do that before or after you take the overall
10 picture of things?

11 A That is after, sir.

12 Q So, for example, we come in court, you can be asked
13 about what got moved. Is that fair to say?

14 A Yes, sir.

15 Q So you initially preserve it, and then you all look at
16 it and see what's important; is that...

17 A Yes, sir.

18 Q And this case, it was actually a search warrant as
19 well, so you actually are actively searching the house; is
20 that ---

21 A Correct. Yes, sir.

22 MR. KENDALL: Nothing further, Your Honor.

23 MR. MORIN: Nothing. Thank you, sir.

24 THE COURT: You may step down. Next witness.

25 (Witness left the stand.)

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 MR. KENDALL: At this time the State will call
2 Daniel Ward.

3 DANIEL WARD, upon first being duly sworn, testified
4 as follows:

5 DIRECT EXAMINATION

6 BY MR. KENDALL:

7 Q Could you please state your name and rank for the
8 record.

9 A Sure. Captain Daniel Ward.

10 Q And, Captain Ward, how long have you been with the
11 Cherokee County Sheriff's Office?

12 A Twenty-two years.

13 Q And what is your current position with the sheriff's
14 office.

15 A Captain, criminal investigation division.

16 Q And so what sort of things do you do as a captain of
17 criminal investigations?

18 A Assign cases, oversee the workload, assist when
19 necessary in cases. I take a call week like everybody else.

20 Q And did you assist in the case against Jason Simmons?

21 A I did.

22 Q And a search warrant was conducted at his house on
23 January 20th. Were you present for that search warrant?

24 A I was.

25 Q And could you please describe to the jury what happened

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 as you went in the home. Who was present inside the home
2 when you got there?

3 A Jason, myself, and the other guys, and Jason.

4 Q And what happened immediately as you came into the
5 home?

6 A We announced what we were there for and
7 Detective Mullinax explained the warrant and mirandized
8 Jason.

9 Q Okay. And did Jason provide you anything or give you
10 anything?

11 A He did. He came forward with a flash drive, a thumb
12 drive ---

13 Q Okay.

14 A --- that he said was proof of him sleeping all night
15 during the night of the incidence, best of my memory.

16 Q And did you watch it right then?

17 A No, sir.

18 Q And why not?

19 A Well, because in cases like this, there are devices
20 that are used to -- I mean, he could have downloaded a
21 malicious program to our equipment, or it could have
22 immediately erased itself.

23 Q Is this something you all saved?

24 A Yes, sir.

25 Q And I'm going to show you what is marked

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 State's Exhibit 25. Do you recognize that?

2 A That is a flash drive.

3 Q Does that appear to be the one that he -- was there?

4 A I honestly can't remember exactly what it looked like.

5 Q Have you had a chance to watch the flash drive?

6 A Uh-huh.

7 Q And what was on that?

8 A There's video -- there are actually three videos on it.

9 Q Okay.

10 A Videos of Jason sleeping throughout the night. There
11 is -- one of the copies -- they all have the same date and
12 times -- similar, at least. One of those videos is of Jason
13 laying on the chair in the living room, I believe, with a
14 camera pointing at him, sleeping all night. There is
15 another one that is very similar, except for the fact in the
16 beginning it shows Jason walk to the camera, make sure that
17 the camera's pointing at where he's sleeping, lay down, and
18 then play all through the night. And then I think on that
19 video was the one where the next morning he gets up, he
20 walks to it, and then you see the time change -- or the date
21 actually change on that video.

22 Q I see. And we'll publish this in a second.

23 Did you all -- were you able to, while you were out
24 there, examine the hard drive as well?

25 A I saw it. Yes, sir.

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 Q Not that hard drive; the recording device.

2 A The recording device. Yes, sir.

3 Q That's State's Exhibit 17.

4 A That's correct.

5 Q And what condition did that appear in?

6 A You could tell that it had been -- I'll be honest, I
7 don't remember. Just like Jacob, I'd have to see the
8 photos. But you could tell that it had appeared to have
9 been opened. But matter of fact, I think it was currently
10 open and the hard drive missing from it. Upon further
11 inspection, we saw that the screws that used to hold the
12 hard drive had been removed.

13 Q So the screws had been removed as well, that kept the
14 hard drive in there?

15 A That's correct.

16 Q And did he indicate where he got this hard drive -- or
17 excuse me -- where he got this information from if the hard
18 drive was gone?

19 A From the Revo America cloud, stored on the cloud.

20 Q Were you able to determine if Revo America offered a
21 cloud service at the time?

22 A I did my best. I tried to -- I called Revo America.
23 They put me in contact with a technician.

24 MR. MORIN: Objection. Hearsay.

25 THE COURT: Well, he hadn't said what anybody's going

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 to say yet.

2 Q At any point in time, were you able, through your
3 research, to determine if Revo offered a cloud service at
4 that time?

5 A Revo -- I was told that Revo America ---

6 MR. MORIN: Objection. Hearsay.

7 THE COURT: Sustained.

8 Q Okay. Without going into what anybody else told, were
9 you able to find a cloud service offered by Revo?

10 A No, sir.

11 Q Did you attempt to do that?

12 A Yes, sir.

13 Q And why did you attempt to do that?

14 A I attempted to do that because it was my intent to
15 serve a search warrant to the cloud and get any data that we
16 weren't able to collect from the hard drive that was
17 missing.

18 Q But you weren't able to do that because you never find
19 where a cloud service ever was?

20 A That's correct.

21 Q I'm going to show you what's been previously entered as
22 State's Exhibit 25. You had the opportunity to look at
23 this, correct?

24 A I have, yes, sir.

25 Q And this is what was -- consisted, which was provided

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 to you all that day?

2 A Yes, sir.

3 Q Now, I'm going to show you first clip dated
4 1/11/2007 [sic] 093409. Before I go all the way into that,
5 can you tell on what date that was modified?

6 A It says date modified January the 11th, 2017.

7 Q Okay. And to be clear, when was the search warrant
8 executed?

9 A January. I'd have to see the copy to be sure. Because
10 of my recollection it was January the 20th.

11 Q All right. Would looking at your notes help refresh
12 your recollection?

13 A I think. January the 20th, 2017.

14 Q And so approximately nine days after this file was
15 modified; is that correct?

16 A Yes, sir.

17 Q Now, before we begin, what date is present right here,
18 in the clip name, on the application file?

19 THE WITNESS: Can I step down there? I can't see what
20 he's pointing at.

21 THE COURT: Yes, sir.

22 (The witness left the stand and went to the screen.)

23 A What did you ask me, sir?

24 Q Right there. How is this named?

25 A Where the -- okay. The green? Revo Online Backup,

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 two-thousand se----

2 Q Uh, whoa.

3 A Clip 01-11. So it's modified by -- by the modification
4 date.

5 Q What about the name of the clip?

6 A The name of the clip?

7 Q Where it says "clip 01," how is that -- right where the
8 arrow's pointed.

9 A Okay. So 93409. 9-3409.

10 Q But it states clip 01-11-2017, and then 093409?

11 A Yes, sir.

12 Q Now, at the top of this clip, can you read the date up
13 here?

14 A I can. It's January the 11th, 2017.

15 Q But down here it's different; is that correct?

16 A That is correct.

17 Q Now, you've watch this entire video. It's pretty long.
18 It's 8 hours long or something like that; is that correct?

19 A I have, sir.

20 Q I don't know if it's exactly eight, but it's a very,
21 very long thing. We don't need to watch that whole thing in
22 court.

23 A I have, sir.

24 (State's Exhibit 25 was played for the Court and jury.)

25 Q And who is that?

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 A That is Jason Simmons.

2 Q And what does he appear to be doing?

3 A He is looking at the camera system. That's where it
4 was located. That's what he appears to be doing.

5 Q Now, what does the clock down here at the bottom say?

6 A 2017, January the 8th.

7 Q So that is different than from the actual -- how the
8 clip is up here; is that correct?

9 A That's correct.

10 Q And after he sets it up, what does he basically do all
11 night?

12 A He lays down in that recliner right there and tosses
13 and turns and appears to sleep.

14 Q At any point in time, do you see **A.F.** at all on this?

15 A No, sir.

16 Q And so according to this clock down here -- which we're
17 looking at 9:45.

18 A Uh-huh.

19 Q So hardly up all night, correct?

20 A Right.

21 Q And, again, it's very long, but over the course of this
22 sleeping, do you see anything wild and crazy or out of the
23 ordinary?

24 A No, sir.

25 Q Any small children running around or anything like

(DANIEL WARD-DIRECT BY MR. KENDALL)

- 1 that?
- 2 A No, sir.
- 3 Q Is there anything else in this camera view, other than
- 4 him sleeping? Like any important stuff throughout the house
- 5 that you can see? In another words, in this area here or
- 6 over here, is there any high-value items or ---
- 7 A No, not that I can see.
- 8 Q So the camera is basically focused on the area he's
- 9 sleeping; is that correct?
- 10 A Right.
- 11 Q And then what appears to be a wood floor with a vacuum
- 12 cleaner?
- 13 A Yes, sir. It appears to me that he has recorded
- 14 himself sleeping.
- 15 Q And as he's sleeping at this point, it appears he still
- 16 has the light on; is that correct?
- 17 A In that room, yes, sir. He's cut the light off in the
- 18 living room, but the light ---
- 19 Q The light's in the other room, so you can see him
- 20 sleeping.
- 21 A Yes, sir.
- 22 Q We're just going to fast-forward. What time is on this
- 23 now?
- 24 A 22:05.
- 25 Q The light still on? He's still laying there, sleeping?

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 A Yes, sir. He's still laying there.

2 Q All right. 23:09?

3 A Yes, sir. Still laying there.

4 Q All right.

5 A He's still there.

6 Q All right.

7 A 02:13 and he's still there.

8 Q All right. Light still on?

9 A Yes, sir. 03:30. He's still there. 04:59. He's

10 still there.

11 Q All right.

12 A 05:50. He's still there.

13 Q And the light stays on all night over there; is that

14 right?

15 A Yes, sir. Appears to be.

16 MR. KENDALL: All right. And I'm playing this, just

17 for the record, in fast-forward.

18 Q All right. It looks he's stirring. Is that what he

19 appear's to be doing?

20 A Yeah. Starting to -- starting to wake up, grab his

21 things.

22 Q All right. And what does he do immediately upon waking

23 up?

24 A Go straight to the camera system.

25 Q And what does he appear to do there?

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 A I'm not sure exactly what happened, but the time just
2 changed from 06:38 to ---

3 Q Keep -- keep looking right there. I'm sorry.

4 What were you saying?

5 A The time just changed from 06:38 to 06:44, skipped
6 ahead. And the view of the camera has changed.

7 Q Okay. We'll go faster here. And if you could watch
8 down here at the time clock.

9 A Yes, sir.

10 Q And tell me if you notice anything changing.

11 And, again, just for the record, the camera is not
12 really pointing at anything at this point, right?

13 A No.

14 Q Or where is the camera pointed at this point?

15 A Appears to be upside down, at the ceiling.

16 Q Okay.

17 A And the date just changed from January 1st to
18 January the 11th.

19 Q So at the end of this movie ---

20 A Excuse me. January the 9th to January the 11th.

21 Q And where is that when you say that happens? Can you
22 show us with the pen where you're talking about.

23 (The witness complied.)

24 A Sure. It's not very bright. That date right there
25 just changed from report -- the incident or the report date,

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 which is January 9th, to two days later, January the 11th,
2 2017.

3 MR. KENDALL: And back up a little bit and show that in
4 real time.

5 Q Okay. And, again, what did you see?

6 A The change from January the 9th to January the 11th.

7 Q And just to be clear: What is the date that's on the
8 top of the clip?

9 A It's still January the 11th, 2017.

10 Q Now, was this the only clip that was on the disk he
11 gave you?

12 A No, sir.

13 Q All right. How many more are on there?

14 A There are two more.

15 Q And what differs between those two clips and this one
16 with regard to their life?

17 A They get shorter.

18 Q They get shorter. All right. I'm going to show you
19 the file merely marked "1."

20 And how does the beginning of this clip compare to the
21 beginning of the last clip?

22 A It's, the best I can tell, the same.

23 Q All right. And, again, we have the lighted area and
24 the dark area; is that correct?

25 A Yes, sir.

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 Q And I guess to be fair, we -- there's some sort of
2 light in that area. Is that fair to say?

3 A Yes, sir.

4 Q Now, we're going to pull over here to the end. So
5 we're just going to do the same thing we did before, sort of
6 fast-forward.

7 And what does he appear to be doing throughout the
8 night?

9 A Lying in that recliner.

10 Q Now, looking at this video to the end -- okay. So with
11 regards to the first clip I showed and the second clip, what
12 was -- with regard to him setting up the camera, was it the
13 same or different?

14 A The same.

15 Q Were there any differences in the end of the video?

16 A In the end of the video, it had been shortened by
17 approximately 30 minutes, to the best of my recollection.

18 Q And does the end of the video show him getting up and
19 moving the camera?

20 A No.

21 Q Does the end of the video of the second video show that
22 time change?

23 A No.

24 Q Okay. And just so we're clear: How was this one
25 labeled?

(DANIEL WARD-DIRECT BY MR. KENDALL)

- 1 A "1."
- 2 Q Just "1." Okay. Now, going to the third video, when
- 3 was this one modified?
- 4 A January the 11th, 2017.
- 5 Q So I guess looking at that date modification, which
- 6 ones of these was the first one that was created?
- 7 A Let's see January 11th, 7:46 p.m.
- 8 Q Check again. The clock.
- 9 A Sir?
- 10 Q Look at the second one. When was that created?
- 11 A January 11th, 2017.
- 12 Q All right. And approximately what time or at what
- 13 time?
- 14 A 12:40 p.m.
- 15 Q Okay. So a little bit after ---
- 16 A Okay. I'm sorry. So...
- 17 Q What about the second video, the one labeled "clip 1,"
- 18 when was that created?
- 19 A 7:46 p.m., the same day.
- 20 Q And what about the one that's been labeled "Revo Online
- 21 Backup"?
- 22 A At 11:18 p.m., the same day.
- 23 Q So this is the last one that was created?
- 24 A Yes, sir.
- 25 Q The first one that was created was the one that was the

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 longer, full one, correct?

2 A Right.

3 Q All right. Playing the third one -- all right -- what
4 differs this one from the beginning of the other two that we
5 saw?

6 A The setting up of the camera has been removed. It's
7 been shortened in the beginning.

8 Q So it's been shortened to basically not show him ---

9 A Correct.

10 Q -- set up the camera? Okay.

11 And jumping here to the end. How's this one...

12 A You want me to tell you now or are we waiting?

13 Q All right. And how does that one end?

14 A It's been shortened even more, look a little further.
15 I think about an hour more to eliminate Mr. Simmons
16 beginning the video or ending the video. He's been taken
17 out.

18 Q Okay. So, in total, how many clips do we have here?

19 A Three.

20 Q And on the -- is it fair to say that two of those have
21 been edited?

22 A Yes.

23 Q All right. And the first clip that we saw, labeled as
24 "application clip 1/11/2017," how did that differ from the
25 other two?

(DANIEL WARD-DIRECT BY MR. KENDALL)

1 A That one differed than the other two by -- it shows
2 Mr. Simmons coming and setting up the camera and it also
3 showed him getting out of bed, and the time, moving the
4 camera again. And then the time changed, and then it looks
5 like the date changed.

6 Q And so it indicated that time and date change as well.
7 Is it fair to say that clip 1 showed setting up the camera,
8 but not the time and date change?

9 A Yes, sir. That's correct.

10 Q And clip -- the third clip we watched, the one that's
11 labeled "Revo Online Backup," that actually cuts out both
12 him setting up the camera and him getting up, moving the
13 camera, and the time changing; is that correct?

14 A That is correct.

15 MR. KENDALL: No further questions, Your Honor.

16 THE COURT: Okay. Before we begin across, why don't we
17 take a morning break. I'll give you all about 15 minutes to
18 stretch your legs and use the restroom. Don't enter any
19 deliberations or discussions.

20 (The jury exited the courtroom at 10:58 a.m.)

21 THE BAILIFF: Everybody be seated until the jury
22 leaves.

23 THE COURT: All right. We can go to the restroom if
24 you need to but you can't talk to anybody while we're at
25 rest. Okay. Why don't you all take about 5 minutes to use

(DANIEL WARD-CROSS BY MR. MORIN)

1 the restroom.

2 (A recess was taken.)

3 (The jury entered the courtroom at 11:16 a.m.)

4 THE COURT: All right. Welcome back, folks. We'll
5 resume now with the defendant's cross-examination.

6 CROSS-EXAMINATION

7 BY MR. MORIN:

8 Q You're Captain Ward?

9 A Uh-huh.

10 Q You are the lead investigator in this case; is that
11 correct?

12 A Yes, sir. That's correct.

13 Q And you're in charge of the investigation and what
14 needs to be done?

15 A Yes, sir.

16 Q Are you familiar with -- I'm going to show you
17 State's Exhibits 2, 3, and 4. If you can just open them. I
18 don't think you have to take them out, but if you do, I can
19 get you gloves.

20 A I'm familiar.

21 Q Okay. Can you tell us if these items were in any way
22 tested by any experts in this case?

23 A To my memory, no, sir.

24 Q And you being the lead investigator, that would be
25 yours to request, typically; is that correct?

(DANIEL WARD-CROSS BY MR. MORIN)

- 1 A I have that authority.
- 2 Q Correct. Well, let's walk through that, then. Because
- 3 you've been in law enforcement for 22 years.
- 4 A Uh-huh.
- 5 Q And you're a captain and you're the lead on this
- 6 investigation, and if we want to send something to, say,
- 7 state law enforcement to have it examined -- whether it be
- 8 fingerprints, a drug report, DNA, or what have you -- you
- 9 would fill out a request for them to do that, would you not?
- 10 A I wouldn't, no, sir.
- 11 Q Who would?
- 12 A We lean heavily on our crime scene unit.
- 13 Q In this case, that crime unit includes Mullinax,
- 14 Henson, and Anthony?
- 15 A That's correct.
- 16 Q Those were the three officers that were with you?
- 17 A Yeah.
- 18 Q Now, the video of the thumb drive that we've seen --
- 19 when you arrived with the other three officers to conduct
- 20 the search warrant, who entered first; do you recall?
- 21 A I do not.
- 22 Q And you say that Mr. Simmons handed you a thumb drive;
- 23 is that correct?
- 24 A He didn't hand it to me, no, sir.
- 25 Q Okay. Did you say he gave it to you?

(DANIEL WARD-CROSS BY MR. MORIN)

- 1 A That's --
- 2 Q Is that your testimony?
- 3 A That's fair, yeah.
- 4 Q Don't -- I don't want to ---
- 5 A Well, what actually happened was he said, "I have
- 6 this."
- 7 Q All right. So it was in his hand?
- 8 A And he laid it down on the table to be collected with
- 9 everything else.
- 10 Q So that's why Officer Mullinax testified he picked it
- 11 up off the table?
- 12 A Exactly.
- 13 Q Okay. Now, in the course of your career or personally,
- 14 have you ever had the occasion to get one of these thumb
- 15 drives -- buy one for whatever reason?
- 16 A Have I ever bought a thumb drive? Is that the
- 17 question?
- 18 Q Bought one and used one?
- 19 A Yes, sir.
- 20 Q All right. And isn't it consistent that when you do
- 21 that and you make a recording of something, it's as it's
- 22 been -- it was referred back and forth -- and I want to be
- 23 clear. On the video it says "modified," but that's the date
- 24 it's created, correct? The thumb drive doesn't look at the
- 25 video and then put on there what it is. That's -- when you

(DANIEL WARD-CROSS BY MR. MORIN)

1 put it in and you make a copy of something, that's when it's
2 going to show that "modified"; isn't that correct? Or is
3 that not your experience?

4 A I presume that's what that means.

5 Q Now, there's three videos on this; is that correct?

6 A Yes.

7 Q And it's your testimony that Mr. Simmons gave it to you
8 and said here it is?

9 A Uh-huh.

10 Q He didn't then make any modifications to it?

11 A After the fact? Is that what you're asking?

12 Q Correct.

13 A No, sir.

14 Q So we can talk about whether it's -- video 1 is longer
15 than video 2 or shorter than video 3, but you watched them
16 all, correct?

17 A I did.

18 Q And they all came from him.

19 A Yes, sir.

20 Q It wasn't -- okay. Now, during your investigation,
21 what did you learn about how this Rovio [sic] system works?

22 A It has a hard drive, like most of them do, that records
23 video. And I'm not sure what else you want.

24 Q Is it Wi-Fi-based?

25 A I -- I don't know the answer to that. I presume that

(DANIEL WARD-RE-DIRECT BY MR. KENDALL)

1 it is Wi-Fi-based.

2 Q Okay. Well, I don't know if it's wired or if it's a
3 Wi-Fi, if it goes anywhere, if the cameras are connected to
4 the hard drive by Wi-Fi or what have you. Do you know?

5 A No, I don't know that.

6 Q Do you know how many cameras he had?

7 A No, sir. I'm not sure.

8 Q When you went out to do the search warrant, you had
9 already -- were aware of what **A.F.** had said, correct?

10 A Yes, sir.

11 Q And what part -- when did she say anything about --

12 MR. MORIN: Well, I withdraw that question.

13 That's all the questions I have.

14 THE COURT: Re-direct?

15 MR. KENDALL: Briefly, Your Honor.

16 RE-DIRECT EXAMINATION

17 BY MR. KENDALL:

18 Q Mr. Morin asked you -- in your experience of using pin
19 drives and whatnot, if you made a video on January 11th,
20 burned it to a hard drive, what would the date show?

21 A January the 11th.

22 MR. KENDALL: Nothing further, Your Honor.

23 THE COURT: Re-cross?

24 MR. MORIN: No, sir.

25 THE COURT: You may step down.

(KELLY CLUNE-DIRECT BY MR. KENDALL)

1 THE WITNESS: Thank you.

2 (The witness left the stand.)

3 MR. KENDALL: The State will call Kelly Clune at this
4 time.

5 KELLY CLUNE, upon first being duly sworn, testified as
6 follows:

7 DIRECT EXAMINATION

8 BY MR. KENDALL:

9 Q Good afternoon.

10 A Good afternoon.

11 Q Would you please state your name for the record.

12 A Kelly Clune.

13 Q And, Ms. Clune, what is your occupation?

14 A I'm a child-abuse medical provider.

15 Q And how long have you been in this occupation?

16 A I've been taking care of abused children for 13 years
17 now. I recently have got my nurse practitioner, and I
18 started taking it to the next level about three years ago.

19 Q Okay. And what sort of education did you go through?

20 A I was -- been a registered nurse for 28 years, working
21 in the emergency department. I got my SANE Certification,
22 which is Sexual Assault Nurse Examiner, in 2007, for adult
23 and adolescents. And then I went back and I educated for
24 Sexual Assault Nurse Examiner for prepubertal children in
25 2009. I got my Nurse Practitioners in 2017.

(KELLY CLUNE-DIRECT BY MR. KENDALL)

1 Q So back in January of 2017, where were you working at
2 that time?

3 A Spartanburg Regional Medical Center.

4 Q And did you conduct a rape kit examination or a sexual
5 assault evidence collection kit examination of

6 A.F. [REDACTED] back in January of 2017?

7 A I did.

8 Q And do you recall what date that was?

9 A January the 9th.

10 Q And could you please describe to the jury the process
11 of what you do with that sexual examination collection kit.

12 A The process -- the first thing we do is we talk to the
13 parents to get a history. We try not to question the
14 children too much. I spend the first 20 or 30 minutes
15 bonding with the child, so that the ---

16 Q Okay. And please don't tell us anything she told you.
17 Just ---

18 A Oh. Bonding with the child so that they'll be
19 comfortable with the exam. At that point I would open up
20 the sexual assault kit and do whatever evidence collection
21 that was needed, based on the history I'd obtained from
22 either law enforcement or the parents.

23 (State's Exhibit 26 was marked for identification.)

24 Q And I'm going to show you what is marked
25 State's Exhibit 26. Do you recognize this?

(KELLY CLUNE-DIRECT BY MR. KENDALL)

1 A Yes, I do.

2 Q And what is that?

3 A That is the sexual assault evidence collection kit I
4 obtained from A.F.

5 Q And do you recall what date it was on?

6 A January the 9th. It says 2016 but it was 2017.

7 Q Okay. And before we actually get into it, once you're
8 done with the collection kit, what do you do with it?

9 A I would seal it up and hand it over to law enforcement.

10 Q Okay. And do you make a notation of that?

11 A Yes. On the back of the kit.

12 Q And did you do that in this instance?

13 A I did.

14 Q And who did you hand the sealed kit to?

15 A It's says Aaron D. Bowles.

16 Q Now, we can go ahead and open this up.

17 If you could, I want you to take a look at these.

18 A Okay.

19 Q In this instance, what evidence did you collect from
20 A.F.?

21 A From A.F., I collected -- is it okay if I refer to my
22 notes?

23 Q Yes.

24 A I collected her shirt; her underwear; a debris sheet,
25 which is a sheet that they stand on as they undress; oral

(KELLY CLUNE-DIRECT BY MR. KENDALL)

1 swab; vaginal swab; an external vaginal area; rectal swab;
2 and a buccal swab, which is inside the cheek.

3 Q And if you could just sort of walk us through that
4 process of what you do and how you collect that.

5 A Sure. We begin by having the child placed on --
6 place -- first I'd place a regular sheet on the floor, place
7 the debris sheet, which comes in the kit, which is just a
8 large paper -- piece of paper on the floor and have the
9 child undress while standing on that sheet. What we're
10 hoping in this instance is if any fibers or hair falls off
11 her body as she's undressing, we would catch it on that
12 sheet. I would then have her step off the sheet, place her
13 in a gown, then fold that up from outer to inner and place
14 it in the evidence bag.

15 Q And what is the purpose of doing that?

16 A We're looking for any foreign hairs, bodies, or dry
17 secretions that may fall off the body as they're undressing.

18 Q And what do you do after that?

19 A After that, we do a head-to-toe examination, looking
20 for any marks, any signs of trauma. And we also do this
21 with a UV-positive light, which is a black light that we use
22 with orange goggles, which will show up body fluids, and
23 it'll glow in like an orange color.

24 Q And did you find any body fluids in this case?

25 A No, I did not.

(KELLY CLUNE-DIRECT BY MR. KENDALL)

1 Q And what do you do after that?

2 A After that, I start collecting my swabs, which is our
3 Q-tips. We collect the buccal swab inside the cheek.
4 That's usually the first thing I collect.

5 Q What is a buccal swab?

6 A It's a swab that you swab inside the cheek. And what
7 you're collecting is the patient's DNA.

8 Q So it kind of creates a known standard. Is that fair
9 to say?

10 A Yes, it creates a known standard.

11 Q And what happens after you do the buccal swab?

12 A We put it in a -- we have a swab dryer, which is a
13 self-contained unit that the swab goes into. Because
14 everything has to be totally dry before we package it up.

15 Q Okay. And then what about after that? What do you do
16 with your buccal swab?

17 A After the buccal swab, I usually do the oral swab,
18 which with that, we are looking for the perpetrator's DNA.
19 We will swab around the teeth, under the tongue, in the
20 lower recess of the jawline.

21 Q And what about after that?

22 A After that, I usually -- after we've done the physical
23 exam of the body, I will gather the vaginal swabs.

24 Vaginal swabs of prepubertal children -- we do not go
25 internal because it's very painful for them, and we are

(KELLY CLUNE-DIRECT BY MR. KENDALL)

1 medical.. The whole reason that we're taking care of them is
2 because of medical, and we don't want to do anything that's
3 going to traumatize further.

4 So what we do is -- the labia come together like this
5 (indicating). We just gently open the labia, and we take
6 the swab. And we'll swab inside the labia, but not all the
7 way internal.

8 Q Okay. So you're swabbing inside the labia. Is that
9 fair to say?

10 A Correct.

11 Q Are you wiping around the outside of the labia, as well
12 or just inside the labia?

13 A It will go some on the outside of the labia too. But
14 mostly, it's just inside the labia.

15 Q And did you do that in this instance?

16 A Yes, I did.

17 Q And what did you do after that?

18 A After that, I obtained a rectal swab. The rental swab,
19 because the rectum is not sensitive, it's actually an
20 internal swab. You take the swab -- usually I will wet it
21 with a little sterile water, and that's to loosen any
22 secretions that may be in there. You insert it into the
23 rectal cavity. You just kind of twirl it around to collect
24 any secretions that may be there.

25 Q So you would collect it from the actual inside of the

(KELLY CLUNE-DIRECT BY MR. KENDALL)

1 rectal area?

2 A Correct.

3 Q And did you do that in this case with A.F.?

4 A Yes, I did.

5 Q What do you do after that?

6 A After that, I place all the swabs -- we have a swab
7 holder that is labeled with each area. We put all of them
8 on the swab holders, place them within the drying unit for
9 them to dry. After they dry, we package it in individual
10 packages.

11 Q Is that what you did in this case?

12 A Yes, it is.

13 Q And just, again, once you have all of this together, is
14 this -- after looking through this kit, is this a fair and
15 accurate representation of what was taken from A.F.?

16 A Yes, it is.

17 Q And what do you do with it before you turn it over to
18 law enforcement?

19 A After it's dry, we individually package it. The --
20 they are in separate envelopes -- all the swabs obtained.
21 And then we put it into a larger outer envelope, which we
22 seal with evidence tape, and I mark my initials on the
23 evidence tape.

24 Q Okay. So when it leaves your possession, it's sealed
25 with evidence tape and marked; is that correct?

(KELLY CLUNE-DIRECT BY MR. KENDALL)

1 A Correct.

2 Q And did you make notations on this box as well,
3 indicating that's the case?

4 A Correct. Because after the envelopes, we will put them
5 inside the box and then seal the box with the evidence tape
6 and, again, with my initials.

7 Q Showing this exhibit again. Are those -- point out
8 your initials to the jury.

9 A Yes. The "K" is on this side and the "KC" on that
10 side -- other side of the box. The "K" here and "C" here.

11 (State's Exhibit 27, 28, and 29 were marked for
12 identification.)

13 Q Okay. State's Exhibit 27 -- do you recognize that?

14 A Yes, I do.

15 Q All right. Now, to be clear to the jury, was it in
16 that original package -- the other packaging?

17 A No, it was not.

18 Q Who added that? Can you tell?

19 A Looks like Billy Anthony.

20 Q And so what packaging did you package it in?

21 A The inner paper packaging.

22 Q And what is that?

23 A That is -- looks like -- I can't see the front that
24 well, where it's labeled. This is the paper bag that comes
25 with the kit that the underwear goes into.

(KELLY CLUNE-CROSS BY MR. MORIN)

1 Q And we got multiple things here. State's Exhibit 28.

2 I'm sorry -- on State's Exhibit 27, did you seal that as
3 well?

4 A Yes, I did.

5 Q Okay. And what is in that?

6 A It looks like the outer package that all the individual
7 swabs and their individual packages goes into; the debris
8 sheet package, maybe; and the slides.

9 Q And did you package those as well, in the sealed box,
10 and envelope?

11 A Yes, I did.

12 Q I think, finally, we just have a -- that was added by
13 you.

14 A Yes. This is a -- if we are concerned that they were
15 given any drugs or alcohol, this is where we would actually
16 draw blood from them and seal it in the kit.

17 Q And were each of these placed, again, in
18 State's Exhibit 26, and sent off to SLED?

19 A Yes, they were.

20 MR. KENDALL: Nothing further, Your Honor .

21 CROSS-EXAMINATION

22 BY MR. MORIN:

23 Q Ms. Clune, is it my understanding -- and correct me if
24 that typically -- this exam took about 30 minutes. Is that
25 fair to say?

(KELLY CLUNE-CROSS BY MR. MORIN)

1 A No, sir.

2 Q Do you have a copy of your report?

3 A Yes, sir.

4 Q Could you look at page 6 of your report.

5 A Yes, sir.

6 Q Does that list just start on kind of on the end time of
7 the exam?

8 A Yes, sir.

9 Q And how long did it take?

10 A Technically, it states 30 minutes.

11 Q You did a head-to-toe exam. Did you at any time note
12 or record any kind of trauma or any kind of abrasions that
13 you referred to you were looking for?

14 A She had a rash on her abdomen.

15 Q Okay. Anything else?

16 A And then she had a small circular bruise to her lower
17 leg.

18 Q Lower leg. Okay. Did you record her general demeanor?

19 A Yes.

20 Q And how would you describe it?

21 A It was playful.

22 MR. MORIN: That's all the questions I have.

23 THE COURT: Can I see you both.

24 (Whereupon, a bench conference was held off the record
25 in the presence of the jury but out of the hearing of the

(KELLY CLUNE-RE-DIRECT BY MR. KENDALL)

1 jury.)

2 THE COURT: Any re-direct?

3 RE-DIRECT EXAMINATION

4 BY MR. KENDALL:

5 Q If you could just sort of elaborate on the 30 minutes,
6 how you did that log.

7 A The time that I placed on my documentation for the SLED
8 kit is the actual collection of the swabs themself. The
9 actual exam takes about three hours because you spend time
10 bonding with the child to begin with, and there's other --
11 getting history, other physical things that you are doing in
12 the meantime.

13 MR. KENDALL: Nothing further, Your Honor.

14 THE COURT: Anything else?

15 MR. MORIN: No, sir.

16 THE COURT: You may step down. Thank you.

17 (The witness left the stand.)

18 THE COURT: All right. Next witness.

19 MR. KENDALL: Your Honor, the State would call
20 Jimmy Henson at this time.

21 JIMMY HENSON, upon first being duly sworn, testified as
22 follows:

23 DIRECT EXAMINATION

24 BY MR. KENDALL:

25 Q Could you please state your name for the record.

(JIMMY HENSON-DIRECT BY MR. KENDALL)

1 A Jimmy Henson.

2 Q And, Mr. Henson, where are you currently employed?

3 A Cherokee County Sheriff's Office.

4 Q And what do you do at the sheriff's office?

5 A Crime scene investigator.

6 Q And how long have you been with the sheriff's office?

7 A Forty years.

8 Q Forty?

9 A Forty.

10 Q Did you have involvement in the Jason Simmons case?

11 A Yes, sir.

12 Q And did you take a buccal swab from Mr. Simmons on

13 June 12th, 2017?

14 A Yes, sir, I did.

15 Q And do you recall where that took place?

16 A In your office.

17 Q And can you please briefly describe to the Court what a
18 buccal swab is -- the jury what a buccal swab is.

19 A To take a buccal swab, we've got Q-tips. There's two
20 comes inside a sealed container. And when we do the buccal
21 swab, we open it and swab the inside of the cheeks and get
22 DNA on it, and we put it back. We -- ours comes with a
23 little box. We drop them -- the swabs back in the box, and
24 the box has the holes in it so it can air dry.

25 (State's Exhibit 30 was marked for identification.)

(JIMMY HENSON-DIRECT BY MR. KENDALL)

1 Q Okay. And I'm going to show you what is marked
2 State's Exhibit 30. Do you recognize this?

3 A Yes, sir, I do.

4 Q And what is that?

5 A This is the envelope that I put the buccal swab in
6 after I did it. I sealed it inside that.

7 Q And you talked about a box. Can you sort of, without
8 opening it up, just sort of show the jury where the outline
9 of the box would be.

10 A Yes. It's flat now. It's been mashed flat, but that's
11 it.

12 Q So that comes inside? You put that -- the swabs inside
13 that?

14 A Put the swabs inside the box.

15 Q All right. And you testified a moment ago you sealed
16 that?

17 A Yes, sir.

18 Q Did you make any markings on that, indicating that it
19 was sealed or anything?

20 A Yes, sir. My initials would be on this tape. This has
21 got the envelope sealed, and my initials is on it and the
22 date that I sealed it.

23 Q And what did you do with that once you sealed it?

24 A Once I sealed it, I enter it in on our property sheet,
25 or the evidence log, at the sheriff's office, and it goes

(JIMMY HENSON-CROSS BY MR. MORIN)

1 into the evidence vault.

2 Q Okay.

3 A Until a trip's made to SLED, and it's taken down there.

4 Q And when you say "the evidence vault," do you have
5 access to the evidence vault?

6 A Yes, sir, I do.

7 Q In fact, one of your responsibilities is actually
8 collecting the evidence; is that correct?

9 A Yes, sir.

10 Q And is that what you did in this case, on
11 State's Exhibit 30, is took it into the evidence vault?

12 A Yes, sir, I did.

13 Q And the time you took it in the evidence vault, was it
14 sealed with evidence tape and initialed?

15 A Yes, sir, it was.

16 Q And this was taken of Jason Simmons on June 12th, 2017?

17 A Yes, sir.

18 MR. KENDALL: Please answer any questions Mr. Morin may
19 have.

20 CROSS-EXAMINATION

21 BY MR. MORIN:

22 Q Did you have any other involvement in this case?

23 A I think I did do something else. No, sir, not on that
24 one I -- date, I didn't. The first search warrant that they
25 did at the house, I went with Detective Mullinax, and I did

(JIMMY HENSON-CROSS BY MR. MORIN)

1 obtain some photographs in it.

2 Q You took some photographs out there?

3 A Sir?

4 Q Did you say you took some photographs out there?

5 A Yes, sir, I did.

6 Q Do you have a special camera for that or did you use a
7 phone?

8 A We have our own cameras -- crime scene cameras.

9 Q Same kind of crime scene camera you've been using for
10 quite a while?

11 A Yes, sir.

12 Q That camera doesn't put dates on things?

13 A Yes, sir.

14 Q Didn't put any dates on these pictures.

15 A It doesn't show the date on the picture itself. But
16 when you put it on the computer, it'll pull the date up on
17 the computer.

18 Q I see. So it doesn't stamp the pictures.

19 A The pictures not stamped -- date stamped. No, sir.

20 Q And is the evidence -- I'm sorry -- your evidence --
21 how do you describe it? I was going to say technician, but
22 that's not right. Evidence custodian?

23 A Custodian.

24 Q Okay. Correct me if I'm wrong, but did you request any
25 items be tested by state law enforcement division in this

(JIMMY HENSON-RE-DIRECT BY MR. KENDALL)

1 case? I mean other than, obviously, you took the buccal
2 swab, and that went. But did you fill out any requests?

3 A I didn't fill out any requests. But, usually, when we
4 do a case, the crime scene technicians will get together and
5 decide what we think needs to go to SLED.

6 Q Okay. Did you participate in that, that you're aware
7 of?

8 A I don't recall.

9 Q Okay. But that being the case, you didn't request
10 anything specifically be tested or not tested?

11 A No. There's nothing except this buccal swab.

12 MR. MORIN: Okay. That's all the questions I have,
13 Your Honor.

14 RE-DIRECT EXAMINATION

15 BY MR. KENDALL:

16 Q Just to clear something up: Would you remember which
17 search warrant you went on, that you were at, one of the
18 search warrants? Do you recall what date that was on?

19 A February the 10th.

20 Q So you went out there on February the 10th?

21 A Yes, sir.

22 Q Do you recall if you were there on January 20th as
23 well, or just the February date?

24 A All I have is the February date.

25 Q Okay.

(BILLY ANTHONY-DIRECT BY MR. KENDALL)

1 MR. KENDALL: Just give us one moment, Your Honor. I
2 have no questions. Thank you, Your Honor.

3 THE COURT: Anything?

4 MR. MORIN: That's all.

5 THE COURT: You may step down. Thank you.

6 (The witness left the stand.)

7 Next witness.

8 MR. KENDALL: Your Honor, at this time the State will
9 call Billy Anthony.

10 BILLY ANTHONY, upon first being duly sworn, testified as
11 follows:

12 DIRECT EXAMINATION

13 BY MR. KENDALL:

14 Q Could you please state your name for the record.

15 A Billy Anthony.

16 Q And what is your rank and what do you do?

17 A I am a lieutenant, and I do crime scene investigations
18 and the evidence custodian at the sheriff's office.

19 Q And what is an evidence custodian -- excuse me -- what
20 is an evidence custodian at the sheriff's office?

21 A We maintain all evidence that is turned in for criminal
22 cases to be held or to be taken to another lab and hold onto
23 it until the court proceeding's concluded.

24 Q And where is this all housed?

25 A The evidence vault is inside the sheriff's office.

(BILLY ANTHONY-DIRECT BY MR. KENDALL)

1 You -- as in, there's only a drop box to access it by other
2 officers -- our officers that drop evidence into. It's kind
3 of like a little mail slot in the wall. They can drop
4 evidence in. But once they drop it in, they can't retrieve
5 it, unless one of the custodians is there to get it out.

6 Q And who are the custodians?

7 A The current custodians now is myself,
8 Detective Jimmy Henson, and Jacob Mullinax.

9 Q And when people drop evidence of like a genetic nature
10 into the drop box, what does it need to be for you all to
11 process it? In other words, what condition does it meet?
12 Can I just take a swab, throw it in there, and walk away?

13 A All the evidence that's dropped into the evidence
14 vault, it has to be packaged in some type of a container,
15 whether it be an envelope or a plastic bag. But before they
16 drop it, it must be in a sealed container. If it comes in
17 and it's not sealed, we make notations of that, and it's --
18 then it would be sealed by us, notating that it was not
19 sealed when it arrived.

20 Q And I'm going to show you what is marked
21 State's Exhibit 30. Do you recognize this?

22 A Yes, I do.

23 Q And what is that?

24 A That's the buccal swab from Jason Simmons.

25 Q And was that collected by you all?

(BILLY ANTHONY-DIRECT BY MR. KENDALL)

- 1 A Detective Jimmy Henson.
- 2 Q And how did it come into your possession?
- 3 A Detective Henson would have placed it into the evidence
4 vault. I primarily transport all evidence to SLED for
5 further testing and bring it back. I would have taken it to
6 SLED for testing.
- 7 Q And did you take it to SLED in this instance?
- 8 A Yes, sir, I did.
- 9 Q And what do you do with it once it's at SLED?
- 10 A When we take it to SLED, we take -- depending on what
11 the item is, we'll go and when we're placing it in their
12 evidence lockers, to drop our evidence off, we'll put --
13 place it inside a heat-sealed envelope. I print my name and
14 date when I'm placing it into the locker. And when I
15 heat-seal it, I put my initials and date to show that I
16 sealed it before I dropped it in.
- 17 Q And did you do that in this instance?
- 18 A Yes, sir, I did.
- 19 Q So that was taken in a sealed envelope to SLED and
20 dropped off up there in a sealed envelope. Is that fair to
21 say?
- 22 A Yes, sir. That's correct.
- 23 Q All right. Now, I'm going to show you kind of a group
24 of exhibits. State's Exhibit 26, 27, 28, and 29.
- 25 First off, as this came to you, how was it packaged?

(BILLY ANTHONY-DIRECT BY MR. KENDALL)

1 A When this was brought to the sheriff's office, it was
2 in the sealed box. The officer that takes it in, in the
3 intake, or gets it from the nurse, he would sign -- he'll
4 initial -- or sign it and date it when he received it. And
5 then there is a date. And where it is placed, we have a
6 refrigerator that has a lock on it for officers. So if they
7 bring something in that must be refrigerated, they put it in
8 there, and they lock the lock. And it can't be accessed
9 again until an evidence custodian comes in and unlocks it to
10 retrieve the evidence out.

11 Q Okay. And what did you do with that box?

12 A I transported -- take -- took it out of the initial
13 refrigerator it was placed in. We barcode it. It has our
14 case number and the item number so we are able to track our
15 pieces of evidence and place it into our refrigeration unit
16 we have inside our evidence vault and then transport it to
17 SLED for testing.

18 Q And do you open the rape kit while it's at the
19 Cherokee County Sheriff's Office?

20 A No, sir.

21 Q So that -- when you took that to -- did you make any
22 markings on it, indicating what you did with it?

23 A The actual box, we do not. When it comes in, if there
24 would -- if it'd had a seal broken, anything, we would have
25 made a notation on the property sheet, where it was brought

(BILLY ANTHONY-DIRECT BY MR. KENDALL)

1 in. And I did not do so on this one.

2 Q Okay. So that indicates it was, in fact, sealed?

3 A That's correct.

4 Q And so you took the sealed box to SLED; is that
5 correct?

6 A Yes, sir. That's correct.

7 Q And I just want to -- and, internally, we have these in
8 sealed evidence bags; do you recall?

9 A Yes, sir. When we went to evidence intake, the sexual
10 assault kits, a lot of times they'll take it -- rather than
11 it going into a locker, they have to put it into the items
12 that must maintain in a refrigeration. They'll actually
13 open the seal in our presence, place them in the bags, and I
14 initial and dated them when I actually sealed them into
15 those bags at SLED.

16 Q Okay. So when it came to you, it was sealed, here, in
17 this -- in State's Exhibit -- in the box of
18 State's Exhibit 26, right?

19 A Yes, sir. That's correct.

20 Q And that includes 27, 28, and 29?

21 A Yes, sir.

22 Q And they're all inside the box. Then you take the
23 entire box to SLED; is that correct?

24 A That's correct.

25 Q And throughout this whole time, it's sealed, correct?

(BILLY ANTHONY-DIRECT BY MR. KENDALL)

1 A That's correct.

2 Q And either on this or on State's Exhibit 30 we looked
3 at a second ago, if the evidence tape is ripped, are you
4 able to tell?

5 A Absolutely. Yes, sir.

6 Q And what's unique about evidence tape?

7 A It's not easily to be able to pull off -- it tears
8 really easily. If you try to pull it off, it kind of tears
9 off in strips and the adhesion -- the glue on the back will
10 maintain -- stay on the packaging. And you'll see it, where
11 if anyone tries to open it, that it'll tear.

12 Q So were all these exhibits, State's Exhibit 30,
13 State's Exhibit 28, 29 -- or 26, 27, 28, and 29 -- were
14 these all sealed?

15 A Yes, sir.

16 Q And they were sealed when they left the sheriff's
17 office; is that correct?

18 A Yes, sir. That's correct.

19 Q And then with respect to these, you actually resealed
20 these in heat-treated envelopes; is that accurate?

21 A Yes, sir. That's correct.

22 Q And, obviously, if someone got in those, then the seal
23 would be broken. Is that a fair statement?

24 A That's correct.

25 Q And how did they come back to you?

(BILLY ANTHONY-DIRECT BY MR. KENDALL)

1 A When I take -- we go to SLED usually, at least, monthly
2 or biweek -- biweekly. When items are ready to be returned,
3 their evidence intake will let us know and we'll pick up any
4 items that are to be returned to our agency and we will sign
5 a chain of custody from them back to us and we'll return it
6 back to the sheriff's office and I place it on the shelf in
7 the evidence vault.

8 Q Okay. And, likewise, State's Exhibit 2, 3, and 4, do
9 you kind of recognize y'all's on this?

10 A Yes, sir.

11 Q Were those also maintained at the sheriff's office?

12 A They are. And all of these envelopes also have a
13 barcode that has our case number, the item description, and
14 item number. And the officers, when they seal them, initial
15 and date it to show the seal was intact.

16 Q Okay. And then State's Exhibit 17 -- was this kept
17 down there as well?

18 A Yes, sir, it was.

19 Q So since this has taken place, this has all been
20 maintained in a secure part of the sheriff's office, other
21 than the stuff that was sent to the South Carolina Law
22 Enforcement Division?

23 A Yes, sir. That's correct.

24 MR. KENDALL: Please answer any questions Mr. Morin may
25 have.

(BILLY ANTHONY-CROSS BY MR. MORIN)

1 CROSS-EXAMINATION

2 BY MR. MORIN:

3 Q These items that you have here, 25, -6 and, -7 in this
4 box, that went to SLED?

5 A Yes, sir.

6 Q And these items here, Items 2, 3, and 4, they did not
7 go to SLED; is that correct?

8 A No. No.

9 Q Let me ask you about the back of this box.

10 A Yes, sir.

11 Q On the back of the box it lists -- it has a list of who
12 had the item, correct?

13 A Yes, sir.

14 Q So we have Kelly Clue first, and that is on
15 January 9th.

16 A Yes, sir.

17 Q And that's at 21:15, which -- almost 10:00; is that
18 correct?

19 A Yes, sir.

20 Q And then Mr -- Officer Bowles, he got it on
21 January 9th, at this date. And he also got it from her at
22 that time, I assume; is that correct?

23 A Yes, sir.

24 Q And then it went into evidence the next day, but it was
25 late. So 2:00 in the morning it ended up in evidence?

(BILLY ANTHONY-CROSS BY MR. MORIN)

1 A Yes, sir.

2 Q Now, when it goes into the evidence vault, that seems
3 to indicate it went in at 2:00 in the morning.

4 A Yes, sir.

5 Q There's nobody there at 2:00 in the morning, though, is
6 there?

7 A It was placed in the evidence refrigerator. The one
8 that has the vault -- the padlock on it. And they placed it
9 inside that until I get it the following day.

10 Q Okay. So this -- we put it in the mail slot, what have
11 you, and nobody can get to it. But now -- not now, but if I
12 understand correctly, there's a separate place that this
13 goes.

14 A Anything that is cold, that has to be refrigerated, it
15 goes into that refrigerator I was telling you about earlier,
16 that has the lock on it, that once the officers place
17 something in it, they lock it back. Then we have to come in
18 to retrieve it out. We leave it unlocked until the next
19 officer needs it to place evidence into.

20 Q So it stays unlocked, and then once something is in
21 there and you come in and see it's locked, then you know you
22 need to get something out?

23 A The officers usually will send us a email, a text
24 message. They -- when they place it in there to let us
25 know. That way, as soon as we get there the following

(BILLY ANTHONY-RE-DIRECT BY MR. KENDALL)

1 morning, we can retrieve the items out.

2 Q Okay. One more thing. So the transfer from the
3 refrigerator to -- from that refrigerator to your
4 refrigerator -- is that recorded somewhere?

5 A Yes, sir. It should be on our property sheet. It is
6 not on the copy that I have in my hands here. I don't have
7 that on this form. I'm sorry, sir.

8 MR. MORIN: That's all the questions I have,
9 Your Honor.

10 THE COURT: Re-direct.

11 RE-DIRECT EXAMINATION

12 BY MR. KENDALL:

13 Q So just to be clear: This was in one refrigerator that
14 was locked, and then you all got it out, and put it in a
15 different refrigerator that was locked?

16 A Yes, sir. That's correct.

17 Q And then took it to SLED after that?

18 A Yes, sir. That's correct.

19 Q And the whole time that happened, it was in a sealed
20 envelope until it got with SLED?

21 A It was in the sealed box, yes, sir.

22 Q And the envelope wasn't busted or -- or the seal wasn't
23 busted or nothing like that?

24 A No, sir.

25 MR. KENDALL: Nothing further, Your Honor.

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 THE COURT: Re-cross?

2 MR. MORIN: No, sir.

3 THE COURT: You may step down.

4 (The witness left the stand.)

5 Next witness.

6 MR. KENDALL: This time the State will call

7 Verona Herrera, Your Honor.

8 VERONA HERRERA, upon first being duly sworn,

9 testified as follows:

10 DIRECT EXAMINATION

11 BY MR. KENDALL:

12 Q Would you please state your name for the record.

13 A Verona Herrera.

14 Q And, Ms. Herrera, where are you currently employed?

15 A DHEC and the on-site wastewater enforcement.

16 Q And back in January of 2017, where were you employed at
17 that time?

18 A The South Carolina Law Enforcement Division, which we
19 refer to as SLED.

20 Q Actually, January into 2018, would it have been the
21 same?

22 A It would. I left there November of last year.

23 Q And in your capacity as -- what did you do at SLED?

24 A Was a forensics serologist in the DNA casework
25 department.

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 Q And what did that entail?

2 A Larger pieces of evidence in crime scene, such as
3 clothing, car parts, handguns -- similar to that -- is
4 brought in. We've looked for bodily fluids, semen, saliva,
5 or blood, and we also test rape kits in order to facilitate
6 further testing within the DNA department.

7 Q And did you do that in the case of State versus
8 Jason Simmons?

9 A I did. Yes, sir.

10 Q I'm going to show you what is marked
11 State's Exhibit 26, 27, 28, and 29, I believe.

12 Can you take a look at those.

13 A Yes, sir.

14 Q All right. And what are those?

15 A 26 and 29 do not remain at SLED. They are returned
16 with the submitting agency. Your Item 27 is the underwear
17 that was contained within the kit when it was submitted to
18 SLED. And my initials are -- and the date that I resealed
19 it are on the bottom here.

20 Item 28, State's Exhibit 28, is the debris collection
21 paper and the envelopes that are contained within the kit
22 that were collected at the time of the exam.

23 Q And do those kits included the swabs that were sent?

24 A Yes, sir. They're inside the larger envelope inside
25 the smaller envelopes.

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 Q And what did you do in that -- this case upon receiving
2 those?

3 A The first thing we do is open the kit and inventory
4 what swabs were submitted to us. In this case, there were
5 several different swabs that were submitted: Vaginal swabs,
6 oral swabs, rectal swabs, the victim buccal swabs, and then
7 there was the debris collection and then the underwear that
8 was packaged separately.

9 Those were assigned distinct item numbers in the case
10 so if the -- in this case, the sexual assault kit is Item 1,
11 the vaginal swabs are going to be labeled Item 1.1, because
12 they were part of that original Item 1, and so forth for the
13 other items.

14 Q And so what sort of testing do you do on these once
15 these come in, or how do you process this when it comes in?

16 A Depending on the information that we're given, we
17 usually test for semen, for the components of semen, and we
18 also could test for saliva, if that's applicable.

19 Q And what sort of training did you have to undergo to
20 start doing those tests?

21 A I have two associate's degree: One from
22 Greenville Tech, one from Tri-County Tech. I have a
23 Bachelor's Degree in Criminal Justice Forensics from
24 Liberty University. And when I first started at SLED, I was
25 trained by a court-qualified, in-house analyst on the

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 evidence processing or the larger pieces of evidence side of
2 it. Later, in 2015, I believe it was, I also added on the
3 body fluid identification, which is the testing we do on the
4 rape kits, or the SANE kits.

5 Q And so you are a serologist; is that correct?

6 A Serologist -- a forensic serologist, yes.

7 MR. KENDALL: Your Honor, we would offer Ms. Herrera as
8 an expert in serology.

9 MR. MORIN: No objections.

10 THE COURT: All right. Folks, remember when we were
11 talking -- I guess it was when we started -- I told you that
12 normally evidence comes in from people getting on the
13 witness stand and telling you what they heard, they saw,
14 they touched, they felt, they smelled. That sort of thing.
15 But we don't normally let people come in and give their
16 opinion about evidence. They're giving you the straight
17 facts.

18 However, the law says that when somebody because of
19 education or experience or specialized training in some
20 field rises to the level of expertise in that field, they
21 are allowed to come in and testify. And they can testify in
22 the form of an opinion, and they can give you the basis for
23 that opinion.

24 This witness has now been qualified as an expert in the
25 field of serology. She'll be allowed to give you an

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 opinion. Just because she's been qualified as an expert,
2 however, does not require that you blindly accept her
3 testimony. You decide how much weight you get her
4 testimony, based on all the evidence that you'll hear
5 throughout the trial. And you can weigh things like her
6 experience and her training, et cetera, in the field. And
7 it's solely within your discretion as to how much weight to
8 give this witness's testimony, along with all the other
9 testimony that you hear throughout the trial.

10 All right. You may continue.

11 MR. KENDALL: Thank you very much, Your Honor.

12 Q So as this came to you -- what did you do first, when
13 this evidence came to you; this rape kit?

14 A This first piece of evidence that I worked on was the
15 underwear. We test with a presumptive test to see if there
16 might possibly be semen or a component of semen in the
17 underwear. Then I go on and process any cuttings that would
18 come from the underwear and the swabs that were in the CSC
19 kit.

20 Q When it came to you in this instant, was this container
21 sealed?

22 A The heat-sealed pouches were sealed, yes, sir.

23 Q And so you were the one that actually had to unseal
24 them?

25 A That is correct. Yes, sir.

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 Q And you testified a moment ago that you read the
2 underwear underneath a light source?

3 A I do, yes. I'm not sure I said that, yes.

4 Q All right. But if you can sort of explained that to
5 me. I'm sorry.

6 A No, that's fine. We have what's called an alternate
7 light source. It emits a specific wavelength of light. It
8 allows us to visualize by -- possible body fluid stains. We
9 use that on fabrics when we're looking for saliva, as well
10 as semen. We would mark those areas, and then go back and
11 test with what we call presumptive tests, which is a quick
12 color change test. We take what looks like a larger Q-tip,
13 moisten that with sterile water, wipe the swab -- the area of
14 interest and then drop some chemicals on it. If it changes
15 color within a minute, that means that there's a possibility
16 that that location could be semen, and we would test that --
17 cut that area and take it for further testing.

18 Q Okay. So what are you actually testing for? Like,
19 what are you specifically trying to find? Is it just semen?

20 A In this case it was just semen. And we also -- I also
21 evaluate it for hair in the underwear.

22 Q Okay. Now, when you're talking about semen, are you
23 specifically talking about just sperm, or are you talking
24 about a greater component to semen?

25 A Actually, both. Semen is comprised of two parts.

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 There's a liquid part, which carries the enzyme and the
2 proteins that we can look for. And then there's the
3 cellular portion, which is the actual sperm cell itself. We
4 do look for both of those in our testing.

5 Q So is it possible to have male ejaculate that does not
6 have semen in it -- excuse me -- that does not have sperm in
7 it?

8 A That is -- that is possible, yes. It's also possible
9 that because semen itself is not a homogenous fluid. Like,
10 every sample you take out of an ejaculate is not going to
11 have the same amount of spermatozoa or sperm cells. So you
12 may miss it in our testing, but it may still be there in
13 very low concentrations.

14 Q And what other reasons would there be for just -- for
15 not having sperm in semen? If someone was -- had a
16 vasectomy, for example?

17 A That is correct. If they had a vasectomy. If it's
18 pre-ejaculate or if they had ejaculated in rapid fire, like
19 over several days, many times, there could be very, very low
20 count that would allow us not to find it as well.

21 Q And when you say "pre-ejaculate," what kind of are you
22 referring to there?

23 A Like the fluid that is released before ejaculation.

24 Q And so I'm just going to be blunt. The white stuff is
25 typically -- ejaculate may or may not have sperm in it. Is

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 that fair to say?

2 A That is correct, yes.

3 Q And in this case, which of the -- what did you check
4 for -- which items did you check for semen?

5 A Item 1 -- the vaginal -- Item 1.1 -- excuse me -- the
6 vaginal swabs were tested for the possibility of semen, the
7 oral swabs, the rectal swabs, and then the underwear.

8 Q Okay. And how did you test those?

9 A For the underwear, it was a quick color change test,
10 which in this case, was negative. The examination for
11 component of semen acid phosphatase was negative. There was
12 also no hair found on the underwear. So nothing went
13 forward from that for further testing.

14 For the swabs, we cut a small portion of it. We soke
15 it in water to release the sperm cells or the components of
16 the semen, and then we do a quick -- it's called a card
17 test. It's read similar to a pregnancy test. So the number
18 of lines indicates whether the chemical is present in the
19 sample or not.

20 We also take a small portion of the extract, the liquid
21 we soak the cells and the chemicals out into, and we place
22 that on a slide and look at it under a microscope to
23 determine if we see the sperm cells themselves.

24 Q And with regard to the vaginal swabs, did you find ---

25 MR. MORIN: Your Honor, can I -- can we approach for a

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 moment?

2 THE COURT: Sure.

3 (A bench conference was held off the record in the
4 presence of the jury but out of the hearing of the jury.)

5 THE COURT: Folks, I need to take up a matter of law
6 right now before we go any further, so let me just get you
7 to go into the jury room. You can use the restroom, and
8 we'll have you back in about ten minutes. Again, don't
9 begin deliberations.

10 (The jury exited the courtroom at 12:17 p.m.)

11 (The witness was excused temporarily.)

12 THE COURT: Okay. Mr. Morin?

13 MR. MORIN: Your Honor, again, I apologize. But
14 sometimes as trials go on, I think about how things are
15 connected, and I come up with an idea. I have an objection.
16 So here's what I'm going to do here. I'm going to object to
17 her testifying as to what her findings are because there is
18 no evidence or testimony in the record that my client at any
19 time even exposed himself to this little girl. None. She
20 was asked on the stand and she said in the video "Did he
21 expose...?" "Was he wearing...?" "Did you see his nu-nu,"
22 and other things, and she said no. There is no testimony
23 that would support them now claiming that there is any kind
24 of protein, antigen, or any other sperm-type thing in this
25 case. And for that reason, I believe that she shouldn't be

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 allowed to say whether or not she found anything. Because
2 there's none -- up to this point, there has been no
3 testimony or any evidence that would support that being
4 found or that that occurred.

5 And I understand that when we were doing a search
6 warrant or what have you, that we're looking for anything
7 that might be of evidentiary value. But in this particular
8 instance, we are now to a point where little girl never said
9 anything like that happening. Never. So for them to now
10 try to introduce evidence that that did happen outside of
11 that, I argue it should be in admissible.

12 THE COURT: All right. What's the State's position?

13 MR. KENDALL: Your Honor, there's certainly additional
14 ways to transfer semen, other than ejaculate or exposing
15 yourself. For example, if he had it on his hands, had it on
16 something else, some sort of other instrument, it could
17 result in the transfer of that.

18 I also don't believe -- there's certainly some
19 difficulties in her testimony as a young child as to
20 conceptually understanding as to what happens. But she does
21 talk about him rubbing things on her in the CAC video. I
22 think that it's certainly sufficient to submit to the jury
23 as to what took place. I mean, the act itself of finding
24 his sperm on her vaginal and rectal area, by itself, is
25 evidence of a sexual assault, regardless of what she says.

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 We see that all the time with murder cases. Certainly, if
2 she'd passed away and we found this, it'd certainly be
3 relevant evidence in that instance.

4 But basically, Your Honor, just because she didn't see
5 how he got the ejaculate on to her doesn't mean that it's
6 not there and doesn't mean it's not evidence of a sexual
7 assault, specifically based on the areas where it's located.
8 I mean, it's located in, I think, what we subsequently
9 testified to is in her -- vaginal swabs came back and the
10 rectal swabs came back.

11 You heard the testimony regarding the rectal swabs and
12 how they did that, as well as the vaginal swabs and how they
13 did that. And, quite frankly, I don't think there's a way
14 that that spermatozoa can get there without some sort of
15 assault taking place. Coupled with her testimony, where she
16 indicates that an assault took place, I think there's
17 certainly sufficient evidence from which the jury can gather
18 that at some point his spermatozoa ended up on her vagina
19 and rectum. She says it's from touching.

20 I think that those two things are very obviously
21 connected. I don't think that she's required to see him
22 masturbate or see him attempt to penetrate her. I think
23 that the fact that they're there, the fact that she said
24 he's the one that touched her is sufficient evidence to
25 suggest that's the case.

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 THE COURT: Response?

2 MR. MORIN: First response is: According to the point
3 I have, I used 1.1 and 1.3, no spermatozoa identified. So
4 we're down to a protein, and they've already put in evidence
5 that it was lotion. They even put the pictures in. So to
6 now say, well, we changed our mind; he was rubbing something
7 on her -- that was the testimony that they went with and
8 evidence they presented.

9 So, again, I would say that they have to establish that
10 something happened before they could put this evidence in.
11 And he may be correct in a murder case, but we have a
12 witness in this case and nothing like that was added and
13 specifically asked.

14 THE COURT: All right. Well, my answer to that would
15 be, well, there's two types of evidence: There's direct and
16 circumstantial. And direct evidence was done in a case like
17 this, the victim we would say, yes, he penetrated me or this
18 is what he did to end up with it. But we're talking about a
19 4-year-old girl and her ability to convey whatever happened,
20 even at the time, was very, very, very limited because of
21 her years, so I don't believe it's required that there be
22 direct evidence that she saw him perform a sex act or state
23 that he performed a sex act. The fact that there is semen
24 or some DNA that appeared on her is circumstantial evidence
25 that something took place. And that's just a piece in the

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 chain that a sexual assault took place, so your motion is
2 overruled.

3 MR. MORIN: Thank you, Your Honor. And, Your Honor, I
4 just want to state for the record that from this point
5 forward, with these pieces of evidence, I'm going to renew
6 my objection based on what I've argued here.

7 THE COURT: And your objection is noted and it's
8 overruled.

9 MR. MORIN: So I just want to ---

10 THE COURT: It's a continuing objection.

11 MR. MORIN: I understand, but I may make it again
12 because sometimes the court of appeal says ---

13 THE COURT: All right. If you feel like it's
14 necessary, if you have new grounds, then ought to let me
15 know. Otherwise, I will just say it's overruled.

16 MR. MORIN: Yes, Your Honor.

17 THE COURT: Okay. Let me ask you this just for
18 planning purposes: Will this be your last witness before
19 lunch?

20 MR. KENDALL: It can be, Your Honor.

21 THE COURT: Okay. Well, let's plan on that. Let's
22 just take five quick minutes if you need to before we
23 resume. Thank you.

24 (A recess was taken.)

25 THE COURT: All right. We have everybody back.

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 It won't be necessary for you to renew your objection.

2 MR. MORIN: Okay. If you say so, Your Honor, then

3 that ---

4 THE COURT: I say so.

5 MR. MORIN: --- then that's what I'm going with.

6 THE COURT: All right. You all ready?

7 MR. KENDALL: Yes, sir, Your Honor.

8 THE COURT: Okay. Bring the jury back in.

9 (The jury entered the courtroom at 12:31 p.m.)

10 THE COURT: All right. We will resume now with direct

11 examination by the State.

12 MR. KENDALL: Thank you, Your Honor.

13 (The witness returned to the stand.)

14 Q Just to sort of go back to what we talked about.

15 So you initially -- or you've checked the underwear and

16 determined there was no semen components and no hair were

17 found, correct?

18 A The one component that I tested for was not there, yes.

19 Q So after you tested the underwear, what did you test

20 after that?

21 A I started on the swabs; the vaginal swabs, the oral

22 swab, and the rectal swabs.

23 Q And what sort of test did you do for those?

24 A It's a test for the presence of p30, which is a protein

25 in the liquid portion of semen, first of all. And then a

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 small portion of that sample is taken and placed on a
2 microscope slide, viewed microscopically to look for the
3 spermatozoa, or the sperm cells.

4 Q And did you do that for each of these: The vaginal,
5 oral, and rectal swabs?

6 A That is correct, yes.

7 Q With regard to the oral swabs, did you find any
8 components semen; this p30 protein?

9 A No, sir. Both his p30 and his spermatozoa were
10 negative.

11 Q So that basically stops the testing of your swabs; is
12 that correct?

13 A That is correct.

14 Q What about with the vaginal swabs? What did you find
15 there?

16 A The examination for component of semen p30 was
17 positive. No spermatozoa were identified, so the item was
18 forwarded to the DNA section.

19 Q And is that your expert opinion; that there was a p30
20 protein, a component to semen present?

21 A Yes, sir.

22 Q With regard to the rectal swabs, what would be your
23 expert opinion with regard to those?

24 A The examination for component of semen p30 was positive
25 as well, no spermatozoa were identified, and the item was

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 forwarded to the DNA section.

2 Q So in both the vaginal and rectal swabs, a component of
3 this p30 protein -- this component to semen, was found, but
4 no spermatozoa; is that correct?

5 A That is correct.

6 Q And that's your expert opinion as an expert?

7 A Yes, sir.

8 Q And you testified a few moments ago there's multiple
9 ways that could be the case. Is that fair to say?

10 A That is correct, yes.

11 Q When you got these things, were they sealed?

12 A Yes. All the individual envelopes were sealed inside
13 the larger envelope.

14 Q And what did you forward then to the DNA section?

15 A Item 1.1, the vaginal swabs; Item 1.3, the rectal swab;
16 and Item 1.4, the victim swab.

17 Q Okay. And who did you give that to?

18 A I gave that directly to the DNA Analyst Samuel Stewart.

19 Q And what did you all do with ---

20 MR. KENDALL: I think we can go ahead and get some of
21 this stuff into evidence right now.

22 Q Did you all keep -- once you got this rape kit, what
23 did you all do? Did you send this stuff to Mr. Stewart as
24 well, this box and this ---

25 A No. The box and the toxicology envelope are returned

(VERONA HERRERA-DIRECT BY MR. KENDALL)

1 to the agency at the time that the kit is submitted to the
2 SLED laboratory. The only things the SLED's allowed to keep
3 are the individually heat-sealed pouches.

4 MR. KENDALL: We would offer State's Exhibit 26 and 29
5 into evidence. It's the blood...

6 MR. MORIN: The stuff that hasn't been tested.

7 MR. KENDALL: And the box.

8 MR. MORIN: Yeah, that's fine. The box. Yes, sir, I
9 don't have any objection to that.

10 THE COURT: Admitted.

11 Q So just to sort of summarize. When it came to you, it
12 was sealed; is that correct?

13 A That is correct.

14 Q When it left you, it went to the DNA analyst; is that
15 correct?

16 A That is correct.

17 Q And you found a potential -- or you found this p30
18 protein, a component of semen, on the vaginal swabs and
19 rectal swabs. That's what you forwarded to him; is that
20 correct?

21 A That is correct.

22 Q Along with her buccal swab?

23 A Yes, sir.

24 MR. KENDALL: If I can just have one moment,
25 Your Honor, just to make sure.

(VERONA HERRERA-CROSS BY MR. MORIN)

1 Q And you didn't handle the defendant's buccal swab,
2 correct?

3 A No, sir. I believe that came in at a later date.

4 MR. KENDALL: Please answer any questions the defendant
5 may have.

6 CROSS-EXAMINATION

7 BY MR. MORIN:

8 Q I'm interested in P90 ---

9 A P30.

10 Q P90 is something else. P30, that is the protein that
11 all males have; is that correct?

12 A That is correct.

13 Q And isn't there a blood test for that?

14 A Yes. It's considered the PSA test. It's to test male
15 blood for the amount of prostate-specific antigen to
16 determine likelihood of prostate cancers.

17 Q So this protein is common in all men?

18 A In specific body fluids, yes, sir.

19 Q And the body fluids being?

20 A It's present in blood in high concentrations of men
21 with prostate cancer. It's present in seminal fluid or
22 semen and can also be present in urine due to the anatomy of
23 the male reproductive and urinary tracks.

24 MR. MORIN: That's all the questions I have.

25 THE COURT: Re-direct?

(VERONA HERRERA-CROSS BY MR. MORIN)

1 MR. KENDALL: Nothing further, Your Honor.

2 THE COURT: You can step down. Thank you.

3 (The witness left the stand.)

4 All right. Folks, we'll break for lunch right now.

5 Again, don't forget don't enter deliberations or discussion

6 when you go to lunch with people on the jury. If you talk

7 to anybody, do not discuss the case, don't discuss witness

8 demeanor, or anything at all about the case.

9 If you would, let's be back at 2:15 p.m. And we will
10 resume this afternoon. Hopefully, see you in a little bit.

11 (The jury exited the courtroom for a lunch recess at
12 12:30 p.m.)

13 MADAME CLERK: This trial is in recess until 2:15 p.m.,
14 but the judge will be taking the bench back at 2:00 p.m.

15 (A recess transpired.)

16 THE COURT: All right let's bring the jury in.

17 (The jury entered the courtroom at 2:18 p.m.)

18 THE COURT: All right. Folks, we're going to resume
19 and let the State call their next witness.

20 Before they do that, though, it looks like we are going
21 to probably be finished tomorrow morning, instead of this
22 afternoon. Kind of hoping maybe we could, but with trials
23 is you just do your best. Is that going to present a
24 problem for anybody? Because I'd indicated at one time I
25 thought we might finish today, but it really looks like

(BRIAN HUDAK-DIRECT BY MR. KENDALL)

1 tomorrow morning. We have no more alternates, and I want to
2 make sure that we're not going to lose any more because of
3 some issue that can't be helped. Okay. I don't see anybody
4 objecting, so call your next witness.

5 MR. KENDALL: Your Honor, the State will call
6 Brian Hudak.

7 BRIAN HUDAK, upon first being duly sworn, testified
8 as follows:

9 DIRECT EXAMINATION

10 BY MR. KENDALL:

11 Q Could you please state your name for the record.

12 A Brian Hudak.

13 Q Mr. Hudak, where are currently employed?

14 A I'm with the South Carolina Law Enforcement Division,
15 known as SLED.

16 Q And what are your responsibilities with SLED?

17 A I work in computer crimes and I perform forensic --
18 digital forensics on cell phones, computers, vehicles,
19 network intrusion cases, pretty much everything digital.

20 Q And what kind of education did you have to learn how to
21 do this?

22 A I've been through a wide array of training through the
23 National White Collar Crime Center. I've been through their
24 basic data recovery analysis, intermediate data recovery and
25 analysis, Macintosh triage and imaging, applied device

(BRIAN HUDAK-DIRECT BY MR. KENDALL)

1 forensics, Windows artifacts. I've also attended classes at
2 the National Computer Forensics Institute, which is run by
3 the U.S. Secret Service. I've taken basic investigation of
4 computer and electronic crimes, basic network investigation
5 training, and also network intrusion response training, as
6 well as various other trainings through NW3C and CFI.

7 Q And what do these areas focus in? What have you
8 learned to do?

9 A We're known to extract and interpret data from cell
10 phones, computers, also network -- computer networks. And I
11 have had recently some education in malware analysis.

12 MR. KENDALL: Your Honor, we would offer Mr. Hudak as
13 an expert in the field of digital analysis.

14 MR. MORIN: No objection.

15 THE COURT: Digital analysis. Is that what you said?

16 MR. KENDALL: Yes, sir, Your Honor.

17 THE COURT: All right. Folks, this witness has now
18 been qualified as an expert in the field of digital
19 analysis. Like I told you with the last witness, experts
20 are allowed to give their testimony in the form of opinions,
21 and so he has been qualified as an expert in this field to
22 be allowed to testify as to his opinion and give you the
23 basis of his opinion.

24 As I also told you with the previous witness, you alone
25 determine how much weight to give his testimony based on all

(BRIAN HUDAK-DIRECT BY MR. KENDALL)

1 of the evidence that you hear throughout the trial. And if
2 you feel like it doesn't match up with anything else you've
3 heard or you don't feel like his experience and education is
4 sufficient, then you decide alone how much weight to give
5 his testimony.

6 All right. You may proceed.

7 Q Mr. Hudak, in your time at SLED, did you analyze a
8 64 gigabytes pin drive submitted by the Cherokee County
9 Sheriff's Office?

10 A Yes, I did.

11 Q I don't know if you can see on the screen. Does this
12 appear to be the three files that were sent up?

13 A Yes.

14 Q And these three files. Let me open one up. Just a
15 second. Does that appear to be the files you analyzed?

16 A Yes.

17 Q And on this pin drive, what sort of analysis did you
18 conduct?

19 A I conducted -- first of all, I forensically imaged the
20 thumb drive before I analyzed it. Which we put the thumb
21 drive up to a write blocker to prevent any of our systems
22 from changing or editing any of the data on it. We create
23 what's called a forensic image of the device, in this case,
24 the thumb drive, which is an exact copy of the thumb drive
25 to a file that goes sector by sector, copies all data.

(BRIAN HUDAK-DIRECT BY MR. KENDALL)

1 And then the program that we'd use to image also then
2 creates what's called a forensic hash value, which is
3 essentially digital DNA. It runs that file, created through
4 an algorithm, that creates a hash file that is unique to
5 that file to show that there was nothing done to manipulate
6 the file. There's nothing changed in that file. You can
7 take that same file I created back in 2017 today and run --
8 the hash value would be the same as that hash value.

9 Q So it's basically an evidence preservation process; is
10 that correct?

11 A Exactly, yes.

12 Q And what do you do after that to make sure you're not
13 messing with anything?

14 A After that -- after the forensic image is created, we
15 put the evidence item back in our vault, and that's the only
16 time we use it, we touch it. Everything -- all the work I
17 do is off of that. Basically, that forensic image, that's a
18 copy that I made.

19 Q And that's exactly the same as what's on the disk?

20 A Correct.

21 Q And in this case, did you do that with the 64-bit thumb
22 drive?

23 A Yes, I did.

24 Q And did you create a report from that? What did you do
25 with that to analyze it?

(BRIAN HUDAK-DIRECT BY MR. KENDALL)

1 A With that, I loaded it into a program called a forensic
2 tool kit. It's otherwise known as FTK. It processes -- it
3 looks for any files on the thumb drive. I also had it
4 attempt to carve out any sort of deleted files or anything.
5 If it could detect if there was anything deleted on it, and
6 then analyze what files it did find.

7 Q All right. And did you do that in this instance?

8 A Yes, I did.

9 (State's Exhibit 31 was marked for identification.)

10 Q And I'm going to show you what is marked
11 State's Exhibit 31. Do you recognize this?

12 A Yes, I do.

13 Q And what is that?

14 A It's part of the report created by the FTK software of
15 the three files that I located that were relevant to this
16 case.

17 MR. KENDALL: And I'm going to -- we would offer
18 State's Exhibit 31 into evidence, and we request permission
19 to publish that.

20 Q And if you can just step down, that would be fine.

21 I'm going to show you this report you generated in
22 regards to these three files.

23 A Yes.

24 (The witness left the stand and went to the screen.)

25 Q Now, what are kind of the common themes -- that's hard

(BRIAN HUDAK-DIRECT BY MR. KENDALL)

1 to see with this pointer but -- common themes in each one
2 that you guys have listed?

3 A For each of the three files I found, it shows the
4 modified date being January 11th, 2017, with created dates
5 of January the 16th of 2017.

6 Q Now, what is the modified date? What is that?

7 A The modified date is normally if any modifications have
8 been made to a file after it's been created, Windows or
9 other operating systems will mark when it was modified.

10 Q And so for these files, they're all different times.
11 But what date were they last modified?

12 A They were last modified January 11th, 2017.

13 Q So the modification occurred on the 11th. When were
14 they actually put on that pin drive?

15 A They were put on the thumb drive on January the 16th of
16 2017. And that's under the created date.

17 Q So these weren't initially saved or anything directly
18 to this pin drive. Is that fair to say?

19 A Not as far as I can tell. That's correct. Yes.

20 Q And they were actually the modified date -- the date
21 that it -- how is the modified related to the original
22 machine?

23 A Whenever you create a file on a computer, obviously,
24 that would be the created date and time. When you're
25 copying a file, say, from your hard drive on your computer

(BRIAN HUDAK-DIRECT BY MR. KENDALL)

1 to a pin drive, such as this one, your -- it's the same
2 file, but the file system sees it as a new file. Which
3 is -- what it will do is it will take the original created
4 date, it'll move that down to the modified date, and then it
5 will put the created date and time as the date and time it
6 was created on that pin drive; copied onto that pin drive.

7 Q So is it fair to say it's specific to the pin drive?

8 A Correct.

9 Q So for that pin drive, as far as it's concerned, it
10 didn't have -- it didn't have anything on it until
11 January the 16th; is that correct?

12 A That's correct. I didn't find any deleted items or
13 anything on it.

14 Q But as far as it knows, that's when these videos got
15 there, that's why it says "created date"?

16 A Correct.

17 Q All right. And then what is the modified date?

18 A The modified date is the original creation date
19 according to the system those files were created on. So
20 assuming those were created on, you know, a DVR or a desktop
21 or whatever, that would have been the original created date.
22 Like, if you saw those files on that system, they would have
23 the created date of January 11th, 2017.

24 Q So as far as the DVR goes, the created date on that is
25 January 11th. Is that fair to say?

(BRIAN HUDAK-DIRECT BY MR. KENDALL)

1 A If that's what created these files, yes.

2 Q Okay. That makes sense. All right.

3 Now, switching back -- hopefully -- to the computer, we
4 have down here at the bottom this sort of running time.

5 What is that? Where does that typically come from?

6 A That would typically come from the date and time of the
7 DVR system.

8 Q And what were the obstacles you ran into on this? Let
9 me actually show you this DVR. It's State's Exhibit 17.
10 What, looking at this, is missing? What needs to be there?
11 Is anything missing?

12 A It looks like there should be a hard drive, like you
13 would find in your computer. It's got two connectors for
14 the power and the data transmission from the motherboard of
15 the DVR that would transmit to the hard drive. And I do not
16 see a hard drive.

17 Q So the hard drive is gone. Typically, on these
18 systems, keeping in mind that its -- the lack of a hard
19 drive is an obstacle for you in doing analysis of these
20 things?

21 A Yes. Without a hard drive, it's worthless to me.
22 There's nothing I can get off of it.

23 Q Typically, in video systems, the clock at the bottom,
24 how is this -- how do they come up with that?

25 A That's set by a user on the DVR system, just like you

(BRIAN HUDAK-DIRECT BY MR. KENDALL)

1 would set the time on your -- you know, on your TV or
2 microwave or stove top.

3 Q So it can be set to anything?

4 A Correct.

5 Q Sometimes, for a reasonable degree -- if you lived in
6 California, you would shift it for that correct time; is
7 that correct?

8 A Yes.

9 Q So it's possible to manipulate that. Is that fair?

10 A Yes.

11 Q So I guess what I'm asking is, how is that similar to
12 any sort of household appliances or anything like that?

13 A It's the same thing. You just go into a menu, go into
14 the settings, and you can change your date and time on your
15 DVR system. Just like, again, you would on your microwave
16 or coffeepot.

17 Q And it can be changed to any date and time that the ---

18 A That's correct.

19 Q The top that's labeled clip 11 -- 11127093409, can you
20 say anything about that at all?

21 A I believe a lot of DVR systems when you export a view
22 from them, it creates a file, and a lot of times the default
23 file name will a lot of times be the date and the time of a
24 video file. So if you're creating a video file from
25 1/11/17, it'll create the file name. And it appears that

(STEPHEN ANDERSON-DIRECT BY MR. KENDALL)

1 the file name is what's on top of that the video.

2 Q Can you manipulate that as well? In other words, was
3 the number of the first clip you listed is 1, would that
4 have come across initially as something entirely different,
5 then he's changed the name?

6 A It could have been renamed before copied to the thumb
7 drive, yes.

8 Q So on what day were these three videos transferred to
9 that thumb drive?

10 A I believe -- I apologize. I believe it was January --
11 if I refresh myself -- I apologize. It would have been
12 January 16th, 2017.

13 Q And what day were those last modified off of the
14 original system?

15 A January 11th, 2017.

16 Q And is that when they would have been created, on that
17 date?

18 A Yes.

19 MR. KENDALL: Nothing further, Your Honor.

20 MR. MORIN: If I may have just a moment, Your Honor.

21 THE COURT: Uh-huh.

22 MR. MORIN: I don't have any questions for this
23 witness, Your Honor.

24 THE COURT: You may step down.

25 (The witness left the stand.)

(STEPHEN ANDERSON-DIRECT BY MR. KENDALL)

1 THE WITNESS: Thank you, sir.

2 THE COURT: Next witness.

3 MR. KENDALL: At this time the State would
4 Steve Anderson, Your Honor.

5 STEPHEN ANDERSON, upon first being duly sworn, testified
6 as follows:

7 DIRECT EXAMINATION

8 BY MR. KENDALL:

9 Q Could you please state your name for the record.

10 A Stephen Anderson.

11 Q And where are you currently employed, sir?

12 A I am the general administrator at the Cherokee County
13 Detention Center.

14 Q And you're Major Anderson; is that correct?

15 A Yes, sir.

16 Q In your role as an administrator of the jail, do you
17 all record phone calls?

18 A Yes, sir.

19 Q And how is that done?

20 A All phone calls are recorded in there, even given a
21 pre-statement that they could be used in a court of law. It
22 is done through a system that is based out of Texas, but it
23 is stored for our use for evidence.

24 Q And you have to go to access those files?

25 A Yes.

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 Q If you don't take action, do those files stay around
2 forever?

3 A They will stay around for one year if we don't take any
4 action.

5 Q And do you have the ability to take action and keep
6 those files?

7 A Yes.

8 (State's Exhibit 32 was marked for identification.)

9 Q I'm going to show you what is marked
10 State's Exhibit 32. Do you recognize this?

11 A Yes. It looks to be a CD of a phone call from our
12 system.

13 Q And have you had an opportunity to listened to this?

14 A Yes.

15 Q And was that a fair and accurate representation of the
16 phone call that was copied?

17 A Yes.

18 MR. KENDALL: And we would offer State's Exhibit 32
19 into evidence at this time.

20 MR. MORIN: No objection.

21 THE COURT: You may publish. It's admitted.

22 What was the date on it again?

23 MR. KENDALL: Of the call?

24 THE COURT: Of the phone call.

25 MR. KENDALL: I believe it was January 23, 2017.

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 (State's Exhibit 32 was played for the Court and jury.)

2 Q All right. Just a couple things real fast. This was a
3 call that was made to Mr. Simmons; is that correct?

4 A Mrs. Simmons made that phone call home.

5 Q And what did he just indicated they took?

6 MR. MORIN: Objection. Hearsay.

7 THE COURT: It speaks for itself.

8 (State's Exhibit 32 was played for the Court and jury.)

9 MR. KENDALL: Please answer any questions the defense
10 may have.

11 MR. MORIN: I have no questions of this witness.

12 THE COURT: You may step down.

13 THE WITNESS: Thank you.

14 (The witness left the stand.)

15 MR. KENDALL: The State will call Samuel Stewart at
16 this time, Your Honor.

17 SAMUEL ADAM STEWART, upon first being duly sworn,
18 testified as follows:

19 DIRECT EXAMINATION

20 BY MR. KENDALL:

21 Q Could please state your name for the record.

22 A Samuel Adam Stewart.

23 Q Mr. Stewart, where are you currently employed?

24 A I work for the South Carolina officer division,
25 commonly known as SLED.

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 Q And how long have you been employed there?

2 A Eight years.

3 Q And what are your responsibilities with SLED?

4 A I'm a DNA analyst in the scientific DNA casework
5 department.

6 Q And what sort of education did you undergo and training
7 to get this assignment?

8 A I received my bachelor's in science and biology from
9 Frances Marion University. I also received in-house SLED
10 training under other court-qualified analysts for a little
11 over a year and a half. I had to successfully complete a
12 written exam, an oral exam, a competency, and mock trial
13 before I was deemed competent as a DNA analyst.

14 THE COURT: Your Honor, at this time we would offer
15 Samuel Stewart as an expert in DNA analysis.

16 MR. MORIN: If I can ask a question.

17 THE COURT: Sure. You can voir dire if you want.

18 BY MR. MORIN:

19 Q How many times have you testified as an expert in DNA
20 analysis?

21 A Approximately 33 times.

22 MR. MORIN: That's all. No objection.

23 THE COURT: All right. Well, folks, this witness has
24 now been qualified as an expert in the field of DNA
25 analysis. As I told you earlier with expert witnesses,

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 they'll be allowed to testify in the form of an opinion.
2 You decide how much weight to give his testimony based on
3 all of the evidence that you hear throughout the trial, as
4 well as to weigh things like his background, training, level
5 of expertise. You decide alone how much weight to give his
6 evidence -- his testimony based on all the evidence that
7 you'll hear throughout the trial.

8 You may resume.

9 MR. KENDALL: Thank you, Your Honor.

10 Q And did you conduct the DNA analysis in the
11 Jason Simmons case?

12 A Yes, I did.

13 Q I'm going to show you what is marked
14 State's Exhibit 30. Do you recognize this?

15 A Yes, I do.

16 Q And what is that?

17 A It is a buccal swab from Jason Simmons. It has the
18 unique SLED lab number and item number, as well as my
19 initials and date on it.

20 Q And how did that come to you?

21 A I got it from my evidence control department.

22 Q And when you got it, was it sealed at that the time?

23 A Yes, it was.

24 Q And after testing it, did you seal it back up and send
25 it back.

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 A That's correct.

2 Q And are there any markings on there that indicate that?

3 A Yes. It has my initials and date, when I entered it
4 into the heat-seal pouch, as well as when I exited it out of
5 the heat-sealed pouch.

6 MR. KENDALL: Your Honor, we would offer State's
7 Exhibit 30 into evidence.

8 THE COURT: Over his previous objection, I submit it.

9 Q And I'm going to show you what is marked State's
10 Exhibit 28. Do you recognize this?

11 A Yes, I do. This is the CSC kit from A.F. [REDACTED],
12 has the unique SLED number and item number as well.

13 Q And did you receive that as well?

14 A Yes, I did.

15 Q Where did you get that from?

16 A I got it straight from Forensics Serologist
17 Verona Herrera.

18 MR. KENDALL: Your Honor, we would offer
19 State's Exhibit 28 into evidence.

20 THE COURT: It's not already in?

21 MR. MORIN: No, sir. It was part of it.

22 THE COURT: Pardon?

23 MR. MORIN: It was part of the one I objected to
24 earlier.

25 THE COURT: All right. Admitted over his objection.

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 Q And were you sent the State's Exhibit 27? Did that
2 actually come to you?

3 A I did not get this item.

4 MR. KENDALL: We would offer State's Exhibit 27 into
5 evidence. It was actually -- the chain was complete through
6 Ms. Verona.

7 THE COURT: I thought all those were already in, but
8 admitted over his objection.

9 Q Sir, once you received these items, what do you do with
10 them?

11 A Once items come into my custody, I start processing --
12 processing these items for DNA to develop a DNA profile.

13 Q And how do you do that? Could you please explain the
14 procedure for how you develop a DNA profile.

15 A Not a problem. The first thing we do is we extract the
16 DNA from the item. Usually, it's a cutting or from a piece
17 of swab. Once I extract it, I put it inside a solution to
18 try to pull away that DNA that may be there. And then I
19 quantify that DNA to try to find out exactly how much we
20 have. We have to have the DNA within a certain range. Too
21 much won't give us a good profile, and too little won't give
22 us a good profile either.

23 Once I find that range that's necessary for each and
24 every item of evidence, I amplify it; make many, many copies
25 of that DNA. And then we put it on another instrument to

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 develop the DNA profile. And once those profiles are
2 developed, I compare the evidence to the known standards,
3 which are the individuals that are involved in that criminal
4 case, to see whether or not those individuals are included
5 or excluded as possible contributors to the DNA profile from
6 the evidence.

7 Q And this case, whose profiles did you come up with?

8 A I had a buccal swab from A.F. [REDACTED] and buccal
9 swabs from Jason Simmons.

10 Q And so from that, were you able to develop a DNA
11 profile of those individuals?

12 A Yes, I was.

13 Q And what items came to you as a result of this?

14 A She sent me items 1.1, the vaginal swabs from CSC kit
15 and Item 1.3, the rental swabs from the CSC kit.

16 Q And what, generally speaking, test did you -- what did
17 you test on this?

18 Let me ask it like this: Did you run tests on this for
19 sperm fraction and nonsperm fraction?

20 A That is correct. Whenever we have an item from a
21 sexual assault kit that has indication of any male DNA, I
22 did a different type of extraction known as differential.
23 And what that does is split each item into to two portions.
24 A nonsperm fraction -- this is the portion, what I hope to
25 separate, all the female DNA that I know that is there, and

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 a sperm fraction. This portion is the portion that I hope
2 to capture any potential male DNA that is present on that
3 item.

4 And this is because of where these items come from, the
5 individual's body, there's a potential that that female's
6 DNA can mask any DNA that's present, any kind of potential
7 male DNA I should say. So we try to separate it out to try
8 to Isolyte -- excuse me -- isolate any of that DNA that may
9 be there from a male.

10 Q Now, when you talk about sperm fraction, does that
11 necessarily require there be an actual sperm?

12 A No. It's just a normal picture that we have for those
13 different portions.

14 Q So you could, for example, pull out this male portion
15 to it and there'd be no sperm in there at all. Is that fair
16 to say?

17 A That is correct.

18 Q That's just what you guys call it; just the
19 nomenclature from how this testing is done?

20 A That is correct.

21 Q And did you run a nonsperm fraction test on the vaginal
22 swabs in this case?

23 A Yes, sir. Nonsperm and sperm.

24 Q And what were, in your expert opinion, your findings
25 with regards to the nonsperm fraction?

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 A The DNA profile -- the nonsperm fraction from the
2 vaginal swab is consistent with the DNA profile of
3 A.F. . And I also -- excuse me, if I may -- I also
4 did Y-testing on these items as well.

5 If I may explain, Y-testing tests DNA only from the
6 Y-chromosome. So it isolates the male's profile. They're
7 only from male DNA that's present there as well. And this
8 kind of profile is -- pass along the male paternal lineage.
9 So this profile is shared by individuals -- father,
10 grandfather, brother, uncle -- anyone in that line too. So
11 I did that testing as well. I just want to explain before I
12 continue with my results.

13 A partial Y-STR DNA profile developed is a mixture of
14 the two male individuals. A partial Y-STR DNA profile of
15 the major contributor matches the Y-STR profile of
16 Jason Simmons.

17 Q And what is meant by "the major contributor"?

18 A Oh, yeah. When we have -- sometimes we have a mixture
19 on an item. That means two or more individuals may have
20 contributed the time -- excuse me -- their DNA through an
21 item. Sometimes I'll break down that mixture into a major
22 and a minor. One person contributed significantly more DNA
23 to that item and a minor contributed -- some contributed
24 significantly to that item.

25 Q And Mr. Simmons was the major contributor in this

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 instance?

2 A That is correct.

3 Q And what's the probability were you able to ascertain
4 that he was the contributor?

5 A Excuse me. The probability of selecting an unrelated
6 male individual having a Y-STR DNA profile matching a major
7 contributor to the non-sperm fractioning of this item is
8 1 in 5600. And the closest statement, paternal male
9 relatives of Jason Simmons may not be excluded as the major
10 contributor to this Y-STR profile.

11 Q Were you able to run the Y-STR profile for the minor
12 contributor?

13 A I did. But it was insufficient for interpretation.

14 Q Was it fair to say that there was a very small quantity
15 then?

16 A That is correct.

17 Q And did you run the sperm fraction DNA on these vaginal
18 swabs as well?

19 A That is correct.

20 Q And if you could, in a situation where you're
21 identifying a male, is there any advantage to using a sperm
22 fraction DNA?

23 A Typically, that's the portion that we hope to have
24 captured, that male DNA that is present on that item.

25 Q And what did the sperm fraction indicate?

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 A The DNA profile is a mixture of at least two
2 individuals. The DNA profile foreign to A.F.
3 matches the DNA profile of Jason Simmons.

4 Q So in that instance, it wasn't a separate male? In
5 this instance, it was A.F.'s DNA and Jason's DNA?

6 A That is correct. And the probability of randomly
7 selecting an unrelated individual having a DNA profile
8 matching a foreign contributor to this mixture is
9 1 in 6 billion.

10 What that statement means is if I took a random
11 person's DNA profile and I compared it to that foreign DNA
12 profile, there would be a 1 in 6 billion chance that that
13 random person's profile would match that foreign DNA profile
14 person.

15 Q And when you talk about the foreign DNA profile as it
16 relates to this case, the foreign DNA profile is
17 Jason Simmons'; is that correct?

18 A That is correct.

19 Q So with regard to the sperm fraction DNA. There is a
20 1-in-6-billion probability of it not being him. Is that
21 accurately stated?

22 A That is correct.

23 Q And is that your expert opinion?

24 A Yes, it is.

25 Q Did you run any additional tests with regards to the

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 vaginal swabs?

2 A Yes. I also did the Y for the sperm fraction as well.

3 That statement -- the partial Y-STR DNA profile developed

4 matches the Y-STR profile of Jason Simmons. And the

5 probability of randomly selecting an unrelated male

6 individual having a Y-STR DNA profile matching the sperm

7 fraction of this item is 1 in 2700.

8 And I guess the statement once again, paternal male

9 relatives of Jason Simmons may not be excluded intrinsic of
10 his profile.

11 Q And I want to kind of ask you a question about that.

12 Does that hold true for the -- other male contributors

13 could be involved -- does that hold true for the sperm

14 fraction you did?

15 A No. Because I believe that he is that individual that

16 is there. So he is the only other contributor to that item.

17 Q So there would not -- in that instance, where you're

18 using sperm fractioning, it doesn't also include all male

19 relatives; is that correct?

20 A No, not for the regular STR that I did.

21 Q So with regard -- so the sperm fraction is found to be

22 a 1-in-6-billion match to Jason Simmons; that does not

23 include all male relatives?

24 A No, that does not.

25 Q All right. With regard to the rectal swabs, what did

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 you find there?

2 A For the non -- excuse me -- the nonsperm portion, the
3 DNA profile is a mixture for these two individuals. The DNA
4 profile of the major contributor is consistent with the DNA
5 profile of A.F. . And the partial DNA profile of
6 the minor contributor is insufficient for interpretation.

7 Q So you were not able to get enough DNA to compare that
8 one to Jason; is that correct?

9 A Yeah. It was just too partial a profile. And we can't
10 put the statistics to that profile, we don't do any
11 comparisons with it.

12 Q And were you able to use the sperm fraction to try to
13 make some findings?

14 A Yes, I did. The sperm fraction partial DNA profile is
15 a mixture of two individuals, but due to the inability to
16 calculate statistic, no further interpretation will be
17 offered.

18 But I also was able to do Y with that sperm
19 fractioning. And the partial Y-STR DNA profile matches the
20 Y-STR DNA profile of Jason Simmons.

21 Q And what probability of that?

22 A The probability of randomly selecting an unrelated male
23 individual having a Y-STR DNA profile matching the sperm
24 fraction of this item is 1 in -- excuse me -- 220.

25 Q Now, why would there be differences between these?

(SAMUEL ADAM STEWART-DIRECT BY MR. KENDALL)

1 What are y'all's limiting factors when you're doing analysis
2 of DNA?

3 A Well, it's just that I -- I just didn't have enough
4 when I did it to -- our normal STR way. But when I just
5 honed in on the Y -- the Y DNA that may have been present
6 there, I did have enough to do the comparison to his
7 profile.

8 Q So the DNA is not changing. It's just the quantity of
9 the DNA and whether it matches; is that correct?

10 A It's the quantity and the methodology that I'm using.

11 Q And the methodology you use -- what does it look for?
12 When you create a profile, what does that mean?

13 A Well, when we do a normal STR profile, it's along
14 21 different chromosomes that are found within your body.
15 So we're taking DNA from all the different chromosomes. But
16 for a Y, I'm only using that chromosome that every male has,
17 so that's why it's -- there's a difference between the two.

18 Q All right. So using the sperm fraction from the
19 vaginal swab, in your expert opinion, what is the
20 probability of it not being Jason Simmons or selecting an
21 unrelated individual?

22 A It's 1 in 6 billion.

23 MR. KENDALL: Please answer any questions Mr. Morin may
24 have.

25 CROSS-EXAMINATION

(SAMUEL ADAM STEWART-CROSS BY MR. MORIN)

1 BY MR. MORIN:

2 Q Mister? Detective?

3 A Mister is fine.

4 Q Mr. Stewart, I'm not quite up to speed on some of this,
5 so if you'll have -- permit me.

6 In order for you to get these statistics, there had to
7 be a study -- or where are you getting that number from?

8 A These numbers are housed by a database that is
9 maintained and verified and certified by the FBI.

10 Q I see. And isn't it true that that database is created
11 by the FBI based on some random samples?

12 A It is done by sampling many, many people, that is
13 correct.

14 Q And how many people?

15 A I would have to say for each different ethnicity --
16 Caucasian, African-American, I believe, there's Asian and
17 Hispanic -- I would say anywhere between hundreds to
18 thousands of people.

19 Q Hundreds to thousands?

20 A Yes.

21 Q And where do these people come from?

22 A I believe it's just a random sampling. I'm not sure --
23 I'm not sure about how, you know, they chose the
24 individuals.

25 Q And if I understand correctly -- and I see on TV

(SAMUEL ADAM STEWART-CROSS BY MR. MORIN)

1 sometimes these other databases -- there's 23, and you said
2 21; is that correct?

3 A We use 21 different locations. That's correct.

4 Q Now, in case you don't know, I'm a little older. When
5 I first started this, it was nine. Did you know -- we
6 started out at nine. Did you know that?

7 A I was not -- I was not doing it when it was just nine.

8 Q And then we went to 13.

9 A I do remember the 13.

10 Q And now we're at 21 or 22.

11 A Twenty-one. That's correct.

12 Q Now, the way it was explained to me, way back when, was
13 we looked at these nine, and if they all matched, then
14 that's a match, correct?

15 A I guess, I would --

16 Q Well, I'm misusing the word "match," ain't I?

17 A I don't know how they did it back then.

18 Q All right. Well, let's do 13, then.

19 A Okay.

20 Q You had 13 and you compared all those 13, and then you
21 matched them up to this database that the FBI has created,
22 correct?

23 A Yes.

24 Q And that's how you match them up to see -- and I'm
25 using the word "match," but we're really not supposed be

(SAMUEL ADAM STEWART-CROSS BY MR. MORIN)

1 using the word "match," are we?

2 A Well, for this, we can use match.

3 Q Okay. All right. So back when we had the 13 -- they
4 said, well, you know, we'll go up to 13. So if we looked at
5 12 and they were all good, but the thirteenth one didn't
6 match, completely thrown out.

7 A I would assume so. If -- we would like the match at
8 every location as possible, but sometimes we do have
9 locations that don't show up. But it would need to be a
10 match at every location.

11 Q All right. So that was when we were at 13. Because
12 now we're at 21.

13 A That's correct.

14 Q So people who matched at 13, 10 those many years ago,
15 if they retested today -- now that we've added another ten,
16 they might actually be kicked out, wouldn't they?

17 A I'm not following.

18 Q You got 13, back when they were doing 13. And you said
19 we looked at 13, and if 12 of them were matches and the
20 13th was not, then that wasn't a match. We eliminated that
21 person.

22 A Oh, yeah. I said that.

23 Q All right. So today -- if back when I had the 13, if I
24 was a match, but if we used the new 21, if we went all the
25 way up to 19, and then last two weren't a match, we'd throw

(SAMUEL ADAM STEWART-CROSS BY MR. MORIN)

1 it out.

2 A I mean, if the profiles doesn't match, then yeah, it
3 wouldn't match as 13 or 21.

4 Q That's my point, though. My point is you had a system
5 of 13.

6 A Yes.

7 Q You increased it to 21.

8 A That is correct.

9 Q And when you did that, people that were previously
10 decided we match, we now may or may not match because we're
11 looking at these extra -- I said 10. I should have eight --
12 eight extra spots, correct?

13 A I'm not familiar with any of that that has happened.
14 Through my -- you know, to my knowledge.

15 Q Well, let me ask you this: These things that you
16 looked at, these chromosomes ---

17 A That's correct.

18 Q --- what do they do?

19 A Are non-coding chromosomes within your body. So
20 usually chromosomes, you know, determine your eye color,
21 your hair color, your skin color. But the chromosomes that
22 we use to develop a DNA profile, they don't code for
23 anything.

24 Q Some people would call them "junk DNA." That's been a
25 term used, it's it?

(SAMUEL ADAM STEWART-CROSS BY MR. MORIN)

1 A That has been a term used for them.

2 Q That's right. So, now, you've got a couple of
3 different things based on these -- so we're looking at some
4 junk DNA, and we're going off of this data that the FBI
5 created. And some of the numbers -- and I wrote them
6 down -- you said one of them was 1 in 5600; is that correct?

7 A That was for the non-sperm fractioning, the vaginal
8 swab, and that was the Y stat -- the Y-STR stat.

9 Q So for that and the approximate population of
10 Cherokee County's 56,000 -- so based on that, you're saying
11 that this fraction would match approximately 1,000 people in
12 this county.

13 A Well, no. Because this one is the one where it's
14 shared. So this is a different database that we're pulling
15 from as well, too, for the Y. And Y isn't as discriminatory
16 as regular STRs, just for the simple fact that it's shared
17 among so many different male individuals.

18 Q Well, that's kind of my point. So the number -- well,
19 the solicitor -- you do have one that says 6 billion.

20 A Oh, and that's for the STR. That is correct.

21 Q And the solicitor talked about that. But I'm
22 interested in -- because I've done these a few times and
23 you've got one number that says 1 in 220.

24 A That's the -- yeah, for the Y stat for the sperm
25 fraction of Item Number 22.

(SAMUEL ADAM STEWART-CROSS BY MR. MORIN)

1 Q So the Y stat is giving us a lower number.

2 A And that's because the shared-ness of those profiles.

3 Q Well, now I'm a little confused, and I apologize.

4 It was my understanding that the Y stat was from the
5 male, the Y chromosomes that appears just on the male.

6 A That's correct. But those profiles are also shared
7 between his brother -- uncle, brother, any of those, so
8 because of that, it's less discriminatory. And because it's
9 less discriminatory, that number, that stat, is going to be
10 lower because it's shared by more individuals.

11 Q Exactly. More individuals. I mean, you're saying --
12 explain that part about his brothers and whatever again.

13 A With that Y profile that I developed, it will be shared
14 by his brothers, uncles, grandfather, anyone who followed
15 that same paternal lineage.

16 Q But you don't know how many brothers and sisters and
17 all that he has?

18 A I do not.

19 Q Right. So when you say 1 in 220 or 1 in 2700 or 5600,
20 you're saying in a random population that match is going to
21 show up once every 220 times?

22 A That is correct for male individuals, of course.

23 Q So if we assume Cherokee County -- that half of the
24 people are males, and that's 25,000. And then we divide
25 that by 220. We're going to come up with a lot of matches,

(SAMUEL ADAM STEWART-CROSS BY MR. MORIN)

1 aren't we?

2 A It is possible.

3 Q Now, you said -- and I don't -- I didn't catch this
4 exactly, but you said if you have too much or too little,
5 you're going to have not a good profile?

6 A That is correct.

7 Q Were you talking about the standards then; the buccal
8 swabs?

9 A Oh, no. I was talking about just DNA in general. We
10 have -- I was talking about how we have to get DNA within a
11 certain range, as much of the amount that we have, I should
12 say.

13 Q So if you have too much DNA, that's going to give you a
14 bad read?

15 A Yeah. The profile won't be useful.

16 Q All right. And you also used the words that when you
17 were working with it, you hoped to separate it out and you
18 were going to try and separate -- or hoped to capture and
19 try to separate.

20 A When we do these different extractions, it's not
21 100 percent that we get a clear-cut separation between the
22 male and the female DNA. Sometimes there's some overlap,
23 and that's common. I mean, that happens all the time, that
24 we have some of her DNA maybe still inside that sperm
25 fraction. That's very common.

(SAMUEL ADAM STEWART-RE-DIRECT BY MR. KENDALL)

1 Q I see.

2 MR. MORIN: That's all the questions I have.

3 THE COURT: Re-direct?

4 RE-DIRECT EXAMINATION

5 BY MR. KENDALL:

6 Q So you ran multiple tests on this, right, between the
7 vaginal and rectal swab, and things like that?

8 A That is correct.

9 Q At any point in time, did you find evidence that it
10 wasn't Jason Simmons?

11 A No, did not.

12 Q So when you developed these profiles, the profile you
13 get from the swabs, is that a full -- you all the -- every
14 single portion of the DNA? How does that work?

15 A For most of them, I did; for some of them, I did not
16 get a full DNA profile. For the sperm fraction of Item 1.3,
17 that was not the full profile; it was a partial profile.
18 And all the profiles that I ran for Y testing, I would go
19 through it with partial profiles as well.

20 Q And then you matched those -- that profile you create
21 against Jason Simmons's, correct?

22 A That is correct.

23 Q And if there's some stuff that's not filled in there,
24 that's reflected in the odds. Is that fair to say?

25 A Yes. It is reflected in the stats. That is correct.

1 Q And the limiting factor to that -- or what is the
2 limiting factor to that? Is that the quantity of DNA? Is
3 that who the person is? What is the ---

4 A It's just the quality and the quantity of DNA.

5 Q So, for example, if there's less DNA found on the
6 rectal swab, than on the vaginal swab, you would -- it might
7 be common for there to be less DNA present, a lower match.
8 Is that fair to say?

9 A A lower statistic. That is correct.

10 Q Now, Mr. Morin asked you about the people of
11 Cherokee County -- people matching it around here.

12 On that sperm fraction DNA that came back as a
13 1 in 6 billion, was that -- did that include his male's --
14 other males in his family?

15 A It did not.

16 Q So that is unique to him. Is that fair to say?

17 A That is correct.

18 Q So it's a 1-in-6 billion chance, not of being his uncle
19 or his mother or anything else, of it being him; is that
20 correct?

21 A That is correct.

22 MR. KENDALL: Please answer any questions...

23 MR. MORIN: If I may, Your Honor?

24 THE COURT: You may.

25 RE-CROSS-EXAMINATION

(SAMUEL ADAM STEWART-RE-CROSS BY MR. MORIN)

- 1 BY MR. MORIN:
- 2 Q I'm not picking up on something here. Maybe you can
- 3 explain it. Your name is Stewart.
- 4 A That is correct.
- 5 Q We're 100 percent sure that it's you.
- 6 A Yes, I'm sure.
- 7 Q We don't need a percentage. We don't need a 1 in 2600,
- 8 correct?
- 9 A That is correct.
- 10 Q Now, Mr. Kendall, just asked you if this DNA is him;
- 11 Mr. Simmons, correct?
- 12 A That is correct.
- 13 Q Your reports got statistics on there: 1 in 2600,
- 14 1 in 5700, 1 in a billion. Correct?
- 15 A That is correct.
- 16 Q And those are because you -- while it is consistent in
- 17 certain respects -- it's not 100 percent. Or -- and you
- 18 tell me, in your experience in 33 times testifying, how many
- 19 times have you seen the number nonillion?
- 20 A I've seen it quite a few.
- 21 Q Quite a few. And how many times have you seen
- 22 quintillion?
- 23 A I've seen it quite a few as well.
- 24 Q And how many times have you seen 220?
- 25 A For Y stat? That could be common for Y stat.

(SAMUEL ADAM STEWART-RE-CROSS BY MR. MORIN)

1 Q Could be?

2 A Yes.

3 MR. KENDALL: That's all the questions I have.

4 THE COURT: All right. You may step down.

5 (The witness left the stand.)

6 Do you have any other witnesses?

7 MR. KENDALL: We were just checking to make sure I've
8 got everything in. I believe I have all my exhibits in.

9 THE COURT: So does the State rest then?

10 MR. KENDALL: If not, I believe there's 35.

11 THE COURT: I've got some jurors that want to go to the
12 bathroom, so if you're going to rest, that's where we're
13 going to break for it right now. If you need to clear up
14 any evidence, make sure it's then. Somebody needs to go to
15 the bathroom, we'll take a break. Don't begin deliberations
16 or discussions. We'll have you back in a few minutes.

17 (The jury exited the courtroom at 3:23 p.m.)

18 (A recess was taken.)

19 (The jury entered the courtroom at 3:36 p.m.)

20 THE COURT: All right. Mr. Solicitor, anything else
21 from the State?

22 MR. KENDALL: Yes, sir, Your Honor. At this time, the
23 State would move Exhibits 1 through 32 into evidence to the
24 extent that any of them are not.

25 THE COURT: I think everything was without objection,

1 except 28, 29, and 30.

2 MR. MORIN: I think that's right.

3 THE COURT: So they're admitted over objection.

4 MR. KENDALL: And the State would rest at this time,
5 Your Honor.

6 THE COURT: All right. Well, folks, you've now heard
7 the State's case. And due to the lateness of the hour,
8 we'll break for the day. We'll finish up the case in the
9 morning.

10 Now, you've heard all the evidence you're going to hear
11 from the State, but you still might have the opportunity to
12 hear something from the defense. The defendant does not
13 have to testify, doesn't have to put up a defense. I'm
14 giving them overnight to decide if they want to. I want to
15 stress to you, as I told you at the beginning of the trial,
16 the State has to prove guilt beyond a reasonable doubt. The
17 defendant does not have to prove he is innocent. He does
18 not have to testify. He does not have to put up a defense.
19 And if he does not testify and if he chooses not to call any
20 witnesses, you are not to hold that against him while you
21 are deliberating. So don't let that enter into your mind.
22 That's not to come up during your deliberations tomorrow.
23 But I just wanted to put that up front to make sure that you
24 understand that he does not have to put up a defense and he
25 does not have to testify and he does not have to even tell

1 me right now whether or not he's decided to. I told his
2 lawyer because it's late, I'll let him decide whether or not
3 he'll do it and let me know in the morning.

4 So we will finish the trial up tomorrow morning, and so
5 don't begin deliberations or discussions or talk about the
6 case with anyone. Don't post anything on social media or
7 try to find anything out on the Internet and if anybody does
8 approach you about the case, please report that to me in the
9 morning. So go home. If you would be back just a little
10 bit before 9:30 a.m. Hopefully, we'll get started right at
11 9:30. Thank you.

12 (The jury was excused for the day at 3:38 p.m., after
13 which the following proceedings were had before the Court in
14 this matter:)

15 THE COURT: All right. Any motions?

16 MR. MORIN: Your Honor, at this time the defense would
17 make a motion for directed verdict on the grounds that the
18 evidence in light most favorable to the State would cause
19 the jury to have to speculate, and also based on my
20 objections to evidence that's been put in regarding that
21 issue.

22 THE COURT: Any response?

23 MR. KENDALL: Yes, sir, Your Honor. I would move the
24 State has met his burden in the light most favorable. We've
25 established jurisdiction through **A.F.** and her mother. She

1 made a disclosure of sexual conduct with the defendant
2 Jason Simmons, who she pointed out in court.

3 Additionally, Your Honor, there's a forensic interview
4 in which, again, detailed evidence of sexual abuse,
5 inappropriate touching to the inside of her vaginal area.
6 Moreover, Your Honor, it is significant evidence to point to
7 DNA is basically found on vaginal and rectal swabs. This in
8 and of itself, I think, is certainly prima facie evidence
9 known there's inappropriate touching, particularly, when
10 coupled with the fact that she does allege inappropriate
11 touching.

12 We've also heard evidence of his attempts to alter
13 evidence or present evidence to law enforcement that
14 misleads, suggesting a guilty conscience in mind, both with
15 the video, which he produced for them, that clearly was
16 produced on a different day and was heavily edited to make
17 it appear that he was just sleeping all night, which was
18 inconsistent with his statement, as well as a jail phone
19 call, in which he requests that Missy or requests that
20 someone basically block police from -- take efforts to block
21 police from accessing his phone. We think in the light most
22 favorable to the State, we've met our burden for directed
23 verdict, Your Honor.

24 THE COURT: Well, I find that there is some direct and
25 substantial circumstantial evidence of sexual assault by the

1 defendant upon A.F. , who is a minor under the age
2 of 11, and so motion is denied.

3 All right. So tomorrow morning you will let me know.
4 You had listed ---

5 MR. KENDALL: --- Melisa Simmons. Yes, Your Honor.
6 That may be a witness too.

7 THE COURT: All right. Let's meet maybe, say,
8 9:15 a.m., and we'll plan accordingly ---

9 MR. MORIN: Yes, sir.

10 THE COURT: --- as to whether or not we're just going
11 to go straight into deliberations and charging and arguing.
12 So if you got anything that you want as far as the charges,
13 you've got what I got. At this point we will leave the
14 defendant not testifying. And everything else, other than
15 statement of the defendant, will be left in -- the statement
16 of the defendant, how defense was offered against him.

17 All right. See y'all at 9:15 a.m.

18 (On Thursday, January 9, 2020, at 3:41 p.m., court was
19 recessed until Friday, January 10, 2020, at 9:28 a.m., and
20 after such recess, the following proceedings were had before
21 the Court and jury:)

22 THE COURT: Okay. We're back. The defendant is in the
23 courtroom. All right.

24 Mr. Simmons, we talked on -- today's Friday -- so
25 Wednesday, I guess, when we started, about your right to

1 testify, not testify. I told you you didn't have to tell me
2 then, but at some point in the trial, you would have to make
3 a decision as to whether or not you want to testify, tell
4 your side of the story to the jury. If you don't want to
5 testify, I will instruct the jury to not hold that against
6 you in any way while they are deliberating.

7 It's that point in time when you'd have to make a
8 decision as to whether or not you're going to present a
9 defense, which would include or not include, you testifying.

10 Have you made a decision?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And what is it? You're going to testify?

13 THE DEFENDANT: Testify.

14 THE COURT: Okay. You will be placed under oath. Your
15 lawyer will ask questions first, and the State will have the
16 right to cross-examine. Is there any issues about prior
17 convictions?

18 MR. MORIN: I don't think he has anything in the last
19 20 years, Your Honor. That was the discussion I had with
20 the State earlier.

21 MR. KENDALL: That is correct, Your Honor.

22 THE COURT: Okay. Well, are we ready, then? Is there
23 anything we need to do before we call the jury in?

24 MR. MORIN: We are ready.

25 THE COURT: State ready?

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

1 MS. LESCANIK: Yes, State's ready.

2 THE COURT: Okay. Bring the jury in.

3 (The jury entered the courtroom at 9:30 a.m.)

4 THE COURT: All right. Folks, welcome back. We are
5 going to now to take it to the next phase of the trial in
6 which the defense will have the opportunity to call the
7 first witness. Mr. Morin?

8 MR. MORIN: Thank you, Your Honor. The Defense would
9 call Jason Simmons.

10 JASON SCOTT SIMMONS, upon first being duly sworn,
11 testified as follows:

12 THE WITNESS: I just have depth perception problems.

13 THE COURT: Okay.

14 THE CLERK: Just don't try to get down until the
15 bailiffs are there to help you. Okay?

16 THE COURT: All right. Mr. Morin?

17 MR. MORIN: Thank you.

18 DIRECT EXAMINATION

19 BY MR. MORIN:

20 Q Mr. Simmons, will you state your name for the jury,
21 please.

22 A Jason Scott Simmons.

23 Q And, Mr. Simmons, just as a matter of housekeeping,
24 let's go over the reason that you're using a cane.

25 How old are you?

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

- 1 A Forty-five.
- 2 Q And have you had or have you sustained a brain injury
- 3 at some point in your life?
- 4 A Yes.
- 5 Q Can you tell me about that.
- 6 A I was shot when I was a baby, and in 2012 -- I don't
- 7 know my age -- I had a stroke.
- 8 Q Well, let's start with that. You got shot when you
- 9 were a baby; is that correct?
- 10 A Yes. When it was a kid.
- 11 Q All right. And as a result, what happened from that
- 12 injury?
- 13 A They had to leave the BB in my brain.
- 14 Q Okay. Now, do you work now?
- 15 A No.
- 16 Q Are you disabled?
- 17 A Yes, sir.
- 18 Q Have you been disabled your whole life since you got
- 19 shot?
- 20 A No. I used to drive a tractor-trailer.
- 21 Q And when did you stop driving the tractor-trailer?
- 22 A March 2nd, 2012, I had a TIA and a TBI, brain injury,
- 23 a stroke.
- 24 Q And after that point, you couldn't drive?
- 25 A No.

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

1 Q Now, as a result of that stroke, did you have surgeries
2 on your brain, then?

3 A Yes.

4 Q And so that's where you've been going since 2012?

5 A Yes, sir.

6 Q Now, there's been testimony about your discussion with
7 Ms. Fortner about having to go to Charleston.

8 A Yes.

9 Q Now, in 2017, did you have to go to Charleston?

10 A Yes.

11 Q And why did you have to go to Charleston?

12 A I have to go to have MRIs and CT scans every six -- six
13 months.

14 Q And why do you have to do that?

15 A The tumors I have, grow. And they have to be removed
16 surgically.

17 Q Now, since 2017 -- it looks like in 2017 you weren't
18 using a cane.

19 A Yeah. It's gradually getting worse.

20 Q And so what Ms. Fortner testifies about your being
21 upset about having to go there in January 2017, did you
22 actually go there?

23 A Yes.

24 Q And how did you go to Charleston?

25 A My wife had to drive me.

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

1 Q And back in 2012, when you had your CDL ---

2 A Yes.

3 Q --- and then you had a stroke, tell me about what
4 happened with your TBI?

5 A I had to make a report to the government -- federal
6 government letting them know that I had a stroke -- excuse
7 me -- surrender them. First they had to, after I made the
8 report, they submitted it to my medical department with
9 Schneider, and Schneider revoked the -- my medical card.
10 And then the Department of Transportation sent a notice to
11 release to have my CDLs revoked.

12 Q Now, back in 2017, were you experiencing any problems
13 regarding these injuries?

14 A Yes.

15 Q And what were they?

16 A Epileptic ---

17 THE COURT: Pardon?

18 THE THE BAILIFF: They can't hear.

19 THE COURT: Can't hear?

20 THE CLERK: Bring the mic closer.

21 THE COURT: Lean in more towards the microphone.

22 A I had -- had the surgery. Repeat the question.

23 Q It's okay. I was asking you about the revocation of
24 your CDL license?

25 A Yes. They revoked my medical part of my CDLs, then

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

1 they revoked my CDLs.

2 Q And then ---

3 A I had to voluntarily return everything.

4 Q Now, in 2017, in January, were you experiencing issues
5 with your brain?

6 A Yes.

7 Q And were you taking any medication?

8 A Yes. Depakote, Keppra.

9 Q And what were you taking those for?

10 A Epileptic seizures.

11 Q Now, there's a video that we've seen of you sleeping in
12 the chair.

13 A Yes.

14 Q Can you tell the jury why it is you were videotaping
15 yourself in the chair.

16 A Trying to catch the seizures on film, where
17 Dr. Vandergriff, Dr. Ringel could see what kind I was
18 having. If they mono or -- I forgot the name of the other
19 one. Mono seizure's a jerk, and it's -- and it's what they
20 call an "absence seizure."

21 Q Now, there's been a 64-gig video.

22 A Yes.

23 Q There's been a discussion about how the State came in
24 possession of that.

25 A Yes.

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

1 Q Tell the jury what you remember about that exchange.

2 A Yes. I was sitting on the couch. I can barely move.

3 I hurt constantly in my back due to my stroke. He -- the

4 police come in -- they rushed in through the house. I

5 didn't know what to do. I'm -- I get scared very, very

6 easily; a firecracker could scare me. He came in and

7 grabbed everything out of my hands, even the flash drive and

8 my cell phone and TV remote.

9 Q What, if anything, did you say about the flash drive?

10 A I told him there is a video of the night that I was in

11 the chair, asleep.

12 Q Did he tell you what night he was interested in?

13 A No. Huh-uh. No, sir.

14 Q Now, there's a video recorder with a missing hard

15 drive.

16 A Yes.

17 Q Tell the jury about the missing -- what happened there.

18 A If anybody's had a computer before, a hard drive, when

19 they fail, they can actually catch fire, burn up. I had one

20 in one of my computers burn up, and I took the hard drive

21 out of the Revo unit. I don't know if it went in one of the

22 computers or a laptop, to give me -- where I could get

23 access to my data on my computer.

24 Q Now, who do you live with now?

25 A My wife, Melisa, and my son, Landon.

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

- 1 Q And how old is Landon?
- 2 A Three months, I think. If not two months, he's almost
3 three.
- 4 Q Now, back on January 8th of 2017, did you at any point
5 come in contact with Jason or Dana Fortner or their family?
- 6 A Yes.
- 7 Q Well, tell me about that.
- 8 A I can remember bits and pieces.
- 9 Q Tell us what you remember.
- 10 A I can remember going out to eat.
- 11 Q Well, let's start there. Because you at this time were
12 living at Quarter Round Road, correct?
- 13 A Yes.
- 14 Q And so you went out to eat. Where did you go? Do you
15 remember where you went?
- 16 A Mexican. I don't -- I forgot the name of the
17 restaurant. It's Mexican. I know that.
- 18 Q And who was at the Mexican restaurant?
- 19 A Jason, Dana, me, Melisa, A.F., M.F..
- 20 Q And when you say "A.F.," you're talking A.F.?
- 21 A Yeah.
- 22 Q So after you ate there -- was that supper or lunch you
23 had?
- 24 A It's a little -- I think it was just getting dark. I
25 can't -- I get supper and dinner confused.

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

- 1 Q All right. Well, it's in that area. So after you ate
2 at the Mexican restaurant, where did you go?
- 3 A I think we went back to their house. I'm not sure.
- 4 Q All right. So you think you went back to their house?
- 5 A Yeah. My mind -- my memory is --
- 6 Q Fair enough. During the dinner, when did it come up
7 that **A.F.** would go with you? And Missy was with you,
8 right?
- 9 A Yes.
- 10 Q Your wife?
- 11 A I don't know if it was in the middle or after dinner.
12 I cannot -- I can't remember that. I think I was outside,
13 smoking. I'm not sure.
- 14 Q But when you went to meet the Faulkners [sic] for
15 dinner or supper later in the evening, you didn't know then
16 that **A.F.** was going to be staying with you?
- 17 A No.
- 18 Q So at some point, it's decided that **A.F.** is going to
19 stay.
- 20 A Yeah.
- 21 Q And you go from their home in Spartanburg to your
22 place, where you were living at Quarter Round Road?
- 23 A Yes. To my mama and Ed's.
- 24 Q Now, who was driving?
- 25 A Melisa.

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

1 Q And when you get to your house, who's in charge of
2 taking care of A.F. -- you, her, or both of y'all?

3 A Missy; Melisa.

4 Q Melisa. All right. So you got back. Was it light or
5 dark out?

6 A Dark.

7 Q And did you go up the stairs into your apartment or
8 live-in area, where you were staying?

9 A Yes.

10 Q What did you do that you remember?

11 A I remember playing, I think, Fallout 4 on the computer
12 and watching some TV and a few other things. And that's all
13 I can remember right now.

14 Q And did any of that -- and where did it occur in the
15 room?

16 A I had my computer hooked to the -- to the big TV, our
17 big TV, I think it was a 50-inch TV, to play Fallout 4.

18 Q There, in the living room?

19 A Yes.

20 Q Did A.F. ever come into the living room where you were?

21 A Yes.

22 Q And when she did, where was Missy?

23 A I think Missy was sitting in the recliner by then. If
24 you...

25 Q All right. So when it was time for A.F. to go to bed,

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

1 tell us about that.

2 A I know I was playing Fallout 4 or watching TV, one of
3 the two. It's on the computer. I knew it was on the
4 computer. I can't remember which -- which computer.

5 Q That's fine.

6 A If it was Kodi or Amazon Fire. It was on one. They
7 were in the recliner and they went into the bedroom. The
8 doorway to the bedroom and the living room is right close to
9 each other.

10 Q Okay.

11 A And I remember her running across the floor. 'Cause I
12 can remember creeks in the floor.

13 Q Did **A.F.** sleep -- where did **A.F.** sleep?

14 A Next to Missy.

15 Q In what room?

16 A The bedroom.

17 Q And how many beds are in that -- in that area that
18 you've got?

19 A One.

20 Q And did you and Missy sometimes sleep in that bed
21 together?

22 A Yes.

23 Q Sometimes you slept in the recliner.

24 A Yes.

25 Q **A.F.** had been with you and Melisa over night before,

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

1 haven't they?

2 A Yes.

3 Q "She," not "they". And during that time -- those times
4 that you were -- you and Missy had her overnight, did you
5 ever -- what was the normal sleeping arrangements?

6 A I'd sleep on either the couch or the chair due to my
7 muscles hurting or ---

8 Q Sure.

9 A --- or spine hurting.

10 Q Is there any time that you and Melisa and A.F. were
11 all in the bed at the same time?

12 A No.

13 Q Is there any time that Melisa -- I mean, A.F. came to
14 the house and she slept in the same room with you?

15 A No.

16 Q Now, the next day, January 9th ---

17 A Yes.

18 Q --- it had been snowing; is that correct?

19 A I think so.

20 Q And who do you remember getting up first that day?

21 A I did.

22 Q And why do you think you got up first?

23 A I usually get up anywhere from 3:00 to 5:00 in the
24 morning.

25 Q So later on, Missy and A.F. got up?

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

- 1 A Yes.
- 2 Q Was there ever a time that you were in a room alone
- 3 with A.F.?
- 4 A No. I was more concerned -- I don't know if it snowed
- 5 that day or iced. I was more concerned of the weather.
- 6 Q Okay. Now, you're going to take A.F. back to the
- 7 Fortner's home, correct?
- 8 A Yes.
- 9 Q Tell me about that. Where did you go?
- 10 Well, actually when you left the house, how many cars
- 11 went?
- 12 A Two.
- 13 Q And what two cars did you have?
- 14 A A Jeep Cherokee and a Nissan Altima.
- 15 Q And which one did you drive?
- 16 A The Jeep.
- 17 Q And so A.F. drove in the Altima?
- 18 A Yes.
- 19 Q And who did A.F. ride with?
- 20 A Missy at first, then swapped to me.
- 21 Q Well, let's talk about that. Where did you go? Did
- 22 you go straight to the Fortner's home?
- 23 A McDonald's.
- 24 Q Do you remember where at McDonald's?
- 25 A Cedar Springs.

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

- 1 Q Is that close to where the Fortner's live?
- 2 A Yes.
- 3 Q So you went to McDonald's. Y'all ate there?
- 4 A Yes.
- 5 Q Now, when you left McDonald's, you were still driving
- 6 the Jeep Cherokee?
- 7 A Yes.
- 8 Q Obviously, your wife's driving the Altima. Where was
- 9 **A.F.**?
- 10 A I had just put her car seat into the back of the Jeep.
- 11 Q And what --
- 12 A I can't name the side of it. Passenger side.
- 13 Q Right. And what was the reason that you did that?
- 14 A Where I could see or if we got in a wreck or something?
- 15 Q No. I want to know why you took the car seat out of
- 16 the Altima and put it in the Jeep?
- 17 A Oh, my wife had got called into work.
- 18 Q And so from there, you went from McDonald's to the
- 19 Fortner's house?
- 20 A Yes.
- 21 Q Did you make any stops along the way?
- 22 A Huh-uh.
- 23 Q And when you got there -- when you got to the
- 24 Fortner's, you had the car seat; is that correct?
- 25 A Yes.

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

1 Q At what happened to it?

2 A I think I took everything inside the house and set it
3 in the door -- I call it like a washroom.

4 Q Now, there's been talk about a backpack you brought in.

5 A Yes. I think that was the last thing I brought in.
6 Because the car seat was heavy.

7 Q And what did you do with that backpack?

8 A I think I set it in the laundry room or in the -- in
9 between the kitchen and the living room, and don't know
10 after that.

11 Q Okay. Now, the Fortners -- it's been several years
12 you've known the Fortners; is that correct?

13 A Yes.

14 Q And did you know the Fortners before or after your 2012
15 stroke?

16 A Before.

17 Q And your wife, Missy, she's related to the Fortners?

18 A Yes, sir.

19 Q How long have you been -- you and Missy been together?

20 A I want to say 2011, 2010.

21 Q And are you married now?

22 A Yes, sir.

23 Q When did you get married? Was it before or after 2012?

24 A After.

25 Q Was it before or after 2017?

(JASON SCOTT SIMMONS-DIRECT BY MR. MORIN)

- 1 A Before.
- 2 Q Mr. Simmons, have you ever put lotion on A.F.?
- 3 A No, sir.
- 4 Q Have you ever been present when A.F. was having a bath
- 5 or a shower?
- 6 A No. I would actually -- actually walk outside.
- 7 Q When that was occurring?
- 8 A Yes.
- 9 Q Have you ever -- well, I don't want to do that too far.
- 10 So you're saying -- there's also some conversation
- 11 about this toothbrush.
- 12 A Yes.
- 13 Q You've heard that?
- 14 A Yes.
- 15 Q Is there -- can you tell the jury if you touched A.F.
- 16 with any kind of vibrating something?
- 17 A No.
- 18 Q Toothbrush?
- 19 A No.
- 20 Q Shaver?
- 21 A No.
- 22 Q Now, when A.F. comes over, sometimes she has to change
- 23 from whatever she was wearing to a nightgown -- night --
- 24 we'll get to that -- nightgown or some other sleeping
- 25 clothes?

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 A Yes.

2 Q And the times that A.F. has been with you and Missy,
3 have you ever changed her clothes?

4 A No. I actually go outside. I do smoke a lot, and I go
5 outside. My parents wouldn't let me smoke upstairs if there
6 were kids upstairs, or anybody stayed over.

7 Q So you were using that time to be a signal for a smoke
8 break.

9 A Yeah.

10 MR. MORIN: Answer any questions. Thank you.

11 THE COURT: Cross?

12 MR. KENDALL: If it pleases Your Honor.

13 CROSS-EXAMINATION

14 BY MR. KENDALL:

15 Q Mr. Simmons, just to make sure I've got a couple of
16 things straight: You were in fact there that night, on the
17 night of January 8th and January 9th?

18 A Yes.

19 Q Is that correct? You were in the home?

20 A Yes, I was in the home.

21 Q And the only other individuals inside that home, in the
22 upstairs apartment were yourself and A.F.; is that
23 correct?

24 A No. Missy; Melisa.

25 Q You yourself and Melisa. Okay. And so there were no

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 other adults, no other children there; is that correct?

2 A No, sir.

3 Q And she spent the night that night, correct?

4 A Yes, sir.

5 Q Now, the other day -- I believe you were in the

6 courtroom. We played a jail phone call -- is that

7 correct -- from you, from the jail?

8 A Yes.

9 Q Who was on the other end of that call?

10 A That was my wife.

11 Q And while in this house, you all at some point in time

12 owned an electric toothbrush; is that correct? You owned an

13 electric toothbrush?

14 A I did not, no.

15 Q Did Melisa own one?

16 A She used one for her -- to clean her ---

17 Q --- rings?

18 A --- rings.

19 Q And so there was an electric toothbrush in the house,

20 correct?

21 A Far as I know.

22 Q Now, we talked about -- a moment ago about the hard

23 drive off this computer, correct?

24 A Yes.

25 Q Off this -- excuse me -- video recording device,

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 correct?

2 A Yes.

3 Q And you testified that it was removed from the video
4 recording device. So let me back up.

5 Prior to them executing the search warrant on
6 January 20th, you were aware that an investigation was
7 taking place, correct?

8 A Not until they showed up.

9 Q Were you contacted by Melisa on January 9th by phone
10 and her asking questions about what happened there the night
11 before?

12 A No. She did not tell me anything on that.

13 Q Did she contact you on the 9th?

14 A She contacted me on the 9th.

15 Q And on the 9th, did she ask you about the rabbit that
16 had been eaten -- the chocolate rabbit thing?

17 A I don't recall.

18 Q But you do you recall having a phone conversation with
19 her about what happened regarding **A.F.** the night before,
20 correct?

21 A No.

22 Q She didn't ask any questions about **A.F.**?

23 A No.

24 Q So she just happened to call on the 9th, after
25 talking ---

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 A She was talking -- are you talking about the jail call?

2 Q No, sir. I'm talking about January 9th, the day after
3 this happened, the same day that you were brought back.

4 Melisa called you and asked you some questions about the
5 night before, correct? She called you from Dana Fortner's
6 house, correct?

7 A No.

8 Q You don't recall any phone calls from ---

9 A I remember talking to her that day, but not at -- I
10 can't remember at night.

11 Q All right. So that afternoon or evening?

12 A I think so.

13 Q And throughout this entire time, Melisa was staying
14 with you, right? You all were in contact, correct?

15 A Yes.

16 Q And once you got arrested, you talked to her on the
17 phone, correct?

18 A Yes.

19 Q And you asked her to basically disable the cellular
20 phone so the police couldn't get on it; is that correct?

21 A No. Basically, we pay by the gig, data. Cut the data
22 off to the phone, where we won't be charged; and cut the
23 voice off to the phone, where we won't be charged; and cut
24 the voice off to the phone, where we wouldn't be charged.

25 Q But you heard that jail call, correct ---

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 A Yes.

2 Q --- here in the courtroom?

3 A Yes.

4 Q I believe what you said was to cut it off so they
5 couldn't use it; is that correct?

6 A Yes. Where we wouldn't be charged the money -- the
7 gigs and the minutes. We only get by -- pay-by-the-minute
8 and pay-by-gig plan.

9 Q But how would they be using it? I mean, you didn't
10 think the police were going to go down to the evidence
11 locker and start making phone calls with your phone, did
12 you?

13 A I did not know. I was ---

14 Q You did not know?

15 A No. I had one phone before. A person used it and used
16 over 30 gig on it before, and I got a \$500 bill and didn't
17 know.

18 Q Okay. But why would you say "so they couldn't use it"?

19 A Where they couldn't use the data off of it.

20 Q Right. The data that would potentially include
21 incidences happening off of this, right, of Melisa ---

22 A The Internet, yes. What I'm talking -- like the data,
23 I'm talking, like cutting the Internet off to it.

24 Q But, again, this would contain what was in the phone,
25 correct?

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 A Everything that's in the phone is in the phone. I
2 can't wipe the phone wirelessly.

3 Q That's not entirely true, is it? You can clear out the
4 phone. In fact, it's what you asked her to do, I believe.

5 A No, sir. You can't wirelessly wipe a phone. I don't
6 know which -- I think it was the S5 that can't be wiped
7 wirelessly. It's got to be in hand.

8 Q Now, you acknowledged you told the police you slept all
9 night that night, correct?

10 A Yes. I was up and down. I think I had a seizure that
11 night.

12 Q And you indicated that you recorded this on a recording
13 device, correct?

14 A Yes.

15 Q And it was set up for this, correct?

16 A Yes, sir. It was set up to record if I was going to
17 have a seizure, trying to find out -- they were trying to
18 find out if I was having mono seizures or absentee [sic]
19 seizures.

20 Q And you produced a disk for the police, correct?

21 A No, not a disk.

22 Q Or a thumb drive. I'm sorry.

23 A Thumb drive.

24 Q And thumb drives have ---

25 A I can't produce a disk off of a thumb drive.

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 Q Okay. But you produced a thumb drive, correct?

2 A Yes.

3 Q And the thumb drive contained on it three separate
4 versions of what took place -- or three separate versions,
5 edited versions of that, correct?

6 A Yes. I don't know the exact time I had a seizure, but
7 it's in the video. I was trying to shorten it down to -- to
8 narrow the seizures down.

9 Q But you didn't just simply abstract the seizures, did
10 you?

11 A No.

12 Q I mean, the disks are on the -- or the videos are
13 almost the same length, minus the part where the date
14 changes, minus the part where you set the camera up, and
15 minus the part where you re-direct the camera to the floor,
16 correct?

17 A The camera never went to the floor.

18 Q Or excuse me -- was taken away from the couch, correct?

19 A Usually, when I get up and moved around, I moved the
20 camera..

21 Q But this wasn't pointed at anything?

22 A It was pointed at the door.

23 Q And you were pointing it -- it was pointed to the top
24 of the doorframe.

25 A Yes.

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 Q And you pulled all of those out -- that portion out, as
2 well as you setting up the camera.

3 A I don't like people looking at me in my drawers -- I'm
4 sorry -- especially my doctor.

5 Q But it is your doctor. What you're saying is you're
6 giving this to the doctor, correct?

7 A Yes.

8 Q All right. A medical professional, correct?

9 A Yes.

10 Q Who has the ability -- who examines you and everything
11 else, correct?

12 A Yes.

13 Q And so what your testimony is, to make sure I'm
14 understanding -- we'll go back -- is that this hard drive
15 went missing because you took this hard drive and replaced
16 it in a different computer?

17 A Yes. One of my computers, the hard drive had failed,
18 and I was trying to get the data off of it.

19 Q But how would putting this drive in that computer
20 recover that hard drive?

21 A It will -- I could spool the hard drives together as
22 one, and the data could be transferred.

23 Q I'm sorry. You could spool them together, but you said
24 that one crashed. You worried about it catching on fire,
25 correct?

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 A Yes. You could spool two hard drives, if it's crashed
2 in one area of the hard drive, like a fragmented file, you
3 could skip that file and move it to a second hard drive.

4 Q And that happened somewhere between when you made that
5 video? It just happened to happen some time when you made
6 that video and when this took place?

7 A No. The hard drive failed maybe six -- six months
8 prior to that.

9 Q But you were still recording off the video system?

10 A Yes.

11 Q And you were making a recording off the video system?

12 A Yes.

13 Q Despite the fact there was no hard drive in the
14 computer.

15 A Yes. You can actually log in through Revo and -- from
16 a remote site to save all data off the camera system to that
17 computer through their app.

18 Q But you didn't have that computer -- you didn't have
19 the hard drive in that computer. The necessary components
20 of the computer were missing, correct?

21 A There was one computer there that had Revo on it and it
22 was a gaming computer and it had Revo on it and you could
23 actually see the live feed from the camera system and save
24 it at the same time.

25 Q So where is the rest of the camera system?

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 A There's three cameras on the side of the house. Two --
2 there were a total of six cameras on the front side of the
3 house and the other six on the other.

4 Q But you had cameras internally, correct?

5 A Only one.

6 Q That would've shown the living room; is that correct?

7 A Yes. Showed the living room -- that -- well, the
8 dining room.

9 Q And the only video we got from this was the one you set
10 up, correct?

11 A Yes.

12 Q The one that you said was taken on January 8th to 9th
13 that was actually labeled January 11th, correct?

14 A Yes. I think that's what the cameras stated on the
15 video.

16 Q And you're fairly fluent in computers, correct?

17 A Decent. Not -- I can't program them. I can -- I can
18 work on them, replace parts of them.

19 Q So you certainly know how to change the time on your
20 camera system, correct?

21 A No. That can't be changed.

22 Q You can't change the time on the camera system?

23 A No.

24 Q Impossible?

25 A Not on that unit.

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 Q So what happens to people who don't live in the Eastern
2 time zone?

3 A If you plug it into the Internet, it's got a auto
4 correction when it's plugged.

5 Q Oh, it has an auto correction; is that correct?

6 A When you plug it in, it won't let you change date and
7 time?

8 Q But if you left it unplugged, then it wouldn't auto
9 correct, correct. It has to be connected to the Internet,
10 right?

11 A No. It would still stay the same if it was unplugged
12 or plugged in.

13 Q How would it be that it'd stay the same? The Internet
14 doesn't just jump on the stuff; you actually have to connect
15 to the Internet, right?

16 A You've got to have Internet going to it.

17 Q Oh. So if it was labeled the 8th or 9th, and then you
18 plugged it back in, you could manipulate it?

19 A No.

20 Q And then when you plugged it back in, it would fix
21 itself, correct?

22 A It would actually fix itself by -- it takes about
23 30 minutes to do.

24 Q Well, what I'm wondering here is if you have a data
25 file that was created on the 11th, which you're claiming

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 took place the 8th and the 9th, where you're videotaping
2 yourself sleeping.

3 A Yes.

4 Q But forensically the entire thing shows the 11th,
5 correct?

6 A Yes. I think that's the date I come home from the
7 hospital.

8 Q Okay. But, again, that wouldn't change the time on the
9 camera. It wouldn't know you came home from the hospital;
10 it's a computer, correct?

11 A Yes.

12 Q Were you aware that A.F.'s panties were in your
13 attic?

14 A No, sir.

15 Q No?

16 A No, sir.

17 Q No idea how they got there?

18 A I know she runs around the -- throwing her clothes when
19 Missy was taking her home. One time she threw all her
20 clothes into the closets and attics, throwing them
21 everywhere.

22 Q And so you have no reason to understand why they would
23 be -- she just run around throwing her underwear in the
24 attic. Is that your testimony?

25 A Yes. I can't go into the attic due to the fact that

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 there is a -- no ceiling, no floor there.

2 Q But there were pairs of underwear there, correct?

3 A Not that I know of.

4 Q But when you were here in court ---

5 A Yes.

6 Q --- watching testimony, correct?

7 A Yes.

8 Q And they were thrown a ways back there; correct? They
9 were thrown a ways back there; they weren't sitting right on
10 the thing. She's a 4-year-old girl.

11 A Yes. They were thrown ---

12 Q Or placed.

13 A --- the way it looks by the pictures, maybe 3-foot from
14 the door. I can't tell.

15 MR. KENDALL: I'm showing him State's Exhibit 11,
16 maybe.

17 A Yeah, it's 11. Looks like 3-foot from the door.

18 Q What's that? I'm sorry?

19 A Looks about 3-foot from the door -- from that door.
20 Because if you count here one, two, and that's the third
21 beam. And I know those beams are set at 12 on center.

22 Q Oh. So 12 on center?

23 A Yes.

24 Q So it's within arm's reach, about 3 feet from the door?

25 A It ain't in arm's reach; it's throwing's reach.

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 Q So just to sort of summarize here: She did stay there
2 that night, correct?

3 A Yes.

4 Q She was 4 years old at the time, correct?

5 A I think so.

6 Q And that was the night you chose to video yourself in
7 your underwear, correct?

8 A I video self [sic] every night, even now, even before
9 that. I want to catch if my seizures are -- epileptic is
10 getting worse, that way I could show Vandergriff and ---

11 Q But you didn't have a disk with the next night or the
12 night after that or the night after that.

13 A Yes.

14 Q You had this burned on there on this drive, correct?

15 A I burn it on all drives. I had a ---

16 Q But you put it on a pin drive to go someplace else,
17 correct?

18 A Yes. To carry to Dr. Vandergriff.

19 Q And specifically asked Missy when she was on the jail
20 call with you if they had gotten that drive, correct?

21 A Yes.

22 Q That was the only one you asked about, correct?

23 A No.

24 Q You didn't ask her about any other nights you were
25 sleeping like that. You asked specifically about that

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 drive, correct?

2 A No. I have two 64-gig drives.

3 Q Oh. So there's a second 64-gig drive?

4 A Yes.

5 Q And did that have other -- so what you were saying
6 is -- what you referenced with Missy is not the drive you
7 gave the police and told them to look at for -- when they
8 executed the search warrant? Is that what you ---

9 A No. I didn't know they were doing a search warrant
10 until after they done went in the house and started picking
11 up stuff.

12 Q At that point they offered them a disk and laid it down
13 there, correct?

14 A A disk?

15 Q A pin drive.

16 A Yes. A USB drive.

17 Q Yes. And that's what you were referencing on the call
18 with Missy, correct?

19 A No. I was actually looking for the other one.

20 Q The other one?

21 A Yes.

22 Q Are there different videos of you sleeping that night?

23 A Not that night.

24 Q So you wanted the police to see evidence that wasn't
25 involving in that night?

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 A There was other nights of me sleeping prior to that
2 when I was having seizures.

3 Q So what you're saying here is that what you wanted to
4 do is have the police see other nights of you sleeping?

5 A No.

6 Q No?

7 A No.

8 Q So why would you be asking about whether the police had
9 taken that drive?

10 A I have around ---

11 Q It was 64-gig drive. It's got the night that you say
12 was created on the 8th and the 9th. You're saying there's
13 another drive that has an additional ---

14 A I don't know when it was created because I -- when you
15 put it in, it created the -- Revo, you know, it creates its
16 own date and time.

17 Q But it's the computer, correct? And you just testified
18 a moment ago, that it's ---

19 A Yes.

20 Q --- automatically set up to update the date and time on
21 the computer, correct?

22 A Yes.

23 Q All right. And the computer says January 11, 2017,
24 correct?

25 A Yes.

(JASON SCOTT SIMMONS-CROSS BY MR. KENDALL)

1 Q And that's the one you offered the police, correct?

2 A I think so.

3 Q Okay.

4 MR. KENDALL: Nothing further, Your Honor.

5 THE COURT: Re-direct?

6 RE-DIRECT EXAMINATION

7 BY MR. MORIN:

8 Q Did you change any dates on any of these videos?

9 A No. No. No.

10 Q What was the reason that you were putting these videos
11 on USB drives?

12 A I wanted to send it to Dr. Vandergriff and Dr. Ringel.

13 MR. KENDALL: That's all the questions I have.

14 THE COURT: Re-cross?

15 RE-CROSS EXAMINATION

16 BY MR. KENDALL:

17 Q But you acknowledge the dates are different on those,
18 correct?

19 A That, I don't know.

20 Q Well, I mean, you sat here. You saw the one that said
21 8th and you saw one that said 11th, correct?

22 A No. I can't see from over there to here.

23 Q Oh, okay. But...

24 MR. KENDALL: Nothing further.

25 THE COURT: You can step down. Next witness.

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 (The witness left the stand.)

2 MR. MORIN: Melisa Simmons.

3 MELISA RENÉE SIMMONS, upon first being duly sworn,
4 testified as follows:

5 DIRECT EXAMINATION

6 BY MR. MORIN:

7 Q Ma'am, would you state your name for the jury.

8 A Melisa Renée Simmons?

9 Q And how do spell Melisa?

10 A M-e-l-i-s-a.

11 Q Melisa, how are you related to Jason?

12 A He is my husband.

13 Q And when did you get married?

14 A June 22nd, 2015.

15 Q All right. And how long have you known him?

16 A How long have I known Jason?

17 Q Yes.

18 A I've known him since 2010.

19 Q Okay. When you met him, was he working?

20 A Yes.

21 Q And what was he doing?

22 A At the time, he was working at a warehouse and had
23 started working -- going back to work at driving a truck.

24 Q And when he was driving the truck, did you travel with
25 him?

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

- 1 A Yes.
- 2 Q And he stopped driving the truck?
- 3 A Yes.
- 4 Q When he stopped driving a truck, were you present with
- 5 him when the reason for him to stop driving the truck
- 6 occurred?
- 7 A Yes.
- 8 Q Where were you?
- 9 A We were at Best Buy in Greenville. He ended up having
- 10 a stroke.
- 11 Q And did he go to the hospital?
- 12 A He did.
- 13 Q And who took him to the hospital?
- 14 A I drove him.
- 15 Q Now, how are you related to the Fortners?
- 16 A Jason Fortner is my cousin.
- 17 Q Fortner. I'm sorry. I've been saying Faulkner.
- 18 Fortner. He's your cousin?
- 19 A Yes.
- 20 Q And after 2012 -- well, let me ask you this: Did you
- 21 and Jason have contact with Jason and Dana?
- 22 A Yes.
- 23 Q In 2011? 2010?
- 24 A Yes.
- 25 Q And after Jason had the stroke, you didn't travel as

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 much?

2 A We didn't.

3 Q Did you spend more time with them?

4 A We did.

5 Q All right. Now, there's been testimony about how many
6 times or -- actually, there's been testimony that on
7 January 8th of 2017, that was the first time **A.F.** had spent
8 the night with you and Jason; is that correct?

9 A That is incorrect.

10 (Defendant's Exhibit 3 was marked for identification.)

11 Q That is incorrect. I'm going to show you what's been
12 marked for identification as Defendant's Exhibit 3 and ask
13 if you, if you can tell me, what's that a picture of?

14 A That is **A.F.** spending the night, at our house.

15 Q Who took the picture?

16 A I did.

17 Q Is this taken on January 8th?

18 A No.

19 MR. MORIN: Move State's Exhibit 3 into evidence,
20 Your Honor -- the Defendant's Exhibit.

21 THE COURT: Without objection, it's admitted.

22 Q Now, in fact, isn't it true that you and Jason had
23 taken **A.F.** out of state?

24 A Yes.

25 Q And when was that?

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 A December of 2016.

2 (Defendant's Exhibit 7, 8, and 9 were marked for
3 identification.)

4 Q I'm going to show you what's been marked as
5 Defendant's Exhibit 7, 8, and 9. Have you take a look at
6 those. Do you recognize these pictures?

7 A Yes.

8 Q Who took these pictures?

9 A I did.

10 Q Where did you take these pictures?

11 A These were taken actually in Knoxville, Tennessee.

12 Q Knoxville, Tennessee.

13 A Yes.

14 Q Defendant's Exhibit 7 -- with regard to --

15 MR. MORIN: Oh, I move Defendant 7, 8 and 9 into
16 evidence, Your Honor.

17 MR. KENDALL: Objection.

18 THE COURT: Admitted.

19 Q With regard to Defendant's Exhibit 9 ---

20 A Yes.

21 Q --- can you tell me where this picture was taken?

22 A It was taken in a hotel where we had spent the night.

23 Q And who was in that picture?

24 A It is me and A.F.

25 Q And A.F. is doing what?

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 A Taking a nebulizer treatment.

2 Q A nebulizer treatment?

3 A Yes.

4 Q Where did you get that nebulizer treatment?

5 A The mask came from their home. She had been getting
6 over from being sick, and she still needed the medication.
7 One of the other children -- I can't remember which one --
8 was also sick and was needing a nebulizer treatment as well.
9 And they only had one machine, but they had several of the
10 masks. The masks came from their house. It was hers with
11 her medicine, and I had used my mama's box for that
12 nebulizer.

13 Q January 8th, of 2017?

14 A Yes.

15 Q When did you first come in contact with Jason and Dana
16 and A.F.?

17 A On that day?

18 Q Yes.

19 A They had called wanting us to come over to go eat. We
20 also carried their Christmas presents to them because they
21 were sick through Christmas. And then we went and eat at --
22 I think it was -- Bronco's up the street. We left, went
23 back to their house, and then when we got back to their
24 house is when A.F. decided that. And they'd asked about
25 us taking A.F.

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 Q And, again, that wasn't something unusual, was it?

2 A No.

3 Q So about what time was it when you left their house to
4 go back to Quarter Round?

5 A Probably about 6:00 or 7:00 that night.

6 Q So it was dark out?

7 A It was.

8 Q Now, when you got back to Quarter Round, what happened
9 then?

10 A We were sitting there watching TV. [A.F.] decided she
11 was still hungry. She had eat some macaroni and cheese, the
12 little cups, ate a popsicle -- freezing and she got on the
13 pad and we went to bed.

14 (Defendant's Exhibits 4, 5, and 6 were marked for
15 identification.)

16 Q All right. I'm going to show you what's been marked
17 for identification as Defendant's 4, 5, 6. Can you tell me
18 what these are?

19 A 4 is a picture of me and [A.F.], with [A.F.] eating the
20 popsicle. 5 is a picture of me and [A.F.] in the bed with
21 her playing on the tablet. And 6 is a picture of [A.F.]
22 eating macaroni and cheese after I had got her ready for
23 bed.

24 Q Who took these pictures?

25 A I did.

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 MR. MORIN: Your Honor, I move Defendant's 4, 5, and 6
2 into evidence.

3 THE COURT: Without objection, admitted.

4 MR. MORIN: If I may have a moment. I'm unfamiliar
5 with their electronics here.

6 Q This is Defendant's 5.

7 MR. MORIN: Can we turn on the lights. It's making it
8 go completely dark. It's doing better with the lights on.
9 Thank you.

10 Your Honor, I ask that she step down just briefly about
11 this photo. I think it would be easier.

12 (The witness left the stand and stepped over to the
13 screen.)

14 Q This photograph --

15 A Yes.

16 Q --- a selfie ---

17 A Uh-huh.

18 Q Where are you two when this photograph is taken?

19 A In the bed.

20 Q What is **A.F.** doing in this photograph?

21 A She is watching the pad -- tablet, going to sleep.

22 Q That's what I needed to ask you. If you'll have a seat
23 back.

24 (The witness returned to the stand.)

25 Q Now, these photographs, the ones that you say come from

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 the 8th, the ones that came from Knoxville, and the one that
2 came from a different date, you took them all?

3 A Yes.

4 Q They are all from your phone?

5 A Yes.

6 Q How many of them did you send to Dana?

7 A A bunch of them.

8 Q A bunch of them. So she had these pictures too?

9 A Yes.

10 Q Now, that night that she came here, the 8th, where did
11 she sleep?

12 A In the bed with me.

13 Q Had she slipped in the bed with you before?

14 A Yes.

15 Q Had she gotten up ---

16 A Yes.

17 Q -- before? Okay. She has?

18 A Uh-huh.

19 Q And what happens -- tell me about that.

20 A When she would wake up, when she would spend the night
21 with us at the house, she would always wake me. And instead
22 of her getting out the other side of the bed, she would
23 always want to crawl over me before I would get up. And she
24 would just stand there and wait on me to get up as soon as
25 she would crawl over me.

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 All right. So this is State's Exhibit 9. And if you
2 can step down for a second.

3 (The witness left the stand and stepped over to the
4 screen.)

5 Q Are you familiar with what this is a picture of?

6 A Yes.

7 Q And what are we looking at?

8 A It is someone standing in the kitchen. The middle
9 room, where the tile changes, is the bathroom. And then
10 where the other doorway is is this the bedroom.

11 Q Now, this is how it was on the 8th?

12 A Yes.

13 Q And is **A.F.**, when she's sleeping, do you always sleep
14 on the same side or does it matter? Sometimes she lands on
15 the right? Sometimes she was on the left?

16 A It was always the same.

17 Q And what was it?

18 A I would always be on the left, next to the doorway, and
19 then she would be on the right, near the wall.

20 Q Okay. You can have a seat.

21 (The witness returned to the stand.)

22 MR. MORIN: If I can just have a moment, Your Honor.

23 Q This is State's Exhibit 10. Can you see that?

24 A I can.

25 Q Tell me about this door.

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 A That is the door that goes into the attic, that's in
2 the living room.

3 Q And is it a full-sized door, or is it a shorter door?

4 A It's a shorter door.

5 Q How did **A.F.** react to this small door?

6 A She was always excited, always trying to open that
7 door, and trying to go in. We would try to keep it locked
8 and keep something in front of it where she couldn't get
9 into it.

10 Q But did she ever get into it?

11 A She has.

12 Q Tell me about when she got into it.

13 A One day I was trying to take and get her to -- ready to
14 go home and she actually opened the door and grabbed her
15 book bag that she had and just poured all of her clothes
16 out, like slinging it and whatnot. I was having to be very
17 careful to try to get her clothes out of the attic because
18 it's nothing but insulation and all you have to stand on is
19 like little rafter things. You don't have no plywood,
20 anything like that.

21 Q Now, Jason had medical things to take care of in
22 Charleston; is that correct?

23 A It is.

24 Q And after this and after the police came, did he go at
25 any point to Charleston?

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 A Yes.

2 Q And how did he get to Charleston?

3 A I drove him.

4 Q And was that one of those ones where he was just down
5 there a day, or do you remember?

6 A He was down there for a day.

7 Q So you drove him down there for his checkup and came
8 back?

9 A Yes.

10 Q Now, since he had his stroke in 2012, has his ability
11 to get around stayed the same?

12 A It's changed.

13 Q And it's changed in which way?

14 A It's went downhill.

15 Q I'm going to show you what's been marked as the
16 State's Exhibit 18. Can you see that okay? Can you tell me
17 about that Sunny Bunny.

18 A It was a Easter bunny that my husband had went and got
19 me for Easter the year before, and no one ever eat it.

20 Q So this is January, and that's an Easter bunny -- candy
21 bunny from the year before.

22 A Yes.

23 Q And this is Defendant's Exhibit 4. Can you see this
24 okay? And I think you've testified, but, again, what is
25 this a picture of?

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 A That's a picture of A.F. sitting on my lap, eating an
2 orange popsicle.

3 Q And is this taken on the 8th?

4 A It is.

5 Q And I've asked because I noticed that the picture
6 doesn't have a date on it, so how do you know what the date
7 is?

8 A It was showing on my phone.

9 Q And that's where these came from?

10 A Uh-huh.

11 Q On the next day, when y'all got up, tell me about that.

12 A Jason had woke up before me. I woke up. A.F. was in
13 the bed, asleep. I shut the door back, went into the living
14 room, waited on her to wake up. Once she woke up, I got her
15 dressed. Well, she didn't want to take her gown off. And
16 we ended up going to McDonald's. I had got called into
17 work. We went to McDonald's at Cedar Springs, went in, sat
18 down, and eat. We ate chicken nuggets. After that, I was
19 trying to hurry up to get back to work. So Jason took the
20 car seat out of my car, put it into the Jeep, and drove her
21 home from there, and I went into work.

22 Q Sometime on the 9th you called -- or Ms. Dana called
23 you?

24 A Yes.

25 Q And she talked about some stuff that allegedly happened

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 on the 8th?

2 A Yes.

3 Q And you went to their house?

4 A Yes. She called me and asked me to come to her house.

5 Q Did you call Jason and tell him what was being alleged?

6 A I don't recall calling him and telling him. I remember
7 telling him when I got home, even though they told me not
8 to.

9 Q So now, is it possible that during that night **A.F.**
10 got into the bathroom?

11 A No.

12 Q Well, is it possible that perhaps she got out of bed
13 and went in there and took a shower?

14 A No.

15 Q Well, let's talk about the shower for a minute.

16 What -- how far -- we've seen the picture, but it's not far
17 from the bed.

18 A Maybe -- maybe 10 feet from the bed.

19 Q There's no bathtub in that?

20 A No.

21 Q It's just a shower?

22 A Yes.

23 Q And what kind of noise does the shower make when it
24 comes on?

25 A Makes a loud noise.

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

1 Q In fact, there's been some plumbing problems out there,
2 hasn't there?

3 A There has.

4 Q At any time this night or any other night, with the
5 exception, I assume -- when you were in Knoxville, I
6 assume -- did Jason have a separate room, or what did we do
7 that night?

8 A We had a room with two beds in it.

9 Q And A.F. ---

10 A A.F. slept with me. We was on the bed closer to the
11 bathroom, at the right; Jason slept over in the bed to the
12 left.

13 Q Is there any other time when Jason slept in a room with
14 A.F. other than that?

15 A No. Not unless it was the night that we had took and
16 stayed at their house to watch the kids for them.

17 Q I see. So sometimes y'all stayed over and watched
18 after all their kids?

19 A Yes.

20 Q Did Jason ever give -- or present during the time she
21 was being undressed or re-dressed?

22 A No.

23 Q Now, the toothbrush that we've heard about ---

24 A Yes.

25 Q --- did you have one?

(MELISA RENÉE SIMMONS-DIRECT BY MR. MORIN)

- 1 A Yes.
- 2 Q Where'd you keep it?
- 3 A In the kitchen, on the top shelf.
- 4 Q And what was it used for?
- 5 A It was used to clean my jewelry.
- 6 Q And how often did you clean your jewelry?
- 7 A About once every week or two because of all the stuff
- 8 that I deal with at work getting into my rings, and I didn't
- 9 want it to mess up.
- 10 Q And where do you work?
- 11 A At Spartanburg Regional Medical Center.
- 12 Q And what do you do there?
- 13 A I'm a phlebotomist.
- 14 Q Do you recall if you ever cleaned your jewelry when
- 15 **A.F.** was present?
- 16 A Yes.
- 17 Q Just a moment. Now, there's a picture here. This is
- 18 Defendant's 6. Can you see that okay?
- 19 A Uh-huh.
- 20 Q This was taken on the 8th; is that correct?
- 21 A It is.
- 22 Q Did you testify that y'all had gone to a Mexican place
- 23 that night?
- 24 A We did.
- 25 Q And when you got to your house -- and apparently she's

(MELISA RENÉE SIMMONS-CROSS BY MR. KENDALL)

1 changed into her nightgown -- gown. She's eating again.

2 A Yes.

3 Q Was that unusual?

4 A No.

5 Q You've been with Jason for almost ten years now?

6 A Yes.

7 Q And he's been disabled for about eight of those?

8 A Yes.

9 Q Do you regularly speak to your husband during the day?

10 A Yes.

11 Q Is there many days that you go and you don't talk to
12 him on the phone if you're not home?

13 A No.

14 Q He can get kind of irritating with the phone calls,
15 can't he?

16 A He can.

17 MR. MORIN: Please answer any questions they have.

18 THE WITNESS: Okay.

19 CROSS-EXAMINATION

20 BY MR. KENDALL:

21 Q I'm going to show you Defendant's Exhibit 3. What date
22 was this taken on? Do you know?

23 A If I'm not mistaken, I'm wanting to say it was like
24 November the 16th or 17th of 2016.

25 Q Of 2016?

(MELISA RENÉE SIMMONS-CROSS BY MR. KENDALL)

- 1 A Yes.
- 2 Q Are these three pictures -- Defendant's Exhibits 9, 8,
3 and 7 -- are those all from the Nashville trip?
- 4 A It's from Knoxville. Yes, sir.
- 5 Q And did you go on the Knoxville trip, where you met
6 there with other families? How were you in Knoxville? Did
7 y'all just go to see sights with other families around?
- 8 A We -- we have a friend that lives up there, and we had
9 planned to go visit her.
- 10 Q So you were meeting other families there, another
11 family there. Is that fair to say?
- 12 A We went to meet a friend that was up there.
- 13 Q And in this case, you all stayed in the same hotel
14 room; is that correct? Slept on separate beds?
- 15 A We did.
- 16 Q Was this a suite, or was this contained to one room?
- 17 A It was -- well, it had -- I'm not sure exactly what you
18 would consider it. It had the two beds. It had the
19 microwave, the sink. It had the bathroom.
- 20 Q There weren't no separate rooms to the room?
- 21 A No.
- 22 Q It was just one room, correct?
- 23 A Yes.
- 24 Q So you were in the same room the entire time as Jason,
25 correct?

(MELISA RENÉE SIMMONS-CROSS BY MR. KENDALL)

1 A Yes.

2 Q This is the Nashville trip?

3 A Knoxville.

4 Q Knoxville. Excuse me. That's correct.

5 Now, I want to touch on the toothbrush. You indicated
6 a moment ago there was an electric toothbrush in the house,
7 correct?

8 A Yes.

9 Q And you had the opportunity -- I believe you were in
10 the courtroom -- to hear the jail phone call the other day,
11 correct ---

12 A Yes.

13 Q --- about the electric toothbrush? It went missing,
14 correct?

15 A Yes. I could not find it after they went in. We've
16 recently moved since then, and I haven't located it.

17 Q So the electric toothbrush is gone, as far as your
18 concerned, right?

19 A Yes.

20 Q And when you were in Knoxville -- you stayed in
21 Knoxville, correct? You didn't ---

22 A Yes. We drove up --

23 Q That was not at your home, here in Cherokee County,
24 correct?

25 A No.

(MELISA RENÉE SIMMONS-CROSS BY MR. KENDALL)

1 Q Now, you testified a moment ago that Jason woke up
2 first, correct?

3 A On that morning of January the 8th, yes -- or
4 January 9th.

5 Q What time did he wake up?

6 A Probably about 6:00.

7 Q And what time did you wake up?

8 A By 6:30, 7:00.

9 Q And is Jason in any way biologically related to **A.F.**?

10 A Jason Simmons?

11 Q Yes.

12 A No, he is not.

13 Q So he has no biological relation to them at all,
14 correct?

15 A No.

16 Q And prior to this happening, did you all have any beefs
17 at all with the Fortners?

18 A No.

19 Q Was there anything going on at this time that was --
20 you know, some sort of like custody battle or like ---

21 A No.

22 Q --- some money y'all were fighting over or some sort of
23 something going on?

24 A No.

25 Q Until this happened, did you have anything, any sort of

(MELISA RENÉE SIMMONS-CROSS BY MR. KENDALL)

1 animosity towards them one bit?

2 A No.

3 Q What about the next morning when A.F. woke up? Was
4 there anything that happened? That you'd spanked A.F. or
5 you screamed at A.F. or something like that?

6 A No.

7 Q Now, once you were -- after this came out, Dana called
8 you, correct?

9 A Yes.

10 Q And do you recall where you were when she called you?

11 A I was at work.

12 Q Did you guys just talk on the phone, or did you
13 actually go over to her home?

14 A She had text me and asked me if I could call her as
15 soon as I was able to. I had called her. She asked me --
16 didn't want to talk on the phone, asked me to meet her at
17 her house.

18 Q And did you go to her house that day?

19 A I did.

20 Q And at that time, she kind of explained to you what was
21 going on, correct?

22 A Yes. She had called -- well, when I got there, she had
23 told me, yes.

24 Q And at one point, when talking to her, the issue of
25 this chocolate bunny came up, correct?

(MELISA RENÉE SIMMONS-CROSS BY MR. KENDALL)

- 1 A Yes. A.F. had talked about it.
- 2 Q And you called Jason about that and asked about that,
3 correct?
- 4 A Yes.
- 5 Q So you call him and asked him about the chocolate bunny
6 and stuff like that.
- 7 A Yeah.
- 8 Q And am I fair to characterize this, that you didn't
9 think that happened, correct?
- 10 A I didn't think it, no. I still don't.
- 11 Q Like I said, that didn't happen in front of you -- the
12 chocolate bunny?
- 13 A No.
- 14 Q And I believe it was an issue whether she climbed up
15 and got it or he gave it to her or something of that effect?
- 16 A I do know that that the picture that was showed of the
17 chocolate bunny was the only chocolate bunny in the house.
- 18 Q But you and Jason talked about that, and he said, yeah,
19 she was trying to get to the chocolate bunny at one point?
20 Something --
- 21 A Yes.
- 22 Q And you weren't present for that, correct?
- 23 A What? When she was trying to get it?
- 24 Q Yes.
- 25 A I was in the house, but I wasn't aware that she was

(MELISA RENÉE SIMMONS-CROSS BY MR. KENDALL)

1 trying to get it.

2 Q So that happened outside of your presence, correct?

3 A Yes.

4 Q And you were unaware of it at that time. Is that fair
5 to say?

6 A I was.

7 Q Now, you testified a few moment ago, I believe, that
8 you actually told Jason what was happening after this took
9 place, correct?

10 A I did.

11 Q So he was aware that there was at least some sort of
12 allegation? You know, certainly didn't know where it was
13 going to go, but there was some sort of allegation going on,
14 correct?

15 A Yes.

16 Q And you were aware of that too, correct?

17 A Yes.

18 (State's Exhibits 33, 34, and 35 were marked for
19 identification.)

20 Q I'm going to show you what is marked
21 State's Exhibits 33, 34, and 35. Do you recognize these?

22 A Yes.

23 Q And what are those?

24 A This is where I had a lease on a iPad that I had to
25 turn in or they was going to charge me \$500 and something

(MELISA RENÉE SIMMONS-CROSS BY MR. KENDALL)

1 for it.

2 MR. KENDALL: And I would offer State's 33 through 35
3 into evidence, Your Honor.

4 THE COURT: Okay. Admitted.

5 Q And this is the same iPad that you had on January 8th
6 and January 9th, correct?

7 A Yes.

8 Q And it appears that you returned that iPad. I'm
9 assuming you got a different one?

10 A No. I turned it in.

11 Q When did you turn that in? It's showing a return date
12 of January 20th, 2017?

13 A January the 20th, then, because that was the last day I
14 had to turn it in or they was going to charge me.

15 Q I'm seeing this. What is this iPad in the picture? It
16 appears to be a receipt for a return.

17 A Yes. That was from Sprint. That's where I had to
18 return the iPad. That's just the case that it was in, here,
19 with the receipt. That's where I had to return it so I
20 wouldn't be charged the \$500 for the iPad.

21 Q So the iPad that was at the house that night wasn't
22 kept. It was turned into Sprint, correct?

23 A It was a lease. That is correct.

24 Q It was returned; is that correct? Okay.

25 Now, from this time she spent the night with you all in

(MELISA RENÉE SIMMONS-CROSS BY MR. KENDALL)

1 November, do you have any -- did she stay the night with you
2 that night?

3 A Yes.

4 Q Do you have any other photographs of her spending the
5 night, as you have here with her sleeping in bed here and
6 her -- with her sitting at the iPad here? Anything other
7 than this? Because if I'm correct, this is her just eating
8 dinner at your house, correct?

9 A That was at night. That was right before we went to
10 bed, and I don't recall on that specific night having a
11 picture of her in the bed with us.

12 Q With us?

13 A With me. I'm sorry. We had a dog at the time that
14 would always sleep in the bed with us.

15 Q Now, do you recall having a kind of -- a phone
16 conversation with Jason?

17 A Can you repeat that?

18 Q At the jail, correct?

19 A Yes.

20 Q And at the jail, he asked you to disconnect, with
21 regard to his phone -- he asked specifically about his
22 phone, correct?

23 A He did.

24 Q A couple of times. Is that fair to say?

25 A Yes.

(MELISA RENÉE SIMMONS-CROSS BY MR. KENDALL)

1 Q And he told you you needed to disconnect it where they
2 can't use it, correct?

3 A Yes.

4 Q And to go in there and block the data, call, and text
5 so they can't use it, correct?

6 A He was worried about the bill being run out.

7 Q Okay.

8 A Because we didn't have unlimited text and talk and data
9 at that time.

10 Q Well, did he say that? He didn't say that on the jail
11 call, correct?

12 A No. But I knew what he was referring to. That's how I
13 took the call.

14 Q That -- go in there and block it so they can't call --

15 A Yes. Because Sprint has ---

16 Q --- block the data and call so they can't use it?

17 A Yes. Because Sprint has a thing that you can go on and
18 block the texts and the calls and all that so that it
19 doesn't run the bill up.

20 Q But it was in evidence at the sheriff's office,
21 correct? I mean, you were aware of that, correct?

22 A I was not aware of what was taken from the house until
23 the second search warrant.

24 Q But I believe on the first phone call, you actually
25 told him what was on -- what was taken from the house,

(MELISA RENÉE SIMMONS-CROSS BY MR. KENDALL)

1 correct?

2 A I was telling him what -- that I had noticed that was
3 gone. I did not have a copy of the actual papers and the
4 evidence that was taken from the search warrant.

5 Q But you knew it was there; then you knew it wasn't
6 there, correct?

7 A Yes.

8 Q He specifically asked about the phone a couple of
9 times. You said the police had it, correct?

10 A I believe so.

11 Q Now, you testified a few moments ago about what she did
12 while you were asleep, right?

13 A What do you mean?

14 Q What **A.F.** did while you were sleeping, like her
15 behavior while you were sleeping, correct?

16 A Yes.

17 Q But during all of that, you would actually be asleep,
18 correct?

19 A She would always wake me up if I were asleep and she
20 were to wake up before me, or if she had to use the
21 bathroom, she would wake me up. And I was a light sleeper.

22 Q But you would already know that at the time she woke
23 you up, correct?

24 A I was a light sleeper.

25 Q But it's certainly possible she got up, you didn't

(MELISA RENÉE SIMMONS-CROSS BY MR. KENDALL)

1 realize it, and the only times you realized she'd woke you
2 up is when she woke you up, correct?

3 A That's not possible.

4 Q It's impossible?

5 A With that bed, it's squeaks, so I could have heard her
6 get out of that bed. It would have woke me up.

7 Q But there's no way for you to know that, correct? I
8 mean, you're kind of guessing that's what would have taken
9 place. Is that fair to say? I mean, you don't know what
10 happens when you sleep, correct?

11 A I'm a very light sleeper with him having the seizures
12 and the strokes and everything. He's fell in the shower.
13 And I'm very alert on everything.

14 Q But the worst things you didn't know about, correct? I
15 mean, didn't know about this chocolate bunny, correct?

16 A I wasn't aware of the -- that is correct.

17 Q And this isn't like a big -- this is a couple of rooms
18 that are all kind of connected, correct?

19 A They are. It's just a big circle.

20 Q So, certainly, some things happened that you weren't
21 aware of, correct?

22 A Yes. I was unaware of the bunny, that she was trying
23 to get it.

24 Q And she was talking about getting the bunny that night,
25 and you didn't know that took place, correct?

(MELISA RENÉE SIMMONS-RE-DIRECT BY MR. MORIN)

1 A Yes, I did not.

2 MR. KENDALL: No further questions, Your Honor.

3 THE COURT: Re-direct?

4 RE-DIRECT EXAMINATION

5 BY MR. MORIN:

6 Q When you went to sleep that night -- there are two
7 doors that go to the bathroom, correct?

8 A Yes.

9 Q Were they open or closed?

10 A The one from the living room to the bedroom was shut;
11 the one from the bathroom to the bedroom was open.

12 Q What about the one from the kitchen to the bathroom?

13 A It was open.

14 Q Now, when you went to sleep, she was sleeping on your
15 right; is that correct?

16 A Yes.

17 Q And when you woke up, where was she?

18 A To my right.

19 MR. MORIN: That's all the questions I have.

20 THE COURT: Any re-cross?

21 MR. KENDALL: Nothing further, Your Honor.

22 THE COURT: You may step down.

23 (The witness left the stand.)

24 Any other witnesses from the defense?

25 MR. MORIN: No, sir. At this time, the defense is

1 going to rest.

2 THE COURT: All right. Well, folks, we are going to
3 take a break now and get ready for the next portion of the
4 trial. I'm going to send you back to the jury room, so we
5 can all taken a break. Don't get into deliberations or
6 discussions about the case. See you back in about
7 15 minutes.

8 (The jury exited the courtroom at 3:38 p.m., after
9 which the following proceedings were had before the Court in
10 this matter:)

11 THE COURT: All right. Are you going to have anything
12 else?

13 MR. MORIN: Your Honor, at this time I renew my motion
14 for a directed verdict on the same basis I made when the
15 State rested.

16 THE COURT: All right. Well, for the same reasons, I
17 will deny them.

18 Okay. Let's come back in about 15 minutes.

19 (A recess was taken.)

20 THE COURT: All right. We've got everybody back.
21 Are you ready, Mr. Solicitor?

22 MR. KENDALL: Yes, sir, Your Honor.

23 THE COURT: Mr. Morin?

24 MR. MORIN: Yes, sir.

25 THE COURT: The defendant is in the courtroom.

1 Bring the jury back.

2 (The jury entered the courtroom at 11:13 a.m.)

3 THE COURT: Okay. Folks, well, we're into the final
4 phase of the trial now, where we will have the closing
5 arguments from the lawyers, and then I will charge you on
6 the law before you then go to retire and consider what your
7 verdict will be.

8 In this final phase of closing arguments, I want to
9 remind you this is the lawyers now getting up and reviewing
10 the evidence that you've heard, and they will give you a
11 preview of the law that I'll be charging you and attempting
12 to persuade you by way of argument to render a verdict on
13 their client's behalf.

14 It's important to remember, the lawyers talking is not
15 to be considered by you as evidence. Evidence, again, is
16 what you've heard from witnesses testifying, photographs, or
17 documents that were admitted into evidence during the
18 record. The lawyers were not, again, witnesses. It's not
19 to be considered by you as evidence what they'd have to say.
20 Our rules of procedure provide that because the State has
21 the burden of proof, that the State gets to argue first and
22 gets to close. So you will hear from State through the
23 solicitor, who will argue their case in full. The defense
24 will then have the opportunity to make a closing argument.
25 Then the State will get to make a brief reply or rebuttal to

(CLOSING ARGUMENTS BY MR. KENDALL)

1 whatever the defense's argument was, if they choose.

2 So we begin by the solicitor with his opening.

3 MR. KENDALL: Thank you, Your Honor. May it please the
4 Court, Counsel.

5 Good morning, ladies and gentlemen. Thank you for your
6 attention throughout this trial. My opening statement I ask
7 of you all three things: First, you listen to the
8 instructions of the judge. In a few moments, the judge is
9 going to give you the final instructions, the final
10 summation. And if I say anything different than the judge,
11 please, by all means, listen to the judge.

12 In the same way that you all decide the facts in this
13 case, the judge decides the law. So with that in mind, I'd
14 like to talk to you all about what the law is in this case.
15 The defendant is charged with criminal sexual conduct with a
16 minor in the first degree. As is relevant in this case, a
17 person is guilty of criminal sexual conduct with a minor in
18 the first degree if that person engages in a sexual battery
19 with a victim who is less than 11 years old. In this case,
20 ladies and gentlemen, it took place when **A.F.** was 4 years
21 old.

22 Now, sexual battery is not just limited to sex, ladies
23 and gentlemen, but can mean sexual intercourse, cunnilingus,
24 fellatio, anal intercourse, or any intrusion, no matter how
25 slight of a person's -- of any part of a person's body or

(CLOSING ARGUMENTS BY MR. KENDALL)

1 any object into the genital or anal openings of another
2 person, except when such intrusion is accomplished or
3 medically recognized treatment, diagnostic purposes with a
4 doctor, the same as we saw here today.

5 In short, ladies and gentlemen, it's not required that
6 the State show that he had actual intercourse with her,
7 sexual intercourse, or had oral sex with her. But a sexual
8 battery occurred if there is any intrusion, no matter how
9 slight, by any part of the defendant's body or an object
10 into the body -- of A.F.'s body for a not
11 medically-recognized treatment or diagnostic purpose.

12 The second thing I asked you, ladies and gentlemen, in
13 this case was too listen to all of the evidence that was
14 presented. And I appreciate the efforts you all have made
15 throughout the course of this trial to pay attention. And
16 I'd like to talk a little bit about what the evidence showed
17 in this case.

18 This case involves the sexual touching of a 4-year-old
19 girl, A.F., by Jason Simmons at his home in
20 Cherokee County. A.F., who is now seven, testified that
21 she'd gone over to Missy and Jason's the night before to
22 spend the night on this night of January 8th, 2017. She
23 testified that the two people at the house were Missy and
24 Jason and that she said that that night she'd been with both
25 of them earlier and that Missy had gone to sleep earlier

(CLOSING ARGUMENTS BY MR. KENDALL)

1 that night and she was with Jason in the living room.
2 There, ladies and gentlemen, on the couch, you heard,
3 4-year-old at the time, now 7-year-old **A.F.** talk
4 about how he touched both inside and outside of her vagina
5 with an electric toothbrush. She also told you that Jason
6 told her not to tell anyone or he would get in trouble.
7 Jason took her home the next day, ladies and gentlemen, to
8 her mother, and they all went to Walmart, where there, in
9 the bathroom, she testified she told her mother what took
10 place.

11 You next heard Tricia Austin, the forensic evaluator,
12 ladies and gentlemen, who testified she interviewed **A.F.**
13 on January 18th, 2017, not long after this took place. You
14 were able to watch the interview and observe **A.F.** as she
15 was 4 years old. And what did the tape reveal? She said
16 she had gone to Missy and Jason's that night. She said this
17 happened while Missy was asleep. She took her clothes off
18 and laid them on the shiny table, and then he put lotion on
19 her nu-nu, what she called her vagina, both inside and
20 outside, ladies and gentlemen, and used the electric
21 toothbrush to shave her legs. She said this all happened on
22 the couch while she was watching a movie. She described the
23 toothbrush to you in the CAC video as being black and brown,
24 and that she then went to sleep in Jason and Missy's bed.

25 Now, ladies and gentlemen, **A.F.** remembers many points

(CLOSING ARGUMENTS BY MR. KENDALL)

1 of this story, what took place that night that she was
2 touched in her vagina by Jason on the couch at Jason's and
3 Missy's. Jason told her not to tell anyone. But there are
4 some differences in this case. **A.F.** was four at the
5 time -- and you're free to watch the video, ladies and
6 gentlemen -- but didn't clearly understand the gravity of
7 the situation.

8 And so, ladies and gentlemen, I'd like to take a few
9 moments to look at all of the evidence in this case, the
10 remaining evidence of this case, and talk about how this all
11 fits together. When you have all the trees, you have a
12 forest. When you have all the puzzle pieces, you can put
13 them together and see the picture.

14 The next witness you heard from in this case, ladies
15 and gentlemen, was **A.F.**'s mother, Dana. She testified
16 what happened that day. This had been a snowy day, and the
17 kids had been sort of pent up inside. She said that Missy
18 offered to take **A.F.** for the night. She told us that
19 Jason, not **A.F.** -- not Missy -- excuse me -- brought
20 **A.F.** home the next day, as Missy had to work. She said
21 that when Jason came in, he got very emotional -- out of the
22 ordinary emotional -- and dropped off -- and told her that
23 **A.F.** had been up late that night, not went to bed at 9:00
24 on the video. She had been up very late the previous
25 evening. She testified that after going to Wade's, she

(CLOSING ARGUMENTS BY MR. KENDALL)

1 indicated she had been sexually assaulted at
2 Jason's and Missy's the night before in the corner -- she
3 told this to her mother in the corner of the bathroom stall
4 at Walmart. Dana then called Missy, who then knew of the
5 allegation, called the police, and tried to take her
6 daughter to the hospital, where she had to undergo a rape
7 kit exam by a stranger, Kelly Clune, the SANE nurse at
8 Spartanburg Regional. She was also able to identify
9 **A.F.**'s underwear found in the attic.

10 Almost as important, ladies and gentlemen, she
11 testified there was no animosity between the families.
12 There were not fights between the families. Everyone was on
13 good terms, ladies and gentlemen. In short, there's none of
14 this bad blood motivation that would exist in a case like
15 this.

16 Next, ladies and gentlemen, you heard from Jacob
17 Mullinax, who executed the search warrant in the home.
18 Jacob photographed the underwear that was found and
19 collected it. More importantly, though, ladies and
20 gentlemen, he found the defendant's video system. But when
21 they tried to gather the video system, to get it all
22 together, look at what happened. It's a video system.
23 Conceivably, it would show -- they realized the hard drive
24 to the system was gone. He also testified that though they
25 collected his cell phone, they were unable to access it.

(CLOSING ARGUMENTS BY MR. KENDALL)

1 Next you heard from Danielle Ward, who was also out on
2 the search warrant. He, too, examined the video recording
3 system and noted that the hard drives and the screws were
4 removed. More importantly, ladies and gentlemen, he
5 testified that when they came in the home, it was
6 Jason Simmons who attempted to give him this pin drive. The
7 pin drive itself contained three video files that showed he
8 had been sleeping that night. But, ladies and gentlemen,
9 though these files contained the same overall thing, about
10 an eight-hour long thing, there are important distinctions
11 between them. The longest file -- that system file that was
12 on there, labeled 1/11/2017 -- showed him walking up to the
13 camera, making sure it was set up right, showed him sleeping
14 through the night, then it showed him get back up again,
15 walk back to the camera, reposition it, to sort of -- it
16 appears to be up into the doorway. It also shows, ladies
17 and gentlemen, the date on that camera jumped. It doesn't
18 say the 8th as it was reported to be, but jumps. The date
19 modified is also consistent with January 11th, the day this
20 video was made. Next, ladies and gentlemen, you saw a
21 shorter video -- it was also on this disk -- of him setting
22 up the system. But in this one, the part where it jumped
23 back to the 11th had mysteriously been taken off. And
24 finally, you saw the video that was his last edit, the one
25 that was renamed or could have been renamed January 8th.

(CLOSING ARGUMENTS BY MR. KENDALL)

1 On this one, not only has he removed himself setting it up,
2 but he's also removed the date reduction and him taking it
3 down at the end. This was further discussed by SLED expert
4 Brian Hudak, who testified that the pin drive, the little
5 disk he gave, was created on January 16th. But the file,
6 what actually happened, the content of that, that was
7 created on January 11th. He also testified it's fairly easy
8 to change the time that was shown on the disk as it was with
9 the regular appliances. You just put in a different time
10 and that's how it sets the time up and was able to show you,
11 ladies and gentlemen, a computer expert, where that hard
12 drive had been and noted that it wasn't there. He showed
13 you the wires, showing how it was previously connected.
14 What does this show, ladies and gentlemen? That this was a
15 manufactured video, not taken on the night of the
16 8th and 9th, but at a later date, most likely the 11th,
17 designed to mislead the police to what happened that night.

18 You heard from Missy that by this point he was aware an
19 investigation was taking place, ladies and gentlemen, and he
20 had made a video to try to get himself out of it, but he
21 messed up. What's more, where is **A.F.**? She's over there
22 that night. He's told Dana that she was up late. We don't
23 see her in that video card. Why? She wasn't there that
24 night. This was created on the 11th, and why did he leave
25 the light on?

(CLOSING ARGUMENTS BY MR. KENDALL)

1 You heard further evidence of his attempts to mislead,
2 obstruct police. You heard a jail call between he and Missy
3 in which he asked her to basically shut down the phones so
4 the police can't get on it. You have that in evidence,
5 ladies and gentlemen. You are welcome to hear that again.
6 But as it's presented, it certainly doesn't sound like this
7 is a data-saving measure. Moreover, this phone is sitting
8 at the sheriff's office. It's not as if the sheriff's
9 office is down there downloading movies onto his phone. It
10 was an attempt to block access to that phone. They also
11 mentioned the toothbrush on the phone. The toothbrush that
12 they -- she said was taken. This was odd because the police
13 testified they didn't take the toothbrush. The toothbrush
14 wasn't taken, ladies and gentlemen; the toothbrush went
15 missing. The toothbrush isn't there any more. It's not
16 down at the sheriff's office. The toothbrush is gone. Most
17 likely the same place that hard drive went. A piece of
18 evidence that just vanished.

19 Next you heard, ladies and gentlemen, Kelly Clune, the
20 SANE nurse, who gave an exam that overall usually lasted a
21 couple of hours. You heard how she preserved the evidence
22 and took swabs of **A.F.**'s vagina and rectum to be sent to
23 SLED to be compared. You heard her testify how she took
24 these swabs, swabbing **A.F.**'s genitals -- or vagina and
25 rectum area.

(CLOSING ARGUMENTS BY MR. KENDALL)

1 Then, after some chain witnesses, ladies and gentlemen,
2 you heard from Verona Herrera, an expert in serology, where
3 they're identifying bodily fluids. She testified to when
4 examining these swabs from the vagina and rectum, she
5 identified the p30 protein, which is a component of semen.
6 She located this, ladies and gentlemen, on both the vaginal
7 and rectal swabs.

8 Finally, ladies and gentlemen, you heard from
9 Daniel Stewart, the DNA expert. He testified in this case,
10 ladies and gentlemen, that he was able to match the DNA to
11 Mr. Simmons of both the vaginal and rectal swab.

12 Now, before we talk about the specifics of this, ladies
13 and gentlemen, I just want to point something out. This was
14 not a cold case. This was not a case where there was no
15 suspect. This was not like one of those things on TV where,
16 after 25 years, they find out who it is, using DNA. This
17 was confirmatory evidence, ladies and gentlemen. **A.F.**
18 said Jason touched me appropriately. The DNA says Jason
19 touched me inappropriately -- or Jason's DNA is on an area
20 that's wildly inappropriate. This is confirmatory. This
21 shows -- this backs up her story. This is a piece of
22 evidence that shows what she said is accurate. And what did
23 it show? A 1-in-6-billion match from the swab on the
24 vagina. The DNA doesn't know the facts in this case, ladies
25 and gentlemen. It's just DNA. So it's not just a

(CLOSING ARGUMENTS BY MR. KENDALL)

1 1-in-6-billion match, but it's a 1-in-6-billion match to the
2 man she happened to spend the night with the night before.
3 The man that she says touched her. This DNA -- a
4 1-in-6-billion match confirms that Jason Simmons is the one
5 that touched her. She said it happened, and this DNA shows
6 it. And, of course, in this case, there were smaller ratios
7 on some of the other swabs; some of the other testing
8 techniques. I think the rectum was the smallest, at 1 in
9 220. I think some were in the 5600s, somewhere around
10 there -- 2600s.

11 But you heard testimony from expert Samuel Stewart that
12 there is not one piece of DNA evidence that excludes Jason
13 as a contributor, not a single one. Some of this DNA may
14 have been more complete than the others. They all match to
15 Jason. Not a single piece eliminated him as the
16 contributor.

17 Now, ladies and gentlemen, after the State closed, you
18 also heard from the defense. The defendant and his wife,
19 Missy, Melisa, who have a child together, a young child -- a
20 certain strong motivation to want this to go away -- but you
21 have some inconsistencies to the defense story, important
22 consistencies. Jason testified he never slept in the same
23 room. Missy testified they slept in the same room in
24 Nashville. Never alone with Missy? Well, that night,
25 apparently, he was alone with her at some point. She didn't

(CLOSING ARGUMENTS BY MR. KENDALL)

1 know about the chocolate bunny. And, apparently, that
2 happened. Jason told her about the chocolate bunny, at some
3 point. And that's, I believe, from the CAC video. She's
4 talking about that later in the night. It happened outside
5 the presence of Melisa. That night, they were alone
6 together at some point.

7 There's also this testimony about how he acted when she
8 was there, which was somewhat odd, to simply leave the house
9 every single time she goes to take her shower or changes
10 clothes or anything like that. That's somewhat bizarre
11 behavior, ladies and gentlemen, not in the ordinary. You
12 don't typically leave the home every time a kid takes a
13 bath. It's a guilty mind.

14 He also testified that he didn't know this was going on
15 until the search warrant took place. It wasn't until the
16 search warrant happened, and that's when he knew what was
17 going on. But Melisa said they talked about it like that
18 next day. That like on the 9th, that they were talking
19 about it. More importantly, ladies and gentlemen, when he
20 made this disk, transferred the pin drive on the 16th, made
21 on the 11th, he knew the investigation was ongoing. When
22 asked about it, he didn't really give a clear answer of when
23 this was created because he screwed up, ladies and
24 gentlemen, couldn't answer that. He's got too many versions
25 on there. He's got some that say the 11th. All say they

(CLOSING ARGUMENTS BY MR. KENDALL)

1 were created on the 11th. And then some where he's changed
2 the clocks to the 8th and the 9th. Three different files
3 edited twice to make it appear that that night he was just
4 sleeping on the couch, claims it was online. The police
5 were never able to find any online backup to this.

6 And, ladies and gentlemen, she also testified about
7 that electric toothbrush, which suddenly went missing.
8 Police don't have it, ladies and gentlemen, and it was
9 definitely there. Where is the electric toothbrush?
10 Probably the same place as that hard drive.

11 Now, ladies and gentlemen, at the beginning of this
12 trial I asked you a third thing: To use common sense. And
13 I hope you will keep this in mind when you evaluate this
14 case; this case, where you heard **A.F.** testify how Jason
15 inappropriately touched her in her vagina. This case, where
16 you watched a video as she explained the touching to a
17 forensic interview as a 4-year-old child. You heard of his
18 bizarre reaction when he took her home, saw the video he
19 attempted to manipulate, ladies and gentlemen, in order to
20 show that he was out there sleeping all night; saw that he
21 removed the hard drive from that recorder; heard him ask for
22 his phone to be put in a position so police couldn't access
23 it; and, most importantly, ladies and gentlemen, you heard
24 there was DNA found in her vagina and rectum that matched
25 Jason Simmons.

(CLOSING ARGUMENTS BY MR. MORIN)

1 Ladies and gentlemen, based on these facts, I would ask
2 you to return a verdict of guilty. Thank you.

3 THE COURT: Mr. Morin?

4 MR. MORIN: A giraffe does not want your peanut butter
5 and jelly sandwich. Why do I say that? Well, when I stood
6 up here before you at the beginning of this trial, I told
7 you that a 4-year-old -- and y'all knew -- some of y'all
8 even shook your head -- y'all knew what I said -- a
9 4-year-old believes what they believe. It doesn't matter if
10 it's true or not. It doesn't matter.

11 In 2000, I took my young child to the Riverbanks Zoo.
12 She was fascinated with giraffes. About a month after we
13 got home, she came crying to us, and she said there's a
14 giraffe in the backyard trying to eat my peanut butter and
15 jelly sandwich. Now, obviously, that's not true. She's 23
16 now; she lives in Spain. If I call her up right now and ask
17 her if that happened, she's going to go, "Well, I know it
18 didn't happen, but that's the way I remember it."

19 And every one of us do that. Every one of us has a
20 dream that we had as a child that if you got on there and
21 you said, you know what, did this happen? You'd say, yes.
22 Now, we're grown-ups, and we know when we're asleep and
23 we're having a dream and we say, well, you know what, that's
24 a dream. But a 4-year-old doesn't have that. So we have to
25 look at what they say. And as the person that I respect

(CLOSING ARGUMENTS BY MR. MORIN)

1 said, you know, children of this age, their ability to
2 communicate sometimes is limited. And that's true. But
3 that doesn't change the burden of the State and that doesn't
4 change the evidence.

5 A.F. -- so let me ask you a couple of questions, and
6 these are good ones. Has A.F. ever met Ms. Leskanic? She
7 sat up here; she said, yes, she's been to meetings.
8 Remember that? Yes. In fact, Mr. Kendall had her stand up
9 and say it. And this tells everything you need to know
10 about this case. Because Mr. Kendall stood right here, and
11 what did he do? "Are you sure?"

12 "I met with this child several times" is what they
13 said. The mama said she was never with her. Now, with
14 Jimmy Henson, who's not here today -- the heavier-set
15 gentlemen who did the swab -- sat up here -- right? Now,
16 Officer Mullinax and Officer Ward -- who was on the search
17 warrant? Anthony, Mullinax, Ward and Hanson. What happens
18 when Henson gets up here? "I wasn't with them." And it was
19 odd. And here's the thing that was odd about that:
20 Mr. Kendall didn't go, "Are you sure?" Why did he do that
21 to A.F., but not to Officer Henson? Because he's
22 suggesting the answer, he's suggesting the answer. And she
23 was convinced the answer was supposed to be yes, when she
24 answered, and she stuck with it. She stayed with it.
25 He's right. Jason and Missy do have a young child

(CLOSING ARGUMENTS BY MR. MORIN)

1 together; they do. That is a reason that she might want to
2 tell them something that's not true. But when she's sitting
3 up there, what did she say? He told me not to tell them,
4 but I did it anyway. Now, how hard would it have been for
5 her not to say that? But she's telling the truth. Mama, on
6 the other hand, when he asked her how many times has she
7 spent the night: That's the first time. When I said, "Are
8 you sure," that's the first time.

9 Well, then I had to come up and I got pictures from
10 Knoxville, where you're taking weekend trips, and the child
11 is sick. Why is that the thing that we're not telling the
12 truth about? Why is that the thing? That doesn't even make
13 any sense, but there it is, there it is.

14 Now, those of you that have children have slept with
15 children. When children move -- and you're asleep and they
16 move, you move. That's a fact. Mr. Kendall wants to talk
17 about: Are you 100 percent sure she didn't leave? This is
18 the same guy who wants to talk about chances of 1 in 220.
19 But it really doesn't. He only wants to talk about 1 in a
20 billion. He likes that number. But the other ones he's
21 kind of fuzzy on: 5700, 220.

22 Well, how about this? When **A.F.** was sitting up here
23 and he asked her and he told you just now, what do you say
24 Jason touched you with, and she said toothbrush. That's
25 what she said. She said a toothbrush. Well, at 1:14 -- and

(CLOSING ARGUMENTS BY MR. MORIN)

1 I wrote 40 seconds -- it might have been give or take a
2 little bit -- on the video that they presented, Ms. Austin
3 asked **A.F.** did he touch your nu-nu with a toothbrush. And
4 she says no. So if she's telling the truth as she remembers
5 it now, and she was telling the truth as she remembered it
6 then, then that means that toothbrush did not touch her in a
7 private area. You will have the video, as Mr. Kendall said,
8 back with you. Fourteen -- right around 4:14 thereabouts.
9 You can watch the whole thing, if you'd like. I thought
10 about playing it in here, but we don't need to do that. We
11 can do that if you feel it's necessary.

12 But to suggest -- so am I saying that **A.F.** is not
13 telling the truth? No. Am I saying that she believes what
14 she said -- saw? Yeah. She's four. She believes it. Did
15 it happen? No. What did she say she had? A chocolate
16 bunny that was a popsicle. What did she have? Well, we
17 have a photograph saying and showing she did have a popsicle
18 with her and it was a chocolate bunny there. Did she see a
19 pad? Yes. Do we have a picture of it? Yes. Why do we
20 have a picture? To send to the Fortners; look, this is what
21 we're doing.

22 When I was growing up it was an attic door smaller than
23 that one, about this big (indicating), in a tri-level. And
24 my parents raised Cain with us about opening that door and
25 looking in there. If you've had a child that has to deal

(CLOSING ARGUMENTS BY MR. MORIN)

1 with that, you know. In fact, I'll go even further.
2 There's a door like that in my house. It's a laundry chute.
3 My daughter jumped down it. She asked if she could jump
4 down. I said don't mess with that. She said, "But I want
5 to see it." And one day I was sitting there, and she came
6 walking around the door that she couldn't have gotten to
7 because I didn't see her. I say, "Did you jump down that
8 laundry chute?" And she was three or four, and she says
9 yes. I said, "How'd you like it?" She said, "I didn't.
10 It's a lot longer than I thought." So when they say "that
11 little door" -- you see that picture -- that's like a magnet
12 to a child. They told you that she had opened that
13 before -- Missy did. The same Missy who says, yep, I told
14 her. There's a lot of people you have to decide who you
15 believe or not believe in this case. But I'm going to
16 submit to you that Missy is the most truthful person that
17 came here. There's plenty of places in there where she
18 could have -- "Well, I don't remember" or "I'm not sure."
19 "I didn't say that." It's all there, it's all there.
20 And as far as DNA goes, I asked the officer -- I asked
21 Mr. Stewart, I said, "Have you done a lot of these?" He
22 said, "I've done 33 in court." And I said, "You've done
23 more than that." I don't want to mislead you. "You've done
24 more than that." And I said, "Have you had many that's had
25 a nonillion?" He said, "Quite a few."

(CLOSING ARGUMENTS BY MR. MORIN)

1 Recently, in a case, in doing something else, I found
2 out what nonillion is. A nonillion is a number with 30
3 zeros after it. Okay. So a billion, seven numbers, I
4 think. A nonillion is 30. He's saying the randomness of
5 possibly picking somebody out at random is 220 or 5700 or
6 2700. Where does it come from? Well, it's this protein. A
7 protein. Yeah. Okay. And are you saying -- what can you
8 tell me about this protein? I can't tell you anything.
9 It's junk DNA.

10 My wife sent away to 23andMe. And guess what? Her
11 ancestors aren't from Germany. Most of them are from
12 England. But the DNA he's using to try to accuse that man
13 of committing a terrible crime -- well, no, it's junk DNA.
14 And he even said it. Well, you know, sometimes it tells you
15 what your hair color is and -- not this. This is just
16 stuff. I'm not really sure. And where is the thing that
17 you came up with this number? Well, the FBI did hundreds of
18 thousands. I'm not sure about this. We talk a lot about
19 that DNA these days.

20 When the government starts coming at me with numbers
21 like 2700 or 5600 or a billion or nonillion, and they're
22 kind of sketchy on that math -- because it's been a long
23 time since I took biology -- and I got done through high
24 school and that was it. But I can tell -- I have a little
25 bit, and I think y'all know a little bit about what we're

(CLOSING ARGUMENTS BY MR. MORIN)

1 talking about here.

2 And really -- Mr. Kendall really, really -- with this
3 video -- did Mr. Simmons make a video, clip it, and put it
4 on a different thing and type something else? It's all
5 right there. He told you why he was doing it. It's not
6 like he somehow tried to hide that. They're concerned about
7 him turning off the phone. Every phone's got a pass code.
8 We all know that. It's 2020. And stuff stored on the
9 phone. And they're going to do what they're going to do, a
10 search. But they don't. That's speculation. That's not
11 even circumstantial evidence. That's complete speculation.
12 They're not even claiming that they -- that there was
13 anything on the phone. They're not even claiming it.
14 They're just talking about it.

15 At the end of the day, the question is: Did this
16 4-year-old have her legs shaved by this toothbrush? Did she
17 eat the chocolate bunny? Was this the first time she'd ever
18 been there? No. Does she believe it? Probably. At the
19 end of the day, Melisa Simmons said I went to sleep in our
20 marital bed with the child and she was moving. Now, maybe
21 Mr. Kendall is not familiar with young children moving
22 around in the bed, climbing up, doing whatever they do
23 because they do a bunch. But if you've slept with a child,
24 a 4-year-old, you're going to be aware of them, and you're
25 going to know it they leave. And that's the bottom line.

(REBUTTAL BY MR. KENDALL)

1 I want to talk about sexual battery for a moment. I
2 don't want to, but I'm going to. It's not enough for them
3 to say he touched her inappropriately. You have to prove,
4 as he's already said, sexual battery, which the judge will
5 tell you. There's a lot of evidence. There's a lot of
6 pictures about different things that went on in there. I
7 put in some because I felt like it was important to
8 establish what real relationship was between them, to
9 establish the fact that they had been staying together. But
10 at the end of the day, this didn't actually happen and he's
11 not guilty. And the fact that she's young and she might not
12 be able to tell the best way, that doesn't change the
13 burden.

14 You know, in 1692, the children of this age came
15 forward and said there's some witches. And they said, well,
16 a lot of the crops were going, so we're going to go with the
17 kids. That's what they're doing. They're going to go with
18 the kids. I have to stay over here. I have to make sure
19 that they're proven beyond a reasonable doubt that this
20 happened. And I submit to you, they have not and he is not
21 guilty. Thank you.

22 MR. MORIN: All right. A brief reply?

23 MR. KENDALL: Yes, sir, Your Honor.

24 Witch hunt, huh? Giraffes, peanut butter sandwiches,
25 kids don't know. That's where we are now? They found

(REBUTTAL BY MR. KENDALL)

1 components to semen in her vagina and rectum, ladies and
2 gentlemen.

3 Now, I understand you heard testimony. You've watch
4 this video. She was four and seven. You can ask enough
5 questions to get her confused. You can get some
6 inconsistencies about this, but the big points of this,
7 always the same: Jason and Missy's house, on the couch,
8 Jason touched her. You want to talk peanut butter
9 sandwiches and giraffes, ladies and gentlemen? Sure. On
10 its face, who knows. When you start looking at other
11 evidence -- if you're in the backyard and you see a bunch
12 half eaten peanut butter and jelly sandwiches and giraffe
13 dung, then maybe that's a little something different. And
14 that's what we've got in this case. This just isn't **A.F.**,
15 and that's it. It's not just Dana, and that's it. And for
16 what it's worth, Mr. Morin asked her, I believe, if she
17 spent the night with her at his house. Not in Nashville.
18 At the house. And that's when she said no. I find it hard
19 to believe that Missy is more believable than her mother.
20 And that's for you to decide.

21 Ladies and gentlemen, there is no reason for his semen
22 or components of semen to be in her vagina and rectum,
23 except one: That he inappropriately touched her. This
24 stuff just doesn't materialize. It just didn't happen to be
25 in her vagina. It just didn't happen to be in her rectum.

(REBUTTAL BY MR. KENDALL)

1 It had to get there, for some reason. That just doesn't
2 come about. Somehow, his DNA ended up there. You heard
3 that from the serologist. You heard that from the DNA
4 expert. And Mr. Morin's tried to paint this picture that
5 sometimes the match is even better. It's 1 in 6 billion,
6 ladies and gentlemen. 6 billion. But what's more than
7 that, it's not just 1 in 6 billion on a cold case. This
8 isn't just a random thing. We're looking at 1 in 6 billion
9 that DNA shows it's him, plus says it's him. This confirms
10 it. So it's like 1 in 6 billion, and it just so happens, of
11 all the 6 billion, it just happens to be the guy she spent
12 the night with the night before. Just so happens to be the
13 guy that she says sexually assaulted her. That's a pretty
14 epic coincidence, ladies and gentlemen. This is his DNA.
15 Moreover, this establishes that there was semen in her
16 vagina and rectum. This isn't just some ---

17 MR. MORIN: Objection. Objection. May we approach?

18 THE COURT: Yes.

19 (A bench conference was held off the record in the
20 presence of the jury but out of the hearing of the jury.)

21 MR. KENDALL: Okay. There is a component of semen in
22 her vagina and rectum. That just didn't get there by
23 accident. That's not hers. That was foreign DNA, ladies
24 and gentlemen. Somebody's proteins, or whatever, from the
25 semen or, you know, potential semen got there. Somebody's

(CHARGE OF THE COURT)

1 did, and it was not A.F.'s. This is foreign DNA. They
2 separated the male component to it, not A.F.'s. So the
3 idea that somebody touched her has been proven. We know
4 there is DNA foreign to her, somebody who touched her.
5 Somehow this foreign DNA got there. Is not A.F.'s.

6 So the question becomes who's is it. Is it some random
7 human being out there in the ether? Somebody that we don't
8 know who it is? Some stranger? Or is it the guy that she
9 says inappropriately touched her. Is it the guy whose DNA
10 matches this to 1 in 6 billion? Is it the guy who tried to
11 distort the hard drive -- or create a video -- excuse me --
12 got rid of the hard drive and create a video that shows he
13 was asleep, even though we know that wasn't that night; that
14 it was created days later? Was it the guy who claimed that
15 he didn't know an investigation was going on, when his own
16 wife testified she told him about it?

17 Ladies and gentlemen, at the beginning of this trial, I
18 asked you to use common sense, and I hope you do that when
19 you approach your deliberations. Thank you.

20 THE COURT: All right. Well, folks, you've now heard
21 all the evidence. You've heard the arguments from the
22 lawyers. And it is my duty now to charge you on what the
23 law is as it applies to those facts for you to renew your
24 verdict upon.

25 I told you at the beginning of the trial, you have

(CHARGE OF THE COURT)

1 duties and I have duties. And my job is to preside over the
2 trial, make sure we followed our rules of procedure, rules
3 of admissibility of evidence. You, on the other hand, I
4 told you are to consider only the evidence that was
5 presented in this courtroom, which, again, consisted of
6 testimony from the witness stand, photographs, documents,
7 things like that, that I allowed to be admitted into
8 evidence. But I also have this final job, which is to
9 charge you on the law that is applicable to this type of
10 case. It's your duties, under the oath that you took at the
11 beginning of the trial, to accept the law as I now charge it
12 to you. And if you think you have some idea of what the law
13 is or what the law ought to be, and it doesn't agree with
14 what I now tell you, under the oath that you took, you are
15 obligated to accept the law as I charge it to you.

16 Now, you are the judges of the facts, and you are the
17 sole judges of the facts. I cannot comment upon the facts.
18 I cannot state any kind of opinion about how I feel from the
19 facts. And if you feel like I made some kind of inference
20 about how you ought to feel about the facts, you are to
21 disregard that. You've misunderstood something that I was
22 saying or some way I looked, the fact that I ruled on
23 admissibility of evidence, things like that -- you are to
24 take no feeling that I have about how you should feel about
25 the evidence in this case. The law does not allow me to

(CHARGE OF THE COURT)

1 have an opinion about the facts of this case. That is
2 solely a matter for you, the jury, to decide. And it is
3 your duty to determine the effect, the value, the weight,
4 and the truth of the evidence that got presented during this
5 trial.

6 I told you at the beginning of the trial, the fact that
7 the defendant was arrested, charged, and indicted in this
8 case is not evidence in this case, and it cannot be
9 considered by you as evidence of guilt in this case, nor
10 does it create any presumption or evidence of guilt.

11 This indictment that I went over with you when we
12 started is simply the formal written notice, which contains
13 the charge that was made against the defendant, and it gives
14 this Court jurisdiction to hear this case. And that
15 indictment was 2017-GS-11-00580, which was for criminal
16 sexual conduct with a minor in the first degree. The
17 defendant pled not guilty to that indictment, and that plea
18 then put the burden on the State to prove his guilt beyond a
19 reasonable doubt.

20 I charge you that a person who is charged with a crime
21 in South Carolina is never required to prove himself
22 innocent. This is an important rule of law in this country,
23 that the defendant in a criminal trial will always be
24 presumed to be innocent of the crime for which he is
25 indicted, unless and until his guilt has been proven by

(CHARGE OF THE COURT)

1 evidence satisfying you of that guilt beyond a reasonable
2 doubt. This presumption of innocence is not some kind of
3 mere legal theory. This isn't just a legal phrase that we
4 toss about. This is a substantial constitutional right to
5 which every defendant is entitled. This presumption of
6 innocence accompanies a defendant from the time he is
7 charged, throughout the trial, unless and until you reach a
8 verdict of guilty based upon evidence satisfying you of that
9 guilt beyond a reasonable doubt.

10 We talked a little bit about reasonable doubt at the
11 beginning of the trial, and again, it is the State's burden
12 to prove guilt beyond a reasonable doubt. I told you some
13 of you may have served in a civil case before, where you
14 were told it was only necessary to prove that a fact is more
15 likely true than not true, such as by the greater weight of
16 the evidence, or a preponderance of the evidence. But in a
17 criminal case like this, the State's proof must be more
18 powerful than that. It must be beyond a reasonable doubt.

19 Proof beyond a reasonable doubt is proof that leaves
20 you firmly convinced of the defendant's guilt. Reasonable
21 doubt has also been defined as the kind of doubt that would
22 cause a reasonable person to hesitate to act. There are
23 very few things in this world that we know with absolute
24 certainty. And in criminal cases, the law does not require
25 proof that overcomes every possible doubt. And based on

(CHARGE OF THE COURT)

1 your consideration of the evidence, you are firmly convinced
2 that the defendant is guilty of the crime charged, then you
3 must find the defendant guilty.

4 On the other hand, if you think there's a real
5 possibility that the defendant is not guilty, then you must
6 give the defendant the benefit of the doubt and find him not
7 guilty. Now, in the course of a trial, there's generally
8 speaking two types of evidence that gets presented: Direct
9 evidence and there's circumstantial evidence. Direct
10 evidence directly proves the existence of a fact that
11 doesn't require any kind of deduction. Circumstantial
12 evidence is proof of a chain of facts and circumstances that
13 indicate the existence of a fact. Crimes can be proven by
14 circumstantial evidence, and the law makes no distinction
15 between the weight or value to be given either direct or
16 circumstantial evidence.

17 However, to the extent that the State relies on
18 circumstantial evidence, all of the circumstances must be
19 consistent with each other and when taken together, point
20 conclusively to the guilt of the accused beyond a reasonable
21 doubt. If these circumstances merely portrayed the
22 defendant's behavior as a suspicious, then the proof has
23 failed. Again, the State has the burden of proving the
24 defendant's guilt beyond a reasonable doubt. This burden
25 rests with the State, regardless of whether the State relies

(CHARGE OF THE COURT)

1 on direct evidence, circumstantial evidence, or some
2 combination of the two.

3 Now, as jurors, you must determine the credibility of
4 witnesses who testified in this case. Credibility simply
5 means believability. It's your duty as jurors to analyze
6 and to evaluate evidence and determine which evidence
7 convinces you of the truth. In determining the
8 believability of witnesses who testified in this case, you
9 can believe the one witness over several witnesses or
10 several witnesses over one witness. You may believe the
11 testimony of a witness in its entirety, or you can reject
12 the testimony of a witness in its entirety. You can believe
13 part of the testimony of a witness and reject the remaining
14 part of that testimony of that same witness. If you reject
15 part, you may still accept the remainder of a witness's
16 testimony. You may consider whether any witness has
17 exhibited to you any kind of interest, bias, prejudice, or
18 other motive in this case. You can consider things like
19 appearance and demeanor of a witness while on the witness
20 stand. You're not bound to decide this case based upon the
21 number of witnesses that a side produces.

22 Now, during the trial, you heard testimony from a
23 child. Where a witness is a child, you must determine, as
24 with any other witness, whether that testimony is
25 believable. In deciding believability, you may consider not

(CHARGE OF THE COURT)

1 only matters that I have already discussed with you, but you
2 may also consider the age of the child, the child's ability
3 to observe and remember facts, and the child's ability to
4 understand and answer questions. Because young children may
5 not fully understand what is happening here, it is up to you
6 to decide whether the child understood the seriousness of
7 appearing as a witness in this trial and whether the child
8 understood the questions, whether the child has a good
9 memory, and whether the child understands the difference
10 between lying and telling the truth.

11 In addition, young children may be influenced by the
12 way the questions are asked. It's up to you to decide
13 whether the witness understood the questions asked. I also
14 told you during the course of the trial that we don't
15 usually let people come in and give their opinion about
16 things in court, but we make an exception for expert
17 witnesses. And these are people who are experts because of
18 experience or education or specialized training in some
19 area, and we allow them to give their opinion and state the
20 reasons for their opinion. You can give the expert's
21 testimony as much or as little weight as you think it
22 deserves. And if you don't think it's based on sufficient
23 education or experience, or you conclude that an expert's
24 opinion is not sound or that it's outweighed by other
25 evidence, you may disregard that opinion entirely. In other

(CHARGE OF THE COURT)

1 words, you're not required to blindly accept an expert's
2 opinion. You have the right to consider the testimony in
3 light of all the circumstances and give it such weight, if
4 any, that you think it's entitled to.

5 Now, as to the offense of criminal sexual conduct with
6 a minor in the first degree, the State must prove beyond a
7 reasonable doubt, that the defendant engaged in a sexual
8 battery with the victim and that she was less than 11 years
9 old at the time of the sexual battery. Sexual battery is
10 defined as sexual intercourse, cunnilingus, fellatio, anal
11 intercourse, or any intrusion, however slight, of any part
12 of a person's body or of any object into the genital or anal
13 openings of another person's body, except when that
14 intrusion is accomplished for medically-recognized treatment
15 for diagnostic purposes.

16 I charged you that consent, willingness, indifference,
17 or ignorance on the part of a minor under the age of 14, if
18 any, as to what was taking place, does not, in any way,
19 affect the charge of criminal sexual conduct with a minor in
20 the first degree, because a person under the age of 14
21 cannot legally consent to sexual intercourse.

22 Now, in determining your verdict of guilty or not
23 guilty, you cannot consider any possible penalty for any
24 particular crime. The punishment for a crime is a matter
25 for me to determine and should never be considered by you in

(CHARGE OF THE COURT)

1 any way whatsoever in arriving at a verdict of guilty or not
2 guilty. Your verdict must be unanimous. In other words,
3 all 12 jurors must agree.

4 Now, madame foreman, when your jury agrees on a
5 verdict, I want you to write it on the back of this
6 indictment. Again, the indictment is the only piece of
7 paper that is going to go back that is not in evidence. And
8 down here on the bottom, you'll see it says two possible
9 verdicts: Guilty or not guilty. And you write whichever
10 verdict your jury agrees on, sign it, date it, and let the
11 bailiff know that you have reached that verdict.

12 Now, I'm going to return you to the jury room, but do
13 not begin your deliberations just yet. I have to give the
14 lawyers the opportunity to show me if I misspoke on
15 something, then we'll get the evidence together, send it
16 back to the jury, with a copy of the jury instructions, and
17 the indictment. And the bailiff will tell you that I said
18 it's okay to begin your deliberations, but do not begin your
19 deliberations until I send word back.

20 Also, your lunch will be here, I think. It was
21 supposed to get here at about 11:00. And you can eat while
22 you are deliberating. You can wait until you've finished
23 eating to begin your deliberations. That is totally up to
24 you. If at any point you need to take a break, for
25 instance, somebody wants to go out and get a breath of fresh

(CHARGE OF THE COURT)

1 air or smoke a cigarette, something like that, you must
2 cease deliberations. You can only deliberate when all
3 12 jurors are in the jury room. All right. Again, do not
4 begin your deliberations until I send word back with the
5 bailiff along with the evidence. All right.

6 (At 12:10 p.m., the jury retired to deliberate on a
7 verdict.)

8 THE COURT: Anything from the State?

9 MR. KENDALL: No, sir, your Honor.

10 THE COURT: From the defense?

11 MR. MORIN: No.

12 THE COURT: Do you want to review the exhibits?

13 MR. KENDALL: Yes.

14 (Counsel examined the exhibits.)

15 THE COURT: All right. Everyone is back. The
16 defendant is in the courtroom.

17 (A note from the jury was marked as Court Exhibit 1.)

18 The jury wants to hear the jail call record. Is that
19 queued up?

20 MR. KENDALL: I believe it is, Your Honor.

21 THE BAILIFF: They're going to bring it out with them.

22 THE COURT: Okay. Bring them in. Tell them to bring
23 the disk.

24 (The jury entered the courtroom at 1:07 p.m.)

25 Okay. Folks, we will queue up the jail call for you. I

1 understand that's what you want hear, so we'll play it
2 through. And if you want to hear it again, let us know.
3 Otherwise, we will stop and go back to deliberations. While
4 it's being played, don't deliberating in front of us. Okay.

5 (Upon the request of the jury, State's Exhibit 32 was
6 played.)

7 Are you finished? You don't want to hear the rest of
8 it? That's enough.

9 THE JURY FOREMAN: We've heard what we needed.

10 THE COURT: Raise of hands. All in favor of stopping
11 it now. All 12 are up. Okay. All right. Go ahead and go
12 on back to continue deliberations.

13 (At 1:13 p.m., the jury returned to the jury room to
14 deliberate.)

15 THE COURT: All right.

16 MS. LESKANIC: We are getting the victims family,
17 Your Honor. If we can have just one moment.

18 THE COURT: All right.

19 MS. LESKANIC: State's ready, Your Honor. Thank you.

20 THE COURT: Okay. Bring the jury in.

21 (The jury entered the courtroom at 1:54 p.m.)

22 (A note from the jury was marked as Court Exhibit 2.)

23 THE COURT: All right. Madame foreman, I understand
24 your jury has reached a verdict; is that correct?

25 THE JURY FOREMAN: Yes, sir.

(JURY VERDICT)

1 THE COURT: Is it unanimous?

2 THE JURY FOREMAN: Yes, sir.

3 THE COURT: All right. Would you give it to the
4 bailiff, please? All right. Did you already publish?

5 THE CLERK: 2017-GS-11-0580, the State versus
6 Jason Scott Simmons, indictment for criminal sexual conduct
7 with a minor, first degree. The jury's verdict is guilty,
8 signed by forelady Sierra Hamilton.

9 Ladies and gentleman of the jury, if this is the
10 verdict of you all, please indicate by raising your right
11 hand.

12 THE COURT: Let the record reflect that all the jurors
13 have raised their right hand.

14 Do you want to poll them?

15 MR. MORIN: No, sir.

16 (The jury was dismissed from duty.)

17 THE COURT: All right. We move to sentencing.

18 Mr. Solicitor, is there anything that you would like ---

19 MR. KENDALL: Just give me a moment to just talk with
20 the victim's family and see if they would like to address
21 the Court.

22 THE COURT: All right.

23 MR. KENDALL: Your Honor, I think Ms. Fortner would
24 like to address the record -- Ms. Dana Fortner. If I could
25 while she comes -- she's getting her thoughts together -- if

1 I can just put in his criminal record.

2 THE COURT: Yes, ma'am. What would you like to tell
3 me?

4 MS. FORTNER: I just want to thank y'all for your time
5 and for hearing this case. And it's just been very
6 traumatic on our daughter, and I just really appreciate
7 everything everybody's done to help us. You know, you don't
8 think something like this would happen to your child. And
9 that was my first thought. I'm very protective, and I don't
10 know if I'm -- I don't even -- my aunt's never really kept
11 them at her house. I don't let them go anywhere. I keep
12 them right under me. And you just don't think somebody
13 would hurt your child like this. And I just -- it's just
14 been really hard, you know, to get through the three years
15 and to put her through therapy, and then pull all this back
16 up. She's had a hard week the last week, a lot of trouble
17 with anxiety and stuff, because of this. And now we can
18 finally move on, you know, take a deep breath and move on
19 and start the healing process for all of us. I think that's
20 all.

21 THE COURT: Thank you.

22 THE WITNESS: Thank you.

23 MR. KENDALL: He does have a criminal record,
24 Your Honor. It's from 1996, domestic violence. It looks
25 like two counts; from '97, fraudulent check, five counts; in

1 1998, criminal domestic violence. And I believe that was
2 his last conviction, Your Honor.

3 THE COURT: All right. And what's the State asking
4 for?

5 MR. KENDALL: This of course carries 25 to life, based
6 on the nature of the crime, the age of the girl -- the
7 child, and his efforts to sort of destroy evidence, we would
8 ask for something certainly higher than the 25 years, but
9 certainly, whatever the Court deems to be appropriate.

10 THE COURT: All right. Mr. Morin?

11 MR. MORIN: Your Honor, I don't have too much to say.
12 You heard my client's family situation and that kind of
13 thing as we've gone through. I'd just say that he -- during
14 the time he was out on bond these three years, on electronic
15 monitoring, he didn't have any violations. He's always
16 responsive to the Court and to me when I needed to see him..
17 He is 45 years old.

18 The charge at the mandatory minimum is going to put him
19 pretty much -- as long a sentence as it is, he obviously, in
20 addition to that, has a young child who he is no longer
21 going to be with. And we would ask something close to the
22 25 years be considered, given his relative little history.
23 And that's what I would have to say, Your Honor. I don't
24 know if his wife has anything further she'd like to say, but
25 I would like to turn around and just check for her.

(SENTENCE OF THE COURT)

1 THE COURT: All right.

2 MR. MORIN: And that would be "no." She's -- can't.

3 THE COURT: Well, Mr. Simmons, do you want to say
4 anything?

5 MR. MORIN: All right. If I may, just a moment,
6 Your Honor.

7 THE DEFENDANT: Before you -- after you sentence me,
8 can I hug my wife.

9 THE COURT: Can you what?

10 THE DEFENDANT: Hug my wife and my kid.

11 THE COURT: I'm sure they will arrange that for you.

12 THE DEFENDANT: Before they lock me up or anything. I
13 think -- I just want to give my son a kiss.

14 THE COURT: Anything else you want to say?

15 THE DEFENDANT: No, sir. I thank you for your time.

16 THE COURT: All right. Well, these are terrible cases.
17 They are the worst, in my opinion. I think I'd rather
18 handle a murder case than something like this. The
19 possibilities of a child being traumatized from this point
20 on -- on the one hand, you'd go, well, she was so young,
21 that maybe she won't remember anything. And hopefully,
22 after the excitement and all the anxiety of going to trial
23 passes, and -- she can move on and maybe get some therapy
24 and put this behind her and not have this affect the rest of
25 her life. But 4 years old -- that's just a monstrous act to

(SENTENCE OF THE COURT)

1 commit this on a 4-year-old. It very truly is and hard for
2 me to understand this kind of crime. It truly is.

3 The case boils down to DNA. It really does, and
4 there's no explanation for it. It's there, and that's the
5 strongest part against you. But that film and plotting to
6 -- they certainly made a good argument that it was an
7 attempt for you to create evidence to show that you didn't
8 do it, which that isn't something that really -- does not
9 work for your favor, I'll be honest with you.

10 Twenty-five years is the minimum. That's probably a
11 life sentence, the way you're deteriorating from the time
12 that I saw you on that film to now. You're not doing very
13 well.

14 Nevertheless, I think a sentence of 40 years in the
15 department of corrections is an appropriate sentence.
16 You'll get credit for whatever time you served. It's no
17 parole, so you've got to do 85 percent. And probably, if
18 you were still alive, be subject to a sexually violent
19 predator. You may or may not ever get out, but good luck to
20 you.

21 MR. KENDALL: Thank you, Your Honor.

22 MS. LESKANIC: Thank you.

23 THE COURT: If there is nothing else we are adjourned.

24 (End of Transcript of Record)

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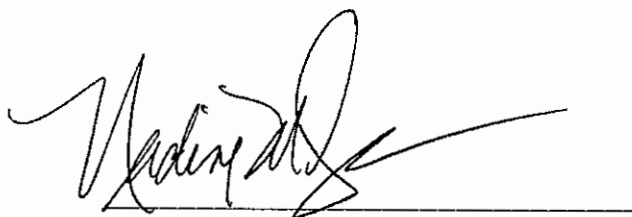
CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Cherokee)

I, Nadine M. Capps, Official Court Reporter for the
Sixteenth 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
evidence introduced in the trial of the captioned case,
relative to appeal, in the General Sessions Court for
Cherokee County, South Carolina, on the 8th-10th day of
January, 2020.

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

April 13, 2020.

A handwritten signature in black ink, appearing to read 'Nadine M. Capps', is written over a horizontal line.

Nadine M. Capps, CVR
Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

County of CHEROKEE SC)JASON SCOTT SIMONS 382074)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS

22CP-110375

APPLICATION FOR

POST-CONVICTION RELIEF

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 SCDC
2. Name and location of Court which imposed sentence CHEROKEE S.C.
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2017GS110580
 - (b) _____

FILED IN THE OFFICE
CLERK OF COURT
2022 JUN - 1 P 12:55
BRANDY W. MOORE
CHEROKEE COUNTY, SC

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 1-10-2020 40 years
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty By JURY TRIAL
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SC COURT of appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. 10-6-2020
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. SENTENCE WAS TO HARSH
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Na
- (b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) VICTIM CHANGED STORY(b) WARRSE SM'S DATED EVIDENCE(c) LAWYER FAILED TO OBJECT

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

(a) LAWYER GOT EMAIL FROM DA PRIZ(b) GOT PICTURE OF EVIDENCE(c) during SENTENCING

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

(a) any petition in a State Court under South Carolina Law? yes(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO(d) any other petitions, motions or applications in this or any other Court? NO

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. SENTENCE WAS TOO HARSH

ii. _____

iii. _____

iv. _____

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

i. SC COURT OF APPEALS

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. Brief stated sentence was to Harsh

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. 10-6-2020

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. sentence was to Harsh

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) Email stated i Be Home FR.'day
 (b) Lawyer got New JOB Before trial
 (c) Lawyer worked on case VERY LITTLE

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? yes
 (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. Am'ke Gmoriu 147 East St John
Street SPARTANBURG SC. 29306
 ii. Susan B Hackett 1330 Lady Street
Suite 401 Columbia SC 29201
 iii. _____

- (b) the proceedings at which each such attorney represented you:

- i. Gmoriu arraignment, trial,
sentencing
 ii. Susan B Hackett, appeal
 iii. _____

19. State clearly the relief you seek in filing this application:

New Trial or Resentencing

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)
)
County of CHEROKEE SC)

VERIFICATION

I, JASON SCOTT SIMMONS, 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.



SWORN to and subscribed before me this 24
day of May, 2022.

Doreen Ferguson (L.S.)
Notary Public

My Commission Expires: 10-1-25

FILED IN THE OFFICE
CLERK OF COURT
2022 JUN - 1 P 12:52
BRADY W. MCREE
CHEROKEE COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

Jason Simmons, #382078,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2022-CP-11-00375

**RETURN AND MOTION FOR A
MORE DEFINITE STATEMENT**

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
AUG - 3 AM 12:03
ANDY W. MCBE

NOW COMES Respondent, moving for a more definite statement and making its return to the post-conviction relief (hereafter "PCR") application filed on June 1, 2022, by Jason Simmons (hereafter "Applicant"). Respondent respectfully offers the following in support of its return:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Cherokee County Clerk of Court. During its April 2017 term, the Cherokee County Grand Jury indicted Applicant for first degree criminal sexual conduct with a minor (2017-GS-11-00580). Applicant was represented by Michael Morin, Esquire. Assistant Solicitor Matt Kendall and Kimberly Leskanic, Esquires, of the Seventh Circuit Solicitor's Office prosecuted the case. On January 8-10, 2020, Applicant proceeded to trial before the Roger M. Young, circuit court judge, and a jury. Judge Young sentenced Applicant to forty years' imprisonment to be served concurrent.

Applicant filed a timely notice of appeal on January 21, 2020 that was perfected by Susan B. Hackett, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State*

v. Simmons, 2022-UP-050 (S.C. Ct. App. filed Feb. 9, 2022). The remittitur was issued on March 11, 2022.

II. Statement of Facts

The minor victim testified that she used to spend the night at Applicant's house. (Tr. 81-82). She stated that when Misty, Applicant's partner, went to sleep, Applicant sexually assaulted her. (Tr. 83). She stated he assaulted her in the living room. (Tr. 84). He touched her both inside and outside her private area. (Tr. 84-85). He used an electric toothbrush. (Tr. 85). Applicant gave her chocolate while the abuse was going on. (Tr. 86). This occurred when the victim was four years old. (Tr. 86). She stated that she told her mother about the abuse, spoke to an interviewer at CAC, and went to the hospital. (Tr. 86).

III. Current Action before the Court

In his *pro se* PCR application, Applicant alleges he is detained unlawfully for the following reasons (excerpts verbatim):¹

1. Victim changed story.
2. Nurse misdated evidence.
3. Lawyer failed to object.
4. Lawyer got email from D.A. prior to . . . got picture of evidence during sentencing.

Attached to and incorporated herein are Applicant's Cherokee County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, and the current PCR application. Respondent reserves the right to amend this return upon receipt of additional relevant information.

¹ Applicant's claims numbers 1, 2, and 4 are all interpreted as ineffective assistance of counsel for failure to investigate claims.

IV. Argument

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. See *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) (“[A] defendant has a right to effective representation, not a right to an attorney who performs his duties ‘mistake-free.’” (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “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, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel’s performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC (“The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence.”).

Reasonableness is determined by the “variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant,” and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”

Yarborough v. Gentry, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel’s strategic decisions are to be afforded “‘strong presumption’ of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel’s performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually “countless” ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel’s deficient performance must have prejudiced the applicant so 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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, “[t]he likelihood of a different result must be *substantial*, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S.

at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Failure to Object

Applicant claims Counsel was ineffective for failure to object. Whether failure to object constitutes deficient performance generally hinges on whether or not a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Applicant has failed to state what Counsel should have objected to, why Counsel was deficient for failing to object, or how Applicant was prejudiced. Thus, a more definite statement is needed. Also, Respondent contends Applicant's allegation likely lacks merit, but requests an evidentiary hearing to fully resolve the matter.

Failure to Investigate

Applicant alleges ineffective assistance of counsel for "failure to investigate." *Strickland* makes clear that Defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. When highlighting failure to investigate as a ground for a larger ineffective assistance of counsel claim, judicial determination of this claim's validity is evaluated for "reasonableness [under] all the circumstances" with "a heavy measure of deference to counsel's judgments" applied. *Id.* That

said, counsel is required to, at minimum, “interview potential witnesses and make an independent investigation of the facts and circumstances of the case”, *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright*, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), *aff’d*, 828 F.2d 670 (11th Cir.1987)), including aggressively re-examining all the government’s forensic evidence and conducting analyses of all other available forensic evidence.” *Id.* (quoting *American Bar Association Guidelines For The Appointment And Performance Of Defense Counsel In Death Penalty Cases*, reprinted in 31 Hofstra L.Rev. 913, 1015 (2003) (emphasis added)).

Counsel is not obligated to “investigate lines of defense that he has chosen not to employ at trial.” *Strickland*, 466 U.S. at 682 (quoting *Washington v. Strickland*, 693 F.2d 1243, 1255 (5th Cir. 1982)). Further, “[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect.” *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Here, Applicant shows no facts indicating that any failure to investigate on the part of Counsel occurred, let alone was unreasonable. Counsel had no obligation to investigate every conceivable defense available in the case; only to engage in reasonable investigation. The Applicant has made no showing that Counsel’s inaction regarding investigations fell outside the zone of reasonableness, nor has Applicant specifically stated what exactly Counsel failed to investigate. Thus, Respondent requests a more specific statement regarding this claim to ascertain the merit, or lack thereof, of the allegation.

Still, the ineffective assistance of counsel allegations probably raise questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 265, 305

S.E.2d 247, 248 (1983) (“Where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court, a question of fact is raised which can only be resolved by an evidentiary hearing.”).

V. Motion for a More Definite Statement

Respondent moves for a more definite statement regarding Applicant’s allegations. Applicant alleges that plea counsel was constitutionally ineffective. However, he does not explain exactly what Counsel did that constituted ineffective assistance of counsel. Applicant fails to set forth with specificity any facts and circumstances upon the claim is based. The Uniform Post-Conviction Procedure Act requires that applicants must “specifically set forth the grounds upon which the application is based.” Section 17-27-50 of the Code of Laws of South Carolina (1976). In a PCR application, it is incumbent upon applicants to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). The Supreme Court of South Carolina has provided that:

[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of counsel is insufficient.

Coardes v. State, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974).

Furthermore, Rule 8(a), SCRCP, requires all civil pleadings include “a short and plain statement of the facts showing that the pleader is entitled to relief.” Respondent moves pursuant to Rule 12(e), SCRCP, to require Applicant to provide a more definite statement of his claims. Respondent moves to require Applicant to file an additional amended application well in advance of any evidentiary hearing concerning this matter. If Applicant fails to file a timely and

responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the allegation.

VI. Other Allegations Denied

Each and every other allegation in Applicant's PCR application not explicitly admitted, qualified, or explain in this return is hereby denied by the Respondent.

VII. Assertion of Rights to Notice of Amendments, Experts

Applicant should raise any claims he intends to raise at the PCR evidentiary hearing well in advance of the hearing. Here, Applicant's court-appointed attorney is the only individual authorized to file amendments to this application, given his representative capacity, Rule 11(a), SCRCF and *pro se* filings will not be considered at the PCR hearing. *State v. Devore*, 416 S.C. 115, 123, 784 S.E.2d 690, 694 (Ct. App. 2016) (*Pro se* filing is a nullity where person was represented by counsel); *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010) ("Since there is no right to 'hybrid representation' that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relief counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.").

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent or, in the alternative, continue the matter to permit adequate time to investigate and address the claims. *See Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) ("In most PCR cases . . . we have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases."); *Love v. State*, 428 S.C. 231, 242, 834 S.E.2d 196, 201 (2019) ("When analyzing the substance of a proposed amendment and any prejudice the State might suffer, a PCR court should consider all relevant circumstances, including, but not limited to, the timing of the motion, the complexity of the new issue, the

degree of surprise to the State, the need for and availability of necessary witnesses to defend against the claim, and whether the substance of the proposed amendment is readily apparent from the underlying plea or trial record.”); *see also* Rules 15(a)-(b), SCRCP (explaining how to amend a pleading). Pursuant to Section 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless the Court grants leave upon good cause shown. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent reserves the right to request a continuance and oppose witness testimony and exhibits withheld until the last minute resulting in undue prejudice to Respondent.

[conclusion and signature line on following page]

VIII. Conclusion

WHEREFORE, Respondent requests that the Court require Applicant to provide a more definite statement and then hold an evidentiary hearing regarding Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHELSEY F. MARTO
Assistant Attorney General

By 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-0386

July 29, 2022

1 STATE OF SOUTH CAROLINA)
)
2 COUNTY OF SPARTANBURG)
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3)
)
4 JASON SCOTT SIMMONS,)
)
5 Applicant,)
)
6 vs.)
)
7 THE STATE OF SOUTH CAROLINA,)
)
8)
)
9 Respondent.)
)

10 -----

11 February 13, 2023
12 Spartanburg, South Carolina

13 B E F O R E:

14 HONORABLE BRIAN M. GIBBONS, Judge.

15 A P P E A R A N C E S

16 CHELSEY F. MARTO, ASSISTANT SOLICITOR
17 For Respondent

18 RODNEY RICHEY, ESQUIRE
19 For Applicant

20

21

22 Julie A. Cendroski,
23 Circuit Court Reporter III
 Seventh Judicial Circuit

24

25

I N D E X

WITNESSPAGE

ANNOUNCEMENT OF CASE

By Ms. Marto

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JASON SCOTT SIMMONS

DIRECT EXAMINATION

By Mr. Richey

5

CROSS-EXAMINATION

By Ms. Marto

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MELISSA RENEE SIMMONS

DIRECT EXAMINATION

By Mr. Richey

18

CROSS-EXAMINATION

By Ms. Marto

22

MICHAEL MORIN

DIRECT EXAMINATION

By Mr. Richey

24

CROSS-EXAMINATION

By Ms. Marto

28

CLOSING STATEMENT

By Mr. Richey

31

CLOSING STATEMENT

By Ms. Marto

32

COURT TAKES UNDER ADVISEMENT

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COURT REPORTER CERTIFICATE

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EXHIBITS

MARKED

ENTERED

NO EXHIBITS PROFFERED

1 JASON SIMMONS VS. THE STATE OF SOUTH CAROLINA

2 THE COURT: All right. We're on the record.
3 Madam Attorney General?

4 MS. MARTO: Yes, Your Honor. May it please the
5 Court? We are here today in the case of Jason Simmons
6 versus the State of South Carolina. Docket Number
7 2022-CP-11-375. He's presently confined in the South
8 Carolina Department of Corrections and was indicted
9 April 2017 for first degree criminal sexual conduct with
10 a minor. He was represented by Michael Morin, and the
11 prosecutor's Matt Kendall and Kimberly Leskanic
12 prosecuted the case.

13 January 8th through the 10th, 2020. Who
14 proceeded at trial before Judge Young, and was found
15 guilty and sentenced to 40 years imprisonment. He filed
16 a timely notice of appeal, January 21st, 2020. This was
17 perfected by Susan Hackett, who filed an Anders brief.
18 This brief and petition was dismissed and the remittitur
19 issued March 11th, 2022. The application was filed June
20 1st, 2022, and the State's return was made July 29th,
21 2022. And with that I'll turn it over to Mr. Richey.

22 MR. RICHEY: We call Mr. Simmons.

23 THE COURT: All right, sir, come on around.

24 (Witness comes forward.)

25 Sir, you just have a seat behind that microphone

1 over there, okay?

2 THE WITNESS: Yeah. It's just gonna take me a
3 little bit to get up there.

4 THE COURT: Don't worry about it. Take your
5 time. All right. Sir, do you swear or affirm that the
6 testimony you give today be the truth, the whole truth
7 and nothing but the truth, so help you God?

8 THE WITNESS: Yes, sir.

9 THE COURT: All right, thank you.

10 Your witness.

11 JASON SCOTT SIMMONS,

12 having been duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. RICHEY:

15 Q. Sir, would you state your name? Take -- pull
16 your mask down, if you would, please. (Complies.)

17 Can you state your name, please?

18 A. Jason Scott Simmons.

19 Q. And are you currently in the Department of
20 Corrections?

21 A. Yes, sir.

22 Q. And are you in there for a conviction for CSC
23 first?

24 A. Yes, sir.

25 Q. Okay. And you went to a jury trial in, in

1 Gaffney, is that correct?

2 A. Yes, sir.

3 Q. And who represented you on that case?

4 A. Michael Morin.

5 Q. Okay. And you filed an application for
6 postconviction relief because it's your position that he
7 didn't effectively represent you, correct?

8 A. Yes, sir.

9 Q. Okay. This was a case involving a child, who at
10 the time, she alleged she was four years old; is that
11 correct?

12 A. Yes, sir.

13 Q. And you pled not guilty; is that correct?

14 A. Yes, sir.

15 Q. And you pled not guilty; is that correct?

16 A. Yes, sir.

17 Q. And you, did you tell Mr. Morin that you were not
18 guilty of these charges?

19 A. Yes, sir.

20 Q. And you wanted to go to trial?

21 A. Yes, sir. I ---

22 Q. Go ahead, I'm sorry.

23 A. Yes, sir, I wanted to go to trial.

24 Q. And then did you all prepare for the trial? Did
25 Mr. Morin talk to you about the trial?

1 A. He talked to me. I don't know what the trial
2 date was. I know he come to the house December the
3 26th, and we only talked that day. Then we went to
4 court on the -- the court date. I don't know the date.
5 I don't know.

6 Q. All right, that's fine.

7 A. And that was it.

8 Q. Okay. Did you all discuss the evidence in your
9 case?

10 A. He, he discussed the DNA test and we done a DNA.
11 And he told me, he said, the numbers ain't right.

12 Q. On the DNA test?

13 A. Yeah. They were -- one was high, one was low,
14 and I don't understand that stuff.

15 Q. Okay. Did he discuss to you how that applied to
16 your case in terms of being successful with the case?

17 A. That's above my knowledge.

18 Q. Okay. So he didn't talk to you about how the DNA
19 affects your case?

20 A. No, sir.

21 Q. Okay. And did -- and did you testify at the
22 trial?

23 A. Yes, sir.

24 Q. And, and your testimony, did you discuss that
25 with Mr. Morin?

1 A. He just told me to answer the questions
2 truthfully and the best of my knowledge.

3 Q. Okay. Did he discuss with you the impact that
4 your testimony would have?

5 A. No, sir.

6 Q. So -- so, January -- you went to trial January
7 the 20th -- January 8th through 10th, 2020. Was
8 that ---

9 A. That's the best of my knowledge.

10 Q. Right.

11 A. I, I don't ---

12 Q. It was right before COVID, right?

13 A. Yeah. It was before COVID, before COVID.

14 Q. And at the time that you went to trial, did the
15 State present any offer to you in the case?

16 A. I think it was 10 or 20 years.

17 Q. Okay.

18 A. I can't remember.

19 Q. Okay. Okay. And, have you recently suffered
20 from a stroke?

21 A. I'm certain. Yes, I've had six.

22 Q. So, so it wouldn't surprise you if you were
23 offered ten years, correct?

24 A. Yes.

25 Q. Okay. And this 10-year offer, did Mr. Morin talk

1 to you about how -- what -- first, let me ask you this
2 question first.

3 Did he talk to you about an accepting or
4 declining an offer?

5 A. I can't remember.

6 Q. Okay. Did he -- did he talk to you about the
7 strengths and weaknesses of your case? Did he say you
8 had a good case or a bad case?

9 A. He said I had a good case to go home.

10 Q. Okay. So, so did you turn down this offer based
11 on his advice?

12 A. Yes, sir.

13 Q. Okay. So, if he had have told you to take this
14 offer, would you have taken it?

15 A. Yes, sir. I'd actually be home with my son right
16 now.

17 Q. So, this is a big deal, this offer, correct?

18 A. Yes, sir.

19 Q. Because you went from 10 to 40.

20 A. Yes, sir.

21 Q. Okay. In discussing this offer that Mr. Morin
22 discussed with you, how the DNA would affect your case
23 during the guilt or innocence?

24 A. No, I can't remember.

25 Q. Okay.

1 A. I want to say the numbers were -- something in
2 the DNA was different.

3 Q. Okay. Did they talk to you about the evidence
4 that was found in the house, the underwear and all that?
5 Did he talk to you about that?

6 A. No, sir.

7 Q. Okay. Did you know about that prior to trial?

8 A. No, sir.

9 Q. Okay. And these underwear that were supposedly
10 found in the attic belonged to the child?

11 A. As far as I know. I know she would run around
12 the house and throw clothes everywhere.

13 Q. So, Mr. Morin did discuss with you, hey, you've
14 got this underwear, DNA, all this stuff?

15 A. No.

16 Q. And the security system in the home, did he
17 discuss with you how that was gonna play out at trial?

18 A. No, sir.

19 Q. Okay. And you were aware that would be at trial,
20 right?

21 A. Yes, sir.

22 Q. The State pretty much ---

23 A. So, I know the security system, all it was to see
24 outside. It wasn't -- the only way it would record was
25 to a hard drive or a backup on line. And it, how do you

1 say, the hard drive once before failed.

2 Q. Right. And so the State in the case, they
3 presented the case that you manipulated the hard drive
4 in some kind of a manner? No, I'm not saying you did,
5 I'm saying that's what the State was trying to present,
6 correct?

7 A. Yes, sir.

8 Q. And they got stuck up on the days that were not
9 on the tape and off on the security cam, correct?

10 A. Yes, sir.

11 Q. And, and did you know prior to trial that that
12 was gonna happen?

13 A. No, sir.

14 Q. Okay. Now, let me go down this list. Number
15 one, the security evidence, you didn't talk about that,
16 correct?

17 A. No, sir.

18 Q. The DNA, you talked about how that was harmful?

19 A. No, sir.

20 Q. The child's underwear was supposed to have been
21 found in the attic and tested and all this stuff. You
22 didn't, you didn't talk about that?

23 A. No, sir, not me.

24 Q. And those three things were critical evidence in
25 your case, correct?

1 A. Yes, sir.

2 Q. And the State beat that like a dead horse at
3 trial, correct?

4 A. Yeah.

5 Q. And, and your testimony at trial, that was part
6 of the stuff that was twisted against you too, correct?

7 A. Yes, sir.

8 Q. Knowing all of this stuff in the case in
9 comparison to a 10-year offer, do you believe it was in
10 your best interest to be told not to take the offer?

11 A. I would have took the ten-year if I would have
12 known all this.

13 Q. Thank you. Answer the questions the Attorney
14 General has for you.

15 CROSS-EXAMINATION

16 BY MS. MARTO:

17 Q. Good morning, sir. So, you stated that Mr. Morin
18 visited you at the house, correct?

19 A. (Indicating.)

20 Q. You stated that Mr. Morin visited you at the
21 house?

22 A. Yes.

23 Q. Was that the only meeting you had with him?

24 A. I know the one we lived at here in Spartanburg.
25 I know that, and I know the prior one when I lived at my

1 mom and dad's. It was just, I think one time or two
2 times, I don't know. I can't remember. I know one time
3 about the DNA and that was it.

4 Q. And did you discuss any of the evidence in this
5 case?

6 A. I can't recall. I know we said something about
7 having a DNA test and they found DNA and they were gonna
8 do a test, and that was it.

9 Q. Do you recall what the results of the test were?
10 Do you recall that they stated that, I believe it was,
11 the semen test they found your semen on her vaginal
12 swab?

13 A. Yes. No, wait a minute. Repeat that where I can
14 hear it.

15 Q. So they did a semen and, I believe, a sperm test
16 with her vaginal swab. Do you recall that?

17 A. Yes.

18 Q. Do you recall that the results of the semen test
19 show you were a contributor?

20 A. It showed -- he told me that it was contact DNA.
21 He didn't say semen, he said it was contact DNA.

22 Q. But you remember that being on the vaginal swab,
23 correct?

24 A. Yes.

25 Q. Do you recall it saying the odds of it being

1 somebody unrelated were one in 5600?

2 A. (Shakes head back and forth.)

3 Q. No? Would you be surprised if that's what they
4 said?

5 A. I can't remember that far. My mind, I lose
6 memory every day.

7 Q. I understand, sir. And would you be surprised to
8 find out that the other sperm test showed it was you to
9 the degree where they said chances of an unrelated
10 individual testing in the same way were one in six
11 billion?

12 A. I remember something up there, but I can't
13 remember that.

14 Q. Do you recall any jail calls in this case?

15 A. Yes. I know I made a call to my wife. A bunch
16 of jail calls.

17 Q. Do you recall what jail calls that were entered
18 roughly said?

19 A. I remember one. He told me, you know, I told my
20 wife to delete my phone off the Sprint account because I
21 didn't have it, because I was in the State's custody. I
22 do remember that, because you can't delete. The phone
23 that I had, you couldn't delete the memory in it or
24 anything. You can't remove anything on it.

25 Q. So, did you tell your wife that she should

1 disable your cellphone?

2 A. Yeah. I told her to delete it off my account --
3 delete it off her account because back then we didn't
4 have much money. We don't.

5 Q. And the surveillance footage, that was of you
6 sleeping, correct?

7 A. Yes, sir [sic].

8 Q. And basically what the State argued at trial was
9 the date you were saying it happened on, was incorrect
10 and that you back dated the tape?

11 A. Couldn't back date it. It was backed up on the
12 internet time. That's the phone. Once it gets on the
13 internet you can't change the date. Even if it ain't
14 plugged up --

15 Q. About what ---

16 A. -- to the internet, it still keeps its time. You
17 can't change it. Once it gets its time, it can't be
18 changed.

19 Q. But that's what the State argued at trial, right,
20 was that you changed the date?

21 A. Yes. In the photos, it was on the DVR that they
22 had was me having seizures. And I'm trying to find out
23 what kind of seizures I'm having. And they actually
24 found out that I have mono seizures.

25 Q. And you testified to that at trial, correct?

1 A. Yes.

2 Q. And you stated that the tapes were being used to
3 document those seizures?

4 A. Yes.

5 Q. And that you didn't change the date?

6 A. No, ma'am.

7 Q. So, based on all this evidence, it's your
8 recollection Mr. Morin told you, you had a good case to
9 bring to trial?

10 A. (Indicating.)

11 Q. You stated that Mr. Morin told you, you would
12 likely win at trial, right?

13 A. Yes, ma'am.

14 Q. Even with all this evidence against you?

15 A. Yes.

16 Q. Okay. And you do remember the 10-year offer,
17 correct?

18 A. I remember some of it. I don't know if it's 10
19 or 20. I can't remember that far.

20 Q. Well, you remember being told an offer, right?

21 A. Told of an offer, yes.

22 Q. And your argument today is that Mr. Morin told
23 you not to take it?

24 A. Yes, ma'am.

25 Q. Because he thought your case was favorable?

1 A. Yes, it was favorable.

2 Q. Despite all the evidence, correct?

3 A. Yes, ma'am.

4 Q. Now, you stated that you and Mr. Morin talked
5 about your decision to testify, correct?

6 A. He told me that I would go up there and just
7 answer the questions yes or no and stuff like that.

8 Q. Did you feel prepared to testify?

9 A. To me, yes.

10 Q. And you wanted to tell your story to the jury,
11 correct?

12 A. Yes.

13 Q. Is that the reason why you decided to testify?

14 A. Yes, ma'am.

15 Q. And that testimony is pretty consistent with what
16 you said today, right?

17 A. As far as I can remember.

18 MS. MARTO: No further questions.

19 MR. RICHEY: No other questions.

20 THE COURT: All right. Thank you, sir, you may
21 step down.

22 (Witness leaves witness stand.)

23 MR. RICHEY: We call Ms. Simmons.

24 (Witness comes forward.)

25 THE COURT: All right. Ma'am, do you swear or

DIRECT EXAMINATION OF MELISSA SIMMONS BY MR. RICHEY

1 affirm the testimony you give today would be the truth,
2 the whole truth, and nothing but the truth, so help you
3 God?

4 THE WITNESS: Yes, sir.

5 THE COURT: Mr. Richey?

6 MR. RICHEY: Thank you.

7 MELISSA RENEE SIMMONS,
8 having been duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. RICHEY:

11 Q. Would you state your name, please, ma'am?

12 A. Melissa Renee Simmons.

13 Q. You're gonna have to pull up to the mic.

14 A. Melissa Renee Simmons.

15 Q. And, Ms. Simmons, do you know Mr. Simmons?

16 A. Yes.

17 Q. Jason Simmons?

18 A. Yes.

19 Q. How do you know him?

20 A. He is my husband.

21 Q. Okay. And how long have you all been married?

22 A. Since June the 22nd, 2015.

23 Q. Since 2015? Okay. And you were with him when
24 all this stuff was going on, correct?

25 A. Yes, sir.

1 Q. You all were together?

2 A. Yes, sir.

3 Q. Okay. And you went -- well, let me ask you this,
4 do you know what type of education Mr. Simmons has?

5 A. I believe he finished high school and went to
6 trucking school.

7 Q. And what is your educational background?

8 A. I have a high school diploma. An associates
9 degree with lobotomy. And I have started back to school
10 when I ---

11 Q. You're gonna have to speak up.

12 A. I said I have a high school diploma. I have my
13 associates for a lobotomy degree. And I had started
14 back to school when I found out I was pregnant with our
15 son for CNA.

16 Q. Okay. Are you working right now?

17 A. I am not.

18 Q. Were you involved -- you were involved with some
19 of the conversations that your husband and his lawyer,
20 Mr. Morin had, correct?

21 A. Yes.

22 Q. And, and you've heard the testimony, and in light
23 of this case, was he offered something to plead guilty
24 in this case?

25 A. He -- Mr. Morin did take and give him the plea

1 deal that the State had come with, a ten-year offer.

2 And he did discuss that more the day of the trial on the
3 first day.

4 Q. Okay. So that offer was out there, the ten
5 years, correct?

6 A. It was.

7 Q. Okay.

8 A. He had mentioned it a couple days prior to the
9 trial. They talked to him more in depth about it the
10 day of the trial.

11 Q. Okay.

12 A. The first day.

13 Q. And from your observations, did he encourage Mr.
14 Simmons to take this offer?

15 A. He told him that he could not make the decision
16 on what to do. They told him that if he did not take
17 the offer, he had a good case that he could win.

18 Q. Okay. And do you know whether he discussed any
19 of this evidence with him?

20 A. Some of it, yes.

21 Q. Okay. And do you know whether he discussed the
22 DNA with him?

23 A. He did.

24 Q. Okay. Do you know whether he discussed the
25 security calls stuff with him on the -- excuse me, the

1 security system stuff?

2 A. He mentioned a little bit about it, but he didn't
3 mention much about it.

4 Q. Okay. What about the, the underwear being found?

5 A. He did mention that. But, if I'm not mistaken,
6 there was no DNA evidence on those underwear.

7 Q. Okay. And what about the vaginal swabs?

8 A. He didn't really go into details about each swab.
9 That was more when it came into the trial. He did
10 mention the DNA and what the DNA results said. And said
11 that the one and something could be a blood type. And
12 he kept saying something about there's 23 chromosomes.
13 That it could be one chromosome could match and the
14 other ones are not. I do remember that being said.

15 Q. Did he discuss with him the dangers of going to
16 trial with this type of evidence?

17 A. He said with the trial that he had a pretty good
18 case, that he could win the trial.

19 Q. Well, when that's --

20 A. He didn't really say anything other than that.

21 Q. Did he ever tell him he had a chance to lose the
22 case?

23 A. He said there was a, I want to say, 85 percent
24 chance to win the case.

25 Q. 85 percent chance to win?

CROSS-EXAMINATION OF MELISSA SIMMONS BY MS. MARTO

1 A. Uh-huh. But he ---

2 Q. Did he -- go ahead, I'm sorry.

3 A. But he never went into details on the 15 percent
4 why he wouldn't.

5 Q. If, just based off your observation, if he hadn't
6 have told him you've got an 85 percent chance to win, do
7 you believe that he would have accepted this offer?

8 A. More than likely, yes.

9 Q. Thank you. Answer the questions the attorney
10 general has for you.

11 CROSS-EXAMINATION

12 BY MS. MARTO:

13 Q. Good morning.

14 A. Good morning.

15 Q. So, were you present during all conversations Mr.
16 Simmons had with his lawyer?

17 A. All of them except for when he would show up to
18 roll call.

19 Q. And did Mr. Morin share with you all the
20 discovery he shared with Mr. Simmons?

21 A. He did.

22 Q. Okay. And, again, you recall seeing the DNA
23 results, correct?

24 A. He had talked about them. He did not show us the
25 actual paper until he actually came to our house and was

1 going over everything.

2 Q. And you discussed the security footage?

3 A. He really, he mentioned the security footage, but
4 he didn't go into detail about anything with a security
5 footage.

6 Q. And you discussed the underwear, correct?

7 A. He did.

8 Q. Did you all discuss the chocolate bunny on
9 the ---

10 A. We did.

11 Q. Did you all discuss the jail calls?

12 A. We did.

13 Q. And did you think all of that evidence
14 collectively was favorable to Mr. Simmons?

15 A. I do know with the chocolate bunny that they was
16 referring to, that was on the wall. We even went back
17 to the crime scene pictures with Mr. Morin, and seeing
18 the chocolate bunny still on the wall had not been
19 touched.

20 Q. And, again, to clarify for the Court, the
21 chocolate bunny was what the victim said was given to
22 her in exchange for ---

23 A. Yes. But it was still un-open on the shelf.

24 MS. MARTO: One moment, Your Honor.

25 BY MS. MARTO:

1 Q. And you testified at trial, correct?

2 A. Yes, ma'am.

3 Q. And your testimony at trial was consistent with
4 your testimony here today?

5 A. Yes, ma'am.

6 Nothing further, Your Honor.

7 MR. RICHEY: No questions.

8 THE COURT: Thank you, ma'am, you can step down.

9 (Witness leaves witness stand.)

10 MR. RICHEY: I call Mr. Mike Morin.

11 THE COURT: All right, Mr. Morin.

12 (Witness comes forward.)

13 All right, sir. Do you swear or affirm the
14 testimony you give today will be the truth, the whole
15 truth, and nothing but the truth so help you God?

16 THE WITNESS: Yes, Your Honor.

17 THE COURT: Thank you, sir.

18 MICHAEL MORIN,

19 having been duly sworn, testified as follows:

20 DIRECT EXAMINATION.

21 BY MR. MORIN:

22 Q. Mr. Morin, what is your position right now?

23 A. I'm a Seventh Circuit Public Defender.

24 Q. So, you've been doing this a long time?

25 A. Criminal work, yes, sir.

1 Q. And you've been doing criminal law a long time?

2 A. Yes, sir.

3 Q. Okay. And I want to ask you about the testimony
4 that was said in this courtroom. In looking at this
5 case, they had DNA; is that correct?

6 A. Yes, sir.

7 Q. And there were some issues with it, but it was
8 admissible DNA?

9 A. Yes, sir.

10 Q. And the vaginal swabs, those were admissible
11 evidence?

12 A. Yes, sir.

13 Q. The jail calls, they were somewhat problematic.
14 Would that be a fair assessment of it?

15 A. I think so.

16 Q. And they were not, what I say, beneficial to his
17 case? They were not, correct?

18 A. Correct.

19 Q. The security system deal, that was favorable to
20 his case?

21 A. No.

22 Q. Okay. So in essence, there was a lot of bad
23 stuff in this case, correct?

24 A. Yes.

25 Q. You heard testimony in -- well, let me say this.

1 CSC first ten years, that's a pretty good offer, just
2 generically?

3 A. Yes. And I think it was a reduction.

4 Q. Right.

5 A. I don't think at that time you could even get ten
6 years on a CSC first.

7 Q. Right. So, for this case, that was a good offer;
8 is that correct?

9 A. Yes.

10 Q. And you've heard the testimony where Mrs. Simmons
11 stated that, that you related to them that they had an
12 85 percent chance of winning. Do you believe this is an
13 85 percent winning case?

14 A. No, and I did not say that.

15 Q. Okay. So the testimony about where Mr. Simmons
16 says, hey, if I had known, and I'm gonna use his phrase,
17 if I would have known this case was in this condition, I
18 would have accepted their offer?

19 A. I heard Mr. Simmons say that.

20 Q. Okay. And in your discussions with him, did you
21 go over the offer with him?

22 A. Yes.

23 Q. And did you make a recommendation in terms of
24 whether to accept or deny, or did you do that?

25 A. I said it was up to him to make the decision. He

1 had been saying since I was hired that he did not do
2 anything. So, I did say it was up to him to make that
3 decision. I wasn't gonna tell him, one way or the other
4 what to do.

5 Q. Did you make any recommendations as to it?

6 A. I believe I recommended that he do it, but I
7 can't say for certain.

8 Q. And, and we can all kind of look back at this,
9 and I want you to see if you can do it at the time.

10 A. Uh-huh.

11 Q. Do you believe it was in his best interest to
12 accept the offer?

13 A. Yes.

14 Q. And did you relay that to him? Do you recall?

15 A. Well, I'll say this, because there's been some
16 questions about percentages. First, I've never in my 30
17 years said we're going to win this case. Never.
18 Second, the best I ever give a defendant odds of winning
19 and losing is 50/50. And, third, I'm pretty sure the 85
20 percent was on the losing recommendation. I have done
21 those types of things before.

22 My policy since the '90s has been, I'm not going
23 to tell someone I think they're gonna get out and have
24 them in jail. And I'm proud to say that's never
25 happened. There are people that got better deals by

1 pleading when I thought they were gonna get more and
2 they got less, but it's never gone the other way. It's
3 one of the few things that I can say with certainty in
4 my job.

5 Q. Did he have any health issues when you were
6 representing him?

7 A. He did. He had the seizures. And that's why one
8 of the videos that's been talked about, they were trying
9 to document. They were trying to see what his seizures
10 were. He was sleeping in a recliner.

11 Q. And do you, at the time, do you believe he had
12 the mental capacity to understand what he was doing?

13 A. Yes. I mean, we discussed, obviously DNA and
14 some other things can be a little bit difficult to
15 follow, but he always said he understood what we were
16 talking about. I didn't see any confusion on his part.

17 Q. And, now I'm gonna ask you this, the DNA,
18 whatever it was, it was admissible testimony, it was
19 coming in, correct?

20 A. Yes.

21 Q. Thank you. Answer the questions the Attorney
22 General has for you.

23 CROSS-EXAMINATION

24 BY MS. MARTO:

25 Q. Good morning, sir.

1 A. Good morning.

2 Q. So, did you share all the discovery you had in
3 this case with Mr. Simmons?

4 A. Yes. Over the several times we've met.

5 Q. Roughly, how many times did you meet with him?

6 A. I saw him at least twice at the house where this
7 allegedly occurred. One time -- the first time I went
8 out there, we walked through the entire apartment. I
9 saw the attic to which they claimed the, the panties. I
10 swept through the house with both he and his wife and
11 discussed where each person was and why. He showed me
12 the video camera system or the computer system that it
13 was off of. I know I was out there at least one other
14 time.

15 Then when they moved to Spartanburg, I met with
16 them at least three times at their new house.
17 Typically, I'd go over there on Saturday and spend an
18 hour or two discussing his testimony or what the
19 evidence was in the case.

20 Q. So you discussed what his testimony was at
21 length, correct?

22 A. Uh-huh. Yes.

23 Q. And did you review the videotapes themselves with
24 Mr. Simmons?

25 A. I, I can't be certain on that. I know I saw

1 them. I think he saw them. He came to the office a
2 time or two as well, but I don't remember. We talked
3 about it extensively because this isn't the first time I
4 heard him talking about that it can't be changed.

5 Q. Were you aware that that was the State's position
6 on the tapes prior to trial?

7 A. Yes.

8 Q. And did you convey that to Mr. Simmons?

9 A. I did.

10 Q. And, again, you never told any of your clients
11 that there was an 85 percent chance of winning at trial?

12 A. No.

13 Q. That's the greatest percent you'll ever give a
14 client is 50 percent, correct?

15 A. Correct.

16 Q. And did you think Mr. Simmons stood at 50 percent
17 chance of success?

18 A. Probably not, but I might have said that to him.

19 Q. But you testified on direct that if you used the
20 term 85 percent, it was losing, not winning?

21 A. Correct.

22 Q. And what did you think your chances of success at
23 trial were going to be?

24 A. I would have said that 85 percent loss, but as
25 long as it's gone now, it's easy to say I would have

1 thought we were gonna lose. But when you're in the
2 case, when your client is saying he didn't do it, when
3 you're trying to get in a position to try the case, I
4 might have said 50/50 then at trial, but I don't know.
5 I can't really say. I do know that 85 percent has never
6 come out of my mouth as we're gonna win, no.

7 Q. Do you recall if Mr. Simmons was willing to enter
8 into a plea?

9 A. He really wasn't. He said he didn't do it. He
10 said he didn't want to admit to something he didn't do.

11 MS. MARTO: Nothing further, Your Honor.

12 MR. RICHEY: No questions.

13 THE COURT: All right. Thank you, sir, you can
14 step down.

15 (Witness leaves witness stand.)

16 MR. RICHEY: Applicant rests.

17 THE COURT: All right. Applicant rests. Any
18 other testimony or evidence in reply from the State?

19 MS. MARTO: No witnesses, Your Honor.

20 THE COURT: All right. Let me hear argument.

21 MR. RICHEY: Thank you, Your Honor. May it
22 please the Court, Your Honor? Mr. Simmons position in
23 this particular case, and in looking at the evidence in
24 this case, we believe that counsel should have advised
25 him to take this plea offer in regards to the amount and

1 scope of evidence on this gentleman.

2 His education level is a little bit past high
3 school. His wife, she's got lobotomy. In looking at
4 the case, in looking at how the State was gonna present
5 it, this 50/50 chance, it's our position that counsel
6 should have recommended he accept this offer with the
7 case that the State was gonna present. That's our
8 issue. Thank you.

9 THE COURT: All right. Thank you, Mr. Richey.
10 Ms. Marto?

11 MS. MARTO: Yes, Your Honor, just briefly. I
12 think given the wealth of evidence against Mr. Simmons,
13 especially in a CSC case. I think Mr. Morin was a
14 credible witness. He already testified that he never
15 told his client his alleged chance of winning, and that
16 it was Mr. Simmons who was reluctant to accept a plea,
17 not because necessarily the evidence, but because he was
18 adamant in the idea that he did not do what the State
19 alleged he did.

20 I believe that Mr. Morin testified that you used
21 the term 85 percent, it was 85 percent chance of losing.
22 And I think that the evidence in this case warrants it,
23 as well as Mr. Morin's experience. You know, he's been
24 practicing criminal law for 30 years, and I think
25 probably testified he never would have told any of this

1 client that, especially in a case like this. And so,
2 because of that, we would just request you deny relief.

3 THE COURT: All right, thank you. I'm gonna take
4 the matter under advisement. I'll issue a decision
5 later on.

6 MR. RICHEY: Thank you, Your Honor.

7 THE COURT: Thank you all very much. You all
8 have a nice day.

9 MR. SIMMONS: Thank you, sir.

10 THE COURT: Good luck to you, sir.

11 (Hearing concluded at 10:39 a.m.)

12

13 --- THIS ENDS REQUESTED TRANSCRIPT ---

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1 COURT REPORTER CERTIFICATE

2
3 I, the undersigned Julie A. Cendroski, Court
4 Reporter for the Seventh Judicial Circuit Court of the
5 State of South Carolina, do hereby certify that to the
6 best of my ability the foregoing is a true, accurate,
7 and complete transcript of record of all the proceedings
8 and evidence introduced in the hearing and/or trial of
9 the captioned case, relative to appeal, in the Court of
10 Common Pleas for Spartanburg County, South Carolina, on
11 the 13th day of February, 2023.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.
14
15
16
17

18 s/Julie A. Cendroski
19 Julie A. Cendroski
20 Circuit Court Reporter III
21 Seventh Judicial Circuit
22
23
24
25

RECEIVED

MAR 17 2023

STATE OF SOUTH CAROLINA)
COUNTY OF CHEROKEE)IN THE COURT OF COMMON PLEAS)
FOR THE SEVENTH JUDICIAL CIRCUIT)
SOUTH CAROLINA SUPREME COURT)Jason Simmons, #382078,)
Applicant,)

Case No.: 2022-CP-11-00375

v.)

ORDER OF DISMISSALState of South Carolina,)
Respondent.)FILED IN OFFICE OF
CLERK OF COURT
2023 MAR -9 A 11:07
CHEROKEE COUNTY, S.C.
BRANDY W. MCBEE

This matter comes before this Court by way of Applicant's post-conviction relief application filed June 1, 2022. Respondent made its return on July 29, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on February 13, 2023, at the Spartanburg County Courthouse. Rodney W. Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's wife and Counsel Michael Morin, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice.

Findings of fact and conclusions of law are set forth below.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Cherokee County Clerk of Court. During its April 2017 term, the Cherokee County Grand Jury indicted Applicant for first degree criminal sexual conduct with a minor (2017-GS-11-00580). Applicant was represented by Michael Morin, Esquire. Assistant Solicitor Matt Kendall and Kimberly Leskanic, Esquires, of the Seventh Circuit Solicitor's Office prosecuted the case. On January 8-10, 2020, Applicant proceeded to trial before the Roger

M. Young, circuit court judge, and a jury. Judge Young sentenced Applicant to forty years' imprisonment.

Applicant filed a timely notice of appeal on January 21, 2020 that was perfected by Susan B. Hackett, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Simmons*, 2022-UP-050 (S.C. Ct. App. filed Feb. 9, 2022). The remittitur was issued on March 11, 2022.

Summary of Relevant Facts

The minor victim testified that she used to spend the night at Applicant's house. (Tr. 81-82). She stated that when Misty, Applicant's partner, went to sleep, Applicant sexually assaulted her. (Tr. 83). She stated he assaulted her in the living room. (Tr. 84). He touched her both inside and outside her private area. (Tr. 84-85). He used an electric toothbrush. (Tr. 85). Applicant gave her chocolate while the abuse was going on. (Tr. 86). This occurred when the victim was four years old. (Tr. 86). She stated that she told her mother about the abuse, spoke to an interviewer at CAC, and went to the hospital. (Tr. 86).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Victim changed story.
2. Nurse misdated evidence.
3. Lawyer failed to object.
4. Lawyer got email from D.A. prior to . . . got picture of evidence during sentencing.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective assistance of counsel:
 - a. For erroneously telling Applicant not to plead because he would win at trial.
 - b. For not sharing all discovery with Applicant.
 - i. Failure to discuss DNA results.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant stated he had a jury trial on his underlying criminal charge and that he was represented by Counsel. He stated that he thought Counsel was ineffective. He stated that Counsel told him he would win at trial. He stated that he discussed the DNA test with Counsel, who told him that the numbers shown were not correct. He stated he did not discuss the impact of testifying at trial with Counsel. He stated that he had a ten year offer on the table, which he rejected because Counsel told him he would win at trial. He stated he had six strokes and did not recall accepting or rejecting plea. He stated he did not talk about the child's underwear in his attic with Counsel. He stated that the State said he manipulated the video footage to make it look like it happened on the night of the incident when it did not. He stated that the video footage was not manipulated. He stated he testified to this at trial as well. He stated he did not know about all the evidence against him.

Wife Testimony

Applicant's wife testified that she has been married to Applicant since 2015. She stated that she was with Applicant at the time of the incident. She stated that Applicant was given a ten-year plea offer that was discussed on the trial date. She stated Counsel told Applicant he could not tell him what to do but said that he had a good case. She stated that she was present during discussions regarding DNA results and security. She stated that the underwear was mentioned. She stated Counsel told Applicant he had an eighty-five percent chance of winning. She stated that Applicant likely would have pled if he knew he had an eighty-five percent chance of losing.

Counsel Testimony

Counsel testified that the evidence against Applicant included DNA evidence, jail calls, vaginal swabs, and security footage. He stated that Applicant was offered a ten-year plea offer to the lesser-included offense. He stated he never told Applicant he had an eighty-five percent chance of winning. He stated that the highest likelihood of success he has ever given a client is fifty percent. He stated that if he told Applicant eighty-five percent, it was regarding chances of losing, not winning. He stated he thought that pleading was in Applicant's best interest and that he thought he told Applicant to plead.

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 and arguments presented at the PCR hearing. Before this Court are Applicant's Cherokee County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, the direct appeal records, and the current PCR application. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application, *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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, 686 (1984);



Butler, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695.



Realistically, this matters “only in the rarest case” because “[t]he likelihood of a different result must be substantial, not just conceivable.” *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Failure to Review Discovery

Applicant claims Counsel failed to review discovery with him. Specifically, he stated Counsel did not review the DNA results with him. Counsel credibly testified that he did review this evidence with him. Accordingly, this claim is dismissed and relief denied accordingly.

Erroneously Telling Applicant Not to Plead

Applicant claims counsel was ineffective for erroneously telling Applicant not to plead because he would win at trial. Counsel credibly testified that he thought pleading was in Applicant’s best interest and that he had little chance of success at trial. This is substantiated by the overwhelming evidence of guilt exhibited in the trial transcript. Accordingly, relief is denied.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty

days of receipt by counsel of the judgment entry's written notice to secure 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 the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this _____ day of _____, 2023.


 BRIAN M. GIBBONS
 Presiding Judge
 Seventh Judicial Circuit

, South Carolina.

407

WITNESSES

Cherokee County Sheriff's Office



ARREST WARRANT NUMBER

2017A1110100062

ACTION OF GRAND JURY

TRUE BILL
TRUE BILL

Foreperson of Grand Jury

Date: 4-13-17

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO. 17-GS-11-00580

The State of South Carolina

County of Cherokee

Barry Barnette, Solicitor

COURT OF GENERAL SESSIONS

April 13 2017 TERM

THE STATE

vs.

JASON SCOTT SIMMONS

Indictment for

CRIMINAL SEXUAL CONDUCT
W/MINOR, FIRST DEGREE

SC Code: 16-03-655 (A) (1)

CDR Code: 385

Class: FEL/A

FILED IN THE OFFICE
CLERK OF COURT

2017 APR 13 A 10:46

SHANDY W. HIGBEE
CHEROKEE COUNTY, SC

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHEROKEE)

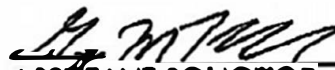
INDICTMENT

At a Court of General Sessions, convened on April 13 2017, the
Grand Jurors of Cherokee County present upon their oath:

CRIMINAL SEXUAL CONDUCT WITH A MINOR, FIRST DEGREE

That Jason Scott Simmons did in Cherokee County between January 8, 2017, and January 9, 2017, commit the crime of Criminal Sexual Conduct with a minor, in that the defendant did engage in a sexual battery with a victim, **MINOR**, who was less than eleven (11) years of age at the time of the said incident(s), in violation of §16-03-655 (A)(1), CODE OF LAWS OF SOUTH CAROLINA, (1976, as amended).

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


ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Cherokee

VS.

Jason Scott Simmons

AKA:

Race: WHITE Sex: M Age: 45

DOB: 1974 SS#: [REDACTED]

Address: John Dodd Rd.

City, State, Zip: Spartanburg, SC 29303

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 (25-life)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2017GS1100580

A/W#: 2017A1110100062

Date of Offense: 1/8/2017

S.C. Code § : 16-03-0655(A)(1); 16-03-0

CDR Code #: 0385

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0655(A)(1); 16-03-0 of the S.C. Code of Laws, bearing CDR Code # 0385

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lowd Act) ☐ §17-25-45The charge is: ☒ As Indicted. ☐ Lesser Included Offense. ☐ Defendant Waives Presentment to Grand Jury. (defendant's initials)The plea is: ☒ With negotiations or Recommendation. ☐ Negotiated Sentence. ☐ Revocation by the State.

ATTEST:

SCB77213

SCB65094

KENDALL, MATT

SC Bar# 116037

Defendant

Morin, Michael David

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 40 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 SCDoc.☐ 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 16-25-28 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

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

Total: \$ _____ plus 20% fee: \$ _____ days/hours Public Service Employment

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine: _____ \$

§14-1-206 (Assessments 107.5 %)	_____	\$
§14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§14-1-211(A)(2) (DUI Surcharge)	\$100	\$
§56-5-2995 (DUI Assessment)	\$12	\$
§56-1-286 (DUI Breath Test)	\$25	\$
Proviso (Public Def/Probation)	\$500	\$
§14-1-212 (Law Enforce. Funding)	\$25	\$
§14-1-213 (Drug Court Surcharge)	\$150	\$
§50-21-114(BUI Breath Test Fee)	\$50	\$
§56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
3% to County (if paid in installments)	\$ 3.75	\$

TOTAL \$ 128.75

Clerk of Court/ Deputy Clerk

Court Reporter: _____

SCCA/217 (04/2018)

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐

Fine may be pd. in equal, consecutive weekly/monthly pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, Proviso requires \$500 be paid to Clerk during probation and shall be collected before any other fees.

Presiding Judge

Judge Code: _____

Sentence Date: _____

January 11, 2020