

VOLUME I OF II

STATE OF SOUTH CAROLINA

In The Court of Appeals

 ORIGINAL

APPEAL FROM HORRY COUNTY

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WESLEY SMITH,

APPELLANT

SUPPLEMENTAL RECORD ON APPEAL

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1 STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
2 COUNTY OF HORRY) INDICTMENT NO: 04-GS-26-2150

3 THE STATE OF SOUTH CAROLINA,)
4)
5 PLAINTIFF,)
6)
7 -VS-)
8)
9 WESLEY SMITH,)
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12 DEFENDANT.)
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Monday through Thursday
April 14 - 17, 2008
Conway, S. C.

11 B E F O R E:

12 HONORABLE EDWARD B. COTTINGHAM, JUDGE, AND A JURY

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MONDAY, APRIL 14, 2008

PRETRIAL MOTIONS AND RULING OF THE COURT

THE COURT: So that everybody will understand, I've got seventy-five jurors standing by, and if I can get a jury from that now, I can. Then, if I can't I'll bring the rest of them and see if I get a jury.

Ah, as I understand it, you had one motion for asked to be transferred to another county. Is that correct?

MR. AXELROD: Yes, sir, and Mr. Taylor will be presenting that motion.

THE COURT: Well, I don't need that motion until I have concluded whether or not after appropriate voir dire whether I can get a jury here or not. After I do that, I'll leave them unsworn, and then I'll hear your motion.

You understand?

MR. AXELROD: Yes, sir, Your Honor.

THE COURT: But our Supreme Court in many cases have said that's not entertainable until we determine whether or not I can get a jury.

Okay?

MR. AXELROD: And, Your Honor, I'm not sure you had it. I had a list of questions for a voir dire.

THE COURT: If you would have been at our meeting you would understand that I'm going to accept those questions.

MR. AXELROD: Thank you, Your Honor. I appreciate that.

1 THE COURT: Alright.

2 Now, I want to break for lunch here very shortly but
3 understand there was one motion you wanted to hear now.

4 MR. VON HERRMANN: Yes, sir, Your Honor.

5 Real quickly, we have a number of law enforcement officers. I
6 believe there's three agents for which the State has not subpoenaed
7 in. There's also a DSS Worker. It's my understanding that the
8 State's not going to take - - we're going to take through Wednesday
9 afternoon, and I, quite frankly, don't want to waste the
10 taxpayers' dollars. These individuals have work to do and are
11 under subpoena from the defendant. I would request that they be
12 released.

13 They have told me that we can get them up here in an hour upon
14 call but right now they're sitting around the bailiff's room and
15 not doing anything, and these folks have other things they need to
16 do.

17 They indicated that they have spoken to Mr. Axelrod, and Mr.
18 Axelrod does not have any objection.

19 THE COURT: As long as they indicate to me and to you that
20 they will be available to honor the subpoena, I will not require
21 them to sit in the courtroom until they are called.

22 You understand that, Mr. Axelrod?

23 MR. AXELROD: Yes, sir, I'm referring - - -

24 THE COURT: Okay.

25 But this is with the understanding that they will be

1 available, and you may advise them of that.

2 MR. VON HERRMANN: Thank you, Your Honor.

3 THE COURT: Alright, sir.

4 Now, what else is before me.?

5 MR. VON HERRMANN: Your Honor, there's a number of motions
6 that we can handle after 2:00.

7 THE COURT: Alright. Let's break.

8 Now, Mr. Axelrod, listen to me. I want you sitting at that
9 table at 2:00. I don't want you in the hall. I don't want you
10 downstairs. I don't want you in the audience. I don't want you in
11 another courtroom. I want you sitting right there.

12 Any questions about that?

13 MR. AXELROD: No, sir.

14 THE COURT: Alright.

15 Now, I propose - - what I propose to do is attempt to select
16 a jury. If we can select a jury, we going to start this case this
17 afternoon. Let there be no question about that.

18 Okay?

19 MR. VON HERRMANN: Yes, sir, Your Honor.

20 THE COURT: Now, if I conclude I can't select a jury here
21 in Horry County, I'll transfer it. If I conclude that I can, I
22 will select a jury, leave them unsworn and hear any further motions
23 that you or - - or co-counsel relative to your motion to move it to
24 another county.

25 Everybody understand that? You understand that?

1 MR. TAYLOR: Yes, sir, Your Honor.

2 THE COURT: I can tell you now, though, that under the
3 various Supreme Court if I conclude and find and the record
4 indicates that I can get a jury who can give both the State and the
5 defendant a fair trial here, we going to try him.

6 Now, it would be extremely unusual for me to have to get - -
7 to say that I can't find a fair jury, and we'll see.

8 You understand that, Mr. Axelrod?

9 MR. AXELROD: Yes, sir, Your Honor.

10 THE COURT: Alright.

11 Now, be back at 2:00. Don't require me to have to run you
12 down.

13 Alright. Thank you.

14 We'll be back at 2:00.

15 MR. VON HERRMANN: Thank you, Your Honor.

16 (The Court recesses this case and thereafter reconvenes the
17 case to continue pretrial motions.)

18 THE COURT: Good afternoon. Be seated, please.

19 Alright, sir.

20 Let the record now reflect that I have held the question of
21 moving to another - - moving the trial to another venue in abeyance
22 until I can ascertain whether or not I can get a jury.

23 You understand that?

24 MR. TAYLOR: Yes, sir, Your Honor.

25 THE COURT: Alright.

1 What's the next motion?

2 Yes, sir?

3 MR. AXELROD: Your Honor, um - - -

4 MR. BAILEY: We need our client.

5 MR. AXELROD: May our client come?

6 THE COURT: Yes, sir.

7 (The defendant is escorted into the courtroom to the defense
8 table.)

9 THE COURT: What's the first motion?

10 Let the record reflect that the defendant's in the courtroom.

11 Again, I say that there is a motion to change the venue, and
12 I will not rule on that until I ascertain whether or not I can get
13 a fair trial, and we'll do that during voir dire.

14 MR. BAILEY: Your Honor, the next motion we're going to make
15 is to suppress the - - the fractured femur.

16 THE COURT: Alright, sir, understanding, now, that we folks
17 - - you folks have been dealing with this case for months. I have
18 not.

19 What is the position with the State with regards to this
20 issue?

21 MR. VON HERRMANN: Your Honor, the State's position is that
22 it's admissible under State v. Fletcher case and under the Rules of
23 Evidence, Your Honor. I'll pass up State v. Fletcher.

24 THE COURT: I've got that.

25 MR. VON HERRMANN: I'm sure you do, Your Honor.

1 Your Honor, if you would like, I can go through the time line
2 with regards to the injuries. It might, perhaps, give the Judge -
3 - -

4 THE COURT: Alright.

5 He mentioned the fractured femur. Is there any other
6 potential injuries you seek to introduce?

7 MR. VON HERRMANN: Yes; sir.

8 There is a pattern of abuse to the child starting sometime in
9 November of 2003 whereby it was reported to - - -

10 THE COURT: Well, let's talk about it first.

11 How old was the child at the time of the child's death?

12 MR. VON HERRMANN: The child was four months old at the time
13 of it's death.

14 THE COURT: So, anything that occurred to the child had to
15 happen within a four months period?

16 MR. VON HERRMANN: Absolutely, Your Honor.

17 THE COURT: Now, go ahead.

18 MR. VON HERRMANN: Your Honor, on December - - or around
19 Thanksgiving of the year, the defendant had admitted and the - - we
20 have a witness who will testify that the child received a small
21 fracture. They didn't present it to a medical doctor until
22 December 9th of 2003 for treatment. There was a swollen leg.

23 The Doctor Cooper-Merchant was the treating pediatrician at
24 that time. She was concerned that there was a fracture of the
25 child's femur, the femur being the largest bone in the human body.

1 They did an x-ray of the child. DSS was notified. It is a small
2 fracture, Your Honor. All of the experts that we have talked to
3 have indicated that it is a - - it is indicative of child abuse,
4 and there is a number of things - - the criteria that they look at
5 to see whether or not it was abuse and neglect.

6 THE COURT: Can you tell me who - - what - - you said
7 somebody reported. Who reported it?

8 MR. VON HERRMANN: Doctor - - the mother ultimately takes the
9 child to the doctor for a well-baby visit.

10 THE COURT: Okay.

11 MR. VON HERRMANN: After the - - after the injury sustained,
12 the small fracture to the leg, Ms. Dandridge indicated to us the
13 treatment procedure that they underwent. They were concerned at
14 the time that DSS would become involved and take the child from
15 them. Mr. Smith created his own homemade brace and placed it on
16 the child in an attempt to try to keep the leg straight prior to
17 the well-baby visit.

18 THE COURT: How did he know the femur was broken?

19 MR. VON HERRMANN: Your Honor, I don't know if he knew that
20 it was broken. He indicated to her that he had a concern that it
21 was broken. I can tell you from looking at the x-rays and the
22 indication of how the experts have indicated to us the child would
23 have been behaving, it would have been pretty apparent that the
24 child at least sustained a very severe injury and probably, most
25 likely it would have - - -

1 THE COURT: Did the experts opine that opinion that it
2 would not likely to have been caused by accident?

3 MR. VON HERRMANN: Yes, sir, Your Honor.

4 THE COURT: You've got experts who are saying that?

5 MR. VON HERRMANN: Yes, sir, Your Honor.

6 THE COURT: And what other - - what other assumed evidence
7 of child abuse do you have prior to this occasion?

8 MR. VON HERRMANN: Your Honor, on January 15, 2004, this
9 child was seen for RSV. It's a respiratory infection. At that
10 time they - - -

11 THE COURT: When was this, now?

12 MR. VON HERRMANN: This was the day he was seen, the date
13 they were seeing the baby.

14 THE COURT: Okay.

15 MR. VON HERRMANN: During that time on January 15, 2004,
16 there was no indication by Dr. Scott Crane that this child had
17 suffered any significant - - or any injury to the rib fracture at
18 all at that particular point.

19 THE COURT: That was - - what was the child seen for at
20 that time?

21 MR. VON HERRMANN: RSV, it was a breathing disorder, a
22 respiratory infection.

23 THE COURT: That was January?

24 MR. VON HERRMANN: Yes, sir, it was January 15th.

25 That child - - subsequent to that was, um, had x-rays done at

1 the time of death which would have been February 14th, and indicated
2 that there were eleven broken or fractured at various stages of
3 healing fractures of ribs both on the back and the front of the
4 child and that, ah, they - - some were already been healed and some
5 of them were in the process of being healed but that at least four
6 hemorrhaging and one rib that had not broken that was hemorrhaged
7 would - - that injury would have occurred within forty-eight hours
8 of the death of the child.

9 THE COURT: How about the one they alleged that was healed.
10 When did they think that that had occurred?

11 MR. VON HERRMANN: It would have to have happened, Your
12 Honor, it's my understanding within twenty-one days of the well-
13 baby visit which would have occurred on February 12th. So they can
14 narrow it down to sometime between January 15th and, ah, twenty-one
15 days prior - - -

16 THE COURT: At the time of the visit of the baby for
17 breathing problems, January 15th?

18 MR. VON HERRMANN: Yes, sir, Your Honor.

19 THE COURT: So they opined that that incident had to have
20 occurred after that and prior to the death, twenty-one days?

21 MR. VON HERRMANN: Yes, sir.

22 THE COURT: But then in addition to that, you are saying
23 that they had found injuries that would have occurred within the
24 last forty-eight hours?

25 MR. VON HERRMANN: Yes, sir, Your Honor.

1 THE COURT: What were they?

2 MR. VON HERRMANN: They were hemorrhaging that were re-
3 injuries to four of the ribs of the child and one that was not a
4 broken rib. It was not a re-injury but it was a new occurrence.
5 It actually had not fractured but it had hemorrhaged from the rib.

6 THE COURT: So, in the four months of that unfortunate
7 baby's life, you are saying that you've got evidence of a broken
8 femur?

9 MR. VON HERRMANN: Yes, sir, Your Honor.

10 THE COURT: In December when the baby was two months old.
11 You've got evidence that sometime after January 15th that baby
12 sustained a broken rib.

13 MR. VON HERRMANN: Eleven, Your Honor.

14 THE COURT: Sir?

15 MR. VON HERRMANN: Eleven within that twenty-one day period.

16 THE COURT: Eleven.

17 MR. VON HERRMANN: Eleven broken ribs..

18 THE COURT: Okay.

19 And you have evidence that there were other injuries no more
20 than forty-eight hours prior to the admission of the child to the
21 hospital.

22 MR. VON HERRMANN: Yes, sir, an incident.

23 THE COURT: And do they indicate what type of harm would
24 have caused that forty-eight hour injury?

25 MR. VON HERRMANN: Yes, sir.

1 They indicate that it was not a striking blow or that it's not
2 possible that it would have been a striking or a dropped blow or
3 anything of that nature. It would have been of a squeezing nature.

4 THE COURT: I got you.

5 MR. VON HERRMANN: Your Honor, the other thing that I failed
6 to mention is the child also had in its system, um, four times the
7 legal or the lethal, excuse me. therapeutic level of
8 pseudoephedrine in the child's system when the child died.

9 So there is at least four or five different occasions.

10 Um, our experts would indicate that the child with the eleven
11 rib fractures would have had to occurred on at least two - - two or
12 more occasions. It did not happen as one occasion or one incident
13 of squeezing that child.

14 And, finally, Your Honor, the doctor is going to testify who
15 is the ER doctor that was presented to the child who had been
16 abused but had ultimately passed away would testify that she had
17 tested the child RSV and on that particular day of February 14th,
18 the day of the demise of the child, the child would test negative
19 for RSV and that her concern and the reason that she contacted law
20 enforcement with this is that she had reviewed the x-rays and the
21 medical reports of prior visits for that particular hospital, she
22 was - - she is an expert in pediatric care and, ah, child and abuse
23 and neglect - - she would indicate that part of her concern in
24 reporting to the authorities, the concern that she had with the
25 child which ultimately led to the autopsy was the fact that she had

1 indicated that the fracture, the femur fracture concerned her
2 because it was in her experience consistent with child abuse and
3 has to be typically - - -

4 THE COURT: Let me ask you this. I'm just curious.

5 Is DSS going to be a witness in this case?

6 MR. VON HERRMANN: Your Honor, the State does not intend on
7 calling DSS. DSS did take the child after the leg fracture and
8 placed it into foster care for a number days, Your Honor.

9 Of course, it had given the child back through the treatment
10 plan.

11 THE COURT: They didn't follow up when these alleged
12 instances allegedly occurred? Something happened to the child - -
13 where was DSS from December til the death of this child when they
14 gave the child back?

15 MR. VON HERRMANN: Your Honor, it - - quite honestly, it's
16 the State's position we're not sure what they were doing. They
17 certainly did not follow up appropriately. It's just really hard
18 to say. We're not presenting any evidence of DSS other than the
19 fact that there was a treatment plan, and they did follow up on one
20 occasion.

21 THE COURT: Well, you know they going to ask DSS if they
22 suspected child abuse when they took the child, why did they give
23 the child back?

24 MR. VON HERRMANN: If that is the position they want to take,
25 Your Honor, I'll be more than happy to have them answer that

1 question.

2 MR. AXELROD: Your Honor, I would object to that one
3 question. What happened was they had a hearing, and they found it
4 unfounded. They found it that it was abuse of the femur but it was
5 unfounded to the perpetrator. They weren't able to say that
6 either Wesley or his wife Charlene had done it.

7 We're here to present evidence today. We have a witness
8 subpoenaed to testify that DSS found it unfounded and returned the
9 baby.

10 THE COURT: No, I'm not going to listen to that today. I'm
11 not going to listen to what DSS found.

12 Alright.

13 I've got a - - Mr. Axelrod, I didn't ask - - I told you to
14 stay at that desk, sir.

15 MR. AXELROD: I'm just telling the DSS worker that she can be
16 excused, Your Honor.

17 THE COURT: Well, no, wait until - - you let me determine
18 my court, now. I don't know what I'm going to do here yet. I want
19 to hear from your distinguished colleague. I may want to hear some
20 testimony. I don't think so but I don't know that yet. So you let
21 me decide, please.

22 Alright. What's your position? Who wants to argue this
23 motion.

24 MR. BAILEY: That's going to be myself, Your Honor.

25 THE COURT: Alright, sir.

1 MR. BAILEY: Thank you, very much.

2 Mr. Von Herrmann stated that his reliance is upon State v.
3 Fletcher for this matter. However, there is a more recent case
4 that seems to be directly on point for the issue of the femur being
5 excluded from this trial, and I provided your clerk with a copy of
6 that.

7 THE COURT: I've read it, digested it at lunch. I thank
8 you for that. State v. Northcut

9 MR. BAILEY: Yes, Your Honor.

10 And I'd like to point out that nearly two months before the
11 victim died in Northcut that victim was diagnosed with a spiral
12 fracture.

13 THE COURT: I understand. I read the case.

14 MR. BAILEY: Now, it was determined to be an accident and
15 never given to DSS and never followed up with that regard.

16 In this present case we have DSS who did investigate this
17 femur. They did find it - - found it against an unknown
18 perpetrator. They specifically investigated Mr. Wesley Smith and
19 his wife Charlene and could not determine that either one of those
20 were the perpetrators that caused the fractured femur.

21 THE COURT: Well, that's - - that's the problem I'm having
22 here. Apparently, they did find it was child abuse but they didn't
23 know who it was but that's the issue in the trial of this case.

24 Let me tell you real quick like, counsel, how I distinguish
25 Northcut, ah, from State v. Fletcher.

1 First, this evidence was introduced in the sentencing phase of
2 a death penalty case, and the courts have said in that case, and
3 Jean Toal dissented, incidentally, the Chief Justice. In that
4 case, though, ah, the doctors found that there was no child abuse
5 in it, and, ah, there was no finding anywhere that it was other
6 than an accident, and it stood solely as the single alleged
7 incident of child abuse, and that former alleged child abuse was
8 used to put in in the death penalty which is different, and I tell
9 you how I distinguish it.

10 In this case, if believed, there are at least three incidences
11 of child abuse.

12 First, there was this broken femur.

13 Secondly, sometime after January 1st, there are incidences of
14 broken ribs.

15 And in February, the time that the child died, number three,
16 there was an inference of death by improper use of drugs, and at
17 that time it was shown that there was another probable child abuse
18 within forty-eight hours.

19 So, if believed, you've got four separate incidences of child
20 abuse on a child four months old.

21 Now, I don't think that Northcut is appropriate in this case
22 because, one, it was one incident; two, there was never a finding
23 that it could have been child abuse; thirdly, it was used in the
24 sentencing phase to impose a sentence of death upon that defendant.

25 So, I would conclude that it is admissible under State v.

1 Fletcher and that within the time frame it's not so far distance as
2 to not have a probative value.

3 So, based on what he says this testimony is, I would
4 respectfully say to you that State v. Northcut in my view is
5 distinguished from the alleged facts in this case, and I frankly
6 agree with the Chief Justice and her analysis even then but I can
7 see why the majority court didn't use that where it was primarily
8 used even in argument by the Solicitor in Lexington County as a
9 basis to impose the death penalty.

10 And I would probably agree with the court that I don't think
11 one broken femur where there was no allegations of child abuse
12 would be a basis for putting somebody to death.

13 So, I would conclude based on the presentation, and I accept
14 what he said. What you want to tell me, Mr. Axelrod, further?

15 MR. AXELROD: Your Honor, what I'd like to -- on that point,
16 the Court's is -- is predisposed to say that the ribs are going to
17 come in at this point.

18 The baby died from cough medicine. That was the death. The
19 baby didn't die from broken ribs. He didn't die from a femur.

20 THE COURT: I understand that.

21 MR. AXELROD: But I still think we have the filter of the
22 403, the prejudicial and probative value.

23 THE COURT: I'm going to give it to you just right now. I
24 understand that.

25 Let me first say to you that I conclude, if appropriate, if it

1 happens, it's appropriate under 403. I would conclude that.

2 Now, even 403 and the various cases indicate that the evidence
3 must be clear, cogent and convincing. If this evidence is four
4 separate incidences including a broken femur, broken ribs, the
5 forty-eight hour incident coupled with a tremendous overdose of
6 some pharmacist - - some kind of medicine, that in my view is
7 clear, cogent and convincing which then leads me to the next
8 question.

9 Whether or not in fairness to our system and in fairness to
10 the defendant it meets the balancing test?

11 Obviously, it's highly prejudicial, obviously, but given the
12 fact that this baby only lived four months and given the fact that,
13 if believed, there is a history of child abuse during the entire
14 life of that child, I would conclude that the probative value on
15 this issue clearly outweighs the prejudicial affect, and it will
16 admitted.

17 Now.

18 MR. BAILEY: Your Honor, if I may inject a point?

19 THE COURT: Yes, sir.

20 MR. BAILEY: In this incidence, the prejudicial affect, and
21 I would have to respectfully disagree that - - -

22 THE COURT: I understand that.

23 MR. BAILEY: Ah, DSS investigated this femur and they
24 specifically investigated our client sitting here. They never
25 found he was the cause of the fractured femur.

1 THE COURT: That's why we going to have - - what interests
2 me is even DHEC concluded that somebody had committed child abuse.
3 They just didn't know who it was. So, I'm admitting it to show
4 clearly that someone committed child abuse on this child.

5 The jury can determine whether or not this defendant did it.

6 And I agree with you as to that issue.

7 Let me ask you this.

8 It's clear that this evidence is admissible under 403(B) to
9 either prove motive, which it could be, absence of mistake or
10 accident, a common scheme or plan and where one is clearly such
11 close as one relates to the other.

12 This would, if believed, clearly indicate a common scheme, a
13 plan or design to abuse this child bringing it up to the time of
14 his death, and if the jury believes these things, they could
15 clearly dismiss any claim of accident with regards to the medicine
16 the child took.

17 So, I've never seen a case more square for than the facts in -
18 - this alleged fracture in this case as it applies to State v.
19 Fletcher, and I understand your case of Northcut but it's just
20 simply not applicable in my view, respectfully, in this case.

21 MR. BAILEY: If I could address one more thing, Your Honor?

22 THE COURT: Sure. I want you to make a full record.

23 MR. BAILEY: Okay.

24 With reliance on State v. Fletcher, it's my understanding that
25 for a prior bad act to be admissible under Rule 404(B) there must

1 be clear and convincing evidence - -

2 THE COURT: Yes, sir.

3 MR. BAILEY: - - that the prior bad act was committed by the
4 accused. Again, I don't think there is enough evidence here to
5 raise - - -

6 THE COURT: No, sir.

7 Under clear, cogent and convincing must be that, ah, there is
8 sufficient evidence to show child abuse, and I would think if, I
9 don't know, but I'll listen but based on the preliminary facts that
10 I understand them to be, either he or his wife or both of them had
11 to do it.

12 MR. BAILEY: And, Your Honor, that - - that's the exact
13 point I'm trying to get at - - and there is - - there is sufficient
14 - -

15 THE COURT: I got you.

16 What's your answer to that issue?

17 MR. VON HERRMANN: Your Honor, all of the evidence that we
18 have says that that child including the statements made by the
19 defendant to the medical authorities, to his wife and to others
20 says that the child was in his sole custody at the time of the
21 injuries.

22 He had - - -

23 THE COURT: We've had pretrial meetings with counsel, and
24 that's what I understood.

25 Counsel, I can tell you that you are fully protected on the

1 record as to your position that these prior acts should be
2 excluded.

3 MR. AXELROD: Your Honor.

4 THE COURT: Yes, sir.

5 MR. AXELROD: In response to Mr. Von Herrmann, Mr. Von
6 Herrmann says that it's undisputed, and I would agree with him that
7 at the time of death, Wesley was with the baby at the time of death
8 but they're trying to bring in things based on the clear and
9 convincing standard that Wesley might not have been there.

10 But the Solicitor is saying that the rib injuries happened
11 within forty-eight hours. The Court has made great note to that
12 fact. I would submit to the Court that they might not even be able
13 to prove that fact that something occurred within that forty-eight
14 hour period, and the ribs actually - - -

15 THE COURT: If they don't prove it, I'll deal with it as I
16 think appropriate but that's just one of the elements. There's
17 three other elements of child abuse, if believed, just not that
18 one. That's just one he says.

19 MR. AXELROD: Judge - - -

20 THE COURT: Clearly, you can't dispute that the child had
21 a broken femur.

22 MR. AXELROD: Yes, sir.

23 THE COURT: And, clearly, you can't dispute that at the
24 time of the child's admission for which it ultimately died, they
25 found some abuse occurred forty-eight hours.

1 MR. AXELROD: Ah, they - - I'm not saying - - -

2 THE COURT: And, clearly, you can't dispute the fact that
3 expert testimony says after January 15th sometime after that, the
4 child had some broken ribs that had to be some several weeks before
5 the child died?

6 MR. AXELROD: Undisputed.

7 THE COURT: Okay.

8 All of these facts lead me to the con - - position that if
9 proved, it's clearly cogent and convincing.

10 MR. AXELROD: Now, in going back to the Fletcher case, you
11 know, when they tried the Fletcher case, they tried the both co-
12 defendants together, and I believe that that may raise to the level
13 of clear and convincing but here we might not reach the
14 preponderance standard.

15 There's no - - Wesley was not the only person taking care of
16 this baby.

17 THE COURT: You arguing questions for the jury. I'm
18 concerned with admissibility of evidence at this time.

19 MR. AXELROD: I don't think even based on the Lyle standard
20 that we don't reach that clear and convincing standard or - - -

21 THE COURT: Well, my view is different, and I respectfully
22 understand yours but you're on the record, and I just clearly think
23 that it's admissible under the context of this case where
24 undisputedly all the experts going to say that that child was
25 abused for the entire four months of its - - its life, and we'll

1 let the jury determine who, if anyone, is responsible for it.

2 On that issue is there any other questions?

3 I don't need to hear you anymore but you've done - - you've
4 ably argued your position. It's just the facts in my view totally
5 against you but I appreciate you calling the Northcut case to my
6 attention.

7 Alright, sir. Thank you.

8 Anything else?

9 MR. AXELROD: Your Honor.

10 THE COURT: Yes, sir.

11 MR. AXELROD: Your Honor, it's a pretrial motion but I'm not
12 sure what photographs the State plans to introduce.

13 THE COURT: What what?

14 MR. AXELROD: What photographs they plan to introduce.

15 You want to have these motions after we pull the jury or you
16 want - - would you like to have them now?

17 THE COURT: No. I'll take a look right quick at them.
18 Let's see them.

19 MR. VON HERRMANN: Since he's concerned, the only thing we're
20 going to admit into evidence - -

21 THE COURT: Sir?

22 MR. VON HERRMANN: - - no, there will be no photographs.
23 There will be four x-rays.

24 THE COURT: Four what?

25 MR. VON HERRMANN: Four x-rays.

1 THE COURT: Okay.

2 MR. VON HERRMANN: There's no photographs of the scene.

3 THE COURT: I assume that they - - they support your view
4 of the evidence.

5 MR. VON HERRMANN: Yes, sir, Your Honor.

6 THE COURT: And they are necessary for the presentation of
7 the evidence.

8 The photographs will not be issued - - introduced. Does that
9 take care of that for you?

10 MR. AXELROD: Yes, Your Honor.

11 And concerning the x-rays, are these photographic x-rays or
12 are these x-rays?

13 MR. VON HERRMANN: They're going to be x-rays.

14 MR. AXELROD: Your Honor, I would - - if they're - if - - I
15 haven't seen the four they plan to introduce. If - - if the
16 Solicitor has them, I'd like to see them because they might be
17 repetitive at that point. I'm not sure what - - what they are.

18 THE COURT: Well.

19 MR. AXELROD: Or we'll deal with it before it becomes an
20 issue?

21 THE COURT: I will.

22 MR. VON HERRMANN: That's fine.

23 THE COURT: I don't see how the x-rays themselves can be
24 said to raise some outrage from the jury.

25 What would be - - what would be your objection? I can

1 understand your objection to photographs but that same objection
2 would not apply to x-rays.

3 MR. AXELROD: Well, I think they're color.

4 THE COURT: Sir?

5 MR. AXELROD: I'm not sure if they're in color.

6 (Mr. Von Herrmann presents them for viewing by Mr. Axelrod.)

7 MR. AXELROD: I'm okay with that, Your Honor.

8 Can we approach, Your Honor?

9 THE COURT: Sir?

10 (Bench conference held off the record and outside the presence
11 of the jury panel.)

12 THE COURT: I want to make sure there's nobody in the jury
13 pool sitting in the courtroom.

14 CLERK OF COURT: No, sir. They're all in Courtroom E.

15 THE COURT: Okay. That's fine.

16 CLERK OF COURT: The rest are down in the jury pool room.
17 Seventy-five are next door. The remainder of the panel are in the
18 jury pool room.

19 THE COURT: Are there any other motions before we begin the
20 voir dire selection process?

21 MR. VON HERRMANN: Your Honor, the State has a couple of
22 motions.

23 THE COURT: Alright.

24 Let me deal with the defense first.

25 Josh, Josh?

1 MR. AXELROD: Your Honor.

2 THE COURT: Sir?

3 MR. AXELROD: Wesley gives an eight hour video-taped
4 statement, and the State says they don't need a Jackson v. Denno
5 hearing but my concern is if - - if anybody was to testify about
6 any statements coming from that video of what Wesley might have
7 said.

8 Mr. Von Herrmann told me that is not the case but I'm not sure
9 if the police officer has told somebody or something comes, "Well,
10 Wesley said this at that statement."

11 If he - - -

12 THE COURT: Well, if it comes in, we'll play the statement.
13 What's your position? We're wasting time here.

14 MR. VON HERRMANN: Your Honor, we don't intend on admitting
15 the state - - the statement into evidence.

16 MR. AXELROD: Well, you said that but if someone testified -
17 - a police officer - - if someone testifies that Wesley said this,
18 then a Jackson v Denno should have been appropriate at some point
19 or, you know.

20 THE COURT: Well, it's appropriate unless you question the
21 voluntariness of it, whether or not he was, ah - - -

22 MR. AXELROD: I am. I'm questioning the voluntariness and
23 whether - - -

24 MR. VON HERRMANN: Your Honor, there's no information. We're
25 not putting them on - - we're not putting them on - - we're not

1 putting those officers on the stand that I'm aware of right now.

2 MR. AXELROD: Well, I had planned to put up the law
3 enforcement officer, and the point is that I'm contesting the
4 statement. If they were to say something - - -

5 THE COURT: No, sir. I'm not going - - the statement is
6 not coming in. So that's not before me.

7 If an officer says that he said so and so whether it was in a
8 statement or somewhere else, they're entitled to say that. That's
9 a declaration against interest.

10 MR. AXELROD: I know. I'm saying that the statement wasn't
11 given voluntarily. It wasn't given freely. So I think I'm allowed
12 to contest that now at the Jackson v. Denno hearing.

13 MR. VON HERRMANN: No, sir, Your Honor. There is no law
14 enforcement officer going to testify to that.

15 There are lay witnesses and medical witnesses for which
16 wouldn't have had to give written Miranda.

17 MR. AXELROD: Your Honor, but the State - - -

18 THE COURT: If it comes up I'll deal with it. If I have to
19 stop during the course of the trial to have Jackson v. Denno I
20 will. There's no need in wasting the Court's time when he says no
21 officer is going to testify into this trial as to what he said in
22 that statement.

23 MR. AXELROD: As long as that - - as long as - - -

24 THE COURT: Well, I'm telling you that.

25 MR. AXELROD: That will be fine, then, Your Honor.

1 THE COURT: I'll deal with it if it happens. Okay?

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

3 THE COURT: Alright. Thank you.

4 But no need in having a Jackson v. Denno hearing if the
5 statement ain't coming in.

6 Now.

7 MR. AXELROD: I - - I don't want to see him backdoor it in,
8 and - - and we skip through a step here.

9 THE COURT: You got to understand, now, that this is not my
10 first rodeo, and I've been on the Bench twenty-five years, and I'll
11 handle it.

12 Thank you.

13 Alright.

14 Anything else?

15 MR. AXELROD: Yes, sir, Your Honor.

16 I have a motion to sequester the witnesses.

17 THE COURT: I think that's appropriate in this case.

18 MR. VON HERRMANN: Without objection, Your Honor.

19 THE COURT: I would also sequester his witnesses.

20 MR. VON HERRMANN: Yes, sir, Your Honor.

21 The only thing is Todd Cox we'd designate as our Lead
22 Investigator.

23 THE COURT: Then, the Lead Investigator certainly will
24 remain in the courtroom.

25 MR. AXELROD: Absolutely. No objection to that, Your Honor.

1 We appreciate Detective Cox being here.

2 THE COURT: How about the experts?

3 MR. VON HERRMANN: Your Honor, our experts won't even be here
4 until tomorrow and Wednesday morning. So, I don't believe there
5 will be any problem with them, Your Honor.

6 THE COURT: You want to sequester the experts, too?

7 MR. AXELROD: Yes, sir, Your Honor.

8 THE COURT: That's fine.

9 He's entitled to that.

10 So are you.

11 MR. VON HERRMANN: Yes, sir.

12 THE COURT: Mr. Axelrod?

13 MR. AXELROD: Yes, sir.

14 THE COURT: I want your witnesses sequestered, too.

15 MR. AXELROD: Yes, sir.

16 (Mr. Axelrod has various defense witnesses exit the
17 courtroom.)

18 MR. AXELROD: Your Honor, may we let our DSS worker - -
19 worker leave today?

20 THE COURT: It's your case. If you decide it's not
21 appropriate, I certainly have no objection.

22 MR. AXELROD: Well, I was trying to, and you told me you
23 might want to take testimony. So.

24 THE COURT: No, no. I don't need it in this case.

25 MR. AXELROD: So, I was checking right now.

1 THE COURT: Well, when you tell me that even DSS found
2 evidence of child abuse but couldn't identify the perpetrator, that
3 helped me decide I didn't need her because the question is whether
4 or not there was a child abuse and whether or not there is a
5 pattern of it.

6 So, ah, I don't - - I don't need to take that. I appreciate
7 your coming to help us, though. Thank you.

8 MR. AXELROD: You're free to leave.

9 THE COURT: Thank you. Thank you, ma'am.
10 Alright. What next?

11 MR. AXELROD: I don't know. Let's see if Mr. Bailey has
12 something.

13 Your Honor - - -

14 THE COURT: I've heard from Mr. Bailey. I've heard from
15 you. How about your distinguished colleague there.

16 MR. TAYLOR: Your Honor, I have nothing other than the
17 change of venue motion but we can't address that at this time.

18 THE COURT: That's the case.
19 You through?

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

21 THE COURT: Thank you.

22 And, ah, how about you?

23 MR. VON HERRMANN: Your Honor, I just have a couple of quick
24 motions.

1 BLAIR HEARING

2 MR. VON HERRMANN: Your Honor, first of all, the
3 Department of Special Needs and Disabilities did a forensic
4 interview and has found in the summary of the evaluation results,
5 this defendant is competent to stand trial, that he has the
6 capacity to conform, and he's criminally responsible. I would just
7 request that the Court admit it into the record.

8 THE COURT: Alright.

9 This is in the nature of a Blair hearing.

10 Mr. Axelrod, have you and your co-counsel had an opportunity
11 to review the findings of the Department.

12 MR. AXELROD: We have, Your Honor.

13 THE COURT: Do you have any witnesses in opposition to
14 that?

15 MR. AXELROD: No, sir, Your Honor.

16 THE COURT: So, there's no basis for me having a hearing,
17 is there?

18 MR. AXELROD: No, sir, Your Honor.

19 THE COURT: Alright.

20 I have reviewed the report, specifically make it a part of the
21 record and with reference to Blair adopt in toto as findings of the
22 Court the findings as contained in this report to which you've read
23 and have no objection.

24 Mrs. McCall, this is a Court's Exhibit in the Blair - - State
25 v. Blair hearing.

1 (The Court Reporter accepts the Evaluation Report as Court's
2 Exhibit #1.)

3 THE COURT: What next, Solicitor?

4 MR. VON HERRMANN: Your Honor, it is our understanding that
5 of the Court System and statutory motion in limini based on the
6 witness list or the curriculum vitae of the experts the defense has
7 provided to the State or they intend on presenting as evidence, it
8 can only be assumed by who these experts are that the defendant is
9 going to put up - - we have not been put on notice of any insanity
10 defense or a guilty by mentally ill defense.

11 Your Honor, it appears to me that they're trying to go for a
12 diminished capacity. Um, they hired a psychologist who gave a
13 test. I just want to make prior - - prior to his testifying - - -

14 THE COURT: I tell you and they're good lawyers, all of
15 them. They know that diminished capacity is not a defense. I
16 tried to use it several times as a defense lawyer, and Judge
17 Spruill corrected me in every occasion.

18 MR. VON HERRMANN: Yes, sir.

19 I just want to make sure that it does not come out, his I.Q.
20 and things of that nature.

21 MR. AXELROD: Well, Your Honor - - Your Honor I think it - -
22 it - - if there has been testimony on Wesley, his I.Q., can come
23 out.

24 THE COURT: On what basis?

25 It might come out if there was some question about the

1 voluntariness of a statement but that's not here.

2 MR. AXELROD: Your Honor, I think it's going to come out that
3 they're - - they're going to say that he went out and bought cough
4 medicine and gave the baby cough medicine, and I think that his
5 ability to be able to - - -

6 THE COURT: Oh, I might let it in on that basis. Whether
7 or not he used a dangerous cough medicine if that's what you're
8 talking about.

9 MR. AXELROD: Yes, sir, Your Honor.

10 MR. VON HERRMANN: Yes, sir.

11 My concern is not necessarily his I.Q. but the fact that he,
12 you know, tried to use diminished capacity. "I didn't to give the
13 child cough medicine."

14 THE COURT: Diminished capacity is not going to come in.
15 It's not going to be a charge to the jury.

16 But if their defense is that because of his low I.Q. he had no
17 conception of that which he allegedly did, I'll let it in on that
18 basis.

19 MR. VON HERRMANN: Well, sir, I believe that is just kind of
20 circumventing the diminished capacity because that - - that's what
21 diminished capacity is. Not even having the capacity by his
22 diminished intelligence - - -

23 THE COURT: No, no. He may not have the capacity to read
24 the instructions of don't give it to children.

25 No. I'll handle that.

1 No. I - - I haven't heard all of the evidence but I could
2 understand, candidly, how somebody with a low I.Q. might not
3 understand the dangers of giving a certain medication to an infant.
4 I can understand that.

5 MR. VON HERRMANN: And - - and I don't necessarily disagree
6 with you in that particular context, Your Honor, but I also don't
7 want him to say well, maybe he wasn't - - he didn't have the - -

8 THE COURT: That's not going to happen.

9 MR. VON HERRMANN: - - about the squeezing of the child, how
10 hard it was.

11 THE COURT: No. I ain't going to let that happen. You
12 don't have to have much intelligence or I.Q. to understand that.

13 MR. VON HERRMANN: I understand.

14 And, Your Honor, the Blair hearing actually says there is mild
15 mental retardation. The doctor has indicated to us that he has
16 changed his mind on that opinion. So - - -

17 THE COURT: That's not coming in except that - - except
18 that he didn't understand the dangers of giving the child if that
19 be the case. I don't know whether he's going to say he gave it to
20 him or not but I could understand why somebody fourteen years old
21 might not know the dangers of cough medicine as opposed to you or
22 I. I'll just have to wait and see.

23 MR. BAILEY: Yes, sir.

24 THE COURT: But they're not --- they have said. They are
25 assessing to me, ah, that you aren't relying on diminished capacity

1 in this case.

2 MR. AXELROD: I - - no, sir.

3 MR. VON HERRMANN: And the only other concern - - the only
4 issue, Your Honor, and this is just a preliminary thing, again, a
5 motion in limini because I want to make sure that everybody is
6 clear before the evidence comes out or before the witnesses start
7 to be interviewed is, obviously, part of their defense is or I
8 would imagine that part of their defense is that somebody else did
9 it.

10 This State, obviously, is very strict in the third party guilt
11 where you can't mere suspicion. I am very hesitant because they
12 have already indicated in their - - in their motions that their
13 point is somebody else did it. I just want to make sure this Court
14 holds their feet to the fire that they have to, um, undergo or to
15 at least have something that casts more than a mere suspicion on
16 any third party with regards to that.

17 THE COURT: Well, I haven't heard - - I haven't heard that
18 defense yet.

19 They might say he couldn't - - "We didn't do it. We don't
20 know who did but we didn't do it."

21 MR. VON HERRMANN: I - - Your Honor, I have no problem with
22 that but I think that at least in pretrial interviews maybe between
23 us they've indicated, for instance, that they're going to put - -
24 or point to Charlene Dandridge as the offender.

25 I agree with the Court with, "I didn't do it but somebody else

1 did."

2 THE COURT: Well, if we get to that issue, I'll rule on it
3 but I'm not about to let the third party guilt in.

4 MR. AXELROD: Well, Your Honor, it's clear that the co-
5 defendant was there two hours before the baby died, clearly, and
6 there was other people there, clearly.

7 THE COURT: Well, the child - - I'll let evidence come in
8 as to co-defendant. Sure.

9 MR. AXELROD: Thank you, Your Honor.

10 MR. VON HERRMANN: Yes, sir. I don't have a problem with
11 that unless - - as long as it doesn't - - as long as it's in
12 accordance with the case law and it's not a mere suspicion.

13 Mr. Axelrod indicated that it was three hours. It was
14 actually closer to five hours difference.

15 THE COURT: I'll deal with it when he gets to it. I'm not
16 likely to let some - - some suspicion of a third party evidence
17 come in as to who did it.

18 They are entitled - - with two co-defendants who were
19 initially charged, they are entitled to show that the other one did
20 it rather than him.

21 MR. VON HERRMANN: Your Honor, that is correct.

22 However, I would point out. The co-defendant is not charged
23 with homicide of the child.

24 THE COURT: I understand that but I'm going to let evidence
25 come in as to the other individual who was there.

1 MR. VON HERRMANN: Yes, sir.

2 And just for the record so the Court know. This individual
3 was charged with the aiding and abetting statute along with
4 somebody else.

5 THE COURT: I understand but he's entitled to show if he
6 can that that individual did it rather than him.

7 MR. VON HERRMANN: As long he doesn't cast the mere
8 suspicion. That's my point.

9 THE COURT: I understand but, again, I don't know. I've
10 already told you it's coming in as it is against an alleged co-
11 defendant.

12 MR. AXELROD: I just want to say about the mere suspicion
13 that the Solicitor keeps saying.

14 THE COURT: Well, I'll deal with that.

15 You see. When I rule with you, I don't need to hear you
16 anymore.

17 MR. AXELROD: Yes, sir.

18 THE COURT: Alright.

19 MR. GARDNER: Your Honor.

20 THE COURT: But I thank you.

21 MR. GARDNER: Your Honor, if you will let the record reflect
22 that I am in the court, and my name is John Gardner, and I
23 represent the co-defendant since y'all were talking about that.

24 THE COURT: We'll do that.

25 MR. GARDNER: Thank you, Judge.

1 THE COURT: I don't need to hear from you at this time
2 since the co-defendant is not here before me.

3 MR. GARDNER: Okay.

4 THE COURT: The only thing I'm saying is apparently there
5 is, ah, was an alleged co-defendant, and if there be some type of
6 evidence to show that that party did it rather than him, I'm going
7 to let it in.

8 I will very carefully examine any evidence that you have as to
9 a third party, and let that be clear. Okay?

10 Alright. What next, please?

11 MR. VON HERRMANN: The State has nothing further, Your Honor.

12 THE COURT: How about it, sir? Anything further?

13 MR. AXELROD: No, sir.

14 THE COURT: Mr. Bailey?

15 MR. BAILEY: No, Judge.

16 THE COURT: Counsel?

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

18 THE COURT: Bring the - - bring me the seventy-five jurors.

19 CLERK OF COURT: Yes, sir.

20 Before I bring them in, seventy-five, this area will not hold
21 them. So, I'm going to need to move some of these chairs from out
22 here back here because the courtroom is full as well as the jury
23 box, and I can't put them in the jury box because I got to seat the
24 jury over there. So, I need to move some of these chairs back to
25 the back.

1 THE COURT: You make arrangements for me to accommodate
2 seventy-five jurors and have the rest of them down there wait to
3 make sure I get a jury in this case.

4 CLERK OF COURT: Yes, sir, I have them waiting.

5 THE COURT: Alright.

6 And I previously said, Mr. Axelrod, that I will give your voir
7 dire questions.

8 (The Court awaits arrangements by the Clerk of Court to bring
9 the seventy-five jurors into the courtroom and then resumes the
10 trial of this case.)

11 THE COURT: Linda, when I was saying Rule 403, it was
12 404(B).

13 MR. AXELROD: Your Honor, may I approach?

14 THE COURT: Yes, sir.

15 (Bench conference off the record and in the presence of the
16 jury panel but outside the hearing of the jury panel.)

17 REMARKS OF THE COURT

18 THE COURT: Alright.

19 Madame Clerk, has all my potential jurors been seated.

20 CLERK OF COURT: Yes, sir.

21 THE COURT: I thank you for your assistance.

22 CLERK OF COURT: Yes, sir.

23 THE COURT: You folks need to know that, ah, in Horry
24 County you have an extraordinary Clerk of Court. I congratulate
25 the electorate of Conway, ah, Horry County for selecting somebody

1 who can run a court in the way that she does. She is recognized by
2 all of the judges who come here as one of the outstanding clerks in
3 this state, and she has an outstanding staff which makes all of our
4 jobs so much easier, and it is for that I personally thank you.

5 CLERK OF COURT: I thank you.

6 (Applause from the audience.)

7 THE COURT: Ah, ladies and gentlemen of the potential jury,
8 by way of introduction, I'm Judge Cottingham from Bennettsville,
9 South Carolina. Under our system of rotation I have been assigned
10 here this week to be the trial judge in any cases brought before
11 me.

12 And, thus, it is my pleasure to be before you this week and to
13 be the trial judge in this case.

14 Now, in just a few moments I'm going to be asking of you
15 certain questions under what we call voir dire or voir dire. Ah,
16 in - - in these questions there's no right or wrong answers. It's
17 just that we need to know that whatever jury we get, ah, is not
18 biased or prejudiced in any way, a juror that says, "Judge, if I am
19 selected, I can give the State of South Carolina a fair and
20 impartial trial," a juror who can say, "I can give the defense a
21 fair and impartial trial," and in all instances a juror who can
22 say, "Judge, if selected as one of the twelve finders of the facts,
23 I will based my verdict, either not guilty or guilty, on the law
24 and evidence heard in this courtroom and from no other place."

25 And so it is our voir dire is designed to ensure that

VOIR DIRE

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1 everybody receives that kind of jury. It's not a probing or
2 prodding into an individual's personal affairs. We would never do
3 that but that's what a voir dire is for is to ensure that we get a
4 jury who can base their verdict on the law and evidence heard in
5 this courtroom and not from some ulterior sources.

6 Now, call your case.

7 VOIR DIRE

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

10 We're here on Docket Number 2004-GS-26-2150, The State vs.
11 Wesley Smith, indicted, Your Honor, for homicide by child abuse.
12 The indictment has been true-billed by the Horry County Grand Jury,
13 Your Honor.

14 THE COURT: May I have the case?

15 MR. VON HERRMANN: Yes, Your Honor.

16 THE COURT: Or the indictment.

17 And for the record, now, who represents the defendant?

18 MR. AXELROD: Stuart Axelrod, also, Paul Taylor and Joshua
19 Bailey.

20 THE COURT: Alright, sir.

21 And the record will reflect that the defendant is in court.

22 Now, first, I would ask that the defendant Wesley Smith please
23 stand and face the jury.

24 (The defendant stands and faces the jury.)

25 THE COURT: Is there anyone among you related by blood or

1 marriage with this defendant? If so, I respectfully request that
2 you stand and give me your name and jury number if known.

3 Do any of you have any kind of close relationships with this
4 defendant such as neighbor, friend of the family, co-worker, church
5 member or any kind of close relationship with him?

6 Do any of you know this defendant or any members of his
7 immediate family in any capacity whatsoever? If so, please stand.

8 You may be seated.

9 (The defendant resumes his seat at the defense table.)

10 THE COURT: I'm going to read the allegations contained in
11 this indictment, and these are allegations only propounded by the
12 State which they must prove if they can by evidence beyond a
13 reasonable doubt. I tell you that the allegations in this
14 indictment is in no sense any evidence. It's simply the formal way
15 by which any individual is brought for trial.

16 Now, I'm going to read these allegations, and they are that
17 only, so that you can respond to the following inquiry.

18 The State of South Carolina upon this indictment alleges that
19 this defendant Wesley Smith did in Horry County on or about
20 February 14, 2004, cause the death of Minor [REDACTED] a four months
21 old child while committing child abuse or neglect and that the
22 child's death occurred under circumstances manifesting an extreme
23 indifference to human life in violation of Section 16-3-85(a)(1) of
24 The South Carolina Code as amended. That is the allegation. That
25 is the charge.

1 This defendant Wesley Smith specifically pleads not guilty.

2 Now, this defendant doesn't have to prove a thing. The State
3 of South Carolina has the burden of proving him guilty beyond a
4 reasonable doubt if they can.

5 Sometimes jurors in the past have said, "Well, he must be
6 guilty of something or they wouldn't try him."

7 But that's not the law in this state. The law is that he
8 comes into this court under the presumption of innocence, and that
9 presumption remains with him throughout the trial from the moment
10 of his arraignment until and unless a jury twelve of his peers has
11 found him guilty unanimously by all twelve of you beyond a
12 reasonable doubt.

13 Now, the alleged victim, the four month old child, is **Minor**
14 Any of you have any connections with that young child or
15 his family or his mother?

16 Any of you have occasion to know **Minor** in any capacity?
17 If so, please stand.

18 Now, first, I am advised that, ah, there was, ah, some mention
19 in the paper today, The Sun News, about the trial of this case.
20 I'm further advised that there may have been some radio or
21 television statement as to this case.

22 Now, the fact that - - and we'll inquire in detail in just a
23 moment but the fact that somebody may have read or heard or seen
24 somebody's allegations or some reporter's statement in the print is
25 not - - does not necessarily disqualify them. If based on that

1 what they've heard or read they've made an irrevocable decision
2 that that individual is guilty, then, obviously, that disqualifies
3 them.

4 But if they can set aside what they may have read or heard and
5 can honestly base their verdict on the law and evidence in this
6 case, it does not disqualify but in order to make sure that the
7 State of South Carolina receives a fair trial and this defendant
8 receives a fair trial, our law is that I must inquire as to that
9 issue and should inquire as to that issue relative to bias or
10 prejudice or relative to whether not somebody having seen or heard
11 something can - - has already made a conclusion.

12 And there are several reasons why something you may have read
13 or heard should not be considered by you.

14 First, it may not be true.

15 Secondly, it may be totally different from the facts.

16 Thirdly, under our Rule when somebody makes an adverse
17 statement against you, you got a right of confrontation, and if you
18 trying to make a decision based on what you may have read or heard
19 in the paper, you are depriving your adversary of the right of
20 confrontation.

21 So, obviously, it would be inappropriate for somebody to say,
22 "Well, I'm going to find him guilty because I read it in the paper
23 or I saw it on the television."

24 But having said that, how many of you have read or heard or
25 seen video or anything, anything about this case, please raise your

1 hand.

2 That's fine.

3 Now, do any -- have any of you, ah, how many of you -- let's
4 take these first. How many over here?

5 I would ask that y'all come forward and let me discuss it with
6 you. Come forward where we can talk about it, please, and then
7 I'll deal with the rest of you.

8 CLERK OF COURT: Number 117, Johnny Evans.

9 THE COURT: Alright.

10 Good morning -- good afternoon, Mr. Evans.

11 MR. EVANS: How you doing, sir?

12 THE COURT: Can you tell me what you read or heard, please?

13 MR. EVANS: Actually, I didn't read a thing. Just, ah,
14 someone told me about it this morning about what he's, ah --

15 THE COURT: Okay. Well, let me ask you this.

16 Someone told -- someone said what they saw on the tv or radio
17 or whatever?

18 MR. EVANS: Yes, sir.

19 THE COURT: Would that impress you to the extent that you
20 can't get it out of your mind?

21 MR. EVANS: Just like what I read in the paper.

22 THE COURT: Sir?

23 MR. EVANS: Just like what I read in the paper is just --
24 just that.

25 THE COURT: Can you tell me? I just want to make sure that

1 whatever they told you, you can set that aside and base your
2 verdict if you're selected on the law and evidence in this court.

3 MR. EVANS: Absolutely, yes, sir.

4 THE COURT: You like me. I don't believe everything I read
5 in the paper. They say some bad things about me from time to
6 time. I didn't believe them.

7 They said some good things about me, and nobody else believed
8 them.

9 So, it works both ways.

10 You are qualified if selected. Have a seat and thank you.

11 Next, please.

12 CLERK OF COURT: Juror 103, Michael Doyle.

13 THE COURT: Good afternoon.

14 What did you hear?

15 MR. DOYLE: They had it on the news.

16 THE COURT: When was that?

17 MR. DOYLE: Last night.

18 THE COURT: Okay.

19 Did that impress you to the extent that you formulated an
20 opinion as to the guilt or innocence of anybody?

21 MR. DOYLE: No, sir.

22 THE COURT: Can, ah, can you set that aside?

23 MR. DOYLE: Yes, sir.

24 THE COURT: I just want to make sure. I read some of this
25 stuff, and, ah, I don't have - - I haven't formed an opinion

1 because I don't know but I just got to be sure that, ah, whatever
2 you read or heard didn't impress you to the extent that you've
3 already informed an opinion.

4 But do you assure me under your oath that if selected you will
5 base your verdict on the law and evidence in this courtroom and
6 from no other source?

7 MR. DOYLE: Yes, sir.

8 THE COURT: I think that you can, too.

9 Thank you for your candor.

10 CLERK OF COURT: 323, Richard Sander.

11 THE COURT: Mr. Sanders, good afternoon, sir.

12 Can you tell me what you read or heard?

13 MR. SANDER: I didn't watch tv or read any newspapers this
14 morning.

15 THE COURT: So, what's got you here before me?

16 MR. SANDER: They took -- they took all of us up here.

17 THE COURT: No, I only wanted to talk to those who - - -

18 MR. SANDER: The ones that read or heard?

19 THE COURT: Yes, sir.

20 MR. SANDER: No, I didn't.

21 THE COURT: Glad to have you.

22 CLERK OF COURT: 384, Richard Watson.

23 THE COURT: Yes, sir, good afternoon, Mr. Watson.

24 What is your response, please?

25 MR. WATSON: I saw it on tv last night and this morning.

1 THE COURT: Alright. Did you form an opinion as to the
2 innocent or guilt based on - - -

3 MR. WATSON: I have. .

4 THE COURT: Sir?

5 MR. WATSON: I have.

6 THE COURT: Based on what you - - I don't want to know what
7 your opinion is - - is that opinion that could not basically be
8 changed by what you hear in the evidence?

9 MR. WATSON: It can't be changed.

10 THE COURT: You're pretty strong about it.

11 I'm going to excuse you from this case. I'm just not going to
12 - - and I appreciate your position, and more important, I
13 appreciate your candor but you've got a pretty formed, ah, firm
14 opinion, and you're entitled to that, you understand, but the fact
15 that you're willing to come forward and tell me that impresses me.

16 I will excuse you from this case. Have a seat, please.

17 Thank you.

18 Next, please.

19 Give me the jury number, please.

20 CLERK OF COURT: #338, I mean, #384, Richard Watson.

21 Alright, now, this one is #338, Don Singletary.

22 THE COURT: Mr. Watson has been excused from this case.

23 CLERK OF COURT: Yes, sir.

24 THE COURT: Now, I want to keep him in the panel for some
25 other cases.

1 Yes, sir, your name?

2 MR. SINGLETARY: Don Singletary.

3 THE COURT: And what is your response, Mr. Singletary?

4 MR. SINGLETARY: I saw it on the news last night and on the
5 radio this morning.

6 THE COURT: Have you formed and expressed an opinion?

7 MR. SINGLETARY: No.

8 THE COURT: Can you set that aside and base your opinion on
9 what you hear in this courtroom?

10 MR. SINGLETARY: Yes.

11 THE COURT: You're assuring me that that would not give you
12 a pre - - pre-idea of either not guilty or guilty?

13 MR. SINGLETARY: Yes.

14 THE COURT: You are qualified if selected.

15 Thank you.

16 Yes.

17 CLERK OF COURT: 349, Nancy Southard.

18 THE COURT: Yes, ma'am. Good afternoon.

19 What is your response, please?

20 MS. SOUTHARD: I briefly read what was in the paper this
21 morning but I assume that's just - - that's just something that was
22 printed about the defendant by someone who doesn't know all about
23 the case, and I'll listen to what goes on in this case before I
24 make a decision.

25 THE COURT: I love that answer.

1 That's what we're seeking, just somebody whose got an open
2 mind and say, "I don't know a thing about this case. I'm not
3 going to be influenced by what I read in the paper or saw. I want
4 to hear what the evidence is."

5 You're qualified if selected. Thank you.

6 CLERK OF COURT: 388, Wayne Weldon.

7 MR. WELDON: Ah, I just read the article in the paper this
8 morning.

9 THE COURT: Does that impress you with such that you may
10 have already formed or expressed an opinion?

11 MR. WELDON: No, sir.

12 THE COURT: And given the fact of what you read, can you
13 give both the State and the defendant a fair trial?

14 MR. WELDON: Yes, sir.

15 THE COURT: And can you promise me that your verdict
16 whatever it is is on the law and evidence in this case?

17 MR. WELDON: Yes, sir.

18 THE COURT: And just want to make sure - - and that last
19 gentleman, I can understand why somebody might be impressed, you
20 know, with what they read in the paper and I have no problems with
21 that but, ah, you're qualified if selected.

22 Thank you, sir.

23 Next.

24 CLERK OF COURT: #38, Charlotte Bowers.

25 THE COURT: Yes, Ms. Bowers, good afternoon.

1 MS. BOWERS: Main thing I heard was this morning. I didn't
2 see anything. I heard news, and this morning when I got here, I
3 heard about it.

4 THE COURT: You haven't formed or expressed any type of
5 opinion?

6 MS. BOWERS: No, sir, I didn't.

7 THE COURT: And you assure me that your verdict will be
8 based on the law and evidence in this courtroom?

9 MS. BOWERS: Yes, sir.

10 THE COURT: I'm sure that it will, and I thank you.

11 She's qualified.

12 Alright.

13 How many of you read, heard or seen something, just over here?
14 Anybody who has read, heard or seen anything, y'all come up here,
15 please and get on the record.

16 CLERK OF COURT: If we can let them line up here and get
17 their name and number.

18 THE COURT: That will be fine.

19 CLERK OF COURT: 124, Sharon Forbes.

20 THE COURT: Juror 24.

21 CLERK OF COURT: 124.

22 THE COURT: 124.

23 CLERK OF COURT: Yes, sir.

24 THE COURT: What have you read or heard?

25 MS. FORBES: Same things.

1 THE COURT: Have you expressed or formed an opinion? Do
2 you have one?

3 MS. FORBES: No.

4 THE COURT: You can base your opinion on the law and
5 evidence in this courtroom?

6 MS. FORBES: Yes, sir.

7 THE COURT: What have you heard on the news?

8 MS. FORBES: Nothing.

9 THE COURT: So you did not read the paper?

10 MS. FORBES: No, sir.

11 THE COURT: And you are telling me that your verdict will
12 be based on the law and the evidence?

13 MS. FORBES: Yes, sir.

14 THE COURT: Thank you. You are qualified.

15 Yes, ma'am.

16 CLERK OF COURT: 354, Debora Stubbs.

17 THE COURT: Ms. Stubbs, did you read or hear something?

18 MS. STUBBS: I read it and have seen it on the news.

19 THE COURT: Okay.

20 And did that influence you in anyway?

21 MS. STUBBS: No, sir.

22 THE COURT: You haven't formed or expressed an opinion as
23 to guilt or innocence?

24 MS. STUBBS: No, sir.

25 THE COURT: Again, you understand my -- the thrust of my

1 inquiry?

2 MS. STUBBS: I do.

3 THE COURT: Can you give the State and the defendant a fair
4 trial here and put that aside as to what you heard?

5 MS. STUBBS: Yes, sir.

6 THE COURT: I think that she can.

7 Thank you. You're qualified.

8 Yes, ma'am?

9 CLERK OF COURT: 28, Melani Biggerstaff.

10 THE COURT: Ms. Biggerstaff.

11 MS. BIGGERSTAFF: I started reading about it last week on
12 the internet and about what trials would be going on this week .

13 THE COURT: Did you read anything in the paper?

14 MS. BIGGERSTAFF: Um, online.

15 THE COURT: Online?

16 MS. BIGGERSTAFF: Uh-huh.

17 THE COURT: Were you impressed with what you read online?

18 MS. BIGGERSTAFF: No. I was just following what trial was
19 going on.

20 THE COURT: As a result of that did you come to any kind of
21 decision as to the innocence or guilt of anybody?

22 MS. BIGGERSTAFF: No.

23 THE COURT: Can you give both the State and the defendant
24 a fair trial?

25 MS. BIGGERSTAFF: Yes.

1 THE COURT: I don't know what was on the internet but it's
2 clear you're saying to me, "I can set that aside."

3 MS. BIGGERSTAFF: Yes.

4 THE COURT: That's all our courts require, and you're
5 qualified if selected.

6 Next, please.

7 CLERK OF COURT: 26, Barbara Bellamy.

8 THE COURT: Yes, ma'am?

9 MS. BELLAMY: I just heard on the news this morning that the
10 trial was going to begin today and just a little bit about the
11 drugs that were found in the baby's system.

12 THE COURT: So, you haven't formed any opinion?

13 MS. BELLAMY: No, sir.

14 THE COURT: And you're comfortable with being a juror if
15 selected?

16 MS. BELLAMY: Yes, sir.

17 THE COURT: Thank you.

18 And, Mr. Axelrod, as I ask a question if you have another
19 question depending upon what we say, I'll be glad to ask her.

20 MR. AXELROD: Thank you, Your Honor.

21 THE COURT: If you have some objection, make it as we go.

22 MR. AXELROD: Well, I'm noting my objections and have on a
23 piece of paper keeping track of those.

24 CLERK OF COURT: 73, Deanna Cochran.

25 MS. COCHRAN: I'm married to *** (unintelligible) Cochran.

1 THE COURT: Okay. What connection does that have with this
2 case?

3 MS. COCHRAN: He's a tv reporter.

4 THE COURT: Okay.

5 Based on that, is he a tv reporter?

6 MS. COCHRAN: Yes, sir.

7 THE COURT: Did that impress you as to the guilt or
8 innocence?

9 MS. COCHRAN: No, sir.

10 THE COURT: Can you, too, now, I mean he told you all about
11 it, and that's proper.. My wife tells me things sometimes that she
12 may have read or heard, and I don't necessarily accept it. I
13 accept the fact that she heard it or read it but - - but you can
14 base your verdict on the law and the evidence?

15 MS. COCHRAN: I can.

16 THE COURT: I think you can. You're qualified.
17 Next.

18 CLERK OF COURT: And she's qualified to stay?

19 THE COURT: Yes..

20 CLERK OF COURT: 137, Winston I. Gerald.

21 THE COURT: Yes, sir.

22 MR. GERALD: I heard something on the news but it's been so
23 long ago I really don't remember what it was about.

24 THE COURT: You're qualified if selected.

25 CLERK OF COURT: 300, Teresa Powers.

1 THE COURT: Alright, now. Where did you get this?

2 MS. POWERS: I got it this morning out of the tv.

3 THE COURT: You did not read it in the newspaper?

4 MS. POWERS: No.

5 THE COURT: But, ah, have you formed or expressed an
6 opinion as to this?

7 MS. POWERS: No.

8 THE COURT: Can you base your verdict on the law and
9 evidence in this case?

10 MS. POWERS: Yes, sir.

11 THE COURT: You tell me you would not be unduly - - you
12 would not be influenced in anyway as to your verdict based on this?

13 MS. POWERS: It made me think.

14 THE COURT: Well, I can understand it but the evidence in
15 this case, hopefully, will make you think.

16 I don't know what it is. I haven't seen it but I just want to
17 make sure that the evidence considered by you is in this courtroom,
18 not what you read or heard in the paper.

19 MS. POWERS: Oh, yes, sir.

20 THE COURT: And you'd have to tell me that in making your
21 decision, innocent or guilty, it will not be based on anything you
22 either read or heard but what you hear in the courtroom.

23 Can you do that?

24 MS. POWERS: Yes.

25 THE COURT: I'm sure that you can.

1 Thank you.

2 CLERK OF COURT: 367, Timmy Todd.

3 THE COURT: Mr. Todd, yes, sir?

4 MR. TODD: I heard it on the radio but I changed the
5 station.

6 THE COURT: Don't bother you in anyway?

7 MR. TODD: No, sir.

8 THE COURT: Made no discussions about it, made no opinions
9 about it?

10 MR. TODD: No, sir.

11 THE COURT: You're qualified.

12 CLERK OF COURT: 386, Lawrence Waye.

13 THE COURT: Mr. Waye?

14 MR. WAYE: Your Honor, I read the paper from cover to
15 cover.

16 THE COURT: I do to.

17 MR. WAYE: And I can't remember hardly anything I read at
18 the first and to the last.

19 (Laughter throughout the courtroom.)

20 THE COURT: You sound like me.

21 You're qualified.

22 All I want you to remember if you're selected is remember the
23 testimony and evidence in this courtroom.

24 I think that you can.

25 Thank you, sir.

1 CLERK OF COURT: 389, John Wallace - - I'm sorry, Wells.

2 THE COURT: Yes, sir?

3 MR. WELLS: I, um, just read the, um, local in Sunday's
4 paper, an article. I just skimmed the headlines.

5 THE COURT: So, you haven't formed an opinion?

6 MR. WELLS: No, sir.

7 THE COURT: With reference to that last juror who said he
8 can't remember from time to time, that's what we call a senior
9 moment, and you seniors are entitled to that.

10 Alright. Next, please.

11 CLERK OF COURT: 250, Lucius Messervy.

12 THE COURT: Yes, sir, Mr. Messervy.

13 MR. MESSERVY: I read about it but I don't necessarily I
14 don't recall any of the specifics.

15 THE COURT: So, you would not be influenced by that?

16 MR. MESSERVY: No, sir.

17 MR. AXELROD: If you would ask him if he was influenced by
18 that.

19 THE COURT: So, I just asked him.

20 He said he had none.

21 You have no opinion as to the innocence or guilt?

22 MR. MESSERVY: No, sir.

23 THE COURT: Thank you.

24 You're qualified.

25 Yes, sir.

1 I remind you and - - as I ask these questions, and I
2 appreciate the one witness that I excused, if anybody based on what
3 they read or heard or seen have formed or expressed an opinion as
4 to the guilt or innocence, I need to know about that but nobody has
5 told me that yet but if be the truth, I want to know about it.

6 And I appreciate the one witness who told me that.

7 Your name, ma'am?

8 MS. STEELE: Deborah Steele.

9 THE COURT: What have you read or heard, please?

10 MS. STEELE: I opened the paper this morning and started to
11 read, and I stopped. I just stopped. I didn't.

12 THE COURT: Well, did - - you haven't formed or expressed
13 any opinions?

14 MS. STEELE: No, sir.

15 THE COURT: Can you give both the defendant and the State
16 a fair trial?

17 MS. STEELE: I can.

18 THE COURT: Can you remove from your mind what you read in
19 the paper and base your verdict on the evidence in this case?

20 MS. STEELE: Yes, sir.

21 THE COURT: Thank you.

22 I believe that you can. Thank you.

23 Yes, sir.

24 CLERK OF COURT: 321, William Rowell.

25 THE COURT: Mr. Rowell, yes, sir.

1 MR. ROWELL: I heard about it on the news last week that
2 this case was coming up but I haven't formed any opinion or
3 anything like that.

4 THE COURT: You didn't read the paper today.

5 MR. ROWELL: No. My paper didn't come yesterday or today.
6 My paper boy's been on the blink.

7 THE COURT: Alright, sir.

8 He haven't even read it.

9 Okay.

10 CLERK OF COURT: 29, Steve Bishop.

11 MR. BISHOP: I heard the news this morning while I was
12 getting up and getting dressed but I don't pay much attention to
13 the news. I look at the weather and probably wouldn't have paid
14 any attention this morning except I knew I was on jury duty.

15 THE COURT: Well, in fairness to the author of that paper,
16 he just made a presentation of allegation, and in fairness to him,
17 he clearly said that in the paper but still sometimes people read
18 allegations and think they are facts, and we just want to make sure
19 that no potential juror has been mislead by what he honestly said
20 was just his - - his view of what the facts are. Whether they're
21 right or wrong I don't know but that's why we are making this
22 inquiry.

23 But you haven't even read the paper?

24 MR. BISHOP: No, sir.

25 THE COURT: Alright.

1 You're qualified.

2 Alright.

3 That takes care of that category.

4 Now, with reference to you folks on the right-hand side, how
5 many of you read or heard or seen or discussed any issue in this
6 case with anybody, please stand?

7 Alright. I would ask that you folks come forward, please,
8 and line up for me, and we'll go through the same procedure.

9 Next, please. Who is the next one?

10 CLERK OF COURT: #371, Betty Tyler.

11 THE COURT: Hey, Ms. Tyler.

12 What is your response, please?

13 MS. TYLER: Say what?

14 THE COURT: What is your response to my inquiry?

15 MS. TYLER: Oh, well, I heard about it on the radio this
16 morning, and then also there was a - - a headline on the internet
17 on Myrtle Beach.

18 THE COURT: Did you happen to read The Sun?

19 MS. TYLER: No, sir, I didn't.

20 THE COURT: So, then, have you informed or expressed an
21 opinion?

22 MS. TYLER: No, sir.

23 THE COURT: The internet didn't persuade you as to who was
24 innocent or guilty?

25 MS. TYLER: No.

1 THE COURT: I think that you can base your verdict on the
2 law and the evidence in this courtroom.

3 MS. TYLER: Yes, sir.

4 MR. AXELROD: Your Honor, I would ask if she can be fair and
5 impartial.

6 THE COURT: Well, based on anything that you may have read
7 or heard anywhere, have you formed or expressed an opinion?

8 MS. TYLER: No, sir.

9 CLERK OF COURT: 33, Virginia Boam.

10 THE COURT: What have you read or heard, please?

11 MS. BOAM: I read it this morning.

12 THE COURT: Based on that or any other information that you
13 may have had, have you informed or expressed an opinion?

14 MS. BOAM: Yes, sir.

15 THE COURT: Don't give me what your opinion is.

16 MS. BOAM: Okay.

17 THE COURT: Ma'am?

18 MS. BOAM: I don't know if I could honestly - -

19 THE COURT: Ma'am?

20 MS. BOAM: I don't know if I honestly not form an opinion.
21 I have an opinion but I'm ashamed to say that.

22 THE COURT: No, no, that's fine.

23 MS. BOAM: I just don't think I can put that aside.

24 THE COURT: I appreciate your candor, and I can understand
25 why somebody might have previously formed an opinion, and there's

1 nothing wrong with that except I need to know about it.

2 MS. BOAM: Okay.

3 THE COURT: I'm going to excuse this juror. Thank you.

4 Now, you will be called upon some other cases this week.

5 MS. BOAM: Yes, yes.

6 THE COURT: Thank you.

7 Mr. Axelrod, I excused that juror.

8 Next, please.

9 CLERK OF COURT: I'm coming.

10 #74, Suzanne Cole.

11 THE COURT: Yes, ma'am, Ms. Cole?

12 MS. COLE: I saw it in the paper this morning.

13 THE COURT: Have you formed or expressed an opinion?

14 MS. COLE: No, sir.

15 THE COURT: Can you set aside whatever you saw in the
16 paper? I didn't read it or scrutinize it.

17 MS. COLE: You know, so much you see on tv and read, it's
18 one day it's this and the next day, it's something else. It
19 doesn't mean it's true because it's print doesn't mean it's true.

20 MR. AXELROD: My question is did she form an opinion?

21 THE COURT: Have you formed or expressed an opinion?

22 MS. COLE: No, sir.

23 THE COURT: You're qualified.

24 CLERK OF COURT: 204, Stephen Kovacs.

25 THE COURT: Ladies and gentlemen, as I inquire here as to

1 have you read or heard anything or seen anything on the internet,
2 this that and the other, my thrust here among other things is to
3 find out if you have previously formed or expressed an opinion as
4 to the guilt or innocence based on your collective understanding
5 from the internet or whether ever else.

6 So, if anybody - - and I'll be asking you but if anybody has
7 formed or expressed an opinion, that last juror candidly said she
8 had formed some type of opinion, and I didn't ask her if whether it
9 was guilty or not guilty but, ah, in abundance of fairness to the
10 State and the defendant, I have excused her.

11 And I will ask you the same question. Have you formed - -
12 previously formed or expressed an opinion in this case?

13 MR. KOVACS: No, I haven't.

14 THE COURT: And what is your response? Have you read or
15 heard it or seen it?

16 MR. KOVACS: I just caught it on tv last week.

17 THE COURT: Last week.

18 MR. KOVACS: Last week they had a little snippet about
19 cases that were coming up for trial in Horry County. They said
20 what the gentleman was charged with.

21 THE COURT: And so you didn't read the newspaper this
22 morning?

23 MR. KOVACS: No.

24 THE COURT: Haven't been on the internet?

25 MR. KOVACS: No, sir.

1 THE COURT: Can you base your verdict on the law and
2 evidence in this case?

3 MR. KOVACS: Yes, sir.

4 THE COURT: I think you can. I'll be delighted to have you
5 if selected.

6 Alright.

7 Alright, next, please.

8 CLERK OF COURT: 256, Anne Mitchell.

9 THE COURT: Ms. Mitchell, yes, ma'am?

10 MS. MITCHELL: I heard it on the radio in the past few days
11 that an actual trial was coming up but other than that I don't know
12 anything about it.

13 THE COURT: You didn't read the newspaper or anything else?

14 MS. MITCHELL: Today I did read the paper.

15 THE COURT: Well, it would be alright if you did but I just
16 want to make sure that you don't consider what you may have heard
17 on the radio as absolute fact.

18 MS. MITCHELL: No.

19 THE COURT: Again, I - - I continue to emphasize and I do
20 it to each juror because we want to get on the record. This lady
21 takes down what I say and what you say, and the record must and
22 should reflect that you will base your verdict on the law and the
23 evidence in this courtroom, and it must reflect that you would not
24 have previously made or expressed an opinion as to the innocence or
25 guilt of anyone.

1 You understand?

2 MS. MITCHELL: Yes, sir.

3 THE COURT: You are qualified if selected.

4 Thank you, ma'am.

5 CLERK OF COURT: 157, Doris Halliday.

6 THE COURT: Ms. Halliday, good afternoon.

7 Yes, ma'am?

8 MS. HALLIDAY: My name is Doris Halliday. I did see something
9 on the news last night but I also heard about the case prior to
10 this when it first happened, and I - - I regretfully say I've
11 formed an opinion.

12 THE COURT: I would excuse you, and I thank you.

13 MS. HALLIDAY: Thank you.

14 THE COURT: Don't say regretfully. I - - a lot of us have
15 an opinion sometimes based on what we read in the paper, and, ah,
16 and the presidential elections going on, people form an opinion
17 based on what they hear, some of which may be true or false, and I
18 understand that and appreciate you telling me that.

19 Yes, ma'am? Your name?

20 CLERK OF COURT: 24, Michelle Beard, Ms. Beard.

21 THE COURT: Yes?

22 MS. BEARD: I just read in the paper this morning that they
23 were going to have a trial today and heard about it on the news
24 also but I didn't really read the article because I was coming in
25 today.

1 THE COURT: So you haven't formed or expressed an opinion?

2 MS. BEARD: I haven't formed an opinion, no.

3 THE COURT: Can you base your verdict on what you hear in
4 this courtroom?

5 MS. BEARD: Yes, sir.

6 THE COURT: You're qualified. thank you.

7 CLERK OF COURT: 277, Sandra O'Donnell.

8 THE COURT: Ms. O'Donnell, yes, ma'am.

9 MS. O'DONNELL: I started to read it this morning, and I
10 stopped. I didn't finish the article because I knew I was coming
11 here today.

12 THE COURT: Well, that's good.

13 MS. O'DONNELL: And I have not seen it on tv or heard it
14 on the radio.

15 THE COURT: And you can give us a fair trial - -

16 MS. O'DONNELL: Yes, I can.

17 THE COURT: - - for both sides?

18 MS. O'DONNELL: Yes, sir.

19 MR. AXELROD: After she read - - -

20 THE COURT: Pardon me?

21 MR. AXELROD: After she read what she read, did she form an
22 opinion?

23 MS. O'DONNELL: No.

24 THE COURT: She - - she's already said that to start with.
25 She has not formed an opinion or expressed one. Correct.

1 MS. O'DONNELL: Thank you.

2 THE COURT: Sound like to me - - sound like you really
3 studied some law somewhere.

4 Thank you so much. You're qualified if selected.

5 CLERK OF COURT: 401, Jana Wright.

6 THE COURT: Yes, ma'am?

7 MS. WRIGHT: I have not read or seen anything but my husband
8 mentioned to me this morning that this trial was coming up.

9 THE COURT: Is that all he said?

10 MS. WRIGHT: Yes, sir.

11 THE COURT: You would not have formed or expressed an
12 opinion about this trial?

13 MS. WRIGHT: No, sir.

14 THE COURT: Nobody told you about any of the facts, alleged
15 facts? They're not facts until proven.

16 MS. WRIGHT: No.

17 THE COURT: You're qualified to serve. Thank you.

18 CLERK OF COURT: 222, William Long.

19 THE COURT: Hey, Mr. Long.

20 MR. LONG: Hello.

21 THE COURT: What can I do for you?

22 MR. LONG: Well, I read the article in The Sun News this
23 morning, and I guess from time to time - - the other night at 11:00
24 I saw it on the television but probably half asleep anyway. I did
25 read the article in the paper today.

1 THE COURT: Well, let me ask you this.

2 You've had some involvement with allegations about what the
3 case may or may not be about. Have you previously expressed an
4 opinion to anyone as to your thoughts about the guilt or innocence?

5 MR. LONG: No, sir.

6 THE COURT: And you have not formed such an opinion?

7 MR. LONG: No, sir.

8 THE COURT: Based on the totality of what you've heard or
9 read or seen, can you assure us that if selected you will base your
10 verdict on the law and evidence in this courtroom and from no other
11 source?

12 MR. LONG: Correct.

13 THE COURT: I think that you can. I know that you can.
14 Thank you.

15 CLERK OF COURT: 332, Richard Settle.

16 MR. AXELROD: That's number 332, Madame Clerk?

17 CLERK OF COURT: Yes, that's correct.

18 THE COURT: Yes, sir.

19 MR. SETTLE: I read it in the paper this morning, and I have
20 formed an opinion about it.

21 THE COURT: Alright, sir. I don't - - I don't want to
22 know what it is but you have formed an opinion. You're entitled
23 to that.

24 I would excuse you from this case. Thank you.

25 CLERK OF COURT: 127, Kelly Fowler.

1 THE COURT: Ms. Fowler?

2 MS. FOWLER: I saw it on the news last night and this
3 morning.

4 THE COURT: Have you formed an opinion?

5 MS. FOWLER: Yes, sir.

6 THE COURT: I will excuse you.

7 Thank you.

8 CLERK OF COURT: 315, Nancy Risch.

9 THE COURT: Yes, ma'am?

10 MS. RISCH: I saw it on the news. It also came up at lunch
11 today but I don't have an opinion.

12 THE COURT: So, you have not formed an opinion?

13 MS. RISCH: She has.

14 THE COURT: Were any opinions expressed at lunch today as
15 to the guilt or innocence?

16 MS. RISCH: Ah, yes.

17 THE COURT: Okay.

18 MS. RISCH: I think you excused one of the women I had
19 lunch with.

20 THE COURT: Okay, but that was not your opinion?

21 MS. RISCH: No.

22 MR. AXELROD: I have a question.

23 THE COURT: Okay.

24 MR. AXELROD: If she had lunch with one them who expressed an
25 opinion - - -

1 THE COURT: No, she hasn't said she formed an opinion.

2 MS. RISCH: I said I hoped we weren't chosen for this.

3 MR. AXELROD: That has to be based on something. That's an
4 opinion.

5 THE COURT: Not necessarily.

6 MR. AXELROD: Ask her why she has that opinion.

7 THE COURT: She hasn't - - she hasn't formed - - well.

8 MS. RISCH: I didn't want to be on this just because of the
9 emotional side of the case.

10 THE COURT: I understand that.

11 MS. RISCH: Kind of a gut wrenching case.

12 THE COURT: I understand and I can understand that but you
13 are willing to serve if selected.

14 MS. RISCH: Yes.

15 THE COURT: And are willing to make your decision as to
16 guilt or innocence based on the law and evidence in this case,
17 right?

18 MS. RISCH: Right.

19 THE COURT: Thank you, Ms. Risch. You are competent to
20 perform as a juror.

21 Next.

22 CLERK OF COURT: 187, Elizabeth Dunham.

23 THE COURT: Yes, ma'am?

24 MS. DUNHAM: I had lunch with her.

25 THE COURT: Do what?

1 MS. DUNHAM: The one you excused, I had lunch with her.

2 THE COURT: The other lady?

3 MS. DUNHAM: Yes.

4 THE COURT: Alright.

5 She was having lunch with the other ladies.

6 Then, you have discussed it?

7 MS. DUNHAM: Yes.

8 THE COURT: Alright.

9 In that discussion did you form or express an opinion?

10 MS. DUNHAM: Well - - -

11 THE COURT: Apparently, some did, and that's evident, and
12 I have no problems with that.

13 But you - - you did not express an opinion as to the guilt or
14 innocence?

15 MS. DUNHAM: No.

16 THE COURT: The fact that you may have discussed the issues
17 that you read in the paper does not disqualify you.

18 Let me ask you this.

19 Is there any reason given what you may have read or heard or
20 discussing at lunch time, is there any reason that you feel in
21 fairness to the State or the defendant that you might not be able
22 to give a fair trial? If there's any reason whatsoever, I'll be
23 glad to excuse you.

24 MS. DUNHAM: I'm not sure.

25 THE COURT: I would excuse you.

1 And I appreciate your candor.

2 (The attorneys and the Court discuss Juror #315, Nancy Risch,
3 off the record, and the Court thereafter re-examines that juror.)

4 THE COURT: Who was the one before her?

5 CLERK OF COURT: Number 315.

6 THE COURT: Would Juror #315 come back one more further
7 moment please?

8 CLERK OF COURT: Nancy Risch, please come forward.

9 THE COURT: Your lunch discussion was very - - was very
10 similar to my wife's bridge parties.

11 In this discussion and the other lady kindly told us, and I
12 appreciate it, that she kind of formed an opinion.

13 MS. RISCH: Uh-huh.

14 THE COURT: Now, you indicated that you certainly had not.

15 MS. RISCH: Not as far as guilt or innocence, no.

16 THE COURT: Ma'am? Yes, ma'am.

17 MS. RISCH: But as far as emotional properties, yes.

18 THE COURT: Well, I can understand because we are dealing -
19 - it is the alleged death of a child by abuse, and it's alleged
20 only.

21 MS. RISCH: Right.

22 THE COURT: And it, obviously, has some emotions for all of
23 us who have children or grandchildren or whatever, and I can
24 understand that.

25 But the other lady indicated that in fairness to her based on

1 that even the, maybe, the emotional aspect she had expressed an
2 opinion. You have told me before that you have not.

3 MS. RISCH: Correct.

4 THE COURT: That is fine. I accept.

5 MS. RISCH: Great. Okay.

6 THE COURT: And I - - and I appreciate - - I hate to call
7 you back but I want to be fair to the system.

8 MS. RISCH: I know.

9 THE COURT: Alright. Thank you.

10 Alright. Anybody else?

11 Alright. Other than those that I have talked to, are there
12 anyone else who have read, heard, discussed, seen on the internet,
13 have any - - has any information been conveyed to you by any forum
14 about any alleged issue in this case? If anybody that I have not
15 discussed qualifies under that question, please come forward.

16 As to that issue, you ought to be satisfied.

17 MR. AXELROD: No, I'm not.

18 THE COURT: What's your problem now?

19 MR. AXELROD: I think they've seen too much.

20 I want to make a motion.

21 THE COURT: I'll let you make it, and I'll rule on it.

22 Now, let me ask you this, ladies and gentlemen. Has any
23 member of the jury or close family member been a victim of a
24 violent crime, violent crime, any of you or any members of your
25 immediate family been a victim of a violent crime? If so, please

1 stand and I'll discuss it with you in private up here.

2 Alright. I'd ask that you line up, and we'll talk to you in
3 private.

4 Counsel may join me.

5 Anybody who has already been excused does not have to come, of
6 course.

7 CLERK OF COURT: 117, Johnny Evans.

8 THE COURT: Yes, Johnny.

9 What family member?

10 MR. EVANS: Sister.

11 THE COURT: Sir?

12 MR. EVANS: Sister.

13 THE COURT: Okay.

14 Would that fact - - it's a traumatic effect on you, of course,
15 it's a violent crime. Would that impact on your ability to be a
16 fair juror in this case, the fact that you've been a victim of a
17 violent crime or your family?

18 MR. EVANS: No.

19 THE COURT: Okay. I think not.

20 Okay. That's fine.

21 Next, please.

22 CLERK OF COURT: 354, Deborah Stubbs.

23 THE COURT: Yes, Ms. Stubbs.

24 Ma'am?

25 MS. STUBBS: My aunt was the victim of domestic abuse.

1 THE COURT: Under domestic abuse? That's your aunt?

2 MS. STUBBS: Yes, sir.

3 THE COURT: Would that affect your ability to do this?

4 There is allegations of domestic abuse upon a young baby here.

5 Would the fact that your aunt suffered that same thing impact on
6 your ability here?

7 MS. STUBBS: It may.

8 THE COURT: It may?

9 And what is your name?

10 MS. STUBBS: Deborah Stubbs.

11 THE COURT: I would excuse this juror. Thank you so much.
12 Next, please.

13 CLERK OF COURT: 277, Sandra O'Donnell.

14 MS. O'DONNELL: I had a cousin who is on the Department in
15 Connecticut and killed in the line of duty.

16 THE COURT: Would that impact on your ability to be a fair
17 juror here?

18 MS. O'DONNELL: No. My son is a policeman, too.

19 THE COURT: This is for my information only but I thank
20 you.

21 Next, please.

22 Yes, ma'am.

23 CLERK OF COURT: 392, Sandra Whidden.

24 MS. WHIDDEN: Sandra Whidden.

25 I'm a victim of physical abuse.

1 THE COURT: Would that affect you?

2 MS. WHIDDEN: Yes.

3 THE COURT: I will excuse you.

4 CLERK OF COURT: 392 is excused.

5 THE COURT: Anyone else on that issue?

6 Alright. This would apply, too, but in abundance of
7 precaution, now, is any member of the jury or family member been a
8 victim of criminal domestic violence? And you may have responded
9 in the last inquiry. If so, please stand.

10 For my information only, does any member of this jury or close
11 family belong to some civic organization such as MADD, SADD, CASA
12 or something like that?

13 Nothing wrong with that. I just need to know it.

14 Is any member of this jury or close family work in any type of
15 law enforcement which would include SLED, police, sheriff anywhere
16 or detention center? Anybody have any close connections with
17 anybody in any type of law enforcement? If so, please stand.

18 Good.

19 May I have your name, sir?

20 MR. CARLOUGH: Richard Carlough.

21 THE COURT: Okay, and what is your response?

22 MR. CARLOUGH: Ah, twenty-six years, I was a member of the
23 Essex County Police Department.

24 THE COURT: Member of the police department.

25 MR. CARLOUGH: I was a police officer.

1 THE COURT: Just a general police officer?

2 MR. CARLOUGH: Yes, sir.

3 THE COURT: Okay.

4 Can I have your number?

5 MR. CARLOUGH: 57.

6 THE COURT: This juror, and this is for my information but
7 that certainly does not disqualify you at all but I need - - I need
8 to know it for my records, and I have that, and I thank you for
9 your response.

10 Yes, ma'am. Your name?

11 MS. PEDDYCORD: Evon Peddycord.

12 THE COURT: And your jury number?

13 MS. PEDDYCORD: 292.

14 THE COURT: And your response, please?

15 MS. PEDDYCORD: My husband is a retired police officer.
16 He was a detective.

17 THE COURT: Where?

18 MS. PEDDYCORD: Winston Salem, North Carolina.

19 THE COURT: Winston Salem?

20 And is your husband with them now?

21 MS. PEDDYCORD: No, sir.

22 THE COURT: Would that impact on your ability in this case?

23 MS. PEDDYCORD: No, no, sir.

24 THE COURT: Thank you.

25 Yes, sir. Your name and number?

1 MR. WELLS: John Wells, #389.

2 THE COURT: Yes, sir?

3 MR. WELLS: My brother-in-law is with Rensselaer County in
4 New York in the State of New York in the Sheriff's Department.

5 THE COURT: Would that affect your ability to be a fair
6 juror?

7 MR. WELLS: No, sir.

8 THE COURT: I think not. Thank you.

9 BAILIFF: One more, 117.

10 THE COURT: Yes, sir. I'm sorry. I should have taken you
11 first.

12 MR. EVANS: Brother-in-law, Police Officer, City of Myrtle
13 Beach.

14 THE COURT: And, ah, is that here in Myrtle Beach? What
15 agency brings this charge.

16 MR. VON HERRMANN: Your Honor, it's the Horry County.

17 THE COURT: Horry County.

18 MR. VON HERRMANN: Yes, sir.

19 THE COURT: And your brother-in-law is a police officer?

20 MR. EVANS: Yes, sir.

21 THE COURT: Would that affect your ability to be a fair
22 juror?

23 MR. EVANS: No, sir.

24 THE COURT: I think not.

25 Who else, please?

1 May I have your name and number?

2 MS. LYNCH: Susan Lynch, 225.

3 THE COURT: Yes, ma'am.

4 MS. LYNCH: I was a deputy sheriff in Richmond, Virginia
5 when I was twenty-one and twenty-two just a few years ago.

6 THE COURT: No, it must have been last year.

7 MS. LYNCH: Well, I'm not sure I can remember that.

8 THE COURT: Join the crowd.

9 May I - - may I inquire as to what division you may have been
10 in in that agency?

11 MS. LYNCH: I was the matron at the Richland City Jail, and
12 I worked also paper service, and I did courtroom security.

13 THE COURT: Would that background that occurred very
14 recently affect your ability to be fair and impartial?

15 MS. LYNCH: I don't think so.

16 THE COURT: I think not. We'll be glad to have you if
17 selected.

18 Alright.

19 Yes, sir.

20 MS. JOHNSON: Your Honor, you mentioned does anybody know the
21 mother of the child but I don't think you mentioned who the mother
22 of the child was.

23 THE COURT: I'm sorry. Please stand.

24 MS. JOHNSON: I'm sorry, Your Honor.

25 You mentioned did any of us know the mother of the child that

1 died, and I don't know who the mother is.

2 THE COURT: I'll give - - what's her name, please.

3 MR. VON HERRMANN: The mother's name would be Charlene
4 Dandridge, Your Honor.

5 THE COURT: Who?

6 MR. VON HERRMANN: Charlene Dandridge.

7 MS. JOHNSON: And she's not in the courtroom today?

8 THE COURT: No, ma'am.

9 Charlene Dandridge.

10 Do you know anybody named Charlene Dandridge?

11 MS. JOHNSON: No.

12 THE COURT: May I have your name and number?

13 MS. JOHNSON: I'm Diane Johnson, 189.

14 THE COURT: Thank you.

15 And I thank you for that inquire.

16 Now, is there anyone among you whether you read or something
17 or knowing - - anyone among you knowing the allegations here who
18 are aware or conscious of any bias or prejudice for or against this
19 defendant on trial for these charges?

20 Now, ladies and gentlemen, the State of South Carolina and the
21 defendant as I've indicated desire from your number twelve jurors
22 and two alternates who can say that I'm not biased or prejudiced
23 against anybody including the State that I will not base my verdict
24 on what I may have read, heard or discussed with anybody, a juror
25 who can say that I have not formed or expressed an opinion as to

1 the guilt or innocence of this party. All of these distinguished
2 litigants and the defendant simply desire from your number a jury
3 who can give both the State of South Carolina and this defendant a
4 fair and impartial trial. If there is anyone among you for any
5 reason who can say to me, "I cannot do that," I will gladly excuse
6 you and understand it.

7 So, I ask all of you. For any reason if you feel that you
8 either cannot be fair to the State or the defendant - - let me tell
9 you why I say this. It has nothing to do with this case. I've
10 used this analogy in this courtroom before to jurors. It is so
11 fitting.

12 Some years ago I was trying an individual, a young man, for
13 felony DUI, it having been alleged that while drunk driving he
14 killed a young girl. I asked that question to the entire panel,
15 and a lady got up and said, "Your Honor, I can't be fair to him.
16 My daughter was killed by a drunk driver."

17 In that same panel a gentleman got up, though, and said, "Your
18 Honor, I can't be fair to the State of South Carolina. They tried
19 my son for the identical thing three times until he was found not
20 guilty."

21 And so whether we like it or not in our experiences in life we
22 develop biases and prejudices.

23 As an example, I've had jurors say, "Judge, I can't be fair to
24 the State of South Carolina. I don't like law enforcement."

25 And, ah, and I understand that.

1 But, so I ask you in the context of what I said, do any of you
2 have or developed - - and we all develop prejudices whether we want
3 to or not - - but in that context, do any of you have such biases
4 or prejudices that you feel for any reason that you can, if
5 selected, you cannot be fair to the State of South Carolina and
6 fair to this defendant. If so, please stand and I'll excuse you
7 from this trial. I've got seventy-five of you.

8 Alright, sir. Come forward, please. Come forward,
9 gentleman.

10 May I have the jury number?

11 CLERK OF COURT: 57, Richard Carlough.

12 MR. CARLOUGH: I've been involved in investigations.

13 THE COURT: I will - - I will excuse you. He has been
14 involved in investigations.

15 I will excuse that juror from this trial, and I - - I thank
16 you for that.

17 Now, alright, from the - - first, one further inquiry.

18 The State of South Carolina is represented by the Solicitor's
19 Office. I would that both of you identify yourselves individually.

20 MR. VON HERRMANN: Thank you, Your Honor.

21 My name is Bert Von Herrmann. I'm an Assistant Solicitor here
22 in Horry County.

23 MR. GRAVES: My name is Stanford Graves. I'm also an
24 Assistant Solicitor here in Horry County.

25 THE COURT: Any of you related by blood or connected by

1 marriage with these folks? Do any of you - have any of you had any
2 dealings such as a witness, a victim or whatever with the
3 Solicitor's Office within the last year or so? If so, please
4 stand.

5 Alright. For the defense, I'll ask that each one of you
6 starting with Mr. Axelrod introduce himself.

7 MR. AXELROD: I'm Stuart Axelrod. I have a practice at 604
8 Myrtle Beach, downtown Myrtle Beach. In my firm is Mr. Joshua
9 Bailey. Also in my firm is Lisa Carver and Christopher Castro.

10 THE COURT: Are any of you clients of this law firm or this
11 gentleman or have you been in the immediate past? If so, please
12 stand.

13 Okay.

14 Mr. Taylor.

15 MR. TAYLOR: Thank you, Your Honor.

16 I'm Paul Taylor. I'm in private practice, sole practitioner,
17 and I'm on 4th Avenue right here in Conway.

18 THE COURT: Okay.

19 Any of you clients of this gentleman or have you been in the
20 immediate past?

21 Okay.

22 Alright. Any other inquiry on behalf of the State?

23 MR. VON HERRMANN: None from the State, Your Honor.

24 THE COURT: From the defendant?

25 MR. AXELROD: No, sir, Your Honor, not at this time.

1 THE COURT: Alright, sir.

2 Sometimes things happen in cases, so I want them to call in -
3 all of the panel to call in after 6:00 tomorrow night.

4 Let them - - I understand they're waiting to select some other
5 juries. Send them down, please.

6 CLERK OF COURT: When I call your name, if you'll please go
7 back down stairs to the jury pool room. These are the ones that
8 were excused on this case.

9 384, Richard Watson, will a Deputy please escort them down?
10 Is there a Deputy somewhere?

11 33, Virginia Boam; 157, Doris Halliday; 332, Richard Settle;
12 107, Elizabeth Dunham; 354, Deborah Stubbs; 392, Sandra Whidden;
13 57, Richard Carlough, and that is all I have, Your Honor.

14 127, were you excused?

15 JUROR: Yes.

16 CLERK OF COURT: I could have been getting the list at that
17 time. I apologize.

18 127, Kelly Fowler.

19 Thank you.

20 THE COURT: Anyone else, Mrs. McCall?

21 COURT REPORTER: None, Your Honor.

22 THE COURT: Thank you for an excellent job.

23 CLERK OF COURT: You're welcome.

24 THE COURT: Alright. Let's proceed with the selection now.

25 MR. AXELROD: May we approach, Your Honor?

1 THE COURT: Yes, sir.

2 (Bench conference off the record and in the presence of the
3 jury panel but outside the hearing of the jury panel.)

4 MR. AXELROD: Thank you, Your Honor.

5 THE COURT: Linda, I want to get on the record with this.

6 (The Court places conversation on the record but outside the
7 hearing of the jury panel.)

8 THE COURT: While the statute relative to strikes is
9 unclear in a case of this kind, it does not specifically mention
10 death by child abuse as a basis for ten strikes, the penalty if
11 convicted could be life imprisonment - - murder, the same thing as
12 murder. Because of this I'm going to give the State ten strikes.

13 Pardon me - - I mean the defendant ten strikes, five and ten
14 but I have told them I will allow the defendant ten strikes though
15 the statute is ambiguous to that.

16 (The Court continues on the record and in the hearing of the
17 entire courtroom.)

18 JURY SELECTION

19 THE COURT: Alright, ah, the Strikes will be five for the
20 State of South Carolina, ten for the defense, and we will be
21 selecting two alternates, and the Rule provides that the strikes
22 will be one and two as to each alternate separately, and in this
23 case I want two alternates.

24 Alright, Madame Clerk?

25 CLERK OF COURT: Yes, sir?

1 THE COURT: We've already had the draw, and do you provide
2 - - did you provide me a list, too?

3 CLERK OF COURT: I gave you one earlier.

4 THE COURT: Alright.

5 Please call it.

6 CLERK OF COURT: 251, Frederick Miles.

7 Please come forward when I call your name.

8 I need for you to stand. Turn around and face the back.

9 What says the State?

10 MR. VON HERRMANN: Please present the juror.

11 CLERK OF COURT: The defense?

12 MR. AXELROD: Please swear the juror.

13 CLERK OF COURT: Please step right here with the Deputy,
14 please.

15 238, Richard Maze.

16 What says the State?

17 MR. VON HERRMANN: Please present the juror.

18 CLERK OF COURT: The defense?

19 MR. AXELROD: Please excuse this juror from the trial of this
20 case.

21 CLERK OF COURT: You're excused on this case. Please have
22 a seat.

23 187, Rebecca Jefferson.

24 What says the State?

25 MR. VON HERRMANN: Please present the juror.

1 CLERK OF COURT: The defense?

2 MR. AXELROD: Madame Clerk, is that number 187?

3 CLERK OF COURT: That's correct.

4 MR. AXELROD: Please swear Ms. Jefferson.

5 CLERK OF COURT: 371, Betty Tyler.

6 MR. AXELROD: Madame Clerk, that number, please?

7 CLERK OF COURT: 371.

8 What says the State?

9 MR. VON HERRMANN: Please present the juror.

10 CLERK OF COURT: The defense?

11 MR. AXELROD: Please excuse the juror.

12 CLERK OF COURT: You're excused on this case.

13 117, Johnny Evans.

14 What says the State?

15 MR. VON HERRMANN: Court's indulgence one second, please.

16 Please present the juror.

17 CLERK OF COURT: The defense?

18 MR. AXELROD: Please swear Mr. Evans.

19 CLERK OF COURT: Please step to the back there.

20 222, William Long.

21 What says the State?

22 MR. VON HERRMANN: Please present the juror.

23 CLERK OF COURT: The defense?

24 MR. AXELROD: Please excuse Mr. Long from the trial of this
25 case.

1 CLERK OF COURT: You're excused on this case.

2 204, Stephen Kovacs.

3 What says the State?

4 MR. VON HERRMANN: Please present the juror.

5 CLERK OF COURT: The defense?

6 MR. AXELROD: Please swear Mr. Kovacs.

7 CLERK OF COURT: Step to the back, please.

8 391, Alex West.

9 What says the State?

10 MR. VON HERRMANN: Please excuse the juror from the trial of
11 this case.

12 CLERK OF COURT: You're excused on this case.

13 189, Diane Johnson.

14 What says the State?

15 MR. VON HERRMANN: Please excuse the juror from the trial of
16 this case.

17 CLERK OF COURT: You're excused on this case.

18 29, Stephen Bishop.

19 What says the State?

20 MR. VON HERRMANN: Please present the juror.

21 CLERK OF COURT: The defense?

22 MR. AXELROD: Swear Mr. Bishop.

23 CLERK OF COURT: Please step to the back.

24 229, Karen Mannion.

25 What says the State?

1 MR. VON HERRMANN: Please present the juror.

2 CLERK OF COURT: The defense?

3 MR. AXELROD: Your Honor, may we approach one second?

4 THE COURT: Yes, sir.

5 (Bench conference held off the record in the presence of the
6 jury but outside the hearing of the jury panel.)

7 THE COURT: Ma'am, may I ask you a question?

8 MS. MANNION: sure.

9 THE COURT: Are you involved in anyway with the Guardian ad
10 Litem program?

11 MS. MANNION: No.

12 THE COURT: Alright. That's fine. Thank you.

13 MR. AXELROD: Please swear the juror.

14 CLERK OF COURT: Please step to the back.

15 389, John wells.

16 What says the State?

17 MR. VON HERRMANN: Please present the juror.

18 CLERK OF COURT: The defense?

19 MR. AXELROD: Excuse the juror.

20 CLERK OF COURT: You're excused on this case.

21 250, Lucius Messervy.

22 What says the State?

23 MR. VON HERRMANN: Please excuse the juror.

24 CLERK OF COURT: You're excused on this case.

25 28, Melani Biggerstaff.

1 What says the State?

2 MR. VON HERRMANN: Please present the juror.

3 CLERK OF COURT: The defense?

4 MR. AXELROD: Please excuse Ms. Biggerstaff from the trial of
5 this case.

6 CLERK OF COURT: You're excused on this case.

7 64, Stacey Harris.

8 What says the State?

9 MR. VON HERRMANN: Please present the juror.

10 CLERK OF COURT: The defense?

11 MR. AXELROD: Please excuse Ms. Harris.

12 CLERK OF COURT: You're excused on this case.

13 256, Anne Mitchell.

14 What says the State?

15 MR. VON HERRMANN: Please present the juror.

16 CLERK OF COURT: The defense?

17 MR. AXELROD: Please excuse Ms. Mitchell from the trial of
18 this case.

19 CLERK OF COURT: You're excused on this case.

20 367, Timmy Todd.

21 What says the State?

22 MR. VON HERRMANN: Please present the juror.

23 CLERK OF COURT: The defense?

24 MR. AXELROD: Madame Clerk, is this number 367?

25 CLERK OF COURT: That is correct.

1 MR. AXELROD: Please swear Mr. Todd.

2 CLERK OF COURT: Please step back there.

3 401, Jana Wright.

4 What says the State?

5 MR. VON HERRMANN: Please present the juror.

6 CLERK OF COURT: The defense?

7 MR. AXELROD: Please swear Ms. Wright.

8 CLERK OF COURT: Please step to the back.

9 277, Sandra O'Donnell.

10 What says the State?

11 MR. VON HERRMANN: Please present the juror.

12 CLERK OF COURT: The defense?

13 MR. AXELROD: Please excuse the juror.

14 CLERK OF COURT: You're excused from this case.

15 226, Thomas Lynch.

16 What says the State?

17 MR. VON HERRMANN: Please present the juror.

18 CLERK OF COURT: The defense?

19 MR. AXELROD: Swear the juror.

20 CLERK OF COURT: Please have a - - please step to the back.

21 I want to say, "Please have a seat in the jury box," and I
22 can't do it.

23 97, Bryan Dodson.

24 What says the State?

25 MR. VON HERRMANN: Please excuse the juror from the trial of

1 this case.

2 CLERK OF COURT: You're excused on this case.

3 88, Alan Cygan.

4 What says the State?

5 MR. VON HERRMANN: Please present the juror.

6 CLERK OF COURT: The defense?

7 MR. AXELROD: Please swear the juror.

8 CLERK OF COURT: Please step to the back.

9 24, Michelle Beard.

10 What says the State?

11 MR. VON HERRMANN: Please present the juror.

12 CLERK OF COURT: The defense?

13 MR. AXELROD: Please excuse Ms. Beard.

14 CLERK OF COURT: You're excused on this case.

15 321, William Rowell.

16 What says the State?

17 MR. VON HERRMANN: Please present the juror.

18 CLERK OF COURT: The defense?

19 MR. AXELROD: Swear the juror.

20 CLERK OF COURT: Please step to the back.

21 THE COURT: What is this juror's name?

22 CLERK OF COURT: William Rowell.

23 THE COURT: Mr. Rowell, I'm going to designate you as the
24 Foreperson of this juror.

25 MR. ROWELL: I thank you.

1 THE COURT: Thank you for volunteering.

2 CLERK OF COURT: 120, Angela Ferrebea.

3 What says the State?

4 MR. VON HERRMANN: Please present the juror.

5 CLERK OF COURT: The defense?

6 MR. AXELROD: Your Honor, may I inquire how many jurors we've
7 selected?

8 THE COURT: Sir?

9 CLERK OF COURT: Eleven. Eleven.

10 MR. AXELROD: Please excuse the juror.

11 CLERK OF COURT: You're excused on this trial.

12 89, Stacy Darroch.

13 What says the State?

14 MR. VON HERRMANN: Please present the juror.

15 CLERK OF COURT: The defense?

16 MR. AXELROD: Swear the juror.

17 CLERK OF COURT: Please step to the back.

18 THE COURT: That will constitute the twelve jurors, and
19 I've previously selected the Foreperson.

20 Now, we're going to have the selection of two alternates. The
21 strikes are one and two.

22 MR. VON HERRMANN: Thank you, Your Honor.

23 THE COURT: As to each separate party.

24 CLERK OF COURT: I do not have a number on my sheet for
25 Myra Brown. 409.

1 409, Myra Brown.

2 What says the State?

3 MR. VON HERRMANN: Please excuse the juror in the trial of
4 this particular case.

5 CLERK OF COURT: You're excused from this case.

6 326, Francesca Schaeffer.

7 What says the State?

8 MR. VON HERRMANN: Please present the juror.

9 CLERK OF COURT: The defense?

10 MR. AXELROD: Swear the juror.

11 CLERK OF COURT: Please step to the back.

12 THE COURT: That will be the first alternate. Now, the
13 next alternate.

14 CLERK OF COURT: 42, Linda Brooks.

15 What says the State?

16 MR. VON HERRMANN: Please present the juror.

17 CLERK OF COURT: The defense?

18 MR. AXELROD: Please excuse the juror.

19 CLERK OF COURT: You're excused on this case.

20 43, Pamela Brooks.

21 What says the State?

22 MR. VON HERRMANN: Please present the juror.

23 CLERK OF COURT: The defense?

24 MR. AXELROD: Please excuse the juror.

25 CLERK OF COURT: You're excused on this case.

1 93, Ernest Derrick.

2 What says the State?

3 MR. VON HERRMANN: Please present the juror.

4 CLERK OF COURT: The defense?

5 MR. AXELROD: Swear Mr. Derrick.

6 CLERK OF COURT: Please step to the back.

7 THE COURT: Alright.

8 First, for the State, is there any Batson issues here to be
9 concerned with?

10 MR. VON HERRMANN: No, Your Honor.

11 THE COURT: How about from the defense?

12 MR. AXELROD: No, sir, Your Honor.

13 THE COURT: Alright, sir.

14 I'll hear any other motions regarding the jury but I can now -
15 - you want to send this jury back to the panel?

16 CLERK OF COURT: To the jury pool room, yes, sir.

17 THE COURT: Alright. I don't know what the other panel is
18 going to be doing but my instructions I want them unless selected
19 to call in after 6:00 tomorrow.

20 CLERK OF COURT: Yes, sir.

21 THE COURT: Alright.

22 You may - - now, ladies and gentlemen, before you go, let me
23 express to you my appreciation for your patience here and for your
24 good attitude. It's been a joy working with all of you, and I
25 thank you for that.

1 Please follow the instructions of Ms. Melani here for me.

2 Thank you.

3 Melani, tell them what you want them to do.

4 CLERK OF COURT: Will you please go back to the jury pool
5 room. I have to check with the other judges because we may select
6 another jury today or because of the hour, we may not but if you'll
7 all please return to the jury pool room, I'll be back there
8 shortly.

9 Thank you.

10 (The remaining jury panel is released to return to the jury
11 pool room for further instructions.)

12 MOTIONS AND RULING OF THE COURT

13 THE COURT: Alright. The record will reflect that the jury
14 and two alternates are in the jury room, remain unsworn at this
15 moment.

16 I understand you had some other motions concerning the jury,
17 Mr. Axelrod?

18 MR. AXELROD: Yes, sir, Your Honor.

19 Your Honor, I've - - I have great concerns about the jury
20 selection concerning the make-up of the jury.

21 Court's indulgence one second, Your Honor.

22 MR. VON HERRMANN: Your Honor, while Mr. Axelrod is doing
23 that, may I release my witnesses.

24 THE COURT: Sir?

25 MR. VON HERRMANN: I've got witnesses waiting here.

1 THE COURT: No. The only thing we're going to do this
2 afternoon is have opening statements.

3 MR. VON HERRMANN: Let me go ahead and release them.

4 THE COURT: Go ahead. Let's see what his concerns are.

5 Bert, you may want to reply to whatever he says. I don't know
6 what his concerns are. I don't know what his position is.

7 MR. AXELROD: Your Honor, thirty-six people in the jury pool
8 had either read in the newspaper, heard on the tv, radio, internet,
9 at lunch - - -

10 THE COURT: How many - - how many on this jury have read or
11 heard something about it?

12 MR. AXELROD: Your Honor.

13 THE COURT: It makes no difference. What's your position
14 on that issue?

15 MR. AXELROD: Well, there are people who have read stuff. My
16 position is that - - and - - and - - and I understand the Court is
17 limited by the parameters of this courtroom but I think that the
18 questioning of the jury, "Have you formed an opinion?" and they
19 say, "No." And then you have a juror come up later and say, "Yes,
20 I have formed an opinion."

21 It's forming an opinion that everyone else heard that these
22 people read this and have an opinion, I think it puts - - -

23 THE COURT: They didn't say what their opinion was. It
24 could have been guilt or innocence.

25 MR. AXELROD: I understand. I think the jury pool is tainted

1 by the fact that they were able to hear the conversations from the
2 Bench. Now, I understand the Clerk of Court's no fault for that
3 but I had asked in my voir dire for the questions to be asked
4 outside their presence because what we have here is people. We
5 had someone come up later and say, I think, "Well, I did read it,
6 and I do think I have an opinion."

7 THE COURT: And I discharged them.

8 Now, let me say this real quick to save a lot of time here.

9 I very carefully asked anybody who had read, heard or knew
10 anything about it to come forward. Without exception to those who
11 I permitted to be examined for further qualification, each one has
12 said, "I may have read something about it, heard something about
13 it."

14 Some of them said, "I don't remember what I heard."

15 Without exception, each one of them said they would not be
16 influenced in any way whatsoever by what they read. Without
17 equivocation everyone of them said they had not formed or expressed
18 an opinion, and I accept that.

19 And then I finally wound up by saying that if anybody for any
20 reason have any reason to believe that they cannot give both the
21 State and the defendant a fair trial, I would excuse you, and
22 nobody else responded.

23 Now, I am not going to dismiss this jury on the basis if some
24 of them may have read some abstract statement by the press.

25 MR. AXELROD: Your Honor, and I want to put in the record

1 that the abstract thing.

2 The Solicitor Von Herrmann is quoted as saying that Wesley can
3 receive from twenty years to life imprisonment if found guilty but
4 then, also, it says that during a mental evaluation Wesley told his
5 physician he gave pseudoephedrine to the child.

6 THE COURT: That statement is not going to be issued - - is
7 not going to be a part of this trial. Isn't that true?

8 MR. VON HERRMANN: Your Honor, neither one of those - - and
9 the second one is not attributed to me. The only thing that I was
10 inquired from the press, that would be for homicide by child abuse.
11 That wasn't even directed towards him.

12 THE COURT: The rest of the article is not prejudicial.
13 It's just what he's charged with.

14 MR. AXELROD: Well, what I'm saying. On the front page above
15 the fold I think - - what I think is prejudicial is the fact is he
16 gave pseudoephedrine to his daughter but didn't know the proper use
17 of the medicine according to court records. Now, if the Solicitor
18 says it's not coming into the case, I'm asking - - I'm asking how
19 they got the court record of something that doesn't exist if not
20 from the Solicitor. I don't understand where that would come from.
21 It says the court and court records that he gave this kid some
22 cough medicine.

23 MR. VON HERRMANN: I have actually no idea where they got it
24 from. I would imagine - - -

25 THE COURT: It makes no difference.

1 Put that document as a Court's Exhibit in the court records.

2 I would conclude that the document if read by anybody is not
3 prejudicial because it affects only those issues with which he is
4 charged.

5 With reference to the alleged statements he's given, the
6 Solicitor says that's not going to be a part of this trial anyway.

7 And anyway if they believe it, it's self-serving because he
8 said he didn't mean to do it.

9 (Court Reporter accepts article as Court's Exhibit #2.)

10 MR. AXELROD: I understand that, Your Honor.

11 MR. VON HERRMANN: I just want to make the record clear, Your
12 Honor.

13 The statement of him saying that he gave it to law - - the
14 statement he gave to law enforcement, "I gave the pseudoephedrine,"
15 is not coming into evidence.

16 He did make those statements to other people.

17 THE COURT: I understand but the statement that he talked
18 about.

19 MR. VON HERRMANN: Yes, sir, and I certainly did not release
20 it to the media in any event.

21 THE COURT: Well, it's not prejudicial anyway because it's
22 self-serving that he didn't do anything illegal.

23 But I'm satisfied and comfortable beyond a reasonable doubt
24 that they've got a juror who can say and all of them have said that
25 they can give him a fair trial, have not formed or expressed an

1 opinion.

2 Our courts have said in a plethora of cases the fact that
3 somebody read something or heard something does not disqualify
4 them.

5 MR. AXELROD: Your Honor - - -

6 THE COURT: I very carefully anybody that even equivocated,
7 I dismissed them as you well know. So, I'm comfortable with that.

8 What else you got? Ain't going argue with - - I'm not going
9 to argue with you about that position. I've made up my mind.

10 MR. AXELROD: And I'm not arguing with you.

11 THE COURT: Okay.

12 What's your next position.

13 MR. AXELROD: What I would like to say is that I respectfully
14 take exception to it.

15 THE COURT: I understand.

16 MR. AXELROD: I want to preserve the record and ask for a
17 change of venue.

18 THE COURT: You are - - your record is - - you are
19 protected on the record. I conclude that there is absolutely no
20 basis to give a change of venue. Conclude that this defendant and
21 the State can get a fair trial here in Horry County, and the record
22 will speak for itself as to that issue.

23 Anything further.

24 MR. AXELROD: Court's indulgence, Your Honor.

25 THE COURT: Yes, sir. Anything further?

1 MR. AXELROD: No, sir, Your Honor.

2 THE COURT: Alright, sir.

3 MR. AXELROD: Can we take a short break, Your Honor?

4 THE COURT: Yes, sir. We'll take a short break. I'm going
5 to bring the jury out. They are unsworn at this time.

6 We'll have opening statements only and stop for the day to
7 give you a chance - - everybody to get ready for trial in the
8 morning at 9:30.

9 MR. AXELROD: Are we going to break now or - - -

10 THE COURT: No, sir. We're going to have opening
11 statements.

12 MR. AXELROD: We need to take a little bathroom break now.

13 THE COURT: Yes, sir.

14 MR. AXELROD: That's all I mentioned.

15 THE COURT: Alright, sir.

16 (The Court recesses for a short break and thereafter
17 reconvenes the trial of this case.)

18 THE COURT: Pardon me?

19 Alright. We got a motion here from DHEC. Come forward.

20 We're on the record, now.

21 Ma'am?

22 MR. AXELROD: Your Honor, may my client come back.

23 THE COURT: Yes. Bring him back.

24 Alright. The defendant is present.

25 What's your position, Ms. Moore, and good to see you.

1 MS. MOORE: Thank you, Your Honor.

2 For the record I'm Celeste Moore, Attorney for the South
3 Carolina Department of Social Services in Columbia, and, Your
4 Honor, the reason I'm before the Court is, ah, last week I was
5 contacted by the former DSS - - Horry County DSS Attorney Mrs.
6 Barbara Blain-Olds, and she received a subpoena from the defense to
7 be here beginning on Wednesday, I believe, and Mrs. Olds was
8 concerned because she had a conversation with Mr. Axelrod, and in
9 her conversation she was led to believe that during her testimony
10 Mr. Axelrod would attempt to obtain testimony regarding her
11 conversations with the DSS Staff in the DSS case against Mr. Smith.

12 THE COURT: While she was representing this defendant?

13 MS. MOORE: No, while she was representing the Department
14 of Social Services. She was formerly a DSS attorney.

15 THE COURT: I understand.

16 MS. MOORE: And so he had subpoenaed her to testify
17 regarding her communications with the DSS Staff in the case that
18 they - - with Mr. Smith here.

19 THE COURT: For what purpose?

20 MR. AXELROD: May I be heard?

21 THE COURT: Sure.

22 MR. AXELROD: Your Honor, what I - - to be quite candid, I
23 believe - - I'm not asking Barbara Blain-Olds to testify to any
24 conversation she had with any workers of DSS because that's
25 privileged but I believe I'm entitled to ask Mrs. Olds about an

1 opinion that she might have formed herself concerning certain
2 issues in this case.

3 THE COURT: No, sir. That's a legal opinion. I'm not
4 interested in her legal opinion.

5 MR. AXELROD: A factual opinion. She was part - - she was
6 part of - - she had a conversation with DSS and - - -

7 THE COURT: The jury is the finders of the facts in this
8 case, not Mrs. Olds.

9 MR. AXELROD: I know but she could present an opinion of what
10 she felt the facts to be at the time.

11 THE COURT: Not in this world I'm not going to permit it.

12 MR. AXELROD: Yes, sir.

13 THE COURT: If that's all you got, I would not permit her
14 to testify to the jury what she felt - - what she found the facts
15 to be.

16 She can say what she did or if she was involved in anyway in
17 what's an issue in this case but under no circumstances would I
18 permit a lawyer, particularly one who at one time represented the
19 defendant as Public Defender to give a factual opinion as to her
20 opinion of what the facts.

21 MR. AXELROD: Well, she never represented Wesley as a Public
22 Defender.

23 THE COURT: Well, I heard that she did.

24 MS. MOORE: No, sir. She represented DSS.

25 THE COURT: Well, I understand.

1 MS. MOORE: In the DSS case.

2 THE COURT: Under any circumstances, her opinion as to what
3 the facts suggest legally is not admissible.

4 Now, if you got some expert medical doctors, I will accept
5 their opinion but I will not accept a lawyer's opinion.

6 You want to tell me what her opinion would have been, what she
7 would have testified to?

8 MR. AXELROD: Well, going back to the femur because her
9 knowledge really was not pertinent to the ribs. Her knowledge was
10 concerning the femur, and based on her knowledge of the
11 investigation that was brought to her she felt that it didn't
12 warrant further charging Wesley. She felt he wasn't guilty of the
13 crime

14 THE COURT: I would not permit that. I will permit you if
15 it's pertinent to show that DSS let the child come back for
16 whatever that may be worth but I'm not going to let her give her
17 opinion - - let her have her opinion.

18 MR. AXELROD: And we might put her up for that purpose.

19 THE COURT: No, sir.

20 Well, I would respectfully deny that.

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

22 THE COURT: A legal opinion by somebody who is involved
23 with one of the participants is not admissible to the jury because
24 it's their decision that is pertinent.

25 MR. AXELROD: Well, and - - -

1 THE COURT: She would be testifying as to her legal opinion
2 on a crucial issue in the case, the ultimate issue.

3 MR. AXELROD: Well, if - - if she was the reason for why the
4 child went back to the family, would she be able to be queried as
5 to why she did give the child back?

6 THE COURT: Not if it involves - - no, sir, that's not
7 necessary. I'm not going to permit a legal opinion.

8 What you say, Bert?

9 MR. VON HERRMANN: Your Honor, just from the State's
10 position, he's going through this for a number of DSS workers, not
11 just the attorney, and it's the State's position that any
12 individual opinion of any of these workers was - - is not relevant
13 to whether or not - - the Judge was returned - - the child was
14 returned to Mr. and Mrs. - - or Ms. Dandridge and Mr. Smith based
15 on a court order, not based on the opinion of DSS, and I don't want
16 them - - -

17 THE COURT: No, I'm not going to let that have an opinion
18 about that.

19 That's for the jury based only.

20 I'll permit the testimony that DSS took the child and
21 subsequently gave the child back.

22 MR. VON HERRMANN: I don't have an objection to that, Your
23 Honor.

24 THE COURT: Well, that - - that's what happened but I'm not
25 going to listen to any opinions.

1 I sustain your motion, Ms. Moore.

2 MS. MOORE: Thank you, Your Honor.

3 THE COURT: But I would suggest, though, that DSS have an
4 attorney present in case some issue - - something else comes up.

5 MS. MOORE: Your Honor, we will have someone present. I
6 won't be here. I'll be out of town for the remainder of the week.

7 But I also want to put on the record that not only would that
8 apply to Blain-Olds conversations but any other DSS Staff or former
9 DSS Staff who testify as he attempts to - - attempts to elicit any
10 conversation or what did you tell the lawyer or what did you tell -
11 - -

12 MR. AXELROD: I wouldn't do that, Your Honor.

13 MS. MOORE: Okay.

14 MR. AXELROD: Actually, that's privileged.

15 MS. MOORE: Okay.

16 We just wanted to make sure of that, Your Honor, and, of
17 course, we would have an attorney here present, and we just didn't
18 want a strange attorney jumping up in your courtroom.

19 THE COURT: If they've got some medical testimony that in
20 his opinion that it did not rise to child abuse, I'll accept a
21 medical doctor's opinion. I will do that but I'm not going to
22 accept a legal opinion.

23 MS. MOORE: Alright.

24 Thank you very much, Your Honor.

25 THE COURT: Alright.

1 Let's have a - I assume that we'll - - we're going to have
2 short opening statements or we going to have lengthy opening
3 statements.

4 MR. AXELROD: It might be somewhat lengthy, Your Honor. I
5 mean, this is a long, serious case.

6 THE COURT: Well, you understand, now, that I'll give you
7 all the time you need at the conclusion.

8 MR. AXELROD: So - - well, there's that theory that says you
9 win it or lose it in your opening.

10 THE COURT: Well, I don't necessarily agree with that
11 theory.

12 MR. AXELROD: I do.

13 THE COURT: We're going to have opening statements here,
14 and they're going to be limited under the Rules, and we're not
15 going to have any long argument to the jury at this time.

16 I want the record to reflect that I'll give you all the
17 reasonable time you need to explain any theory you have at the
18 conclusion but the purposes of opening statement is to give the
19 jury some guideline as to what you propose to prove.

20 Bring the jury in.

21 STIPULATION AS TO WITNESSES

22 MR. VON HERRMANN: Your Honor, one second before you bring
23 them.

24 One other thing, Your Honor, that we did want to put on the
25 record, and I apologize.

1 Mr. Axelrod has been more than gracious about this, and I want
2 it on the record to be clear.

3 We are flying in - - -

4 THE COURT: I want it on the record that Axelrod was
5 gracious.

6 MR. VON HERRMANN: I've got to say. He was easy to get along
7 with about this.

8 THE COURT: I want that on the record.

9 Go ahead. What's the point now? Excuse me.

10 MR. VON HERRMANN: We are obviously flying in a number of
11 experts from the East Coast from Philadelphia as well as the West
12 Coast, and we actually have one of our doctors right now that's
13 stuck in Denmark of all places.

14 A lot of these witnesses are - - -

15 THE COURT: Denmark where?

16 MR. VON HERRMANN: The country of.

17 THE COURT: If he was in Denmark, South Carolina, I could
18 help you.

19 MR. VON HERRMANN: Yes, sir.

20 But he is planning on being here. We're planning on tomorrow.

21 However, not all of the witnesses that are flying in from
22 California and from Philadelphia are chain witnesses. Mr. Axelrod
23 has agreed that in the event because of the NDA crisis and all the
24 airline problems, we expect them to be in here first thing
25 Wednesday morning but he's allowing us to put up all of the experts

1 out-of-order without that chain being completed, and the agreement
2 is if the Court's willing to accept the stipulation that in the
3 event something happens really bad and we're not able to fly those
4 folks in that the remedy to the defense in this case would be a
5 mistrial, and we would have to do it at a later time.

6 Our failure to complete the chain because we don't have those
7 people readily available would not be terminal to our case.

8 THE COURT: Well, I would determine after you put in
9 whatever you put in whether it rise to the level of mistrial or
10 not. That would be my decision.

11 MR. VON HERRMANN: Right, yes, sir, Your Honor.

12 THE COURT: But that would - - under your understanding,
13 that would be the limit of - - would be a mistrial.

14 MR. AXELROD: Your Honor, in - - it was our discussion in our
15 agreement because it's concerning blood and it's a fungible item
16 that - - that he would have to protect that chain, and we're both
17 in agreement. As he said, I was gracious. I'm not trying to
18 impede the trial.

19 THE COURT: I'm going with what you - - I'm going to agree
20 with it.

21 Now, in the same token, if we need to work with the defense to
22 get some of your witnesses out of order, we'll do the same thing.

23 MR. AXELROD: And - - and - - and for the record, I'd like to
24 put on there that Mr. Von Herrmann has been quite easy to work with
25 on this case, and it's been something that we - - he's handed all

1 the material over. We've - - -

2 THE COURT: Okay. I understand the airline strike but I
3 would think we would get him here someday.

4 MR. VON HERRMANN: I don't think we will have any problem,
5 Your Honor.

6 The only other thing is Mr. Axelrod, we've agreed not to make
7 him bring in even though he might have chosen to on some of them
8 any evidence custodians that - - any records that we both possess
9 are admissible as copies.

10 THE COURT: Okay. The gist of this whole matter is that
11 assuming I have to mistry it, he will not raise the issue of
12 prosecutorial misconduct.

13 MR. VON HERRMANN: Yes, sir.

14 And the copies are admissible as originals subject all the
15 other standards.

16 THE COURT: Yes, sir. I understand.

17 MR. AXELROD: And to further clarify that, Your Honor, Mr.
18 Von Herrmann called me I believe two or three days ago. We've
19 talked almost every day, and he's always on vacation or I'm working
20 or something but he has one piece of paper that he wanted to bring
21 from the Conway Hospital, I believe, and he's bringing it in. He's
22 going to bring it in through the doctor, and I wasn't opposed to
23 making him bring a custodian down.

24 THE COURT: Okay.

25 Alright. Follow the Rule as to opening statement, now, which

1 is you don't go into your whole case. You just give a kind of a
2 guidelines to help the jury to follow you as to what your case is
3 about.

MOTION AND RULING OF THE COURT

4
5 MR. AXELROD: Yes, sir.

6 For clarification, Your Honor, if the State goes that way, I
7 would think that I'd be allowed to go that way also but also I have
8 an issue to bring up to the Court prior to the opening statement.

9 THE COURT: What is that?

10 MR. AXELROD: We made a motion to suppress the femur, and it
11 was denied.

12 THE COURT: Suppress what?

13 MR. AXELROD: The femur.

14 THE COURT: You mean the evidence of the femur.

15 MR. AXELROD: Right, the evidence of the femur.

16 THE COURT: Yes.

17 MR. AXELROD: I don't know if Mr. Von Herrmann - - I don't
18 know if Mr. Graves is going to do the opening. If Mr. Graves is
19 going to go into the issue of the femur in the opening. In regards
20 I want to object at that point to preserve my record.

21 THE COURT: No, you preserve it now. I'm telling you. I
22 don't want an objection - - I'll perceive that you've made that
23 objection. You would make it as and if he was making it during the
24 time.

25 I can tell you that that's coming up during his opening

1 statement. Sure it is.

2 MR. AXELROD: And - and I want to make sure that I'm - - I'm
3 protected fully on the record that you've advised me that you want
4 me to make that motion now which I have made, and at the end of the
5 opening statement I would ask you to once again protect that
6 record.

7 THE COURT: I will do that outside the presence of the
8 jury. That's fine.

9 MR. AXELROD: I didn't want it to be - - I didn't want to
10 object to the Solicitor just, you know, if he says something wrong
11 I'll object but if he for the femur - - -

12 THE COURT: Well, obviously, he's entitled - - that's a
13 part of his case to show whether it's true or not to show a
14 continuing effort of child abuse. I mean, that's a part of his
15 case.

16 MR. AXELROD: And I think that if they're allowed to go fully
17 into the case in the opening, then I'll have some discretion and
18 I'll go that way, too.

19 THE COURT: Well, I'm not going to let him go into it as
20 the basis for his allegations. He's just going to say that we can
21 show that, that that occurred, and you don't deny that it occurred.

22 But I'll deal with it as appropriate.

23 Bring the jury in, please.

24 Counsel, I would ask now that you - - I mean, not counsel, for
25 television.

1 REPORTER: Yes, sir.

2 THE COURT: Share what you do this afternoon now with
3 anybody else under the Rule who may request it. You may as a
4 courtesy call them and tell them that you did it.

5 REPORTER: Absolutely.

6 THE COURT: Because they will share with you what they do
7 tomorrow. Right?

8 REPORTER: I don't know because of the competitive nature.

9 THE COURT: Sir?

10 REPORTER: I don't know that the competitors that they
11 will share the video or not.

12 THE COURT: They got to.

13 REPORTER: Do they have to?

14 THE COURT: Under the Rule.

15 REPORTER: Alright.

16 THE COURT: Sure they have to.

17 Have you read the Rule permitting cameras in the courtroom?

18 REPORTER: I have not, sir.

19 THE COURT: Well, you better read them. That's why we only
20 have one camera with the understanding that it is shared. That's
21 why I'm telling you to share what you do with them.

22 REPORTER: Absolutely.

23 I'll make sure that they are notified.

24 THE COURT: Alright.

25 I haven't read the Rule lately but that's clearly the Rule.

1 MR. AXELROD: Your Honor, is it the first camera in that gets
2 the - - gets it.

3 THE COURT: No, I generally let them decide which one. I
4 let them make that determination as what they want to do.

5 (The jury returns to the courtroom at 4:55 p.m.)

REMARKS OF THE COURT

7 THE COURT: Make sure the alternates sit where they suppose
8 to and the Foreman sits.

9 Alright, sir. During the trial of this case I respectfully
10 request that the Foreperson to occupy that chair at all times. The
11 two alternates will always occupy those two chairs. The rest of
12 you may sit as you choose.

13 At the appropriate time I will keep the jury fully instructed
14 including the Foreman.

15 Mr. Foreman, your job would be, of course, to preside in the
16 jury room during deliberations and to be the jury's spokesman in
17 the courtroom, and I will keep you fully advised and have prepared
18 for you, if necessary, various forms of the verdict for your
19 consideration.

20 Swear this jury.

JURY SWORN

22 (The Clerk of Court swears the jury.)

23 THE COURT: Mr. Foreman, ladies and gentlemen, for this
24 afternoon we're going to have the opening statements of the State
25 and the defendant and then stop for the day. You've had a full

1 day here for which we appreciate it, and we'll have reasonably
2 short opening statements here and then rest for the evening.

3 Now, recognizing that for some of you you may have not ever
4 served on a criminal case, let me briefly explain to you how we
5 proceed.

6 First and foremost, this defendant has pled not guilty to
7 these allegations in this indictment which I've already told you is
8 no evidence. The evidence comes from this witness stand under
9 oath.

10 And to this indictment this defendant specifically pleads not
11 guilty thereby placing the burden of proof upon the State of South
12 Carolina of proving him guilty of this charge if they can to your
13 satisfaction unanimously beyond a reasonable doubt.

14 No defendant in this state has to prove anything. Any
15 defendant including this defendant no matter how serious may be the
16 charge is always to be presumed innocent until his guilt has been
17 proven beyond a reasonable doubt.

18 That presumption of innocence is the bedrock of our judicial
19 system.

20 Now, we will proceed in the following manner.

21 The State of South Carolina will give you a short opening
22 statement. It's to be used more as a guideline. He'll tell you
23 what he proposes to prove.

24 Now, what the lawyers tell you is not evidence but he's
25 entitled to tell you what his case is about, not to go into detail

1. with what every witness is going to testify but generally what he
2. says is about and what he intends to prove.

3. Mr. Axelrod or distinguished counsel, any one of the three,
4. will make a statement to you as to what their position is, and,
5. again, this is a guideline to help you follow the testimony as it
6. produces.

7. Following that, various witnesses will be called upon to
8. testify. After the various witnesses who are called have concluded
9. their testimony, I will give you the instructions in the law with
10. regards to any issue before the Court.

11. Following that, the State and the defendant will have an
12. opportunity to make a full closing argument to you with regards to
13. their view of any evidence in the case. Now, it's their view but
14. it's not evidence again.

15. In that regard I tell you and emphasize to you that from this
16. moment on there is nobody in this wide world that can tell you
17. twelve what the facts are. You will determine the facts based on
18. the testimony from the witnesses in this courtroom and from other
19. documents that may be introduced.

20. With regards to documents, from time to time they are
21. introduced. They may publish them by passing around. They may
22. wait but they'll be on the record, and, Mr. Foreman, anything
23. that's introduced into evidence will be with you and your jury
24. during the jury room during your deliberations.

25. Well, jurors have said in the past, "Well, Judge, I don't know

1 a thing about this case. How - - how are we to determine what the
2 facts are?"

3 Well, you will determine the facts from the witnesses'
4 testimony and from such other documents as may be introduced in the
5 trial of this case.

6 In considering a witness' testimony you are the sole and only
7 judges of a particular witness' testimony. You may believe all of
8 what a witness says or none. You may believe one witness against
9 that of many or the other way around.

10 You know, you didn't leave your common sense on the streets of
11 Conway, South Carolina when you came into this courtroom, and we
12 all know from our experiences in life and parents or raising our
13 children or working. When folks tell us things, we kind of size
14 them up, and we decide whether we believe some of it, all of it or
15 none of it.

16 A lot of times we look at as, "Well, how - - hey, how do they
17 come to know about what they're telling me?"

18 We would always ask ourselves as a tool, "Hey, does this
19 person have a reason to be biased or prejudiced with regards to the
20 testimony they're giving me?"

21 You can think of other tools that you use but the basis is
22 simply this. You determine where the credibility is. You are the
23 sole judges. As I've said, believe some of it, none of it or all
24 of it. That's for you to determine as finders of the facts.
25 Nobody else can tell you concerning the credibility of witnesses.

1 In judging credibility you have but one single objective as to
2 credibility, to find the truth whatever it is and let that truth be
3 reflected in your verdict.

4 Now, as I've indicated at this time, we're going to have the
5 opening statements and then recess for the evening.

6 You may have your statement.

7 OPENING STATEMENT BY MR. GRAVES

8 MR. GRAVES: May it please the Court, Your Honor.

9 Ladies and gentlemen, a baby is dead. A precious little baby
10 girl is dead. [Minor] [REDACTED] born October 7, 2003, died
11 February 14, 2004.

12 You've all heard the story about the little dash on the
13 tombstone, how it means so much. It didn't mean very much for
14 [Minor] [REDACTED] because she only lived for 130 days, and during those
15 130 days, well, you - - you hope when hearing of a child dying
16 young, you first hope that they were blessed with quantity of life.

17 When you hear that a child dies at 130 days, you hope that they
18 are blessed with quality of life. Neither is true for [Minor] [REDACTED]
19 She was born. She lived. She suffered, and then she died.

20 The - - over the next few days you're going to hear from
21 various witnesses who treated [Minor] [REDACTED] during her life, who
22 examined her after her death and who tested her body because [Minor]
[REDACTED] [REDACTED] ceased being a child on February 14th of 2004, and she became
24 a crime scene because the direct evidence leading to charges came
25 from her tiny body after her death.

1 The, um, pathologist, physicians who do the autopsies, as well
2 as medical technicians who treated - - who tested her blood,
3 forensic toxicologists tested her blood, and the materials that
4 came from that is what yielded this charge.

5 Now, the police investigated these charges. The child stopped
6 breathing at home. The police came and looked at the house but the
7 true evidence, the true evidence of the crime came from the body,
8 and that ties us to the child's father, Wesley Smith.

9 Mr. Von Herrmann and myself will be presenting the witnesses
10 for the State, and we carry the burden of proof. Now, the burden
11 of proof as you well know from television and other places means
12 that we have to prove every element, each element, each smaller
13 part of a larger crime to your satisfaction beyond a reasonable
14 doubt.

15 Now, that standard, beyond a reasonable doubt, is - - and
16 you'll hear it from the judge in the jury charge - - is that you
17 believe that the facts leave you firmly convinced, that you are
18 firmly convinced that the events occurred as - - as related.

19 Now, the charge in this case is homicide by child abuse, and
20 homicide by child abuse is different than murder. Homicide by
21 child abuse is - - a person is guilty of homicide by child abuse if
22 he causes the death of a child by child abuse or neglect which is
23 physical injury to the child and the circumstances of that death
24 manifest an extreme indifference to human life.

25 Child abuse, neglect, extreme indifference to human life and

1 that ties us to Wesley Smith.

2 When you hear from the, ah, doctors, the doctors who treated
3 Minor during her life she made several doctors' visits, you
4 will learn of injuries dating from the end of November which was
5 treated on December 9th of 2003, and that injury was a spiral
6 fracture of the child's femur.

7 Our experts will tell you that a spiral fracture is a clear
8 indication of abuse, and you should know that the femur in the
9 human is what we call the long bone but in a child, it's quite
10 short, and this injury, our expert will tell you, occurs when a
11 bone is twisted.

12 Now, in addition to the spiral fracture of the femur from
13 December - - treated in December, occurred in November, the - - the
14 child upon autopsy it was discovered that she had numerous broken
15 ribs. Now, these are cracked or fractured ribs, healing ribs and
16 ribs that are hemorrhaging, some of which these injuries occurred
17 within forty-eight hours of her death. All of these injuries were
18 in Minor small chest and back.

19 Lastly, you will hear of the pseudoephedrine poisoning, the
20 toxic level of a medicine that is not indicated for infants, not
21 any infant any circumstance. Minor when her blood was
22 tested had four times the adult therapeutic dose in her blood
23 stream. She was - - she stopped breathing when she was in the
24 custody and care of Wesley Smith, the defendant in this case.

25 Ladies and gentlemen, Mr. Smith was responsible for the care

1 of Minor and he didn't do his job, and as a result Minor
2 died on February 14th of 2004.

3 THE COURT: Mr. Axelrod or Mr. Taylor or Mr. Bailey,
4 whoever.

5 OPENING STATEMENT BY MR. AXELROD

6 MR. AXELROD: May it please the Court, Your Honor?

7 Do any of you have an opinion at this point? And if you do,
8 you should not be on this jury. That's the truth. The judge asked
9 you numerous times, "Do you have an opinion?"

10 The judge told you to listen to the facts of this case before
11 you form an opinion. If you have formed an opinion after this man
12 talked, you should not be on this jury. You should tell somebody.
13 That's reality because Wesley didn't do this. He didn't do it.

14 But if you'll listen to what you hear, you're going to say,
15 "Hey, he had to have done it. He has to be guilty. Put him under
16 the jail."

17 This case has been going on for four years, in excess of four
18 years. Written in the newspaper every other month, on television,
19 on the internet, on the radio, an article today, local section.

20 The man says that the evidence is going to tie to Wesley
21 Smith. It's not. They have to tie to Wesley Smith beyond all
22 reasonable doubt, a doubt that will leave you firmly convinced as
23 to guilt or innocence, and it's amazing in this case. They just
24 decided it was Wesley, and I'll give you an incidence, why they say
25 it was Wesley. Well, Wesley was - - Wesley was with Minor the day

1 she died of the cough medicine.

2 She died from cough medicine, an overdose of cough medicine.
3 Wesley is with her. Absolutely, at that moment Wesley was there ut
4 there was somebody there an hour before that. Ebony's mother was
5 there three hours before that, and each of these incidences of what
6 you heard, you're going to find out that Wesley was not the sole
7 care giver of **Minor** but let's just lock up - - let's lock up Wesley
8 because that is the easiest, simplest thing to do.

9 You're going to hear about the femur. You're going to hear
10 about the femur, and they say that there's experts who are going to
11 say that the femur is - - is a - - is an injury of abuse but not
12 all of the time, most of the time. Absolutely.

13 And when you look - - when you look at what happened to **Minor**
14 it is a shame. I'm the first one to tell you that. This girl
15 suffered but not at Wesley's expense - - his hands, did not.

16 The femur, you're going to hear testimony. We're going to
17 present testimony that DSS found an abusive situation but could not
18 find it against Wesley or his mother. You're going to hear
19 testimony from the police and Social Services workers that they
20 think Wesley was covering up for Ebony's mother, and you're going
21 to hear that several times.

22 Now, Wesley - - Ebony's mother is not here. She's not on
23 trial today. She's going to testify against Wesley.

24 You're going to hear that it wasn't Wesley. You're going to -
25 - you're going to hear that many people took care of **Minor** You're

1 going to hear from Wesley's family. You're going to hear about
2 a man that loved his child.

3 I'll tell you two things that are going to be the truth.
4 There's two truths in this case. **Minor** was abused. Absolutely,
5 positively, she was abused. Not at the hands of Wesley, not at
6 the hands of Wesley.

7 But we're human. You will remember this week for the rest of
8 your life and maybe not in a good way because we're going to go to
9 our souls in this one because it's real easy. They want you. They
10 don't have papers on their table. They want to say to you,
11 "There's a dead baby. Convict him."

12 It's the simplest thing to do. It's the simplest thing to do.

13 We're human. We come into a courtroom, we have opinions
14 automatically. We have internal prejudices. If it's cloudy
15 outside, we think it's going to be raining, maybe. If it's sunny,
16 we think it might be hot in the summertime.

17 You have to put that aside. You got to leave that at home.
18 The judge is going to tell you you can't talk to anybody about this
19 case. You can't talk to yourselves until it's all over. You can't
20 talk to your wife, your husband, your girlfriend, boyfriend. You
21 can't even talk to your dog in theory. I think a dog's okay.

22 He's going to tell you you can't read the paper. You can't
23 look at television. These people will be everywhere.

24 What matters is that you come in here, and that's all Wesley
25 asks, that you come in here and listen to the facts and render a

1 verdict that's just, and it might not be a verdict you want to
2 render.

3 "There's a dead baby. Maybe we should convict him."

4 I'm telling you. Listen to these facts. Listen to every
5 single fact, and then if they convince you and you are firmly
6 convinced beyond all reasonable doubt, you render that verdict of
7 guilty but after you hear all of the facts, if you go back into
8 that jury room, you say, "You know, I don't know. I'm not sure.
9 With everything that happened, I still don't know," you have an
10 oath whether you like it or not to come back not guilty.

11 They are putting this together. You have the femur. It
12 happened November 23rd. You're going to hear testimony that they
13 took her to the doctor on December 9th. You're going to find out
14 that on January 15th, the baby goes to the doctor, and it has an
15 infection in its lungs but has no broken ribs, no broken ribs,
16 uncontradicted.

17 From January 15th to February 14th, ribs break, approximately
18 eleven ribs, and then the baby dies of cough medicine,
19 pseudoephedrine or cough medicine. They're going to tell you that
20 it's cough medicine that you never give to a baby, and you've heard
21 lately that a lot of babies have died from cough medicine but
22 they're going to tell you that the rib injuries occurred as early
23 as forty-eight hours before the death, and - - and through their
24 experts and their reports, I think we're going to be able to show
25 that they're even further removed, and I think you're going to see

1 evidence and you're going to hear testimony and see evidence that
2 Wesley was a loving man. You're going to probably see and hear
3 evidence that will make you doubt whether or not Wesley can be
4 found guilty beyond all reasonable doubt.

5 This is an horrific case. The Solicitor is right. She was
6 born. She lived. She suffered, and she died.

7 It's going to be a hard case. You won't forget this week.
8 You just won't but I do think that if you keep an open mind and you
9 listen clearly, you listen to both sides, and you say to yourself,
10 "Why is he the one at that table?" and ask yourselves that.

11 "Why is he here? Why is he the only one here? Why didn't
12 they investigate? Did they really want to find out what happened
13 or did they just want to go home *** (unintelligible)"

14 When you look at the surface of this case, the surface of this
15 case, it will tell you. It's probably Wesley. But when you look
16 deep down at this case, when you share the case, when you look at
17 both sides, it's not Wesley.

18 Thank you.

REMARKS OF THE COURT

20 THE COURT: Thank you, Mr. Axelrod.

21 Thank you, Mr. Graves.

22 Ladies and gentlemen, that will conclude the opening
23 statements, and, ah, when we return promptly at 9:30 in the
24 morning, we'll begin the testimony, and so I ask that when you
25 return in the morning, please return not to the general courtroom

1 but to your jury room, and when you get up here on the third floor,
2 just let the bailiffs know that you are a juror in this case, and
3 they will escort you to the jury room.

4 Now, remember these following admonitions which are continuing
5 throughout the trial.

6 You must not discuss this case with anyone or permit anyone to
7 discuss it with you. You must not make any independent inquiry of
8 any kind. You must not discuss any issue in the case even among
9 yourselves until I have given you the case for your deliberation,
10 and that's appropriate only - - you will need to hear all of the
11 testimony before you begin your deliberations as finders of the
12 facts.

13 Now, it's very important that you follow these admonitions.
14 There may be something in the press in the morning or on tv, and I
15 would respectfully request that just out of caution, please turn it
16 outside. I ask that you not read the paper, again, because
17 whatever your verdict is in this case, it must be based on the law
18 and the evidence heard in this courtroom, and tomorrow morning when
19 you return if there's anything in the paper about it, I'm compelled
20 to ask you if any of you read it, and I trust that you will tell me
21 you did not if that be the truth.

22 If there's something on television, I ask that you turn it
23 aside. Quite often what's on television is exactly what you heard
24 in the courtroom which would not be prejudicial but sometimes
25 commentators want to put their own opinion to it, and that opinion

1 is not for your consideration. You are the finders of the facts to
2 be based on the evidence in this courtroom and not some opinion by
3 somebody who's not involved in the trial of the case.

4 I want to start the case at 9:30. I would ask that you be
5 here a few minutes earlier. The custom of your splendid Clerk and
6 her staff is to have some type of ham biscuits or sausage biscuits
7 or doughnuts or something along with hot coffee waiting on you when
8 you get here.

9 And so I look forward to seeing all of you at 9:30 in the
10 morning. You are now excused.

11 Thank you.

12 (The jury is released for the day at 5:22 p.m. to return at
13 9:30 a.m. on Tuesday.)

MOTIONS AND RULING OF THE COURT

14
15 THE COURT: Alright.

16 Mr. Axelrod, did you have any objection to that opening
17 statement of the Solicitor?

18 MR. AXELROD: I renew my objection that he mentioned the
19 femur that we made a motion to suppress the femur from coming into
20 this case. We thought that based on the case of Northcut that it -
21 - it should have been kept out. That's why I respectfully told the
22 Court prior to it. I let the Court rule.

23 THE COURT: That was an in limini ruling, and the Rules
24 specifically requires that at the time you do that. I will note
25 your objection to the record as to his statement, and you, of

1 course, are entitled to object again at the time of the
2 introduction of that testimony.

3 MR. AXELROD: I - - I would just like for you to put on the
4 record, Your Honor, that you asked me to refrain from objecting
5 during the opening, and you were going to protect me for that.

6 THE COURT: It is protected. You asked me - - you
7 specifically said you objected to any reference to that and were
8 prepared to interrupt him, and I asked that you make - - make that
9 after his testimony.

10 MR. AXELROD: Thank you, Your Honor.

11 THE COURT: And you are protected on that issue because,
12 clearly, you were prepared to interrupt him at that time.

13 MR. AXELROD: Yes, sir.

14 And I will interrupt him probably at - - at the first
15 introduction of - - of the case in chief because as the Court's
16 aware, the opening is still - - -

17 THE COURT: Just at the time I've heard all about it.

18 Just say, "Please note my objection for the record on that
19 issue."

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

21 THE COURT: Okay?

22 MR. AXELROD: That will be fine.

23 THE COURT: And you must - - under the Rules you've got to
24 object. So, I understand that.

25 Anything further before we retire for the evening?

1 MR. AXELROD: No, sir, Your Honor.

2 THE COURT: How about it for the State?

3 MR. VON HERRMANN: Nothing from the State, Your Honor.

4 THE COURT: See all of you at 9:30 ready to go.

5 MR. VON HERRMANN: Yes, sir, Your Honor.

6 MR. AXELROD: Yes, Your Honor.

7 THE COURT: You be at the table.

8 MR. AXELROD: Oh, Your Honor, I have one more issue to bring
9 up. I forgot.

10 THE COURT: What is it?

11 MR. AXELROD: And I mentioned it to Mr. Taylor sitting here
12 during Sam's opening statement. We never read the witness list to
13 the jury.

14 THE COURT: Well, nobody asked me to. So I didn't do it.
15 If you'd have asked me to, I would have done so but that's fine.

16 I don't see any real issue with regards to that.

17 Alright, sir.

18 You will recall specifically. I asked if there were any
19 further questions for the State. They said none. I inquired any
20 further questions by the defense. You said none.

21 So, you got any other problems?

22 MR. AXELROD: Not that I can think of right now.

23 THE COURT: Okay.

24 See you in the morning at 9:30.

25 Thank you.

1 You were on the record when he made the motion - - made the
2 statement that we did not go over - - -

3 COURT REPORTER: Yes, sir.

4 THE COURT: Mr. Axelrod has raised the question that we did
5 not read the witness list to the jury. My response was that
6 neither the State nor him requested that, and it was not done.

7 I specifically asked the State were there any other questions.
8 They said no.

9 I specifically asked Mr. Axelrod as to that issue, and he said
10 no.

11 Consequently, there being no issue as to the jury list, they
12 were not read to the jury.

13 Now, Mr. - - the Solicitor has provided to you as a courtesy
14 his witness list.

15 MR. TAYLOR: Yes, sir.

16 THE COURT: Do you wish to respond to that courtesy by
17 providing him one? I'm not going to require you to do it because
18 I did not voir dire the jury.

19 MR. TAYLOR: Well, Your Honor, to be quite honest with you,
20 I prefer not at this time because I don't have a copy of the
21 witness list as far as the witnesses that Mr. Axelrod is going to
22 call for this case.

23 THE COURT: Well, can you - - and I'm not going to order
24 you to do it but surely you know some of the witnesses you're going
25 to call

1 MR. TAYLOR: I have a list of about a hundred names that
2 Stuart wanted me to add to the list. Stuart told me that he was
3 going to call a hundred people in this case. I've never been
4 provided with a list - - -

5 THE COURT: You nor Stuart knows - - understand that
6 there's not going to be a hundred witnesses testifying.

7 MR. TAYLOR: I understand that, Your Honor, but to be candid
8 with the Court, I don't have any more of a list as far as witnesses
9 in this case - - -

10 THE COURT: Well, in fairness, since y'all have cooperated
11 both ways, can you provide him a copy of the list that you know you
12 going to give?

13 MR. TAYLOR: Well, Your Honor - - Your Honor, Mr. Axelrod
14 has not provided me with his witness list. I, therefore, can't
15 provide to him - - -

16 THE COURT: Mr. Axelrod, you want to respond?

17 MR. AXELROD: Your Honor, I don't want to provide a list. At
18 this point I would say no to that.

19 THE COURT: Well, before you call one of them up, you got
20 to give him notice so he can have a chance to check for any prior
21 record.

22 MR. AXELROD: That's fine.

23 THE COURT: You understand that.

24 MR. AXELROD: Absolutely, Your Honor. That will be fine.

25 THE COURT: I'm not going to order you to do it at this

1 late date even though our courts has said for purpose of voir dire
2 he was entitled to it but nobody asked for it. So, I'm not going
3 to order it.

4 MR. AXELROD: Thank you, sir.

5 MR. VON HERRMANN: Yes, sir.

6 THE COURT: But I'm specifically telling him before he
7 calls one, if you have a concern as to prior record, he's got to
8 give it to you and give you notice - - I want him to have
9 sufficient time and notice for him to check for prior record.

10 MR. AXELROD: Yes, sir, Your Honor. I'll be sure the State

11 - -

12 THE COURT: So I don't want you to do it right before you
13 call the witnesses and I have to recess the court.

14 MR. AXELROD: I wouldn't do that, Your Honor.

15 MR. VON HERRMANN: That's my concern, Your Honor. I'm not
16 overly concerned.

17 THE COURT: I - - I understand. Well, everybody
18 understands where we're coming from.

19 Okay. Anything further?

20 MR. AXELROD: Nothing.

21 MR. VON HERRMANN: Nothing, Your Honor.

22 MR. AXELROD: Have a nice night, sir.

23 THE COURT: Okay.

24 Thank you.

25 (The Court adjourns the trial of this case for the evening.)

TUESDAY, APRIL 15, 2008

(The Court convenes the trial of this case at 9:47 a.m. with all parties present in the courtroom.)

THE COURT: Good morning, ladies and gentlemen. Please be seated.

Good morning, Solicitor. Your witness here?

MR. VON HERRMANN: Yes, sir, Your Honor.

THE COURT: You ready to proceed?

MR. VON HERRMANN: Yes, sir, Your Honor.

THE COURT: How about it, Mr. Axelrod?

MR. AXELROD: Ready to go, Your Honor.

Good morning, sir.

THE COURT: Good morning.

Bring the jury in.

(The jury returns to the courtroom at 9:49 a.m.)

THE COURT: The jury is present.

Good morning, Mr. Foreman, ladies and gentlemen. I trust that the biscuits provided for you were satisfactory to everybody.

FOREMAN: Thank you. They were.

THE COURT: Thank you.

You may call your first witness.

MR. VON HERRMANN: Thank you, Your Honor.

The State would call Dr. Eugenia Cooper-Merchant to the stand, Your Honor.

(The witness takes the witness stand.)

1 DR. EUGENIA COOPER-MERCHANT, being duly
2 sworn, testifies as follows:

3 CLERK OF COURT: Please be seated.

4 State your full name.

5 DR. COOPER-MERCHANT: Eugenia Cooper-Merchant.

6 CLERK OF COURT: Spell your last name for the Court.

7 DR. COOPER-MERCHANT: C-o-o-p-e-r M-e-r-c-h-a-n-t.

8 DIRECT EXAMINATION BY MR. VON HERRMANN:

9 Q. Good morning, Doctor.

10 A. Good morning.

11 Q. Can you please tell the jury what type of doctor you are?

12 A. I'm a pediatrician.

13 Q. And can you give the jury the benefit of your educational
14 background and what it took for you to become a pediatrician.

15 A. Okay.

16 Um, I did pre-med, and after that I did five years of medical
17 school. I'm train Liberia, West Africa, and it - - it's a five
18 year program unlike the United States where it's four years. So,
19 I did do the five year program.

20 And then I did two years of, um, residency training before
21 coming to the United States, and I also worked in pediatrics there,
22 and upon coming to the U. S. I had to take three national exams in
23 order to be qualified to do another pediatric training in the U.
24 S., and this took another three years.

25 Q. And how long have you been participating as a pediatrician?

1 A. In the U. S. since 1998.

2 Q. And in being a pediatrician, do you stay abreast of the local
3 trends and stay educated in pediatrics in general?

4 A. Yes, sir, I do.

5 Q. And do you have and have you received any special training
6 with regards to abuse and neglect cases?

7 A. Yes. Um, in the state where I trained you have to do a
8 certificate of training in child abuse in order to be licensed in
9 New York, and I did that in 1998.

10 Q. Are you familiar with child abuse and the detection and your
11 requirements of notification under the law?

12 A. Yes, sir.

13 MR. VON HERRMANN: Your Honor, at this time we would tender
14 Dr. Cooper-Merchant as an expert in pediatrics.

15 MR. AXELROD: Without objection, Your Honor.

16 THE COURT: Without objection.

17 Mr. Foreman, ladies and gentlemen, a witness such as this
18 doctor who has been qualified - - you may qualify somebody as an
19 expert who by training and experience has information or possession
20 in a certain field based on that training, and with regards to an
21 expert's testimony, you, of course, may accept or reject the same
22 depending on your view of the facts but based on the testimony here
23 and without objection from defense counsel, I qualify this witness
24 as a medical doctor in the field of pediatrician - - of pediatrics.

25 MR. VON HERRMANN: Of pediatrics, Your Honor.

1 THE COURT: Yes, sir, and I find her so qualified as an
2 expert in that field.

3 You may proceed.

4 MR. VON HERRMANN: Thank you, Your Honor.

5 Q. Doctor, were you the pediatrician, ah, one of the
6 pediatricians that saw Minor Smith, the individual that we're
7 talking, the baby that died?

8 A. Yes, sir.

9 Q. And can you tell me what other doctors within your group has
10 seen that child?

11 A. Ashwin Mallikarjun.

12 Q. Let me draw your attention specifically to December 9, 2003.
13 Did you have the occasion to observe or to treat Minor

14 A. Yes, sir.

15 Q. And can you please tell the jury when the child was presented
16 to you on December 9, 2003, what it was you were there to do and
17 what you observed?

18 A. Um, she came for a two month old well-baby check-up which is
19 when we do a complete physical, do a history of how the child's
20 eating and development and all of that, and then we give the two
21 month old shots.

22 Q. Did you notice anything while you were doing the exam that
23 concerned you?

24 A. Yes, sir.

25 THE COURT: What was the date of this, now?

1 MR. VON HERRMANN: That is December 9th, Your Honor, of 2003.

2 THE COURT: Okay. Alright.

3 Q. Can you please tell the jury what it was that specifically
4 concerned you with regards to, ah, Minor [REDACTED]

5 A. Her right thigh was very swollen and painful, and whenever I
6 checked her she started to cry every time I touched her leg.

7 Q. Specifically, what parents were there at the time?

8 A. Both parents were there.

9 Q. And that would be the defendant Wesley Smith and Charlene
10 Dandridge?

11 A. Yes, sir.

12 Q. Can you please tell me what excuse Mr. Smith offered as far as
13 what occurred with the child in the beginning?

14 A. He had no idea how it happened.

15 Q. What did you do, um, when you realized that the child was
16 injured on a particular leg?

17 A. I first of all asked him how it happened, and he said he
18 didn't know how it happened but because the leg was swollen and
19 painful and I knew that the child wasn't a walking or crawling
20 child, and I told them - - at first of all, I asked them why didn't
21 they come, and I was told, "Well, we came at lunch time, and you
22 were closed."

23 So, I said, "But you could have come back another time. Why
24 didn't you go to the emergency room?"

25 And their response was that - - the mom answered that she

1 would have been reported as a bad mom, but there were - - I still
2 had to by law and training, I still had to send the baby to the
3 hospital and do x-rays and find out what's going on which is what
4 I did.

5 Q. And what was the hygiene of the child like upon seeing her?

6 A. It was clean.

7 Q. And so you, um, admitted the child and had x-rays done?

8 A. Yes, sir, I did.

9 Q. Did you see the child again and the parents at the hospital?

10 A. Yes, sir.

11 Q. When you asked Mr. Smith his story about how this occurred,
12 was there any indication who had - - who had control and was taking
13 care of the child when the injury occurred?

14 A. The dad was. Initially, he said that he didn't but eventually
15 he didn't know how it happened but then eventually he was watching
16 the child, and somebody rang the doorbell, and he went to answer
17 the door and - - and the child fell or he fell and the child fell
18 on the leg.

19 Q. And did you have an opportunity to discuss with the
20 radiologist the, ah, injury that occurred to the leg?

21 A. Yes, sir.

22 Q. Can you tell the jury what type of injury that is?

23 A. The, ah, child had a spiral fracture.

24 MR. AXELROD: Your Honor, at this point I would renew my
25 objection. Any - - any introduction of any information concerning

1 the femur.

2 THE COURT: No, sir. I - - I understand your objection,
3 and I have respectfully overruled it in the records.

4 MR. AXELROD: You've already ruled. Yes, sir.

5 THE COURT: Thank you.

6 You may proceed.

7 MR. VON HERRMANN: Yes, sir.

8 A. The child had - - the radiologist called me and said that the
9 child had a spiral fracture.

10 Q. What - - what does a spiral fracture indicate to you with
11 regards to this child?

12 A. It's an indication of child abuse.

13 Q. When Mr. Smith indicated to you that he had been - - was
14 holding the child and dropped the child, is that consistent with a
15 spiral fracture?

16 A. Not usually, no.

17 Q. Exactly what type of action would it take to create a spiral
18 fracture?

19 A. It's more like a pulling and twisting type of injury.

20 Q. What did you do specifically with regards to any further - -
21 let me make sure I understand correctly.

22 At the doctor's office he says he doesn't know how it
23 happened. At the hospital he says, "Well, I dropped the child."

24 A. Yeah.

25 Q. Did he indicate to you that he was the sole provider of the

1 child at that particular time?

2 A. My - - I don't remember the exact words he said but when I
3 asked about who keeps the child, there was just the two of them.
4 He when mom work and mom when he work, and at the time, um, mom was
5 not aware of how it happened, and he eventually said that he was
6 watching the child and somebody opened - rang the doorbell, and - -
7 and the child fell when he went to get the child - - when he went
8 to get a doorbell.

9 So, from that - - I figured that he was the one that had the
10 child because mom was not there.

11 Q. Did you or have you ever prescribed pseudoephedrine for a
12 child this age, a four month old child?

13 A. I have in rare circumstances, um, and even - - but the, ah,
14 the dosing is different for older kids versus younger kids.

15 Q. Did you ever or anybody you know of ever prescribe
16 pseudoephedrine to Minor

17 A. Ah, I wrote a prescription for Rondac-DM drug but it does not
18 have pseudoephedrine. It has phenylephrine, and that was after on
19 - - the child was in foster care.

20 Q. Let me be real clear about my question.

21 A. Uh-huh.

22 Q. Did you or anybody that you know ever prescribe or indicate to
23 them to give this child pseudoephedrine?

24 A. No, sir, no. I'm sorry. No.

25 Q. Okay.

1 But there is - - there another RSV inhaler we'll talk about
2 later.

3 A. Yes. But no.

4 Q. So, the inhaler that was prescribed for the child later on,
5 that Dr. Mallikarjun saw the child, did that have pseudoephedrine?

6 A. No. No, it didn't.

7 Q. I have no further questions.

8 Please answer any questions Mr. Axelrod or his client - - his
9 co might have for you.

10 MR. AXELROD: May it please the Court, Your Honor?

11 CROSS EXAMINATION BY MR. AXELROD:

12 Q. Good morning, ma'am.

13 A. Good morning.

14 Q. Were you Charlene - - were - - were you Ebony's doctor?

15 A. Yes, sir.

16 Q. And you followed her from her birth until her demise?

17 A. Except for the last visit.

18 Q. Alright.

19 Now, tell the jury. When you saw **Minor** in the beginning - -

20 A. Uh-huh?

21 Q. - - was there any difficulties with her? Was she a well
22 baby? Did you find any irregularities in any part of her body?

23 THE COURT: When talking to the witness, please face the
24 witness.

25 MR. AXELROD: I'm sorry, Your Honor.

1 A. Okay.

2 Beginning from when?

3 Q. From birth.

4 A. She had jaundice at - - she had jaundice shortly after birth
5 but that went away.

6 Q. She was born on was it October 7th?

7 A. I don't remember her birth. They all said she was born in
8 October.

9 Q. Okay.

10 Now, after that when was the next check-up you had with her?

11 A. I saw her after she left the hospital. She was about three or
12 four days old when I saw her for jaundice.

13 Q. Okay.

14 How was she then?

15 A. She had jaundice then but she was fine other than being yellow
16 - - and she had a heart murmur as well.

17 Q. Exactly.

18 She had a heart murmur.

19 A. Yes, she did.

20 Q. Tell the jury what a heart murmur is.

21 A. A heart murmur is joist a noise you hear in the heart when
22 you're listening. In a newborn it's one of those things that goes
23 away for the most part because when a baby is in a mom's belly the
24 placenta does most of the work that a heart is suppose to do, and
25 then when a baby is born, the baby's heart takes over, and it takes

1 a little while, a couple of days to weeks for that to be normal,
2 and the noise usually goes away.

3 Q. But you weren't sure of that, were you - that the noise would
4 go away?

5 A. No, I wasn't sure.

6 Q. And tell the jury what you asked Charlene to do because of the
7 heart murmur.

8 A. I asked her to go see a cardiologist.

9 Q. And what day did you ask her to go see the cardiologist?

10 A. If I recall, I think her appointment was in October - -
11 sometime in October.

12 Q. If -- in fact, you made an appointment for her?

13 A. Uh-huh.

14 Q. And it was October 28th?

15 A. Yes.

16 Q. Down - - that's what the chart says?

17 A. Yes, yes, yes.

18 Q. Okay.

19 And tell - - tell the jury the results of the - - tell the
20 jury what the cardiologist told you.

21 A. If I recall, she didn't go to that appointment.

22 Q. Did you ever ask her why she didn't go?

23 A. I don't remember having that conversation but usually if the
24 heart murmur is gone, I don't bother with it anymore.

25 Q. She never - - she never went to the cardiologist, did she?

1 A. No, she didn't.

2 Q. Now, when you would discuss the care of Minor did you discuss

3 - -

4 A. Uh-huh?

5 Q. - - it primarily with Charlene?

6 A. When they kept coming to the doctor, we discussed it with
7 whichever parent is there, and most times those parents and this
8 kid - - I think both parents came for the two month well-baby
9 check.

10 Q. Alright. Now.

11 A. Uh-huh.

12 Q. At some point Minor gets an inhaler?

13 A. I'm sorry?

14 Q. At some point Minor goes to see - - I'm going to let you look
15 at this, Doctor.

16 A. Okay.

17 Q. Take a brief look at it and then we'll discuss it.

18 A. Okay.

19 Q. And would it be fair to say that Minor went to the Conway
20 Hospital, and she was given a Ventolin Inhaler?

21 A. That's what it says on the paper.

22 Q. And I think at some point we have some papers that say that
23 then the baby was referred back to you?

24 A. Yes, sir.

25 Q. And you were aware that - - you were aware that the baby

1 received the Ventolin Inhaler?

2 A. I was not there when she came back for her follow-up. My
3 partner saw her. So, yes, going over the notes, I saw that she
4 did receive one.

5 Q. Okay.

6 And - - and, Doctor, I'm going to hand you up what - - I have
7 some information on Ventolin Inhaler - - Aerosol Inhaler.

8 A. Uh-huh.

9 Q. I think you've seen, maybe, information such as this.

10 A. Uh-huh.

11 Q. And I'm going to let you - - I'm going to let you look at it
12 but, ultimately, I'm going to take you down to this section - -

13 A. Uh-huh.

14 Q. - - where it says, "some medicines may interact," and then I'm
15 going to discuss it.

16 Briefly if you can, you just read this little area, and then
17 we'll discuss it but I'm not going to ask you that top part there.

18 A. Uh-huh.

19 Q. Okay, Doctor.

20 A. Uh-huh.

21 Q. And on the bottom, it says that there are medicines that
22 interact with a Ventolin Aerosol. Correct?

23 A. Yes.

24 Q. And then on the second page, there are some big words here
25 but, in actuality, they say that pseudoephedrine - -

1 A. Uh-huh.

2 Q. - - would react with a Ventolin Inhaler.

3 A. Uh-huh.

4 Q. So, if someone was taking pseudoephedrine then that could be -
5 - that could be a dangerous situation?

6 A. Possible, it depends.

7 Q. Well, it does say that a Ventolin Inhaler can cause severe
8 breathing problems right after you take a dose. Correct? You're
9 aware of that?

10 A. Well, some people breath a lost faster, and then they get
11 better.

12 Q. But it causes - - it can cause - - it can cause severe
13 breathing problem when you take a dose?

14 A. I haven't seen it cause severe problems. I've seen some
15 people breath a little faster and then - - get better - - because
16 - - because what it does, it's a bronchial dilator which means
17 that, um, it opens up the airways. So, if you're having trouble
18 breathing, what it does is it helps the muscles to relax and opens
19 up the airways so you can breath better.

20 Q. And doesn't pseudoephedrine close the airways to suppress?

21 A. It dries up secretions in the airways.

22 Q. And - - and closes the airways slightly.

23 So - - so you - - if you were taking pseudoephedrine and a
24 Ventolin Inhaler - -

25 A. Uh-huh.

1 Q. - - you could be opening an airway and closing an airway
2 simultaneously, could you not?

3 A. No. What I know is pseudoephedrine to do is to dry up mucus,
4 secretions. I don't know about closing the airways.

5 Q. Now, a Ventolin Inhaler can cause a fast or irregular
6 heartbeat. Correct?

7 A. It can.

8 Q. Okay.

9 Now, we don't know whether **Minor** continued to have a heart
10 murmur. Now - -

11 A. If - - -

12 Q. - - do you know the doctor at the Conway Hospital - -

13 A. Uh-huh. Uh-huh.

14 Q. - - that prescribed the Ventolin Inhaler - -

15 A. Uh-huh.

16 Q. - - knew of your report of the heart murmur on October 12th
17 when you told her to go to the cardiologist?

18 A. I don't know if the doctor knew but if he's - - if he's
19 prescribing her an inhaler, I'm sure he must have listened to her
20 heart, and if you look at my two month well-baby, if I didn't
21 mention the heart murmur, then that mean it have resolved, and,
22 usually, if the heart murmur persists, then I would insist that
23 they go back to the heart doctor.

24 Q. But you don't know whether the doctor who prescribed the
25 medicine in the ER ever checked for a heart murmur, do you?

1 A. I don't know. I'm going according to my notes because the
2 doctor in the ER saw the baby after I saw her I think.

3 Q. Well, show me in your notes where the doctor took your notes
4 and looked at them before he prescribed the Ventolin Inhaler.

5 A. I don't have a copy of my notes. May I look at my notes?

6 Q. Absolutely.

7 A. Please?

8 Q. Okay.

9 THE COURT: Solicitor, do you have an objection to this?
10 She cannot possibly know if she wasn't there what the doctor did or
11 didn't do.

12 MR. VON HERRMANN: Your Honor, it's my understanding from her
13 testimony that she detected at the two months that there was no
14 heart murmur.

15 DR. COOPER-MERCHANT: Thank you.

16 MR. VON HERRMANN: So, I mean - - I think that - - if she can
17 testify to it, Your Honor, I think that - - -

18 THE COURT: Alright. Go ahead.

19 MR. VON HERRMANN: I think at some point, Your Honor, I
20 agree. I will object. If he can narrow it down but I think she's
21 already testified the heart murmur didn't exist the day she had the
22 swollen leg.

23 MR. AXELROD: She asked if she could see her notes is what
24 she just asked me. I would ask her to see her notes.

25 THE COURT: Yes, sir. I'll let her see her notes.

1 Q. You can see your notes, ma'am.

2 A. Okay.

3 THE COURT: Don't ask her anymore what the doctor found
4 because she wasn't there.

5 Q. You got your notes with you?

6 A. No, I don't but, if you have a copy, I can locate it.

7 Q. No, I don't have one.

8 A. Okay, but, um, can I just say that what I said in the
9 beginning was when the heart murmurs are there as newborn, they
10 typically go away, and those that don't go away are those that we
11 insist see the cardiologist.

12 So, she didn't have one when I saw her.

13 Q. Isn't it true that a Ventolin Inhaler can worsen breathing if
14 you have a reaction to it?

15 MR. VON HERRMANN: Your Honor - - -

16 A. I thought I answered that before. I'm sorry.

17 MR. VON HERRMANN: - - Your Honor, I'm going to have to
18 object to that. We were going to have a toxicologist to come in
19 and can answer any of those questions. She's a pediatrician.

20 THE COURT: She's - - if she can answer it, I'll permit it.

21 MR. AXELROD: Thank you, sir.

22 THE COURT: I - - I thought she answered it while ago.
23 I'll let her respond in the way that she thinks appropriate.

24 MR. AXELROD: No, I asked a different question the last time,
25 Your Honor.

1 This one I'm asking, can it worsen the breathing, can it
2 worsen.

3 THE COURT: If she can - - if she's competent to say - -
4 testify, she can. If she's not, she can say that.

5 How would you care to answer the question, Doctor?

6 A. From what I know, it can - - it dries up the secretions, and
7 that's what I said before which is what we use it for.

8 Q. Can a Ventolin Inhaler cause dizziness?

9 A. Any medicine can basically cause a whole bunch of side
10 effects.

11 Q. And, in fact, you're absolutely correct.

12 A. Uh-huh.

13 Q. Wouldn't it be fair to say that caution is advised when you
14 - using a Ventolin Aerosol Inhaler in children, that they may be
15 more sensitive to its affects?

16 A. Yes, sir, dose-wise and usually it's just a rapid increase in
17 the heartbeat and that goes away.

18 Q. But if they have - - if they have a reaction - - I understand
19 that usually it might just be a rapid heart rate and it would go
20 away but if a child was allergic to it, it could have different
21 results, couldn't it?

22 A. I really haven't seen a lot of allergies to albuterol. It can
23 happen but I have not seen much of that.

24 Q. Okay. I'm okay with that.

25 Now, You mentioned that on the 9th of December when you went

1 to see - - when they came to see you - -

2 A. Uh-huh.

3 Q. - - Charlene told you that she was afraid to go to the
4 hospital because they might consider her a bad mother.

5 A. Yes, that's what she said.

6 Q. Did that surprise you?

7 A. No.

8 Q. Tell the jury why it did not surprise you that Charlene might
9 say to you that they would consider her to be a bad mother.

10 A. Why I was not surprised? Well, people have a fear of Social
11 Services and whether it's rational or not, they do. So she just
12 might be one of those who thought that way.

13 Q. You spoke of the spiral fracture - -

14 A. Uh-huh.

15 Q. - - as being a sign of child abuse.

16 A. Yes.

17 Q. It is your testimony today to this jury - -

18 A. Uh-huh.

19 Q. - - that every spiral fracture is child abuse?

20 A. No, I didn't say that. I said it's usually a sign of child
21 abuse.

22 Q. But not all the time?

23 A. Not a hundred percent but in most cases it's a sign of child
24 abuse especially when the story of how it happened does not
25 correlate to the facts you are seeing.

1 Q. Well, you went into a great deal of testimony of Wesley saying
2 that - -

3 A. Uh-huh.

4 Q. - - at some point he had the baby and he fell. The baby might
5 have fallen, and it might have been a spiral fracture, and you said
6 that did not go in line with that. Correct?

7 A. Yes.

8 Q. What happens if the spiral fracture didn't occur there and
9 Wesley had no idea how the spiral fracture even occurred, and that
10 was the best guess that he had for the fracture that was presented?

11 THE COURT: Wait a minute, now. You are asking her to
12 speculate, and I'm not going to require her to do that.

13 Exception sustained.

14 MR. AXELROD: I'll - - I'll reword that question.

15 Q. Could the spiral fracture have occurred for **Minor** trying to
16 climb out of the crib?

17 A. A two month old?

18 Q. If they - - if they get themselves up a little bit or if they
19 get their leg twisted and they turn themselves, can they not have
20 a spiral fracture?

21 A. A two month old?

22 Q. I'm asking. Can you have a spiral fracture getting your leg
23 caught when you twist?

24 A. Not when you're two months old.

25 Q. If you take a baby out of a car seat and you grab a baby by

1 his legs, if someone grabs a baby by his legs and twists the legs
2 when they're pulling out of a car seat, can you have a spiral
3 fracture?

4 A. That sounds a lot violent to me because normally if you're
5 putting a baby in a car seat or taking a baby out, you don't grab
6 and pull a baby and twist.

7 Q. But like you said, not all spiral fractures are abusive in
8 nature.

9 A. Yes, that's what I said but most of them are considered a sign
10 of child abuse.

11 Now, I'm not a radiologist but there is a way that you can
12 look at - - the radiologist can look and tell you, um, based on how
13 it happened or based on what the spiral fracture looks like that it
14 can be child abuse.

15 Q. Now, your testify today, I believe - - -

16 MR. AXELROD: Court's indulgence, Your Honor.

17 THE COURT: Doctor, would you like a cup of water or
18 something?

19 DR. COOPER-MERCHANT: Yes.

20 Q. Your testimony today was that you never prescribed
21 pseudoephedrine for the baby, correct?

22 A. I didn't say that.

23 Q. I'm asking. Did you ever prescribe pseudoephedrine for - -
24 tell the jury if you prescribed pseudoephedrine for - - for **Minor**

25 A. I prescribed a cold medicine that contained a decongestant

1 cough phenylephrine.

2 Q. Did it contain pseudoephedrine?

3 A. I don't remember the formulation then but it, um, usually
4 either that or phenylephrine. That was four years ago. I don't
5 know what's changed since.

6 Q. My question to you is four years ago - -

7 A. Uh-huh.

8 Q. - - did you prescribe a medicine that had pseudoephedrine in
9 it?

10 MR. VON HERRMANN: Objection. Excuse me.

11 Objection, Your Honor.

12 The question is whether or not it was prescribed to **Minor**
13 Smith, not has she ever prescribed it.

14 THE COURT: I know.

15 MR. VON HERRMANN: Thank you.

16 Q. No. My question was, "Four years ago did you prescribe **Minor**
17 a medication that had pseudoephedrine in it?"

18 A. I don't remember the formulation because medications have
19 changed.

20 Q. So, it's quite possible that the medicine you prescribed to
21 **Minor** had pseudoephedrine in it?

22 A. From looking at past formulations, I think it was
23 phenylephrine.

24 Q. Okay.

25 Now.

1 A. Uh-huh.

2 Q. I want - - I want you to tell the jury - -

3 A. Uh-huh.

4 Q. - - that at some point you talked to the social worker, and
5 you told the social worker - -

6 A. Uh-huh.

7 Q. - - that you thought Wesley was covering up for Ebony's
8 mother.

9 MR. VON HERRMANN: Objection, Your Honor.

10 A. What?

11 MR. VON HERRMANN: There's nothing in the record that says
12 that.

13 MR. AXELROD: Court's indulgence, Your Honor.

14 THE COURT: I will permit it for the jury as to what she
15 said.

16 Go ahead. I'll permit it.

17 Q. Tell the jury why you told the social worker that you felt - -
18 -

19 THE COURT: I'm going to permit this testimony but you
20 understand that she's not the finders of the facts. The jury is,
21 and the jury will make the determination on who did it, not her but
22 I'll permit that one question and give her an opportunity to
23 explain it, and we going to get on with that because the jurors
24 determine who did what.

25 A. I don't remember making that statement.

1 THE COURT: That will end that conversation on that, sir.
2 She does not remember making that statement.

3 MR. AXELROD: I'm okay with that, Your Honor.

4 THE COURT: Alright, sir.

5 MR. AXELROD: I'm okay with that question.

6 Court's indulgence, Your Honor.

7 Q. And I understand that this happened many, many, many years
8 ago.

9 A. Uh-huh.

10 Q. And I think you testified earlier that if Charlene wasn't
11 there, Wesley was taking care of the baby.

12 A. That's what they told me.

13 Q. And if Wesley wasn't there, Charlene wasn't taking care of the
14 baby?

15 A. I didn't say she wasn't. That's not what I said.

16 Q. No, no. I'm sorry.

17 If Wesley wasn't there, Charlene was taking care of the baby.

18 A. That's what they told me.

19 Q. Yes. I made a mistake when I said that to you.

20 A. Okay.

21 Thank you.

22 MR. AXELROD: Nothing further from this witness, Your Honor.

23 THE COURT: Alright.

24 Can this witness come down?

25 MR. AXELROD: At this time, Your Honor.

1 MR. VON HERRMANN: I've got some questions, Your Honor.

2 REDIRECT EXAMINATION BY MR. VON HERRMANN:

3 Q. Would it help you if you saw your report from 12/9 of '03 with
4 regard to medication you prescribed?

5 A. Yes.

6 MR. AXELROD: May I see it, please?

7 Q. Can you please tell the jury what the discharge medicines you
8 prescribed were?

9 A. Nystatin creme and (unintelligible).

10 Q. Was that, in fact, the same thing the discharge information
11 that you gave?

12 A. Yes, sir.

13 Q. And does that have pseudoephedrine or any type of - - -

14 A. No, it doesn't.

15 Q. So, it is - - and take a look if you'd like to. Is it fair
16 to say that you've never prescribed any medication to the child
17 that had pseudoephedrine in it?

18 A. May see my notes?

19 Q. I can show you everything that I have.

20 A. Yes.

21 This is what he's referring to.

22 MR. AXELROD: Your Honor, I - - I don't know if there's a
23 question here. She can look at the chart but it appears they're
24 having a conversation up there right now.

25 THE COURT: No, sir. He's showing her charts so she can

1 refresh her memory. They are entitled to do that, and I'll give
2 you the same opportunity and have done so.

3 A. This, um - - -

4 THE COURT: She's looking at it.

5 A. Can I answer from that?

6 Okay.

7 On the 18th of December, I gave her a cold medicine which is
8 Rondec-DM drug, and as I had told him earlier, I don't recall the
9 formulation but it's got phenylephrine which is, ah, an
10 antihistamine decongestant like that dries up secretions and - -

11 Q. I'm sorry.

12 A. - - and I don't know if the formulation back then had, ah,
13 pseudoephedrine but as of last year I know it had phenylephrine.

14 Q. Phenylephrine, not pseudoephedrine?

15 A. Not that I remember.

16 Q. And how long would you have - - would you have prescribed
17 those medications for them - - for the child to take?

18 A. No more than a week, and the instructions that are on there
19 for that age is prescribed like a quarter of a millimeter which is
20 that much, and it's four times a day, and when I do prescribe the
21 cold medicines, I tell whoever it is, the care giver, the side
22 effects and to go ahead and stop the medicine if they notice any of
23 these side effects.

24 Q. And you indicated that it's not that - - you don't believe it
25 was pseudoephedrine?

1 A. Uh-huh.

2 Q. Tell us what day you prescribed this medication?

3 A. December 18, 2003, and going down here in my notes, I wrote
4 that they are suppose to give .25 cc's four times a day and that I
5 described the side effects to them which would may baby being
6 cranky or sleepy or, um, not wanting to eat and stuff and with
7 instructions for them to stop the medicine if they noticed any of
8 these things.

9 Q. And that was actually some three months before this child
10 died, correct?

11 A. Yes, sir.

12 Q. Would he - - she have still been giving that child that
13 medication?

14 A. No, sir.

15 Usually when we tell them if the child has the cold for more
16 than two weeks, you need to bring the child back to see us because
17 there's a chance that a child can get a pneumonia or ear infection
18 or something. So we do not let them give medicines for more than
19 two weeks on the cold medicine.

20 Q. And did you prescribe this Ventolin Aerosol?

21 A. No, sir, I didn't.

22 Q. Are you really familiar with this particular medication and
23 prescribing that?

24 A. Yes, sir.

25 Q. And have you done that in the past?

1 A. For **Minor** or any other patient?

2 Q. Other patients?

3 A. Yeah. A lot of - - we have a lot of those matters in my
4 practice, and, yes, I have given that, and I really haven't seen
5 anybody, um, have any problems other than being shaky like you
6 would if you have too much coffee to drink.

7 Q. And with regards to your physical exam on 12/9 of 2003?

8 A. Yes, sir.

9 Q. Was there any indication of the heart murmur at that point?

10 A. No, there was not.

11 Q. So, the heart murmur had disappeared?

12 A. It was gone which is what I suspected but for the first week
13 of life or so because you can't tell without either listening,
14 seeing the baby again and rechecking or sending them to a
15 cardiologist. I had to make that decision but I'm certain when I
16 saw the baby for the two month check-up, there was no more heart
17 murmur.

18 MR. VON HERRMANN: I have no further questions.

19 Thank you, Your Honor.

20 RE-CROSS EXAMINATION BY MR. AXELROD:

21 Q. I'm confused.

22 You just testified that you would not prescribe that Rondec-DM
23 for more than one week. Did you say that?

24 A. Yes, I said that.

25 Q. Then tell the jury why the instructions you wrote for the

1 Rondec-DM does not limit it to one week.

2 A. Because I instruct the parents what to do.

3 Q. Okay, and what did you tell - - what did you tell Charlene and
4 Wesley to do that day when you prescribed that medicine that you
5 don't think has pseudoephedrine in it?

6 A. When I prescribed the medicine, the patient - - the baby was
7 with the foster parents.

8 Q. So, you never talked to Wesley nor Charlene?

9 A. I didn't see them. They didn't have the kid then, no.

10 Q. And you discussed the side effects with the foster parents?

11 A. Yes, I did.

12 And - - -

13 MR. AXELROD: Nothing further.

14 THE COURT: Okay.

15 MR. VON HERRMANN: I just have one question, Your Honor.

16 REDIRECT EXAMINATION BY MR. VON HERRMANN:

17 Q. You don't even know if the parents ever received this
18 medication, do you?

19 A. No, I don't know.

20 Q. And, in fact, had they - - if the child was in foster care for
21 over seven days - -

22 A. Uh-huh.

23 Q. - - they could not have received it.

24 A. No, they shouldn't have. That's one and the other thing,
25 too, is the instructions when you write a prescription, the

1 instructions are on the bottle how much to give and how often to
2 give it.

3 RE-CROSS EXAMINATION BY MR. AXELROD:

4 Q. So, if you gave the medicine to the foster parents, you don't
5 even know if the foster parents told Charlene and Wesley of the
6 side effects from the conversation you had if they had the medicine
7 at that point?

8 A. I don't know if they had the medicine but the instructions
9 were there clearly how much to give and how often to give it.

10 Q. But you don't know if the side effects were ever discussed
11 with Wesley or Charlene, do you?

12 A. I think I already said that, sir.

13 Q. That you don't know.

14 A. I don't know.

15 Q. Thank you.

16 A. If the child had the medicine or if it was discussed.

17 Q. And it's - - it's your opinion today that that medicine you
18 prescribed did not have pseudoephedrine in it?

19 A. I don't remember.

20 That was four years ago.

21 THE COURT: She's answered that question at least separate
22 times, and that is sufficient.

23 MR. AXELROD: Well - - -

24 THE COURT: No, sir. You've asked it enough.

25 MR. AXELROD: Thank you, sir.

1 Q. That's all, ma'am.

2 THE COURT: Alright.

3 Doctor, you may come down.

4 Can this doctor now be excused from her subpoena?

5 MR. VON HERRMANN: Yes, sir, Your Honor. We request that.

6 THE COURT: You are now excused, and we thank you for your
7 participation.

8 MR. AXELROD: Your Honor, she is still under my subpoena.

9 DR. COOPER-MERCHANT: Thank you.

10 THE COURT: Well, I'm going to let her to go work, and if
11 you need her, she'll be available.

12 MR. AXELROD: Absolutely. Thank you.

13 THE COURT: Okay.

14 DR. COOPER-MERCHANT: Thank you.

15 THE COURT: You may go.

16 If we need you later, Doctor, we'll call you but I don't want
17 to deprive you from going to your office.

18 DR. COOPER-MERCHANT: Thank you so much.

19 (The witness leaves the witness stand.)

20 THE COURT: You're certainly welcome.

21 Call your next witness, please.

22 MR. VON HERRMANN: Thank you, Your Honor.

23 The State would call Steven Hayes, please.

24 (The witness takes the witness stand.)

25

1 DR. STEVEN HAYES, being duly sworn,
2 testifies as follows:

3 CLERK OF COURT: Please be seated.

4 Please state your full name.

5 DR. HAYES: Steven Hayes.

6 CLERK OF COURT: And spell your last name for the Court.

7 DR. HAYES: H-a-y-e-s.

8 DIRECT EXAMINATION BY MR. VON HERRMANN:

9 Q. Dr. Hayes, can you please tell the jury where you're currently
10 employed?

11 A. Lexington Medical Center in Columbia.

12 Q. And in January of 2004, where were you employed?

13 A. Conway.

14 Q. And what did you do and what do you do?

15 A. Emergency Medicine Physician.

16 Q. Can you please explain to the jury? Give them the benefit of
17 any licenses you have certifications and work experience.

18 A. I'm a medical doctor, and I'm board certified in Emergency
19 Medicine.

20 Q. And as part of that - - your certification and being in
21 Emergency Medicine, do you keep up on a routine basis with the
22 procedures and how to do the things that you need to to stay
23 abreast of your field?

24 A. Yes, sir.

25 THE COURT: Is his qualifications admitted as a doctor of

1 Emergency Medicine? Mr. Axelrod?

2 MR. AXELROD: Your Honor?

3 THE COURT: Is his qualifications admitted as a doctor of
4 Emergency Medicine?

5 MR. AXELROD: Oh, absolutely, sir.

6 THE COURT: Alright, sir.

7 Let's proceed.

8 You are qualified as an expert as a doctor of Emergency
9 Medicine.

10 Q. Dr. Hayes, did you have an opportunity on January 15th of 2004
11 to see or to treat an **Minor** a young child?

12 A. Yes, I did.

13 Q. And can you tell the jury exactly what you did as a part of
14 your examination?

15 A. Um, I base - - I did a history and physical exam.

16 Q. And did you, ah, request any x-rays be done?

17 A. Yes. I believe I did a chest x-ray.

18 Q. Did you detect any problems with the child, any ailments?

19 A. Um, the child has RSV.

20 Q. Can you tell the jury what RSV is?

21 A. RSV is Respiratory Syncytial Virus. It's a virus that little
22 kids get, um, that causes wheezing. If you or I had it, we'd have
23 a little scratchy throat, dry cough.

24 Q. What did you do particularly to cure that with drugs?

25 A. Really, the only treatment is breathing treatments with

1 albuterol.

2 Q. And is that an inhaler or how is that given?

3 A. It can be given Nebulizer. We send kids home with inhalers
4 if they don't have Nebulizers.

5 Q. And in this particular case with Minor [REDACTED] what did you do?

6 A. Um, I believe we sent her with an inhaler.

7 Q. And did you prescribe any pseudoephedrine for the child?

8 A. No.

9 Q. Have you ever prescribed pseudoephedrine for a child?

10 A. No.

11 Q. Would you prescribe pseudoephedrine for a child?

12 A. No.

13 Q. Tell, the jury if you would what effect pseudoephedrine would
14 have on a child if given?

15 A. Um, it would make the heart race, um, make the blood pressure
16 go up. It's just not prescribed especially in the two - - I
17 believe the child was one month old.

18 Q. Is it recommended for prescription to children?

19 A. No. I think it's actually completely taken off the market
20 now.

21 Q. Did you discharge or - - or give the instructions to the
22 parents with that discharge?

23 A. Yes.

24 THE COURT: What was the date of the discharge?

25 MR. VON HERRMANN: The discharge, Your Honor, is January

1 15, 2004.

2 Q. Let me show you, Doctor, State's Exhibit #1 marked for
3 identification. Are you familiar with that particular form?

4 A. Yes.

5 Q. Would you please tell the jury what that particular form is?

6 A. Ah, it's the Discharge Form that we send home with those
7 parents.

8 Q. And who signed on the bottom left hand corner of the document?

9 A. I did.

10 Q. And who signed the bottom right hand corner as the parent or
11 the care taker?

12 A. I can't read the whole name, W. Smith.

13 Q. Wesley Smith?

14 MR. VON HERRMANN: Your Honor, we'd move State's Exhibit #1
15 into evidence.

16 MR. AXELROD: No objection, Your Honor.

17 THE COURT: Without objection.

18 Mr. Foreman, this matter - - this form will be with you in the
19 jury room during your deliberations.

20 Do you care to publish at this time? It's not necessary
21 unless you care to.

22 MR. VON HERRMANN: Your Honor, if I could have him just
23 answer a few questions. Then I'd like to publish it.

24 THE COURT: Alright, sir. That's fine.

25 It is introduced without objection.

1 (The Court Reporter accepts State's Exhibit #1 into evidence.)

2 Q. Can you please tell the jury the instructions and what the
3 patient's name is that you gave instructions on?

4 A. The patient's name is Minor

5 Q. And we know Wesley Smith is the defendant here.

6 Can you tell them what specific instructions you gave with
7 regards to that matter? The type of medicine to give and that - -
8 -

9 A. Ah, we gave instructions for Tylenol and/or Motrin for fever
10 and then a Ventolin Inhaler for the wheezing.

11 Q. Now, does any of that have any pseudoephedrine in it?

12 A. No.

13 MR. VON HERRMANN: Your Honor, we'd like to publish this at
14 this point, please?

15 THE COURT: You may proceed while the jury passes it
16 around.

17 MR. VON HERRMANN: Thank you, Your Honor.

18 Q. Doctor, in your experience how long does RSV last in a child?

19 A. Um, a couple of days, maybe up to a week.

20 Q. You wouldn't have expected that child to be suffering in
21 February from RSV?

22 A. I'm sorry. I don't remember the exact date I saw the child.

23 Q. January 15th.

24 A. No.

25 Q. Do you indicate to the parents if there were any type of side

1 effects or anything that occurred while taking this medication to
2 return to the hospital immediately?

3 A. Yeah. Yeah, we give instructions of any worsening to return.

4 Q. Did you notice any other problems with the child at that
5 point?

6 A. No, I did not.

7 Q. Did you - - did you or have you had any conversations with Dr.
8 Crane, the radiologist?

9 A. No.

10 Q. Thank you.

11 MR. VON HERRMANN: No further questions, Your Honor.

12 CROSS EXAMINATION BY MR. AXELROD:

13 Q. Good morning, Doctor.

14 January 15, 2004, were both parents there when you saw Minor

15 A. I do not remember.

16 Q. And you - - you listed on that sheet that there could be side
17 effects to albuterol?

18 A. I didn't write the side effects to albuterol specifically. I
19 wrote, ah, what things to be concerned - - concerned about with the
20 child being fit.

21 Q. Okay.

22 And you say that you never prescribed any pseudoephedrine for
23 the child?

24 A. No, sir.

25 Q. And you - - you even said that - - what can pseudoephedrine do

1 to an infant, two month old infant?

2 A. Like I said. Make the heart race, ah, make the blood
3 pressure go up.

4 Q. It would be bad?

5 A. Yeah.

6 Q. And, in fact, I think you testified that they've now taken
7 pseudoephedrine off the market for drugs such as these?

8 A. Yes.

9 Q. And is that because, you know, the dangerousness they found
10 with pseudoephedrine in children?

11 A. Yes.

12 Q. Specifically, with infants?

13 A. Yes.

14 Q. In fact, isn't it true that - - I don't know if you know this
15 but if you do you can answer to the jury that really, the original
16 doses was from - - they stopped at two years old. Before they
17 took it off the market, they said, "A child under the age of two it
18 should never be given to."

19 Is that correct?

20 A. I don't know the exact age - - age range.

21 Q. And you're - - you're an Emergency Room doctor now?

22 A. Yes.

23 Q. And isn't it true that right now they're saying not to
24 prescribe cough medicine with pseudoephedrine to a child under the
25 age of six?

1 A. Yes.

2 Q. That's the cut-off now?

3 A. I believe it is, yes.

4 Q. A far cry from two or three months.

5 A. Correct.

6 MR. AXELROD: That would be all, Your Honor.

7 THE COURT: You may come down.

8 You have any further questions?

9 MR. VON HERRMANN: No, sir, Your Honor.

10 THE COURT: You may come down, Doctor, and are excused, and
11 we thank you.

12 (The witness leaves the witness stand.)

13 MR. VON HERRMANN: We'd call Dr. Scott Crane.

14 (The witness takes the witness stand.)

15 DR. SCOTT CRANE, being duly sworn,
16 testifies as follows:

17 CLERK OF COURT: Please be stated.

18 Please state your full name for the record.

19 DR. CRANE: Scott Crane.

20 CLERK OF COURT: And spell your last name for the Court.

21 DR. CRANE: C-r-a-n-e.

22 CLERK OF COURT: Thank you.

23 DIRECT EXAMINATION BY MR. VON HERRMANN:

24 Q. Dr. Crane, can you please tell the jury where you're employed?

25 A. Um, I work for Carolina Radiology. I work at Conway Hospital.

1 Q. And can you tell the jury as a Radiologist what it is you do?

2 A. I, um, supervise and interpret, ah, exams done in the
3 Radiology Department.

4 Q. And when we say exams are we talking in terms of x-rays and
5 that type of things?

6 A. X-rays, CT's, Ultrasounds.

7 Q. And can you tell the jury how long you've been doing this?

8 A. I've been at Conway Hospital sixteen years.

9 Q. And as part of your - - your keeping up in your field of
10 studies, do you go to seminars and maintain adequate certification
11 to make sure you are able to do that?

12 A. I'm Board Certified in the State of South Carolina in
13 Diagnostic Radiology. I have continuing medical education where
14 every year we go to courses - - -

15 THE COURT: Mr. Axelrod, do you permit him to be qualified
16 as a Diagnostic Radiologist?

17 MR. AXELROD: Absolutely, Your Honor.

18 THE COURT: Alright, sir.

19 Qualifications are admitted. You may proceed.

20 MR. VON HERRMANN: Thank you, Your Honor.

21 THE COURT: As a Diagnostic Radiologist.

22 MR. VON HERRMANN: Thank you, Your Honor.

23 Q. Specifically, Dr. Crane, in this case, The State vs. Wesley
24 Smith, were you asked to interpret and look at x-rays, um, to
25 determine what type of fractures or if there were fractures?

1 A. Yes.

2 Q. Let me show State's Exhibit #2 marked for identification in
3 this particular case, and I hand you two x-rays. Are you familiar
4 with those particular ones?

5 A. Yes.

6 THE COURT: You going -- you propose to show them with the
7 lights dim?

8 MR. VON HERRMANN: Yes, sir.

9 Well, no, sir. I believe that we're going to be able to do
10 it without that.

11 THE COURT: But you'll be showing them on that screen?

12 MR. VON HERRMANN: Yes, sir.

13 THE COURT: I'll be going around to see.

14 MR. AXELROD: Your Honor, may we approach for a second?

15 THE COURT: Yes, sir.

16 (Bench conference held off the record in the presence of the
17 jury but outside the hearing of the jury.)

18 Q. Dr. Crane, in making your analysis as a Radiologist have you
19 chosen the two views that you prefer that would help you or assist
20 you in telling the jury about the injuries of this child?

21 A. Yes.

22 MR. VON HERRMANN: I'll wait for the judge to move around.

23 (The Court moves to a better location for viewing the x-rays
24 being presented.)

25 MR. VON HERRMANN: Your Honor, at this time we would move

1 State's Exhibit #2 marked for identification into evidence.

2 THE COURT: In evidence. Proceed.

3 (The Court Reporter accepts State's Exhibit #2 into evidence.)

4 Q. Dr. Crane, if you can come down and place these on the board,
5 and, hopefully, we won't have to dim the lights, and we can show
6 them.

7 First of all, what day were these taken and interpreted?

8 A. Ah - - -

9 Q. Or taken, I should say?

10 A. December 19th - - I'm sorry, December 9th.

11 THE COURT: Doctor, I would ask that you step back a little
12 bit so that everybody can see, please. Thank you.

13 Q. If that helps you, you can just point.

14 Explain to the jury, if you would, in these particular
15 pictures or x-rays exactly what's important about them.

16 A. This is the, ah, the thigh bone. This is the big leg - - the
17 bone in the leg here. This is the normal appearance of that thigh
18 bone, the femur on the left side, and on the right side, there's a
19 fracture through that femur bone, through that thigh bone, and this
20 fracture has what's called callus which is how bones heal. They
21 have calcification that attempts to get the bones back together,
22 and so that's why this bone looks wider than the other bone because
23 all of this is the healing of that fracture through the shaft of
24 that femur.

25 Q. Is there any way to determine how long that injury has

1 occurred?

2 A. Well, um, bones, they put casts on bones so that they don't
3 move around, and if - - it isn't casted, then that healing can be
4 interrupted and slowed down, and so it's a little bit hard to tell
5 exactly how long it's been fractured because you don't know how
6 much the bone has been moving without being casted but because of
7 this callus formation you know that this bone has been fractured
8 for at least two weeks.

9 Q. Do you have any idea if this child had ever been seen based on
10 the medical records you've seen had ever seen a physician and had
11 it properly taken care of?

12 A. Not based on the records in the Radiology Department.

13 Q. We'll put these up, Doctor, and we'll look at the other two.

14 Under State's Exhibit #3 marked for identification, have you
15 chosen two diagrams, ah, or two x-rays that you feel would assist
16 you in describing any injuries or in light thereof with regards to
17 the child in January 15, 2004?

18 A. Yes.

19 Q. Does - - can you please explain to the jury what these are x-
20 rays of?

21 A. These are chest x-rays. These are the ribs here. This is the
22 heart. The dark area are the lungs here, and these are the
23 shoulders and the clavicle, the collar bones here.

24 Q. Are there any fractures or any concerns you have with regards
25 to the ribs of Minor [REDACTED] on January 15, 2004?

1 A. No.

2 Q. There were no fractures at all?

3 A. That's correct.

4 Q. So we know that any injury if there were subsequent injuries
5 that occurred after that particular date?

6 A. Yes.

7 Q. And we know that somewhere prior to two weeks from January 9th
8 was a spiral fracture to the leg?

9 A. December - -

10 Q. Excuse me, December.

11 A. - - December 9th.

12 Q. Yes, sir.

13 A. Correct.

14 Q. You can have a seat, Doctor. Thank you.

15 MR. VON HERRMANN: Your Honor, we would move State's Exhibit
16 #3 into evidence.

17 THE COURT: It is admitted.

18 (The Court Reporter accepts State's Exhibit #3 into evidence.)

19 MR. AXELROD: Your Honor, without objection. May I just ask
20 that - - are both of those x-rays being called one exhibit?

21 MR. VON HERRMANN: Yes. I put them both in - - the film,
22 both of those photos - - the x-rays with regards to the leg is
23 State's Exhibit #2. State's Exhibit #3 is the chest x-rays.

24 THE COURT: Okay.

25 Identify them for the Court Reporter, please.

1. MR. VON HERRMANN: Number 2 is the leg injury. Number 3 is
2 the lack of rib fractures.

3 Q. Doctor, tell the jury if you could how we typically see or
4 what you typically see in spiral fractures: What type of injury
5 causes spiral fractures?

6 A. Um, most frequently, it's a twisting type injury that causes
7 the bone to fracture in a spiral rather than just a crack.

8 Q. In your experience as a Radiologist do you see falls - - these
9 type injuries occur in falls or are they typically another type of
10 injury?

11 A. They're usually a different type of injury.

12 Q. And are they consistent with in your experience abuse and
13 neglect?

14 A. They're, um, yes. Most typically, not accidental or abuse
15 cause of the fracture.

16 Q. No further questions, Doctor. Thank you for your help.

17 CROSS EXAMINATION BY MR. AXELROD:

18 Q. Doctor, you spoke of - - you spoke of when you looked at the
19 femur, the spiral fracture of the femur, you looked at it on the 9th
20 of December, 2003.

21 A. I'm not sure exactly of what - - when I interpreted the x-ray
22 but it was obtained then.

23 Q. I'll rephrase my question.

24 You took the x-ray - -

25 A. Yes.

1 Q. - - on the 9th?

2 I'm not trying to trick you.

3 Okay.

4 And you said it was fractured for two weeks?

5 A. Well, because of the healing I would estimate that the
6 fracture would be at least two weeks old because of the amount of
7 reaction around the fracture.

8 Q. So, here's my question to you.

9 Could the fracture be three weeks old?

10 A. Yes.

11 Q. Could the fracture have been four weeks old?

12 A. Yes.

13 Because the fracture wasn't immobilized, it's a little bit
14 hard to age the fracture because if there is continuous bone
15 motion, then it alters the rate of healing.

16 Q. Slows it down?

17 A. Yes.

18 Q. And when the fracture occurred, you don't even know where the
19 child was, do you?

20 A. No, sir.

21 Q. Or who it was with?

22 A. Correct.

23 Q. And isn't it true that all - - that some spiral fractures are
24 not abusive?

25 A. That's correct.

1 Q. And some spiral fractures are accidental?

2 A. That's correct.

3 Q. Thank you.

4 REDIRECT EXAMINATION BY MR. VON HERRMANN:

5 Q. You indicate that - - in particular with a three month old or
6 two month old, do you expect an accidental spiral fracture of a
7 child's femur?

8 A. Um - - -

9 MR. AXELROD: Your Honor, he's asking him to speculate on
10 this.

11 THE COURT: No, sir. He's an expert. The jury can accept
12 or reject his testimony.

13 I let you make the inquiry. I'll certainly permit the
14 Solicitor to do it.

15 MR. AXELROD: Thank you.

16 THE COURT: Go ahead.

17 A. Statistically, over seventy percent of spiral fractures of the
18 femur on children that aren't walking are caused by abuse or non-
19 accidental cause.

20 Q. And would it go - - I mean, obviously, the less mobile the
21 child, here two months old, would that be less likely to be?

22 A. Correct. If the child is not walking, then it's more likely
23 to be caused by abuse.

24 MR. VON HERRMANN: No further questions, Your Honor.

1 RE-CROSS EXAMINATION BY MR. AXELROD:

2 Q. Well, you just testified that seventy percent of spiral
3 fractures in a child the age of **Minor** would be abusive?

4 MR. VON HERRMANN: Your Honor, I don't believe that's what he
5 said. He said of the children.

6 THE COURT: The jury will understand what he said.

7 A. Seventy - - of children that are before they walk, you know,
8 infants that aren't walking, approximately seventy percent of the
9 spiral fractures of femurs are caused by non-accidental or abuse
10 causes.

11 Q. And thirty percent would be accidental and not abusive?

12 A. Correct.

13 Q. Thank you.

14 MR. VON HERRMANN: No further questions, Your Honor.

15 THE COURT: Alright.

16 You may come down, Doctor, and this doctor is excused.

17 Thank you.

18 (The witness leaves the witness stand.)

19 MR. AXELROD: Your Honor, may we approach a second.

20 THE COURT: Yes, sir.

21 (Bench conference off the record and in the presence of the
22 jury but outside the hearing of the jury panel.)

23 THE COURT: Ah, ladies and gentlemen, it's 11:00. You've
24 been out here about an hour and a half. Let's take a about a
25 fifteen minute break and call you right back, please. We'll then

1 work on until lunch hour. Thank you.

2 (The jury retires to the jury room at 10:59 a.m.)

3 THE COURT: Alright. We're in recess for a few moments.

4 MR. AXELROD: Thank you, Your Honor.

5 (The Court recesses this trial for a short break and
6 thereafter reconvenes the trial of this case.)

7 THE COURT: Thank you. Be seated.

8 Bring the jury in, please.

9 (The jury returns to the courtroom at 11:23 a.m.)

10 THE COURT: Alright, sir. Call your next witness, please.

11 MR. VON HERRMANN: Thank you, Your Honor.

12 The State calls Dr. Rodney Robertson, please, Robertson.

13 (The witness takes the witness stand.)

14 RODNEY ROBERTSON, being duly sworn,
15 testifies as follows:

16 CLERK OF COURT: Please be seated.

17 State your full name.

18 MR. ROBERTSON: Rodney Robertson.

19 CLERK OF COURT: Spell your last for the Court.

20 MR. ROBERTSON: R-o-b-e-r-t-s-o-n.

21 DIRECT EXAMINATION BY MR. VON HERRMANN:

22 Q. Mr. Robertson, can you please tell the jury where you were
23 employed in December 14th of 2004?

24 A. Yes, sir. At Plantation Apartments. I
25 was a - - I own Titan Protective Services which is a private

1 security company.

2 Q. And is that address where the event occurred where the child
3 died?

4 A. Yes, sir, it is.

5 Q. And were you employed that particular day? Were you working?

6 A. I was.

7 Q. Tell the jury if you could exactly what your duties and
8 responsibilities were that day.

9 A. I was to patrol the property and handle any problems or
10 situations that might arise on the property.

11 Q. And did a situation arise on the property?

12 A. Ah, yes, sir, ah, I was flagged down. So, that's how I got
13 involved.

14 Q. Explain to the jury how that happened.

15 A. I was flagged down while on patrol of the property of a infant
16 that was unresponsive. So, I went to check on the child.

17 Q. Can you tell me what you found when you got there?

18 A. I believe - - there was a lady trying to do CPR at the time on
19 the couch, and I moved the child to the floor and took over the CPR
20 until EMS got there.

21 Q. Was the defendant present at that particular time?

22 A. I don't recall.

23 Q. And can you tell me? Did you have any training in CPR?

24 A. I have.

25 Q. Did you begin resuscitative measures?

1 A. I did, yes, sir.

2 Q. And when did you cease giving resuscitative measure?

3 A. When relieved by EMS upon their arrival.

4 Q. And was there anything else extraordinary that occurred on
5 that particular day?

6 A. Not that I recall, sir.

7 Q. Did you just fill out a report in that regard?

8 A. I did, yes, sir.

9 MR. VON HERRMANN: No further questions, Your Honor.

10 CROSS EXAMINATION BY MR. AXELROD:

11 Q. Good morning, Mr. Robertson.

12 A. Good morning, sir.

13 Q. You said when you arrived there, a lady was doing CPR?

14 A. Yes, sir. That is correct.

15 Q. What lady?

16 A. I couldn't tell you at this time.

17 Q. Now, do you know if anybody was doing CPR before that lady
18 did?

19 A. I couldn't say.

20 Q. Did you ask?

21 A. No, sir.

22 Q. Now, why did you remove the baby from the couch to the floor?
23 Tell the jury.

24 A. The reason being is CPR is not done properly if you're on a
25 couch or if you are in the bed.

1 Q. So, with your expertise in administering CPR, the lady doing
2 CPR on the sofa was incorrect?

3 A. Yes, sir, she was incorrect, and she wasn't - - just partially
4 doing it at the time.

5 Q. Nothing further.

6 A. Okay.

7 MR. VON HERRMANN: No further questions, Your Honor.

8 THE COURT: You may come down and are excused from your
9 subpoena.

10 Thank you.

11 MR. ROBERTSON: Thank you, sir.

12 (The witness leaves the witness stand.)

13 MR. VON HERRMANN: Your Honor, the State would call Dr. Carol
14 Rahter to the stand.

15 MR. AXELROD: Your Honor, for the witness' knowledge, we
16 still have him under our subpoena for later this week.

17 THE COURT: That's fine if necessary but I don't want to
18 keep all these people away from their work.

19 MR. AXELROD: They can go back to work now and we can get
20 their phone numbers.

21 THE COURT: Well, that's what I just said.

22 I understand.

23 Who is your next witness?

24 MR. VON HERRMANN: Dr. Carol Rahter.

25 THE COURT: Who?

1 MR. VON HERRMANN: Carol Rahter, R-a-h-t-e-r.

2 (The witness takes the witness stand.)

3 DR. CAROL RAHTER, being duly sworn,
4 testifies as follows:

5 CLERK OF COURT: Please be seated.

6 State your full name.

7 DR. RAHTER: Carol Ann Rahter.

8 CLERK OF COURT: And spell your last for the Court.

9 DR. RAHTER: R-a-h-t-e-r.

10 DIRECT EXAMINATION BY MR. VON HERRMANN:

11 Q. Dr. Rahter, in December 14th of 2004, where were you employed?

12 A. At Conway Hospital.

13 Q. And what was your job and duties and responsibilities there?

14 A. I was an Emergency Physician there.

15 Q. Did you also have any, ah, training or any expertise in the
16 area of child abuse and neglect?

17 A. I do.

18 Q. Can you please explain to the jury where you obtained that and
19 what type of experience you have?

20 A. Well, I'm Board Certified in Emergency Medicine. So, a lot of
21 that training has to do with, um, child abuse and neglect.

22 MR. AXELROD: Your Honor, we'll stipulate to the expert.

23 THE COURT: Alright. I stipulate - - you're stipulating
24 her as in Emergency Medicine?

25 MR. VON HERRMANN: Emergency Medicine and an expert in child

1 abuse and neglect cases, Your Honor.

2 MR. AXELROD: No objection, Your Honor.

3 THE COURT: Sir?

4 MR. AXELROD: She's highly qualified. Your Honor, no
5 objection to Dr. Rahter being qualified.

6 THE COURT: No objection. She's stipulated as so qualified
7 in both areas.

8 That's fine. That will save us some time.

9 Thank you, Mr. Axelrod.

10 MR. VON HERRMANN: Thank you, Your Honor.

11 Q. Dr. Rahter, did you have an occasion on February 14, 2004, to
12 see a patient by the name of Minor

13 A. Can - - can I have my records?

14 Q. Dr. Rahter, this is the record.

15 A. Okay. Thank you.

16 And the answer is yes.

17 Q. Okay.

18 Tell me exactly how the child was presented to you at the
19 time.

20 A. The child Minor came in via EMS in full cardio-pulmonary
21 arrest with CPR in progress.

22 Q. Was CPR being done in progress?

23 A. Yes, it was.

24 Q. And can you tell the jury exactly what they - - exactly in
25 layman's terms exactly how she was presented to you?

1 A. How the child presented to the Emergency Department?

2 Q. Yes.

3 A. Yes.

4 Um, the child had no pulse and was what we call asystolic
5 which basically means flat-line. They were doing CPR, and they
6 had a tube in the child's mouth doing ventilation, breathing for
7 the child.

8 Q. Um, did you attempt to resuscitate the child?

9 A. We did.

10 Q. And were you successful in that?

11 A. We were not.

12 Q. And did you ultimately pronounce the child dead?

13 A. I did.

14 Q. And do you - - can you tell the jury approximately what time
15 that was?

16 A. 7:53 p.m.

17 Q. Did you have an opportunity to talk to Mr. Smith at the
18 hospital?

19 A. Yes, I did.

20 Q. And did he give you a time line as to the events of that day?

21 A. Yes, he did.

22 Q. And can you just relate to the jury? Did he ever mention
23 anybody else being there during the time period of the event?

24 A. No. He told me everything that he did with feeding the baby,
25 rocking the baby, and the baby coughing and him going to check on

1 the baby, um, that he was the caretaker at the time.

2 Q. And can you give the jury the benefit of that particular day
3 the outline of the time table?

4 A. Yes.

5 Um, I went into the consultation room to speak to, um, Ebony's
6 father, and he told me that the child was coughing, slobbering at
7 5:35 in the afternoon, and he used the inhaler that he had.

8 He then said that he fed the child, um, six ounces and rocked
9 the baby to sleep at approximately 6:00 p.m. and put her in her
10 crib.

11 He stated that a little bit after 7:00, he heard coughing and
12 thought it was the six year old child that was in the home. Ran up
13 to check on that child at which time he realized it was not that
14 child and went in and found, um, **Minor** with secretions coming out
15 of her nose and mouth.

16 Ran to the neighbor's house. Called 911, and, ah, EMS were
17 notified at 7:28 p.m.

18 Q. Did you indicate - - or did you discuss with him a prior
19 injury of the spiral fracture of the femur?

20 A. I did.

21 Q. Can you tell the jury what his story was that he gave you?

22 A. Let me just review this real fast.

23 Okay.

24 Um, he reported to me that he was holding the child in a
25 chair, that a neighbor came into the house and found the child on

1 the floor, and so he didn't remember anything. He assumed he had
2 a seizure.

3 Q. Did you do any tests on the child to see if the child should
4 have been taking any medication?

5 A. I did a RSV test. Um - - -

6 Q. Tell the jury what RSV means.

7 A. Respiratory Syncytial Virus, the virus that children get that
8 causes them to wheeze and have fever, and sometimes it can make
9 them stop breathing. So, that's why I tested for RSV. It was
10 negative.

11 Q. And at the time of the child, the day that the child died can
12 you tell the jury what it being negative means?

13 A. It means the child did not have that virus.

14 Q. Was there anything that you could tell that would have the
15 need - - resuscitative medication to be given to the child?

16 A. I don't know whether the child was wheezing that day or not
17 because, obviously, the child wasn't wheezing when - - when, um,
18 she presented to me.

19 Often times when children do have RSV, they wheeze and we use
20 an inhaler on the child. So, that may or may not have been
21 appropriate. I'm not sure.

22 Q. But there was no RSV. So it would unlikely be symptomatic?

23 A. Correct.

24 Q. And was there any bruising on the child at that particular
25 time?

1 A. There was not.

2 Q. What specifically concerned you about the death of this child
3 and the indication that there might have been abuse and neglect?

4 C Well, it's always concerning when a child has a spiral
5 fracture to the femur. Um, it's very highly correlated with child
6 abuse.

7 So, we have a child that has a previous spiral fracture of the
8 femur that now presents dead to me at four months of age. So, it's
9 quite concerning that there was some kind of child abuse that was -
10 - that occurred here.

11 Q. And what did you - - was it your opinion - - you've had an
12 opportunity to review all of the records with regards to the spiral
13 fracture?

14 A. I did.

15 At that time we were able to go into the computer at Conway
16 Hospital and, um, bring up other people's dictations, and so I did
17 that as well as I spoke with, um, a pediatrician that had been
18 involved with the care of the child.

19 Q. Did you read all the other consistent stories that the
20 defendant had told?

21 A. I did.

22 Q. And were you aware that there were a number of these stories?

23 A. Yes.

24 Q. Did any of them to you in your experience ring true with
25 regard to an injury of this type?

1 A. No.

2 To get a spiral fracture you have to have something that's
3 stationary and a twisting motion.

4 So, the child get's thrown off of your lap onto the floor,
5 there's no stationary twisting motion.

6 Um - - the child - - if you're startled and throw a child off
7 the floor, there's no stationary and twisting motion to cause a
8 spiral fracture, and, clearly, with the child with a spiral
9 fracture to their leg, the leg is swollen. You're going to notice
10 that. There's going to be some trauma that you know that's
11 associated to cause that injury. It's not something that you're
12 not aware of how it happened.

13 Um, and none of the three stories that were documented in the
14 medical record or told to me that night are consistent with causing
15 spiral fracture of a femur.

16 Q. And in - - having that, um, was - - is it your understanding
17 if you have information that Wesley Smith was the custody - - the
18 child was in the custody of Wesley Smith on that day the episode
19 occurred?

20 MR. AXELROD: Your Honor, as to what occurred?

21 THE COURT: Sir?

22 MR. AXELROD: I can't understand the question. If the
23 Solicitor would just be more specific. I don't know if he's
24 talking about the femur at that point.

25 MR. VON HERRMANN: I - - I - - I can rephrase the question.

1 THE COURT: Alright, sir.

2 Q. With regards to when the femur injury occurred, this spiral
3 fracture, could you have ascertained that he was only in the
4 custody and care of this defendant?

5 A. No. My understanding is the child presented to the
6 pediatrician's office with a swollen leg but the injury was
7 actually three to four weeks old. So, I don't know who was with
8 the child three to four weeks before.

9 Q. So, it was the mother that took her to the hospital?

10 A. It - - my understanding was the mother and father took the
11 child to the pediatrician. I may be wrong about that.

12 Q. Okay.

13 And - - was it - - do you have an opinion as to whether that
14 spiral fracture was abuse and neglect?

15 A. I think it has to be abuse and neglect unless you have a
16 mechanism that would support getting that type of injury.

17 Q. And we don't have one?

18 A. We do not.

19 Q. Thank you.

20 No further questions, Dr. Rahter.

21 THE COURT: Mr. Axelrod, you may examine.

22 MR. AXELROD: Thank you, Your Honor.

23 CROSS EXAMINATION BY MR. AXELROD:

24 Q. Good morning, Dr. Rahter.

25 A. Good morning.

1 Q. How are you today?

2 A. I'm fine, thank you.

3 Q. You said that Wesley's stories on how the baby might have got
4 hurt was not consistent with a spiral fracture.

5 A. Correct.

6 Q. Okay.

7 Now, maybe the - - maybe Wesley wasn't there when the fracture
8 occurred. Is that possible?

9 A. That's certainly - - certainly possible.

10 I don't think anybody knows exactly when that fractured
11 occurred.

12 Q. Thank you.

13 Wesley never told you alone - - the day that **Minor** died on
14 February 14th, Wesley never told you he was alone that whole day by
15 himself with the baby, did he?

16 A. No. He told me he was home that night with the baby and the
17 six year old. I don't know about earlier in the day.

18 Q. Because he told you that the baby was coughing and slobbering
19 at 5:35 p.m., now, you said the baby, Similac with Iron,
20 approximately six ounces, and he rocked the baby to sleep at
21 approximately 6:00 p.m. and put **Minor** in her crib?

22 A. Correct.

23 Q. And at 7:00 p.m. he heard **Minor** crying?

24 A. No. At 7:00 p.m. he heard coughing.

25 Q. I'm sorry.

1 A. Thought it was the other child.

2 Q. Heard coughing. I'm sorry.

3 And then he also told you that day that he started CPR
4 himself, correct?

5 A. Um, yes, he did.

6 And then he left the baby there and ran next door to call 911.

7 Q. And you also gained information from the family that - - that
8 Wesley told you they'd both been using the inhaler, both he and
9 Charlene?

10 A. Correct. About once a day.

11 Q. Okay.

12 And would it be fair to say that a spiral fracture was not the
13 cause of death?

14 A. Correct.

15 Q. Thank you.

16 MR. VON HERRMANN: I have no further questions, Your Honor.

17 THE COURT: You may come down and are excused.

18 Thank you.

19 (The witness leaves the witness stand.)

20 MR. VON HERRMANN: Court's indulgence.

21 Your Honor, the State would call Demi Garvin to the stand.

22 THE COURT: Alright, sir.

23 (The witness takes the witness stand.)

1 DR. DEMETRA JONES GARVIN, being duly
2 sworn, testifies as follows:

3 CLERK OF COURT: Please be seated.

4 Please state your full name.

5 DR. JONES: My name is Demetra, Dr. Demetra, D-e-m-e-t-r-a,
6 Jones, J-o-n-e-s, Garvin, G-a-r-v-i-n, and I'm commonly called Demi
7 Garvin.

8 DIRECT EXAMINATION BY MR. VON HERRMANN:

9 Q. Good morning, Dr. Garvin.

10 Can you please tell the jury exactly what you're expertise
11 lies in?

12 A. Yes, sir.

13 I am - - my expertise, ah, in terms of my education, training
14 and experience is primarily targeted in two area: Forensics, that
15 being Forensic Toxicologist and Forensic Drug Chemist.

16 I am also a Clinical Toxicologist.

17 MR. AXELROD: Your Honor, we will stipulate that she's an
18 expert in Forensic Toxicology and the other matters she said.

19 THE COURT: By stipulation it is agreed that she is an
20 expert in these fields, and I have previously explained to you the
21 law with regard to experts.

22 An expert based on training and experience may give their
23 opinion in a particular field. You, the jury, of course, are
24 entitled to accept it in whole or in part as you think appropriate.

25 You may proceed.

1 Q. Can you explain what a Forensic Toxicologist and a Drug
2 Chemist - - a Clinical and Forensic Toxicologist and Drug Chemist
3 actually does for the jury? What's your background and what you
4 do do?

5 A. Yes, sir.

6 A Clinical Toxicologist is an individual who assists other
7 health professionals, nurses, physicians, pharmacists in
8 identifying whether or not a living person, a patient has been, um,
9 the victim of what we refer to as a toxic insult meaning some
10 substance, foreign substance that has been administered to or in
11 whom the patient has been exposed to result in, um, an adverse
12 affect which could be anything from a minor affect to a fatal one,
13 and then to, ah, in conjunction with the other allied health
14 professionals, develop a treatment plan for that individual which
15 includes proper drug therapy if that's warranted, providing an
16 antidote if that's warranted and also monitoring the patient and
17 seeing them through until their ultimate disposition whatever that
18 might be.

19 The Forensic Toxicologist who, um, myself, in particular,
20 identifies, um, drugs, alcohols and other poisons in the body, ah,
21 fluids and tissues of both living and deceased individuals for
22 purposes of developing an interpretation of those results primary
23 in a court of law if asked to do so.

24 Um, I work as a Forensic Toxicologist in conjunction with, um,
25 treating professionals, medical professionals, as well as the legal

1 profession and law enforcement.

2 And, finally, um, as a Drug Chemist I am qualified to in the
3 course of my daily activities analyze what I refer to as pills,
4 powders, potions and paraphernalia in an effort to identify the
5 substance that has been submitted for analysis whether it is an
6 illicit drug, a prescription drug, an over-the-counter drug, ah,
7 and also to assist in death investigations where paraphernalia,
8 pills, powders and potions may have been left at the scene and need
9 to be explored.

10 Q. Can you tell the jury how you became involved in this
11 particular case of Minor

12 A. Ah, yes, sir.

13 Um, I have a Forensic Consultancy known as the Forensic
14 Science Network. It's a limited liability corporation. It was
15 established in 1997. Ah, I'm in partnership with two other
16 colleagues in Columbia, South Carolina, and we essentially
17 developed consultative toxicology services for coroners and
18 pathologists in the State of South Carolina who - - who wish to use
19 our services.

20 And by that I mean we would, ah, we partnered with a
21 laboratory in, ah, Philadelphia, right outside of Philadelphia in
22 Willow Grove, Pennsylvania known as National Medical Services that
23 also have a satellite laboratory in Alameda, California, at that
24 time, and we partnered with them to establish toxicology testing
25 for those coroners and pathologists who wish to engage our services

1 whereby biological specimens from deceased individuals would be
2 collected either pursuant to an autopsy or without an autopsy if
3 one was not performed.

4 They would then be shipped to the laboratory for testing.
5 That testing panel was developed by us in conjunction with National
6 Medical Services, and then we would subsequently be involved in
7 additional directing of testing if that was warranted, retention of
8 specimens if that was warranted, interpretation, ah, and any
9 additional consultation that was necessary.

10 Q. And I guess we need to talk about it. Are you in any way
11 employed by the Solicitor's Office - - Solicitor's Office or law
12 enforcement in this county?

13 A. In this county, no, sir, I'm not.

14 Q. And are we paying you anything for your testimony today or for
15 your analysis?

16 A. No, sir.

17 Q. Tell me, ah, just as an overview - - we're talking - - we're
18 talking in this case about pseudoephedrine in particular.

19 Tell us in particular how infants versus - - or adults versus
20 other levels or age groups are affected by pseudoephedrine and
21 other drugs.

22 I mean, you know, we're talking about portion or size issue or
23 how was that?

24 A. First of all, um, Pediatric Toxicology is a particular
25 interest of mine. Um, the first thing that I would say is that

1 children are not small adults. This is a common misperception
2 particularly not only, ah, among the lay public but also among
3 health professionals.

4 Um, there is a vast difference in the way a child handles - -
5 a child's body handles a drug - - a particular drug, ah, from that
6 of an adult, and even within the pediatric population the way that
7 an infant, ah, and I define an infant as a child less than two
8 years of age, processes medication in the body is very different
9 from how a four year old would process that medication, is very
10 different from how a twelve year old would process that medication,
11 is very different from how a seventeen year old would process that
12 medication.

13 So, um, when it comes to, ah, while it is somewhat drug
14 dependent, it is very important to understand that infants may
15 respond quite differently under given conditions - - under the same
16 conditions that other children and, certainly, adults could respond
17 to a medication and, particularly, in this case pseudoephedrine.

18 Q. In National Medical Services running a complete panel, are
19 there any other concerns that you have with regard to the report
20 and the findings with any other medication or anything other than
21 pseudoephedrine?

22 A. Um, I'm not sure I understand your question.

23 Q. Is there anything other than pseudoephedrine that would have
24 been of some distress to this child?

25 A. Um, well, I guess I would say that, um, we - - the - - the

1 testing panel that was performed on the blood obtained from Minor
2 Smith, ah, was, ah, ah, extremely comprehensive. Ah, it included
3 a variety of, ah, multiple over-the-counter medications,
4 prescription medications, illicit medications, alcohols and, um,
5 the results of the analysis, ah, ah, were found to contain only
6 pseudoephedrine, ah, at a concentration of 1300 nanograms per
7 milliliter of blood.

8 Q. And what is the adult therapeutic level for pseudoephedrine?

9 A. Um, typically the adult therapeutic concentration in the blood
10 for doses that range anywhere from 15 to 60 milligrams per dose,
11 again that's an adult dose, um, range anywhere in the literature
12 from about 200 nanograms per mil. to a thousand nanograms per mil.

13 Q. So, in - - it's above therapeutic level for an adult?

14 A. That's correct.

15 Q. Let me ask you, Dr. Garvin, give you an opportunity to review
16 this.

17 MR. AXELROD: May I see it, please.

18 Q. I show you State's Exhibit #4. Are you familiar with that
19 particular form?

20 A. Yes, sir, I am.

21 Q. Can you specifically tell them what day that form was filled
22 out?

23 A. It appears to have been filled out on December 18th of 2003.

24 Q. And you don't know this. We talked about this form a little
25 bit before.

1 MR. VON HERRMANN: Your Honor, we'd move State's Exhibit #4
2 marked for identification into evidence.

3 MR. AXELROD: Without objection, Your Honor.

4 Your Honor, may I see it once more to see - - I object to
5 this coming in, Your Honor. It can't come in through this witness.

6 THE COURT: What is your objection, please?

7 MR. AXELROD: It - - it - - it's not this witness' report or
8 paper.

9 MR. VON HERRMANN: Your Honor, that's correct but that is the
10 paper on which the expert relied on for her opinion that she's
11 about to give.

12 MR. AXELROD: It - - it's hearsay. She can testify to what
13 she relied on but the paper can't come in because of that.

14 THE COURT: Who is the author of this paper?

15 MR. VON HERRMANN: The author, Your Honor, that is the one
16 Mr. Axelrod cross examined the non-author of it as well earlier
17 with regard to whether pseudoephedrine was prescribed to the child.

18 THE COURT: And what is the - - what is the purpose of this
19 that you can't accomplish by testimony itself?

20 MR. VON HERRMANN: I can do it that way.

21 THE COURT: I think - - since the author is not here, I'll
22 permit, of course, examination about it because she's relied on it.

23 MR. VON HERRMANN: Thank you.

24 THE COURT: But I'm going to sustain that objection.

25 MR. AXELROD: Thank you, sir.

1 (The Court Reporter accepts State's Exhibit #4 for
2 identification only.)

3 Q. Doctor, is it your understanding and there's been testimony
4 that you don't know about that occurred before hand but this - - a
5 particular medication was diag - - or prescribed for **Minor** in
6 December of '03?

7 A. Yes, sir, that's correct.

8 Q. And can you tell the jury what that medication is?

9 A. Ah, the medication that was prescribed on December 18th of 2003
10 was Rondec-DM which stands for dextromethorphan, and it was
11 prescribed at a concentration of 0.25 cc's or milliliters orally,
12 ah, qidpin, which means four times a day as needed.

13 Q. Does that particular medication contain other ingredients
14 other than pseudoephedrine?

15 A. Yes, it does.

16 Q. And what has - - would it have been picked up on the panel
17 that National Medical Services ran their screening for?

18 A. Yes, it would have.

19 Q. Is there any indication that that medication was given to that
20 child?

21 A. Um, based on the post-mortem toxicology results, ah, the
22 toxicology results do not support the administration of this
23 particular medication to the child on or about the time of death.

24 Q. So, is it your opinion with a reasonable degree of medical
25 certainty that that medication was not prescribed or not given to

1 that child within that time period of death?

2 A. That's correct.

3 Q. Can you please tell me if pseudoephedrine should be - - should
4 be prescribed in and of itself to a child under the age to two
5 years?

6 A. At, um, at the time of this death in 2004, um, the, ah,
7 pediatric preparations that were available, the directions on those
8 - - on the pseudoephedrine containing preparations indicated that
9 they were not to be given without physician supervision or
10 physician direction in children under the age of two.

11 Um, since that time, ah, there has been, ah, ah, there have
12 been hearings at the national level, at the federal level and
13 beyond to, ah, support the removal of these preparations completely
14 for use in children under the age of two, excuse me, under the age
15 of six now, and some particular preparations are not to be used in
16 children under the age of twelve.

17 Q. And - - and I think I got away from my question.

18 The results of the toxicology screening was there anything
19 other than pseudoephedrine found in the child?

20 A. For - - for those analytes or those compounds that were tested
21 for, no, sir.

22 Q. And that's an exhaustive screen?

23 It's a large screen you run for a lot of different things.

24 A. It's a very comprehensive screen. It contains, ah, the
25 overwhelming majority of compounds and their breakdown products

1 otherwise known as metabolites that we see most commonly in both
2 the pediatric population and adult population.

3 Q. What effect does pseudoephedrine - - or pseudoephedrine have
4 on a child?

5 A. Um, again, ah, my comments are relegated to a four month old
6 since, as I stated before, ah, children of various ages can be
7 subject to, ah, differing side effects or adverse effects from a
8 given drug but, in particular, pseudoephedrine in a four month old,
9 um, in my opinion would not be indicated for use and, also, would
10 place the child at increased risk if given in excessive
11 concentration to the development of, um, what we call hypertension
12 which is high blood pressure, ah, central nervous system
13 stimulation which could result in seizures or, ah, cardiac
14 dysrhythmia which could result in an abnormal heart rhythm, ah,
15 subsequently leading to cardiovascular clots.

16 Q. And can you tell this jury what effect it would have on - -
17 let me - - strike that.

18 Have you had an opportunity to review the autopsy at this
19 particular time?

20 A. Yes, sir.

21 Q. And are you aware of how many rib fractures and injuries there
22 were?

23 A. Ah, yes, I am.

24 Q. And have you had an opportunity to, ah, gain the information
25 that there is at least four hemorrhaging that occurred within

1 forty-eight hours of the child's death?

2 A. Ah, yes, sir.

3 Q. Are you familiar with the term "chemical restraint"?

4 A. Yes, I am.

5 Q. Can you please tell the jury would benefit or effect a child
6 who needed to be chemically restrained because of injuries of this
7 type?

8 A. The term "chemical restraint" has been coined in, ah, forensic
9 circles if you will or the forensic profession, particularly
10 pathology and toxicology, to explain scenarios where, um, over-the-
11 counter and prescription substances as well as some illicit
12 substances have been identified in young children where the
13 underlying reason for their administration was to, um, subdue the
14 child so that the care giver would not have to care for the child
15 or tend to the child, um, or to quiet the child, if you will, in
16 some manner.

17 I've been involved in a number of cases, pediatric cases,
18 where, ah, just such an event occurred, and, ah, we most commonly
19 find over-the-counter substances used in this scenario because they
20 are readily available and - - and frequently found in - - in many
21 households.

22 Q. And what forms are children's pseudoephedrine typically found
23 in?

24 A. In this particular age group if the preparation was going to
25 be given to a child of less than two at the direction of a

1 physician, it would have, ah, been available, ah, provided in the
2 form of pediatric drops where the actual bottle itself, ah, in
3 fact, the top of the bottle, what closes the bottle, keeps it
4 closed is actually attached to a dropper that's calibrated
5 specifically for use with that product.

6 Q. Does pseudoephedrine stop coughing or wheezing and - - is it
7 a cough syrup?

8 A. Pseudoephedrine has no effect on cough.

9 Q. What effect does pseudoephedrine have on a child that would
10 have coughing or wheezing?

11 A. Well, it's not - - it's not used for that purpose.
12 Pseudoephedrine is decongestant which means it reduces nasal
13 stuffiness, and helps, um, the child or the individual - - it opens
14 up the nasal mucous and allows them to breath a little bit better
15 so that their nose doesn't feel as stuffy.

16 Q. Understanding that pseudoephedrine has been - - had been given
17 to this child and it's not indicated but that even if at that
18 particular time the physician had - - had - - we had no evidence of
19 the physician giving it to - - -

20 MR. AXELROD: Is the Solicitor testifying or asking a
21 question?

22 MR. VON HERRMANN: I'm trying to get to the question.

23 MR. AXELROD: Well, you're testifying at this point.

24 THE COURT: Wait a minute.

25 When you need to address the Court, please stand.

1 MR. AXELROD: Your Honor - - -

2 THE COURT: Rephrase the question and proceed.

3 Q. What would a responsible parent or care giver do to make sure
4 that pseudoephedrine was administered properly to a child? What
5 would you expect to see other than the fact that they wouldn't do
6 it?

7 A. The, um, the care giver would be advised and, in fact, is
8 advised on the preparation itself to contact a physician for
9 direction in terms of administering the drug to the child.

10 Q. Do you have any information? Have you reviewed all or some
11 of the DSS reports with regards to the interviews that have been
12 done with the parents?

13 A. Yes, I have.

14 Q. And in particular with this defendant, Wesley Smith, did you -
15 - have you had an opportunity to review it and review the fact that
16 he gave the child a dosage of that?

17 A. Ah, yes, I did review materials that spoke to or indicated the
18 amount that, um, Mr. Smith gave Minor [REDACTED]

19 Q. Was the level of what Mr. Smith indicated and admitted giving
20 this child, would that amount result in 1300 nanograms per
21 milliliter that we have found in the child's blood as of this
22 autopsy?

23 A. Um, based on the - - the materials that I reviewed, it appears
24 that that, ah, the dose described by Mr. Smith would be
25 inconsistent with what was found on post-mortem toxicology.

1 Q. So, it would be inconsistent with his story?

2 A. Yes, sir.

3 Q. But it would be consistent that he gave the child medication?

4 A. Yes, sir.

5 Q. He just would have given her more?

6 A. That would appear to be so, yes, sir.

7 Q. Have you ever been able to attribute the death of a child to
8 the intake of pseudoephedrine?

9 A. Yes, sir.

10 Q. And in this case you indicated you have read the autopsy?

11 A. Yes, sir.

12 Q. Is it your opinion based on the autopsy that you can say in
13 and of itself the pseudoephedrine killed the child or could it be
14 a contributing factor?

15 A. Um - - -

16 MR. AXELROD: Your Honor, I don't believe that this witness
17 is qualified to testify to the cause, actually, if she is a
18 forensic toxicologist. I think the Solicitor is now gone beyond
19 her realm of expertise.

20 THE COURT: No, sir. She is an expert, and you have
21 qualified her in that. She's entitled, of course, to rely on
22 opinion anything that she may have read or heard. In my view she
23 can express her opinion, and I tell the jury that even as an
24 expert, they can accept it, reject it, accept it in part or keep it
25 in part but let's hear the question again, now.

1 Q. Do you have an opinion as to whether this pseudoephedrine in
2 and of itself killed the child or may have possibly contributed to
3 the child's - - -

4 THE COURT: Let me ask you first.

5 Do you feel that based on your expertise you are qualified to
6 answer such a question?

7 DR. GARVIN: Yes, sir.

8 THE COURT: Alright.

9 Proceed.

10 MR. VON HERRMANN: Do you need me to repeat, Your Honor?

11 THE COURT: Please, sir.

12 Q. The level of pseudoephedrine we have in this child, is it
13 possible that that child died as a result of the pseudoephedrine or
14 is it possible that it was a contributor - - contributing factor to
15 the death of the children or the child, excuse me? Is it
16 possible?

17 A. I would - - -

18 MR. AXELROD: Your Honor, that's a compound question. If he
19 can, maybe, the Solicitor could just break it down to a simple
20 question. He's asked three different questions.

21 THE COURT: I - - I - - I decline to tell him how to ask a
22 question.

23 You may ask it in the manner that you think is appropriate,
24 and she may answer in the same way.

25 Go ahead.

1 A. I would answer that question by saying that in cases where I'm
2 asked to consult, ah, in - - in toxic insults or in alleged or
3 purported toxic insults wherein the pathologist, ah, believes that,
4 ah, the resulting toxicology may have been a contributory factor in
5 the death, ah, when I'm asked to do that, um, and I review all the
6 information which is available to me at that time which includes,
7 ah, the autopsy findings if an autopsy was conducted, the
8 toxicology and the medical history and scene investigation, um, I
9 ask myself again by asking myself, "Could the toxicology results in
10 and of themselves be a cause of death in the absence of an
11 anatomical cause of death?"

12 And the way that I would answer that question then would be
13 yes. In this particular case in the absence of an anatomical cause
14 of death, the toxicology alone would have been sufficient to cause
15 death in a child this age.

16 Um, on the other hand if an anatomical cause of death is
17 present, it most certainly could be contributory.

18 Q. What is the most common medication you see for chemical
19 restraint on a child that has been injured and has cracked ribs,
20 fractured ribs or hemorrhaging?

21 A. Um, in my twenty-five years, almost twenty-five years of being
22 a Forensic Toxicologist, the most common preparation that I've seen
23 used for purposes of chemical restraint that has resulted
24 subsequently in a pediatric death has been diphenhydramine
25 otherwise known as Benadryl, another over-the-counter product.

1 Q. And what would be the second thing?

2 A. Ah, various compounds containing pseudoephedrine.

3 Q. And have you read the autopsy with regards to the stomach?

4 A. Yes, sir.

5 Q. And is there any indication of anything in the stomach that
6 would concern you? How does that - - how is the expulsion rate of
7 pseudoephedrine?

8 A. The stomach, ah, the gastrointestinal tract appeared to be
9 empty, the stomach, more specifically, it contained some amount of
10 mucus but there, ah, I - - in my interpretation the stomach was
11 essentially empty on or about the time of death.

12 Q. And with regards to the time line that was provided to you and
13 we've discussed, would it be possible for that child to have
14 absorbed during that period of time that pseudoephedrine?

15 A. Yes, sir.

16 MR. VON HERRMANN: No further questions, Your Honor.

17 Q. Please answer any questions Mr. Axelrod may have.

18 THE COURT: MR. AXELROD:.

19 CROSS EXAMINATION BY MR. AXELROD:

20 Q. Good afternoon, Doctor.

21 A. Hi.

22 Q. Tell the jury - - we're talking about absorption rate. Tell
23 the jury about the studies that have been done on absorption on two
24 month or three month old babies concerning pseudoephedrine. Tell
25 the jury all the studies that you've studied on that.

1 A. There are no studies. Ah, this medication has not been
2 studied in children less than the age two in a - - in a therapeutic
3 modality.

4 Q. And that's because of the severity and the dangers associated
5 with that?

6 A. That's correct.

7 Q. Because it would be true to say that when we do a study, a
8 clinical study with pharmaceutical company, it's done with
9 volunteers?

10 A. Um, yes, for the most part it's done with volunteers. That's
11 correct.

12 Q. Okay.

13 Now, I wasn't going to ask this question but the Solicitor
14 asked you was he paying you, and you said no.

15 A. That's correct.

16 Q. Who is paying you today?

17 A. Ah, I'm the Assistant Laboratory Director for the Richland
18 County Sheriff's Department, Forensic Sciences Laboratory, and the
19 Richland County Sheriff's Department or Richland County is paying
20 me to be here today.

21 Q. Okay.

22 So, the Richland County Sheriff's Department is paying you?

23 A. That's correct.

24 Q. Okay.

25 And they paid you for all the work you did - - in - - in

1 reviewing this case?

2 A. I've not been paid any amount for reviewing this case, sir.

3 Q. Okay. Okay.

4 Now, we've had discussion about pseudoephedrine today. It is
5 true that in December of 2003, Rondec-DM contained - - contained
6 pseudoephedrine?

7 A. Yes, sir. One milliliter of Rondec-DM contained 7.5, excuse
8 me, 15 milligrams of pseudoephedrine.

9 Q. And it would have been written on the label?

10 A. That's correct.

11 Q. Pseudoephedrine?

12 A. That's correct.

13 Q. Okay.

14 And we now know through children dying from pseudoephedrine
15 that it's a dangerous drug.

16 A. Ah, in an infant it can be, yes, sir.

17 Q. And, actually, when **Minor** received the pseudoephedrine to
18 begin with, she was under the care of a foster parent. Are you
19 aware of that?

20 A. Yes, sir.

21 Q. And it says there, I believe, the doctor actually spoke with
22 the foster parents concerning the dangers with the pseudoephedrine.

23 A. Yes, sir.

24 Q. But you don't know whether or not when the child was returned
25 to Charlene and to Wesley whether or not they were ever told about

1 the dangers of pseudoephedrine?

2 A. No, sir. I have no knowledge of that.

3 Q. And today you testified that pseudoephedrine is not - - it's
4 contra-indicated for anybody under the age of six.

5 A. That's correct.

6 Q. Based on what you know about pseudoephedrine, the poisons or -
7 - strike that question.

8 Based on your knowledge of pseudoephedrine and its toxicity
9 and the - - based upon your - - your knowledge of pseudoephedrine
10 and the toxic effect it has on very young infants would you have -
11 - would you prescribe today pseudoephedrine for a two month old
12 child?

13 A. Well, I'm not a physician. So, technically, in South
14 Carolina I'm not allow to prescribe but I am a registered
15 pharmacist, and, um, on this day I would discourage any parent from
16 giving that medication.

17 Q. Thank you.

18 You testified that you reviewed the reports of what Wesley
19 said he gave to Minor the cough medicine.

20 A. I reviewed the materials from a DSS notation - -

21 Q. Okay.

22 A. - - specifically.

23 Q. And you said that the material you reviewed was inconsistent
24 with the findings that you found with the amount of cough medicine
25 with pseudoephedrine in Minor

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

2 Q. So, it would be fair to say that maybe Wesley only gave one
3 dose as he said he did.

4 A. One dose of what, sir?

5 Q. Pseudoephedrine.

6 A. Which product, specifically, sir?

7 Q. Whichever one you said you reviewed.

8 A. Um, I reviewed one product that was provided on December - -
9 on or about December 18th of 2003, excuse me, but I believe that I
10 testified earlier that in my opinion this would not have been the
11 product that was given on or about the time of death.

12 Q. Explain that.

13 A. This product, ah, one milliliter of this product contains 15
14 milligrams of pseudoephedrine - - -

15 Q. I understand that.

16 THE COURT: Wait a minute. Whoa, whoa, whoa.
17 Let her finish.

18 MR. AXELROD: Your Honor, I'm agreeing with her.

19 THE COURT: Well - - let - - agree if you will but let her
20 finish her answer - -

21 MR. AXELROD: Okay.

22 THE COURT: - - and then agree, please.
23 Go ahead.

24 A. One milli - - -

25 THE COURT: Finish your answer, ma'am.

1 A. I'm sorry.

2 One milligram of carbinoxamine and four milligrams of
3 dextromethorphan, neither one of these analytes or compounds
4 present in Rondac-DM was found in the post-mortem blood of Minor

5 [REDACTED]

6 So, it would be my opinion that that product was not the
7 product that was administered.

8 Q. I didn't mean to - - my question might have been confusing but
9 that was not my question. That was - - I'll go back.

10 When Minor died you said that Wesley's story of what he
11 administered to Minor was not consistent with the findings you
12 found in toxic - - toxic - - toxic level of the pseudoephedrine
13 within Ebony's body. Correct?

14 A. That is correct, sir.

15 Q. That was what I was asking you.

16 But, so, you say his story is not inconsistent but back at the
17 Solicitor said, "Well, maybe, he just gave the baby more than he
18 told you."

19 But, maybe, is it possible? The mother was home that day.
20 There was other people there that day.

21 THE COURT: Wait a minute, now. She cannot possibly
22 speculate as to who else was there and she can't - - she's a
23 testifying expert. She does not know that.

24 MR. AXELROD: But I can ask her this question this way.

25 Q. If Wesley says he gave one does and you say it's not

1 consistent with what you found and it's inconsistent. The
2 Solicitor wants to infer that Wesley gave more. Can't you also
3 infer that maybe someone else gave cough medicine?

4 MR. VON HERRMANN: Objection, Your Honor.

5 THE COURT: No, sir. I object to that.

6 She can't possibly make that inference. She - - she - - she
7 can't do that.

8 MR. AXELROD: The Solicitor inferred that to her and she
9 answered.

10 THE COURT: No, sir. I didn't hear that, now.

11 I'm permitting her as an expert on what she read and what she
12 knows but she can't speculate as to some other person.

13 If you've got some evidence of that, come at it but not
14 through this witness.

15 Q. Let me ask you this.

16 Do you know if Wesley gave all of the cough medicine you found
17 in **Minor**

18 A. Um, excuse me, no, sir, I do not.

19 Q. Okay.

20 We'll go with that.

21 And when you speak of chemical restraints - - that we give
22 medicine to restrain a child such as **Minor** we don't know whether
23 Wesley was the one who did that, do we?

24 A. No, sir. That is - - that is one situation that I am aware
25 of in Pediatric Toxicology.

1 Q. Thank you.

2 MR. AXELROD: Nothing further, Your Honor.

3 MR. VON HERRMANN: I just want to be clear.

4 REDIRECT EXAMINATION BY MR. VON HERRMANN:

5 Q. It's your opinion, Doctor, within a reasonable degree of
6 medical certainty Rondiac - - Rondac - - is that how you pronounce
7 that, correct?

8 A. Rondec.

9 Q. Was not given to that child?

10 A. Ah, that's correct.

11 MR. VON HERRMANN: No further questions, Your Honor.

12 MR. AXELROD: Nothing further, sir.

13 THE COURT: Alright.

14 You may come down, and you are - - may she be excused from her
15 subpoena?

16 MR. VON HERRMANN: Your Honor, she is from Columbia, and I'd
17 like to have her excused from her subpoena.

18 MR. AXELROD: No objection, Your Honor.

19 THE COURT: You are excused from your subpoena, and we
20 thank you for your appearance having honored that subpoena. Thank
21 you so much.

22 (The witness leaves the witness stand.)

23 THE COURT: Call your next witness.

24 MR. VON HERRMANN: May we approach, Your Honor?

25 THE COURT: Yes, sir.

1 (Bench conference held in the presence of the jury but outside
2 of the hearing of the jury.)

3 MR. VON HERRMANN: Your Honor, the State would call Charlene
4 Dandridge to the stand.

5 THE COURT: Alright, sir.

6 MR. VON HERRMANN: Your Honor, there is an issue of law that
7 we probably need to discuss with regard to this witness.

8 THE COURT: You want to outside the presence of the jury?

9 MR. VON HERRMANN: Yes, sir, Your Honor.

10 THE COURT: We will do that.

11 I'll let you go to the jury room, please. I'll be calling
12 you back very shortly.

13 (The jury retires to the jury room at 12:18 p.m.)

14 CO-DEFENDANT - CHARGE/RIGHT TO TESTIFY OR NOT

15 THE COURT: Let the record reflect, Mrs. McCall, that the
16 jury has departed the courtroom.

17 Yes, sir?

18 MR. VON HERRMANN: Your Honor, ah, the State will be calling
19 the co-defendant to this defendant, Charlene Dandridge. That is
20 his wife.

21 Your Honor, Mr. Gardner has expressed to me while he has
22 talked to his client he understands how her presence, ah, potential
23 problem with her testifying and admitting things under oath. Mr.
24 Gardner has asked me, and I agreed that the Court would admonish
25 her and just protect her rights and put it on the record as to what

1 possibly she could be exposing herself to by taking the stand and
2 admitting, um, to her involvement in this case.

3 She is, Your Honor, currently charged.

4 THE COURT: Does she have any Fifth Amendment issues that
5 she wishes to raise in incriminating herself and understanding she
6 doesn't have to do that?

7 MR. GARDNER: She's aware of her rights, Your Honor. I have
8 discussed that with her in great detail.

9 THE COURT: And does she, of course, it's, ultimately, it's
10 her decision. Of course, you may express to me that you have
11 discussed it with her.

12 And what is your understanding of her decision to testify or
13 not to testify?

14 MR. GARDNER: She wishes to testify, Judge.

15 THE COURT: Alright.

16 Have her come forward, and swear this witness.

17 She can stand before me initially. Just have her come
18 forward. Stand right here, ma'am.

19 (The witness stands before the Court and is duly sworn.)

20 THE COURT: Alright.

21 Listen to me, please.

22 COURT REPORTER: Your Honor, I need her name, please.

23 MR. GARDNER: Tell them her name and how you spell it.

24 MS. DANDRIDGE: My name is Charlene Dandridge. It's C-h-
25 a-r-l-e-n-e D-a-n-d-r-i-d-g-e.

1 THE COURT: Okay?

2 COURT REPORTER: Yes, sir. Thank you, Your Honor.

3 THE COURT: Alright, counsel, first, as I understand it,
4 she is an indicted co-defendant?

5 MR. GARDNER: That's correct, Your Honor.

6 THE COURT: To be tried separately from this defendant?

7 MR. GARDNER: That's my understanding, Your Honor.

8 THE COURT: It is your understanding, now, that she well
9 may incriminate herself by her testimony.

10 MR. GARDNER: She may as any witness or co-defendant may but
11 my - - based on my conversation with her and talking with her
12 about, I don't think she would incriminate herself. I have
13 explained to her the potential problems that she runs into by
14 taking the witness stand.

15 THE COURT: Does she fully understand from your explanation
16 if she said to me, "Judge, I waive my Fifth Amendment rights not to
17 testify and not to incriminate myself," this Court would absolutely
18 honor it with no penalty to her?

19 MR. GARDNER: Yes, sir.

20 THE COURT: Alright.

21 MR. GARDNER: May I have one moment?

22 (Counsel for the witness discusses matter with witness once
23 again off the record.)

24 MR. GARDNER: She understands that, Your Honor.

25 THE COURT: Alright.

1 And have you explained to her that my only interest in this
2 case with regards to her testimony is it be the truth, the whole
3 truth and nothing but the truth. I'm not interested in who she
4 helps or hurts. I'm interested in if she testifies it will be
5 under oath and whether her testimony is the truth.

6 MR. GARDNER: I have discussed that with her, Your Honor. I
7 do believe she understands that.

8 THE COURT: Does she understand it being under oath, now,
9 if her testimony is substantially different on another occasion,
10 she well may be indicted for perjury for either lying under oath
11 now or then. I don't suggest that she would but if that occurred,
12 that would be a severe penalty.

13 Does she understand that?

14 MR. GARDNER: She does, Your Honor.

15 THE COURT: Alright.

16 Now, ma'am, under the Constitution of this state and under the
17 Fifth Amendment, one who claims Fifth Amendment privileges that
18 basically say for me to testify would incriminate myself, you don't
19 have to testify under that provision. You understand that?

20 Ma'am?

21 MS. DANDRIDGE: Yes, sir.

22 THE COURT: Talk louder so she can take it down.

23 Now, your attorney tells me that you wish to waive any Fifth
24 Amendment rights that you have and to testify and that that
25 testimony may incriminate you. That's his position but,

1 ultimately, the final issue as to whether you wish to testify or
2 not, wish to waive your Fifth Amendment rights belongs solely to
3 you. Do you understand that?

4 MS. DANDRIDGE: Yes, sir.

5 THE COURT: Do you have any questions about what I say to
6 you?

7 MS. DANDRIDGE: No, sir.

8 THE COURT: Is it your desire to testify or not testify?

9 MS. DANDRIDGE: I will testify.

10 THE COURT: Ma'am?

11 MS. DANDRIDGE: I will testify.

12 THE COURT: And that is your desire?

13 MS. DANDRIDGE: Yes, sir.

14 THE COURT: Freely and voluntarily made?

15 MS. DANDRIDGE: Yes, sir.

16 THE COURT: Ah, I will accept it.

17 Is there any other inquiry that you would have under this - -
18 under the Fifth Amendment issue only?

19 MR. VON HERRMANN: No, sir, Your Honor.

20 THE COURT: Alright.

21 Based on that I will accept it.

22 Thank you.

23 MR. VON HERRMANN: Thank you, Your Honor.

24 THE COURT: Alright.

25 Bring the jury in, please.

1 Let her wait there until the jury gets in. She can take the
2 witness stand at that time.

3 Mr. Axelrod, if at the end of her direct examination it is
4 approaching the lunch hour, we will recess for lunch, and you will
5 have your cross examination after lunch.

6 MR. AXELROD: I think we will, Your Honor.

7 THE COURT: Sir?

8 MR. AXELROD: I think we will.

9 THE COURT: Well, it depends on how long he takes.
10 Well, let's see.

11 (The jury returns to the courtroom at 12:25 p.m.)

12 Alright. Call your next witness and have her sworn.

13 Yes, sir.

14 MR. VON HERRMANN: Thank you, Your Honor.

15 The State would call Charlene Dandridge to the stand, Your
16 Honor.

17 THE COURT: Come around, please, ma'am.

18 (The witness takes the witness stand.)

19 CHARLENE DANDRIDGE, being duly sworn,
20 testifies as follows:

21 CLERK OF COURT: Please be seated.

22 State your full name.

23 MS. DANDRIDGE: It's Charlene Dandridge.

24 CLERK OF COURT: And spell your last name for the Court.

25 MS. DANDRIDGE: D-a-n-d-r-i-d-g-e.

1 DIRECT EXAMINATION BY MR. VON HERRMANN:

2 Q. Ms. Dandridge, can you please tell me what relationship you
3 and - - -

4 Can you please tell the relationship you have - - had with
5 Wesley Smith, the defendant in this case?

6 A. Ah, he and I, um, were living together. Um, we were on the
7 verge of marriage.

8 Q. Did you have a child in common with Mr. Smith?

9 A. Yes.

10 Q. And what was that child's name?

11 A. Minor

12 Q. And that is the child we're talking about that passed away
13 today?

14 A. Yes.

15 Q. Ms. Dandridge, let's go ahead and take care of some
16 preliminary things before we talk about the circumstances
17 surrounding the death.

18 You have - - are you facing criminal charges right now?

19 A. Yes.

20 Q. And who is prosecuting that case?

21 A. Honestly, I don't know. I'm not sure.

22 Q. Do you have any deals with me with regards to a potential
23 sentence or a potential outcome with your cases?

24 MR. AXELROD: Your Honor, she's testified that she doesn't
25 know who is prosecuting her. So, I think that the question - - -

1 THE COURT: No, sir.

2 I will take judicial notice of the fact if you tell me that
3 you are the prosecuting attorney. As to her case I will take
4 judicial notice of it.

5 MR. VON HERRMANN: I am, in fact, Your Honor.

6 THE COURT: Alright. I take judicial notice of the fact
7 that this counsel is the prosecuting attorney also.

8 Now, you may proceed.

9 MR. VON HERRMANN: Thank you, Your Honor.

10 Q. Ms. Dandridge, do you have any deals with me with regards to
11 the outcome of your sentence, penalty or the disposition of your
12 charges in anyway?

13 A. No, sir.

14 Q. Have you been instructed how much time you are facing if
15 you're convicted of the two charges you are facing?

16 A. Yes, sir.

17 Q. Can you please tell this jury how many years you're facing in
18 the penitentiary under those charges?

19 A. Thirty years.

20 Q. Did you receive instructions from me with regards to - - how
21 to - - what I wanted you to testify to today?

22 A. Please re-ask the question.

23 Q. Did I give you any instructions about - - with regards to
24 your testimony today what - - how - - what to testify?

25 A. No, sir.

1 Q. Did I indicate to you that you needed to tell the jury the
2 truth?

3 MR. AXELROD: Your Honor, that's impermissible to bolster the
4 witness. He - - he - -

5 MR. VON HERRMANN: Absolutely incorrect, Your Honor.

6 THE COURT: No, sir. It is permissible, and I will permit
7 it.

8 MR. VON HERRMANN: Thank you, Your Honor.

9 Q. Ms. Dandridge, did I tell you that you had to come into this
10 courtroom and tell this jury the truth no matter who it hurt or
11 helped?

12 A. Yes, sir.

13 Q. In November of 2003, where were you employed?

14 A. Office Depot.

15 Q. In the latter portion of November did you come home - - who
16 was taking care of Minor at the time while you were at work?

17 A. Wesley.

18 Q. Did you come home on some occasion and notice that Minor
19 had a problem with her leg?

20 A. Ah, I was informed when I came home.

21 Q. Did you look at the leg?

22 A. Ah, thereafter, yes.

23 Q. What did you notice about the leg?

24 A. It was - - it was immobile. It wouldn't move.

25 Q. Where were y'all living at the time?

1 A. Plantation Apartments.

2 Q. Is that here in Horry County?

3 A. Yes.

4 Q. Did you have a discussion with regards to the injury on the
5 leg with Mr. Smith?

6 A. Did we discuss it? Yes.

7 Q. And did he tell you what occurred?

8 A. Yes.

9 Q. And what did he tell you occurred on that?

10 A. Um, how I understood what he was telling me was that he was
11 napping on the chair next to the door with the baby, the baby on
12 his chest holding on with both arms. A knock came to the door and
13 the knock was very loud. When he heard the knock, the hand that
14 was holding her back came down leaving the child with no support on
15 the back, and she fell backwards with, I think, that particular leg
16 still in his arms.

17 Q. Did you have a discussion with the defendant about the fact
18 that her leg was broken?

19 A. Um, we thought it was because it wasn't mobile.

20 Q. What did the defendant do instead of taking the child to the
21 doctor?

22 A. Um, there was a - - a splint kind of splint homemade placed on
23 the side of her leg.

24 Q. Did you do that or did this defendant?

25 A. He did.

1 Q. Why did you not take the child to the doctor?

2 A. I - - I wanted to keep my family together. Um, I did love my
3 children.

4 Q. When did you take **Minor** to the doctor?

5 A. It was for a well - - a well-baby check-up.

6 Q. And would that have been on December 9th?

7 A. Yes.

8 Q. Was the leg mobile at that time?

9 A. It wasn't, and it was moving a little but not very well.

10 Q. Tell us what happened when you got the doctor on that day.

11 A. Um, when we got to the doctor's office, um, they begin to take
12 all the clothes off of the child, and, um, we then told them what
13 had happened, and when we told them what had happened, um, we were
14 excused from the room, um, so that they could examine her and - - -
15 that - - that was the - - that was the turning point for it all.

16 Actually, I didn't receive her back that day.

17 Q. Did you hurt that child prior to that day? Did you hurt that
18 baby?

19 A. No.

20 Q. Did you have an older sibling or an older child that lived in
21 the house with you?

22 A. Yes.

23 Q. At some point was cough medicine involved for that child?

24 A. Yes.

25 Q. Who bought the cough medicine?

1 A. I would have bought it.

2 Q. And how old was that child?

3 A. Um, at the time he was between five and six.

4 Q. Did you administer the cough drops to the child - - to Tyrell?

5 A. Ah, when he need them - - when he needed them, yes.

6 Q. Did you ever give any cough medicine or anything to **Minor**
7 Smith other than the inhalant?

8 A. I - - I gave her - - I don't remember giving her drops. I
9 don't.

10 Q. With the inhaler, wen was the inhaler prescribed for **Minor**

11 A. Um, when? I remember it coming about, um, I think it was
12 after she was returned, um, from DSS.

13 Q. Does January 15th sound about right?

14 A. I believe so. I was in January that I got her back.

15 Q. And you got an inhaler?

16 A. Exactly.

17 Q. Can you tell me the last time the child used the inhaler?

18 A. Probably two times because of the reaction I was getting from
19 her.

20 Q. Did you have a conversation with this defendant about that
21 inhaler and agree not to administer that?

22 A. I - - I did because I didn't like the reaction I was getting
23 from her.

24 Q. Did y'all agree not to use the inhaler again?

25 A. I do believe I did want to take her off of it. I'm not quite

1 sure if I did take her off completely.

2 Q. Did the child ever use the inhaler during the month of
3 February?

4 A. No because I didn't - - I - - I - - her reaction after taking
5 her off of it was a lot better - - was what I was use to seeing her
6 like.

7 Q. During the later part of January and the first - - prior to
8 the 14th of February did **Minor** have any distress? Did she have any
9 problems that she would have needed medication?

10 A. Um - - to think back, um, not that I can remember. I know
11 occasionally a cough here and there but I don't think it was
12 anything major because we kept up with appointments and everything
13 to make sure.

14 Q. Did you take your child to another well-baby visit on February
15 12th?

16 A. Yes.

17 Q. And was there any problems or any distress for that child at
18 that point?

19 A. When I left the doctor's office, they said that she was find.

20 Q. When you - - you were still working at that point, between
21 January 15th and February 12th?

22 A. Yes.

23 Q. Or let me - - I apologize. January 15th and February 14th.

24 A. Yes.

25 Q. Now, where were you employed at that time?

1 A. Still at Office Depot.

2 Q. And about how many hours were you working?

3 A. Um, I think about twenty-five to thirty hours a week.

4 Q. And who was the sole care giver and provider of care for **Minor**
5 Smith while you were at work?

6 A. Wesley.

7 Q. Was it Wesley's responsibility to take care of that child?

8 A. I did leave him with her.

9 Q. When you got your child back from foster care in January 15th
10 or right around there, the 13th, were you instructed to have
11 arrangements made for someone else to take care of that child and
12 not Mr. Smith?

13 A. Yes.

14 Q. And was Mr. Smith aware that he was not to be alone with that
15 child?

16 A. Yes.

17 Q. Did y'all violate that court order and allow Mr. Smith to take
18 that child into his custody when he was not suppose to do so?

19 A. Yes.

20 Q. Was he the primary care - - only care giver of that child when
21 you were at work?

22 A. Yes.

23 Q. Let's talk about at the 12th at the well-baby visit there's
24 nothing wrong with the child that's detected. What day was that?

25 Do you recall?

1 Do you recall what day it was?

2 A. I believe it was probably a Thursday.

3 Q. Do you recall if you had Thursday and Friday off of that week?

4 A. I do believe so.

5 Q. And did you spend time and take care of **Minor** **[REDACTED]** during
6 that particular period?

7 A. Yes.

8 Q. And that would have been the 12th and 13th?

9 A. Yes.

10 Q. Saturday was the 14th?

11 A. Yes.

12 Q. Tell me what you did on the 14th of February.

13 A. I went to work around 10:00.

14 Q. When you went to work who was at the home?

15 A. My children and Wesley.

16 Q. And that's Tyrell, Wesley and **Minor** Correct?

17 A. Yes.

18 Q. Did you come home for lunch on that day at some point?

19 A. Yes.

20 Q. Who was present at that time?

21 A. The children and Wesley.

22 Q. What was **Minor** doing when you got home?

23 A. Uh, at that time she was, um, taking in a bottle, and, um, she
24 was eating. She was - - she was playing and everything, and before
25 I got ready to go back, she was almost on her way to sleep.

1 Q. Did you give any medication to the child?

2 A. No.

3 Q. Was anybody present at that time other than those three and
4 yourself?

5 A. No.

6 Q. So what time did you go back - - back to work?

7 A. Um, it was approximately somewhere between two and three.

8 Q. While you were there at home for lunch, did **Minor** - - was she
9 under distress at all? Did she have any signs that she was
10 hurting - - crying?

11 A. No.

12 Q. When was the last time - - there's been some indication - -
13 did - - were you familiar that Mr. or the defendant in this case
14 had seizures?

15 A. Yes.

16 Q. When was the last time he had had a seizure?

17 A. Um, it had - - it had been some time. Um, he - - he was doing
18 a lot better once she got back in the house and opposed to when she
19 wasn't.

20 Q. When you were holding **Minor** to take care of her on that
21 Thursday and Friday and Saturday, did you ever squeeze the child?

22 A. No.

23 Q. How would you typically - - show the jury how you would hold
24 the child. We're talking about a four month old baby.

25 Q. I'd either cradle her or to raise her up, I'd have her by the

1 legs, this arm and support on the back.

2 Q. Did the child ever fall?

3 A. No.

4 Q. Did you have - - did you ever have any rough play or see
5 anybody, Tyrell or anybody be rough with her?

6 A. No.

7 Q. Let's talk about this January 15th well-baby visit.

8 Was there ever indication between January 15th and the child -
9 - the day your child died on February 14th that you had seen any
10 bruising on the child?

11 A. I didn't see any - - anything on her. Um, I - - I don't
12 remember seeing any bruising.

13 Q. Tell me when you were alone with just **Minor** and this defendant
14 and the child got to crying excessively or crying, how would this
15 defendant - - what would he do?

16 A. Um, in most cases if he couldn't handle it, he'd just step
17 out, um, take a walk.

18 Q. Were there times that he couldn't handle her crying?

19 A. Um, there - - there - - there was only one time when things
20 got a little strange when we were all in a car, and I guess it
21 wasn't a way for him to actually just get out and walk, and we - -
22 she - - she was crying in the backseat, and I had to get in the
23 backseat in order to take care of her so that she could calm down
24 a little.

25 Q. Didn't you indicate during your interviews that Mr. Smith had

1 to leave the apartment sometimes and leave the child with you while
2 she was crying?

3 A. Yes.

4 Q. Was Mr. Smith, the defendant, working during the time between
5 January 15th and February 14th?

6 A. No.

7 Q. At any time that you saw or had any concerns of Tyrell's
8 activities with Minor

9 A. No.

10 Q. He never struck the child or anything like that?

11 A. No.

12 Q. Tell us about how you found out about Minor being in distress.

13 A. Okay.

14 Ask - - ask that question again. I'm sorry.

15 Q. The day, February 14th, the day Minor passed away - -

16 A. Right.

17 Q. - - were you at work. Tell the jury how you found out about
18 what occurred.

19 A. Um, I was - - I was entering into the housing complex where we
20 lived, and I saw ambulances and fire trucks and everything, and I
21 was going towards my house. I didn't think it was my house.

22 Um, as I was getting closer and closer to the house, they had
23 stopped me and, um, said that, um, I needed to turn around. A baby
24 was on the hospital, and I had to make a u-turn and follow the
25 ambulance, um, driving as fast as possible trying to keep up with

1 the ambulance I kind of fell short. Um, by the time I did, um, get
2 to the hospital, I was told she was deceased.

3 Q. Did you talk to this defendant about him administering
4 medication to **Minor** that day?

5 A. By the time everything was going on and inside of the
6 hospital, um, detectives came in, and he started explaining that he
7 had given her some medicine that day.

8 Q. Was that after you had left from lunch?

9 A. Yes.

10 MR. AXELROD: Your Honor, the Solicitor is leading the
11 witness. If he would just ask the questions, he's been leading her
12 somewhat, and I haven't objected.

13 THE COURT: Just follow the rule.

14 MR. VON HERRMANN: Yes, sir.

15 Q. Did you go and talk to law enforcement after that?

16 A. Yes.

17 Q. How long was that?

18 A. It - - me actually sitting in the room was approximately about
19 an hour. I had actually been there sitting and waiting for about
20 five.

21 Q. Did you tell the police the truth and everything that you know
22 about this?

23 A. No.

24 Q. And why didn't you? Why did you lie to the police? Why did
25 you deceive them?

1 A. I wanted to - - I wanted to keep my family together. The last
2 little bit that I had, I wanted to keep it.

3 I - - I - - I love my son. I love my daughter, and when she -
4 - when she was gone I wanted to keep my son.

5 Q. Did you ever hurt your child?

6 A. No.

7 Q. Did you ever squeeze your child or allow anybody to have the
8 chance to hurt your child or take care of your child
9 inappropriately?

10 A. No.

11 MR. VON HERRMANN: Your Honor, I have no further questions.

12 THE COURT: Mr. Axelrod, do you prefer to have your
13 examination after the lunch hour?

14 MR. AXELROD: Yes, sir. It's going to be lengthy.

15 THE COURT: Well, it's nearly 1:00.

16 So, we'll take a break at this time. Be back promptly at
17 2:30.

18 Please remember my admonitions. Don't discuss the case with
19 anyone. Let no one discuss it with you. Do not discuss it among
20 yourselves.

21 Be back in the jury room at 2:30.

22 Thank you.

23 (The jury departs the courtroom at 12:50 p.m. for lunch to
24 return at 2:30 p.m.)

25 THE COURT: Anything at this time for the State?

1 MR. VON HERRMANN: Your Honor, just one thing.

2 We request that this witness be sequestered where she can't
3 discuss anything. I'll have the Victim's Witness Program take her
4 and bring her lunch back. I just - - -

5 THE COURT: I want her - - I want her sequestered.

6 Anything else from you, Mr. Axelrod?

7 MR. AXELROD: No, sir, Your Honor.

8 THE COURT: Alright. Thank you.

9 MR. VON HERRMANN: Your Honor.

10 THE COURT: Yes, sir.

11 MR. VON HERRMANN: Your Honor, I do think that if she wants
12 to see her lawyer, the State has no objection to that.

13 MR. AXELROD: Your Honor, at this point - - at this point,
14 Your Honor, she is on the witness stand, and if I was to do my
15 cross examination, she would have been able to talk to her lawyer.
16 I would say to Mr. Gardner I love him to death but I would - - -

17 THE COURT: I will not permit her to talk to anyone about
18 any of her testimony and, more especially, you, the lawyer or the
19 Solicitor.

20 MR. VON HERRMANN: Fine.

21 THE COURT: Alright. Thank you. Let's break for lunch.
22 Gentlemen, come here a minute, please.

23 (The Court recesses the trial of this case and thereafter
24 reconvenes the trial of this case at 2:35 p.m.)

25 THE COURT: Thank you.

1 Good afternoon.

2 Solicitor, you ready to proceed?

3 MR. VON HERRMANN: Yes, sir, Your Honor.

4 THE COURT: Mr. Axelrod, you ready?

5 MR. AXELROD: Sir, yes, sir.

6 THE COURT: Okay.

7 Bring my jury.

8 (The jury returns to the courtroom at 2:37 p.m.)

9 THE COURT: Alright, sir.

10 (Witness resumes the witness stand.)

11 THE COURT: Mr. Axelrod.

12 MR. AXELROD: Thank you, Your Honor.

13 CHARLENE DANDRIDGE, having previously been
14 sworn, testifies as follows:

15 CROSS EXAMINATION BY MR. AXELROD:

16 Q. You told the jury that you were planning to marry Wesley.

17 A. Yes, sir.

18 Q. And he was a loving father.

19 A. Yes, sir.

20 Q. Was that the truth?

21 A. Yes, sir.

22 Q. You testified that the charges you were facing carried up to
23 thirty years in the penitentiary.

24 A. Yes, sir.

25 Q. I'm sure the Solicitor told you you could have been charged

1 with homicide by child abuse.

2 MR. VON HERRMANN: Objection, Your Honor.

3 There's no indication that she could have been charged with
4 homicide by child abuse. No evidence that she did.

5 THE COURT: Let's hear - - let's hear the question again.

6 MR. AXELROD: The question would be that she could have been
7 charged with homicide by child abuse - - -

8 THE COURT: She's not a lawyer, now. She can't answer that
9 question.

10 I sustain that.

11 Q. Are you aware that the penalty for homicide by child abuse is
12 greater - - -

13 MR. VON HERRMANN: Objection, Your Honor.

14 THE COURT: No, wait - - wait, no. She's not charged with
15 that.

16 You can get - - you can ask her to what the penalty is to
17 whatever she's charged with in the indictment.

18 Q. The only - - -

19 THE COURT: The law permits that, you understand?

20 MR. VON HERRMANN: Yes, sir. I have no problem with that.

21 THE COURT: Alright.

22 Q. How many charges are you charged with?

23 A. I think two.

24 Q. And - - and what does each charge carry?

25 A. One carries twenty, and the other carries ten.

1 Q. Now, the Solicitor told - - told you to tell the truth,
2 correct?

3 A. Yes.

4 Q. And you testified that you lied to the police.

5 A. Yes.

6 Q. Okay. Let's start.

7 What was the first thing you lied to the police about?

8 MR. VON HERRMANN: Objection, Your Honor. That's not how we
9 use prior inconsistent statements. That's inconsistent with the
10 Rules of Evidence.

11 THE COURT: Yes, sir.

12 Use the correct way.

13 Show her where - - show her specifically where you say she's
14 lied. Identify it so she knows what you're talking about and then
15 ask her.

16 MR. AXELROD: In her direct examination by the Solicitor, he
17 asked her, "Did you lie to the police?"

18 And she said, "Yes."

19 THE COURT: Wait a minute.

20 Yes, sir. Yes, sir. State your objection for the record.

21 MR. VON HERRMANN: Your Honor, that is not what I asked. I
22 said, "lied and/or misled."

23 It's the State's contention and I believe it's this witnesses
24 contention when she answered the questions that she simply omitted
25 a lot of information that she had that would have allowed them to

1 make - - to make an arrest.

2 THE COURT: Okay.

3 If - - Mr. Axelrod, if you'll identify, first, the time and
4 the place so that she can understand what you're talking about,
5 that would be helpful to her and the jury.

6 MR. AXELROD: Well, what concerns me, Your Honor - - -

7 THE COURT: No, I'm not concerned with what concerns you.
8 I'm concerned with asking the lady such that she can know what
9 you're talking about.

10 MR. AXELROD: She testified under direct exam, Your Honor,
11 that she lied to the police.

12 THE COURT: I didn't hear her say that.

13 Go ahead. Tell it again.

14 MR. VON HERRMANN: Your Honor, again, the way that I believe
15 the Rule says that he has to do it, he has to ask her if she gave
16 a particular statement of a particular fact. If she then denies
17 or says she doesn't, then he's entitled to show.

18 THE COURT: Absolutely correct, oral or written.

19 Just ask her if she said whatever you claim she said, and then
20 ask her did she say it. Was it true or false?

21 Q. This morning when you testified under oath in your direct
22 examination, did you state that you made statements to the police?

23 A. Yes.

24 Q. And did you tell the - - did you tell the jury this morning
25 that you lied in some of those statements?

1 A. Yes.

2 Q. Now, we did not go into those individual statements, did we?

3 A. No, sir.

4 Q. So, you know which ones you lied about at this point, and I
5 don't.

6 THE COURT: No, sir. That's not the way to do it.

7 Give the statement and then ask her if it's true or false and
8 if she said it.

9 MR. AXELROD: Okay.

10 THE COURT: Now, that shouldn't be very difficult for you
11 to comprehend.

12 Q. When you went to the hospital on December 9, 2003, with the
13 femur, you remember that day?

14 A. Yes.

15 Yes.

16 Q. Were you upset that day?

17 A. Yes.

18 Q. Explain to us how you were upset that day.

19 A. When I - - the day that we were on that particular day - - I -
20 - I had to bring the truth out to the doctor. Therefore, like I
21 explained earlier, knowing that from there my family would probably
22 be torn apart.

23 Q. And that upset you?

24 A. Yes.

25 Q. And while you were at the hospital that night you spoke to

1 social service workers and the police. Is that correct?

2 A. Yes.

3 Q. And they saw that you were upset?

4 A. Yes.

5 Q. Is that the truth?

6 A. Yes.

7 Q. And I believe you testified at the hospital that you stated
8 you did not hurt Minor

9 A. I did not hurt Minor

10 Q. Is that the truth?

11 A. That is the truth.

12 Q. And didn't you tell the police that you never saw Wesley hurt
13 Minor

14 A. I did not see him physically hurt her, no.

15 Q. So, that would be the truth?

16 A. That's the truth.

17 Q. That Wesley never hurt Minor - - -

18 MR. VON HERRMANN: Objection, Your Honor.

19 A. With my own eyes - - -

20 THE COURT: Wait a minute, now. You're misquoting her.

21 She said - - she testified she didn't see him do it.

22 Q. When you were with Wesley and Minor did you ever see Wesley
23 hurt the baby?

24 A. Not with my own eyes, no.

25 Q. How else but from your eyes would you see that?

1 MR. VON HERRMANN: Objection, Your Honor. That's
2 argumentative.

3 THE COURT: I'll permit that question.

4 Go ahead.

5 Q. You can answer that question.

6 A. I did not see him do it.

7 THE COURT Phrase the question again for her, Mr. Axelrod.

8 MR. AXELROD: She - - -

9 Q. How else but from your own eyes would you have seen that?

10 A. No other but way but to see him.

11 Q. The day that **Minor** died on February 14, 2004, did you give
12 medicine to **Minor**

13 A. No.

14 Q. Did you ever tell anybody you gave medicine to **Minor**

15 A. Not that I can remember.

16 Q. Take your time. It's a very important question. I want you
17 to think about it.

18 On one hand you tell me that you didn't give any medicine to
19 **Minor** and I asked you again, "Is it your sworn testimony on
20 February 14th that you did not give **Minor** medicine?"

21 A. Not on that date, no.

22 Q. And that is the truth?

23 A. That is the truth.

24 Q. And I'm sorry if some of this is painful to you but I must ask
25 these questions.

1 What was the last day that you gave Minor medicine?

2 A. Um, I'm not sure. I would assume that it would have been on
3 my two days off.

4 Q. Tell the jury what medicine you gave Minor on your two days
5 off.

6 A. I don't remember.

7 Q. Is that the truth?

8 A. That is the truth.

9 Q. You testified in your direct examination that you only gave
10 the inhaler twice to Minor That's not true, is it?

11 A. From what I can remember, it is.

12 Q. When you say, "from when you can remember," what don't you
13 remember about this?

14 MR. VON HERRMANN: Objection, Your Honor.

15 THE COURT: No, sir. That's too wide. Specifically, you
16 can ask her of some incident that you claim she doesn't remember
17 but - - -

18 Q. Why don't you remember - - -

19 THE COURT: I can hardly remember what I remember. I can't
20 get into what I don't remember.

21 Go ahead.

22 Ask her another way.

23 MR. AXELROD: I'll ask her another way.

24 THE COURT: Thank you.

25 Q. Concerning the inhaler, you testified that you only gave it

1 two times, and then you said that that's the best you can remember.
2 Concerning the inhaler, I want you to think about it all the times
3 you gave that baby the inhaler. Take your time and think.

4 A. I only remember twice because of the reaction she got from it.

5 Q. Okay.

6 Now, when was that?

7 A. It was - - it was after that well-baby check-up. That was
8 when she received it.

9 Q. And the well-baby check-up was when?

10 A. I want to say two prior - - two days prior to her death.

11 Q. So, did you give her that medicine, the inhaler, two days
12 prior to her death?

13 A. I did.

14 Q. You did?

15 A. I would have given it to her.

16 Q. And what other medicine did you give her two days prior to
17 your - - to her death?

18 A. I don't remember.

19 Q. What other medicines were in your house that you could have
20 given her?

21 A. I don't know.

22 Q. You gave her pseudoephedrine, didn't you?

23 A. Not that I remember.

24 Q. Not that you remember.

25 Is your testimony that on that wellness check-up day, the baby

1 was fine? You told the jury that.

2 A. Yes.

3 Q. Then why were you giving the baby medicine?

4 A. All I know is that I had the medicine that was given to me
5 that was told to me to give to her.

6 Q. But if the baby was fine and you testified that the baby was
7 fine, why give it medicine that it doesn't need?

8 A. It might have been the wrong date on which I had given it to
9 her.

10 Q. Well, you just remembered the date a minute ago.

11 MR. AXELROD: I'll move on, Your Honor.

12 THE COURT: Sir?

13 MR. AXELROD: I'll move on.

14 Q. You say that Wesley was not allowed to be alone with the child
15 - - after you received **Minor** back?

16 A. Yes.

17 Q. You testified that Wesley was the only care giver to **Minor**
18 when you worked?

19 A. Yes.

20 Q. Let's discuss this because that's not true, is it?

21 MR. VON HERRMANN: Objection, Your Honor. That's purely
22 argumentative.

23 THE COURT: Ask her why - - if you got some reason to say
24 that, ask her so she can know what you're talking about.

25 MR. AXELROD: Well, I told her, Your Honor, it's not true.

1 I'm going to let her explain it.

2 THE COURT: Well, no. You - - you - - you give her some
3 situation and ask her if that's true or not.

4 MR. AXELROD: Okay.

5 THE COURT: So that she can reply to what - - what you're
6 talking about.

7 MR. AXELROD: Okay.

8 Q. You testified that Wesley was the sole care giver from January
9 15th until Minor died on February 14th.

10 THE COURT: Yes, sir.

11 MR. VON HERRMANN: Your Honor, I'm going to object.

12 She indicated in the direct examination that it was about
13 three days where they had a babysitter there. So was it about the
14 18th or 19th.

15 THE COURT: The jury understands that.

16 But go ahead.

17 Q. You testified that Wesley was the sole care giver from January
18 15th until February 14th?

19 A. Yes.

20 Q. Okay.

21 Where - - on January 16th, where were you?

22 A. I don't know. I want to say I was home.

23 Q. Let me ask this way.

24 Was Minor home with you on the 16th of January?

1 A. All I know is that I had just received her back into the home.

2 Q. Okay.

3 Was **Minor** home with you - - and you should remember this if
4 you just received her back. Was **Minor** home with you on the 16th
5 of January?

6 A. She would have been home. However, I'm not sure if I was home
7 physically at that day. I'm not sure.

8 Q. Okay.

9 And I wasn't asking my question. I'll rephrase it. I'm not
10 trying to confuse you.

11 On January 16th, was **Minor** in your apartment?

12 A. Yes.

13 Q. Do you remember her being home?

14 A. I just know that she was back home from being from DSS.

15 Q. On the 17th of January, was **Minor** home in your apartment?

16 A. Again, she would have been at home.

17 Q. On January 18th, would she have been home in your apartment?

18 A. She would have been.

19 Q. The 19th?

20 A. She would have been home.

21 Q. The 20th?

22 A. She would have been home.

23 Q. The 21st?

24 A. She would have been home.

25 Q. The 22nd?

1 A. She would have been home.

2 Q. The 23rd?

3 A. She would have been home.

4 Q. And the 24th?

5 A. She would have been home.

6 Q. Are you sure?

7 A. To the best of my knowledge, she would have been home.

8 Q. Take your time and think about it, and I'm not trying to rush
9 you here.

10 THE COURT: She's answered your question. Go ahead.

11 Q. Now - - on February 12th, I believe you testified that there
12 was nothing wrong with **Minor**

13 A. Right. That's what the doctor told me.

14 Q. And you had **Minor** in your custody, in your control that entire
15 twenty-four hour period. Isn't that true?

16 A. Yes.

17 Q. And on February 13th, the day before **Minor** died, you had total
18 control and custody of **Minor** that day. Correct?

19 A. Yes.

20 Q. And it's your testimony that there was nothing wrong with
21 **Minor** that day?

22 A. No.

23 Q. But still felt a need to give medicine?

24 A. I don't - - I can't say that I can recall every time the
25 medicine was given to her by my hand.

1 Q. Okay.

2 On February 14th, the day **Minor** died, when you got up that
3 morning **Minor** was fine. Correct?

4 A. Yes.

5 Q. She was in your control the 12th, the 13th and the 14th until
6 you went to work?

7 A. Right.

8 Q. And you left for work about 9:50 in the morning?

9 A. Right.

10 Q. Returned approximately 2:00 for lunch?

11 A. Yes.

12 Q. Did you give her medicine that day, too?

13 A. No. She had just taken a bottle. Um, no, I didn't - -
14 before I left she was smiling. So, I didn't see any need to.

15 Q. Did you give her medicine that day?

16 A. No.

17 Q. You testified that Wesley, Ebony's dad, could not control
18 **Minor** when she was crying?

19 A. When - - when she would cry for an extremely - - for a period
20 of time, he would walk out for a minute to catch his breath.

21 Q. Isn't it the truth that you were the one who could not control
22 yourself when **Minor** was crying?

23 A. That is not so.

24 Q. You testified you never squeezed the baby?

25 A. No.

1 Q. You testified you never hurt the baby?

2 A. No.

3 Q. But when your anger comes out, it comes in outbursts, doesn't
4 it?

5 A. This I can truly say. I'm not one to get angry.

6 Q. Isn't it true that when you went for the wellness check-up,
7 you never told the doctor about the reactions that **Minor** had to the
8 asthma pump?

9 A. I did tell him.

10 Q. You did - - -

11 A. And I did tell him that I took her off of it.

12 Q. But you - - you told the police you never told the doctor,
13 didn't you?

14 A. I did.

15 Q. You did tell the doctor?

16 A. No. I told the police that.

17 Q. And isn't it true that you would work all day and come home
18 and then you'd have to be up all night with **Minor** - - because **Minor**
19 was a fussy, crying baby? Tell the jury about that.

20 A. She would get up two night - - two parts of the night.

21 Q. What parts?

22 A. About - - if she went to bed early enough, she'd get up at
23 approximately 1 - - 1:30 and then maybe again about 3:30, and the
24 next time she'd get up it would be early morning just before my son
25 had to go to school.

1 Q. Now, during this time Wesley was sleeping, wasn't he?

2 A. Yes.

3 Q. And you woke up because **Minor** was crying and was fussy?

4 A. Yes. Only to give her a bottle.

5 Q. Of course. Nobody is with you in the middle of the night
6 when you're up with **Minor**

7 And in your household, you were in charge of all the
8 discipline and the feeding, weren't you?

9 A. Yes.

10 Q. And you would get stressed out, wouldn't you?

11 A. Not to the point where I would hurt my children.

12 Q. Wasn't my question. My question was, "You would get stressed
13 out, wouldn't you?"

14 A. Occasionally, not often.

15 Q. What is not often? Two times.

16 A. Maybe once a month.

17 Q. What day in February did you get stressed out because of
18 **Minor**

19 A. I wasn't stressed out until I found out she had passed.

20 Q. And that's when you were upset at the hospital when you talked
21 to the social worker and the police?

22 A. Yep.

23 Q. You didn't trust the people who lived in that area, did you?

24 MR. VON HERRMANN: Objection, Your Honor. Relevance.

25 THE COURT: I'll permit it. I'm not sure of the relevancy,

1 and I'll - - I'll listen to it very carefully.

2 A. No. I can't say that I really did.

3 Q. And you were concerned about people that came into your house?

4 A. Yes.

5 Q. But you brought friends into the house, did you not?

6 A. Ah, yes.

7 Q. Who did you bring in?

8 A. Um, I had a sister, and I had one girlfriend that I know of
9 that - - that dropped by.

10 Q. And what male visitors did you bring into the house?

11 A. None.

12 Q. Is that the truth?

13 A. No. Yes, yes.

14 Q. You testified or I think you told to the police that you never
15 saw Wesley or anybody hurt **Minor** in your presence.

16 A. Exactly.

17 Q. Isn't it true - - isn't it true that you wished that Wesley
18 had a job at that time?

19 A. Wished, yes.

20 Q. It would have helped lessen your stress?

21 A. Yes.

22 Q. Now, you testified that between January 15th and February 14th,
23 Wesley was the sole care giver to **Minor** when you were at work?

24 A. When I left the house, there was the children and Wesley.

25 Q. You testify that Wesley was the sole care giver from January

1 15th to February 14th. Is that the truth?

2 A. When I left my house, it was my two children and Wesley. That
3 is the truth.

4 Q. My question, ma'am, please answer my question. My question
5 is that from January 15th through February 14th, you testified that
6 Wesley was the sole care giver to **Minor**

7 A. Yes.

8 Q. Isn't it true that the lady next door was a babysitter for
9 **Minor** during that time?

10 A. Three days.

11 Q. Which three days?

12 A. It was shortly after she got back home in January. I can't
13 remember what days I started working but it was the three days in
14 that week.

15 Q. Was it the first week you got home - - was it the first week
16 that you got **Minor** home after the 15th?

17 A. I believe it was.

18 Q. Are you sure it was? Think about it.

19 A. I believe it was.

20 Q. So, when you told the jury today that Wesley was the sole care
21 giver to **Minor** from January 15th to February 14th, that was not true,
22 was it?

23 A. No.

24 Q. And isn't it true that Aunt Lula lived across the street from
25 you and Wesley and **Minor**

1 A. Yes.

2 Q. And isn't it true that Aunt Lula also took care of Minor

3 A. That was what I was told.

4 Q. Who told you that?

5 A. Wesley.

6 Q. You never saw Lula in your apartment with your eyes?

7 A. I've seen her for visits. I did not see her when she came to
8 either pick up Minor to either to take her to her house or to - -
9 there - - stand there and watch Minor after I was gone - - I left
10 out of the house.

11 Q. But you knew she picked up Minor and took her because she told
12 you, didn't she?

13 A. I do not recall that.

14 Q. Have you ever heard of selective memory?

15 MR. VON HERRMANN: Objection, Your Honor.

16 THE COURT: Yes, sir. I sustain that.

17 MR. AXELROD: I'll move on, Judge.

18 Q. How many times did Aunt Lula take care of Minor

19 A. I don't know.

20 Q. So when you said to the jury today that the only time - - the
21 only person that took care of Minor between January 14th and
22 February - - January 15th and February 14th was Wesley, that was not
23 true once again. Isn't that correct?

24 A. That is why I said when I left the house the only people that
25 were there were my two children and Wesley.

1 Q. That day. I'm speaking of all the days - - -

2 MR. VON HERRMANN: Your Honor, I'm going to object to the
3 question.

4 A. That was every day.

5 MR. VON HERRMANN: He asked her question and she's in the
6 middle of answering, and he interrupted her. Just let her finish
7 her answer.

8 THE COURT: I understand.

9 Q. I'm sorry. Please finish your question - - your answer.

10 THE COURT: And lower your voice. You don't mean to do it
11 but you're talking a little harsh to her.

12 MR. AXELROD: I understand. Very good. I'll lower it down
13 a little bit.

14 THE COURT: Mr. Axelrod, lower your voice.

15 Thank you.

16 A. That was every day.

17 Q. Then why did you tell people that people would come in to
18 monitor **Minor** so Wesley could take naps during the day.

19 MR. VON HERRMANN: Objection, Your Honor. She never said
20 that.

21 THE COURT: She can ask her if she said it but don't tell
22 her why she said it. You haven't asked her if she said it.

23 Q. Did you ever tell anybody - - -

24 A. I did.

25 Q. Who did you tell?

1 A. Um, I - - I think I made mention of that to the police.

2 Q. You told the police that people would come in and sit with
3 Minor while Wesley took naps?

4 A. Yes.

5 Q. So that when you told the jury today that the sole care giver
6 for Minor from January 15th to February 14th was Wesley, that was a
7 lie, wasn't it?

8 A. No.

9 Q. Well, if you told the jury that the only sole care giver of
10 Wesley that entire time - - the sole care giver of Minor was Wesley
11 that entire time and now we've gone through the next door neighbor,
12 Aunt Lula and people in the neighborhood that you don't trust to
13 come in - - -

14 THE COURT: Wait a minute. Whoa.

15 MR. VON HERRMANN: Objection, Your Honor.

16 THE COURT: Just ask her another question. I mean, you can
17 argue that to the jury but ask her a specific.

18 Q. You said it was nobody but Wesley being the care giver to
19 Minor Correct?

20 A. We did have a babysitter for three days. Thereafter, Wesley
21 was the sole care giver.

22 Q. So you never told anybody that people came in from the
23 neighborhood to sit with Minor and monitor the baby?

24 MR. VON HERRMANN: Your Honor, I believe she answered that -
25 - asked and answered.

1 THE COURT: The jury understands what she said.

2 You may answer that question again.

3 You cannot misquote the witness deliberately, now. You may
4 not have heard what she said.

5 MR. AXELROD: I'm not misquoting her deliberately.

6 THE COURT: Well, I'll let the jury make that
7 determination.

8 Ask the question again and give her a chance to answer.

9 Q. If the only time that there was a care giver was the three
10 days of the next door neighbor and we know that Aunt Lula took care
11 of her, too, how could you tell somebody that people from the
12 neighborhood came in to monitor the baby if you didn't know about
13 it?

14 MR. VON HERRMANN: Your Honor, I'm going to have to object.
15 I'm not even sure what that question is.

16 "How did you not know about it?"

17 THE COURT: I'm having difficulty, too.

18 Re-arrange the question so that she'll understand.

19 Q. You say that the only - - the only care givers that you're
20 willing to acknowledge today besides Wesley is the next door
21 neighbor, correct?

22 A. Yes.

23 Q. And Aunt Lula now, correct?

24 A. Far as I was told, yes.

25 Q. Now, you're saying other than those people there can't be any

1 other care givers for Minor that you know of?

2 A. That I know of, no.

3 Q. Then why did you tell the police that there were other care
4 givers?

5 A. I worked - - I had worked very hard to keep my family together
6 and whatever I had to say in order to keep them together, I - - I
7 was trying to save what little bit of my family that I had left and
8 - - -

9 Q. So that statement was a lie to the police?

10 MR. VON HERRMANN: Your Honor, again, I object. She hadn't
11 completed her answer.

12 THE COURT: I understand.

13 Let her finish, Mr. Axelrod.

14 You may finish your answer, please.

15 A. I just really - - I just really wanted to save my family - -
16 after - - even after all of the pieces fell apart, I wanted to save
17 what was left.

18 Q. So, that statement to the police was a lie?

19 THE COURT: What statement? Ask her what statement so
20 she'll - - so she can intelligently answer.

21 Q. The statement that you told the police that there was people
22 in the neighborhood that came in to monitor Minor so Wesley could
23 sleep was a lie?

24 A. That was a lie.

25 Q. Tell me how you formulated that lie? How did you come up

1 with those specific - - -

2 THE COURT: No, sir. That's not - - that's a formulation.

3 That's not a proper question to ask her.

4 Q. But that was a lie?

5 A. That was a lie.

6 Q. Isn't it true that Minor received a lot of attention?

7 A. Attention as in?

8 Q. People doting on her? She was a beautiful baby.

9 A. Yes.

10 Q. And did Wesley place a lot of attention on Minor

11 A. Yes.

12 Q. And didn't he want to show her to everybody?

13 A. Yes.

14 Q. And say, "Here is my baby girl Minor

15 A. Yes.

16 Q. "The apple of my eye."

17 A. Yes.

18 Q. And you became jealous of that, didn't you, the attention she
19 received?

20 A. No.

21 Q. You're sensitive to - - you're sensitive to rejection, aren't
22 you?

23 A. No.

24 Q. You were abandoned when you were a child, weren't you?

25 MR. VON HERRMANN: Objection.

1 THE COURT: Wait a minute. That's not relevant to any
2 issue in this case.

3 Not going to get into that now. It has no bearing on any
4 issue before this jury.

5 Q. The day after **Minor** passed away what did you do?

6 A. The day after - - I - - I - - I was at home, um, um, I was
7 home. He was home for part of that day. Um - - -

8 Q. Was Wesley upset that day?

9 A. Yes.

10 Q. Were you upset that day?

11 A. Yes.

12 Q. Is that the truth?

13 A. Yes.

14 Q. Were you crying?

15 A. At points. I was trying to be strong.

16 Q. You testified, I believe, or you spoke to the police and told
17 them that both of you looked after **Minor** that when he was out
18 looking for work or working, you looked after **Minor** and when you
19 were out working, he looked after **Minor**

20 A. Yes.

21 Q. So, on your days off each week you had **Minor**

22 A. Yes.

23 Q. So Wesley wasn't the sole care giver in respect to you, too,
24 was he?

25 A. I was the mother.

1 Q. Now, did you - - on the day [Minor] died, I want to go back to
2 this for a minute. You say you don't remember what medicine you
3 gave [Minor] but I'm going to ask you. Did you give [Minor] cough
4 medicine the day she died on February 14, 2004?

5 A. No.

6 Q. Is that the truth?

7 MR. VON HERRMANN: Your Honor, I'm going to have to object.

8 A. No.

9 MR. VON HERRMANN: He asks a question and then he follows up
10 by, "Is that the truth?"

11 THE COURT: That's improper.

12 She asked the question and each answer.

13 Go ahead.

14 Q. When you were disciplining Tyrell, did you ever pick him up
15 and shake him?

16 A. No.

17 MR. VON HERRMANN: Your Honor, again - - -

18 THE COURT: No, that's not proper, "Are you sure?"

19 She told you that. Ask the next question.

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

21 Q. Isn't it true that you told Wesley's parents that with all of
22 Ebony's crying she got on your last nerve?

23 A. No.

24 Q. Did you testify today that Wesley was not able to quiet [Minor]
25 when she cried?

1 A. At times.

2 Q. And you were the only one who could accomplish that?

3 A. Well, not always.

4 Q. Did you ever grab **Minor** around the waist to quiet her?

5 A. No.

6 Q. Because you know that you are aware of this that when **Minor**
7 died, she had eleven or more broken ribs in her chest, didn't she?

8 A. I found that out later.

9 Q. And isn't it true that you were quite curious about the
10 autopsy results when you were interviewed by the police? That you
11 wanted to find out what they were going to find out?

12 A. All I wanted to know was how could a child be breathing and
13 laughing at one part of the day and then all of a sudden by the
14 time you get back home, they are no longer breathing. That was
15 all I wanted to know from the autopsy report.

16 Q. You went to parenting classes with Wesley. How did they go?

17 A. Um, as far as I can remember, they went well.

18 Q. Did Wesley participate?

19 A. Yes.

20 Q. Was he a good dad?

21 A. Yes.

22 Q. You've never seen Wesley harm anybody in your presence, did
23 you?

24 A. No.

25 Q. And, in fact, **Minor** never cried with Wesley, did she?

1 A. In most cases, no.

2 Q. And Wesley never got up with the baby at night?

3 A. Not that I can remember because I was closer to her.

4 Q. Well, you testified that you did all of the feeding at night.
5 I'm just trying to confirm that.

6 A. Yes because I was closest to her crib.

7 Q. Now, you said that on February 12th Minor was normal?

8 A. Yes.

9 Q. And that on that day only you took care of her?

10 A. On the 13th?

11 Q. The 12th?

12 A. The 12th?

13 Q. You were off from work that day.

14 A. Yes, I would have been taking care of her.

15 Q. And on February 13th you were off from work that day?

16 A. Yes.

17 Q. You said that you lied to the police?

18 A. I did.

19 Q. And you said you did that to save your family?

20 A. I did.

21 Q. Or was it maybe to save yourself?

22 MR. VON HERRMANN: Objection, Your Honor.

23 THE COURT: No, sir. I'll permit that question.

24 Go ahead.

25 A. No, it wasn't to save myself. It was to save my family.

1 MR. AXELROD: Nothing further at this point.

2 THE COURT: You have any further questions?

3 MR. VON HERRMANN: Yes.

4 REDIRECT EXAMINATION BY MR. VON HERRMANN:

5 Q. Ms. Dandridge, you indicated that you gave the child the
6 inhaler for a couple of times after it was prescribed to your child
7 at a well-baby visit?

8 A. Yes.

9 Q. Isn't that day that it was prescribed - - -

10 MR. VON HERRMANN: Your Honor, he's leading the witness.
11 It's still a redirect.

12 Q. Well, let me show you the medical reports. See if you can
13 recognize the date the child was prescribed RSV medication. What
14 day was that, ma'am?

15 A. January 15th.

16 Q. So, in fact, it wasn't two days before the child died.
17 Correct?

18 MR. AXELROD: Your Honor, he's leading the witness again.

19 THE COURT: I'll permit that - - that. It's clarification.
20 Go ahead.

21 Q. Is that correct, Ms. Dandridge?

22 A. Yes.

23 Q. When was the last time that you used after January 15th the
24 inhaler?

25 A. I - - I can't say that I know. I just know that I gave her

1 two - - two pumps of it at different times. I don't know if one
2 was for one day and the next day or if it was the prescribed hours.
3 I just know that the reaction she got from it I didn't like.

4 Q. Did you ever give the child the inhaler in February?

5 A. No.

6 Q. You - - Mr. Axelrod indicated to you about the preacher lady
7 taking care of the children. Can you tell me the approximate
8 three days that you indicate that she took care of the child?

9 A. Um - - um - - I don't know if it was three days in a row or if
10 it was just three days in that week. Um, I just know that she had
11 hurt herself trying to come down and see the baby, and, thereafter,
12 she thought that in order for her to take care of herself, it
13 wouldn't be a good idea to keep her but as far as date I couldn't
14 tell you. I just know it was three days.

15 Q. Can you narrow it down to a particular part of a month, the
16 first of January, second of January?

17 A. It was somewhere close after she came back home which would
18 have been after the 15th.

19 Q. So within that week?

20 A. I believe it was within that week or somewhere around in that
21 area.

22 Q. Were you - - why were you concerned with the preacher lady - -
23 going over to Wesley Smith and staying over at that apartment? Why
24 were you calling upon her services?

25 A. Be - - before - - before I could get - - before I could get

1 her back into the house, I had meeting with Social Services, and
2 they told me that I had to have a care giver before I could get her
3 back into the home, and she had agreed to do so.

4 Um, it was actually suppose to be for longer terms but like I
5 said, her hurting herself, she didn't do it as long as we thought.

6 Q. And now that you're a little bit more familiar with the date
7 that inhaler was given, the week that Minor passed away did you
8 give any medication to Minor that week, the last week of
9 February?

10 A. No, not that I can remember.

11 Q. Did you give her pseudoephedrine that week?

12 A. I can't say that I know what that is. So I can't say that I
13 gave it to her. I don't know.

14 Q. Well, if she wasn't in any distress, did you ever give her any
15 medicine?

16 A. No.

17 Q. And you indicated to Mr. Axelrod that from February 12th of the
18 well-baby visit the child was okay?

19 A. Yes.

20 Q. So from the 12th to the 14th, you wouldn't have had any reason
21 to give any medication?

22 MR. AXELROD: Your Honor, he's leading the witness.

23 THE COURT: Yes, sir. I sustain that.

24 Q. Is there any reason you would have had to give the witness
25 medication - - -

1 MR. AXELROD: Your Honor, he's leading the witness.

2 THE COURT: Wait a minute. Wait a minute, now.

3 Just follow the rule.

4 MR. VON HERRMANN: My question is, "Is there any reason you
5 would have?"

6 THE COURT: That's not leading. It doesn't suggest an
7 answer.

8 Go ahead.

9 Q. Between February 12th and February 14th?

10 A. No.

11 Q. And when you came home from lunch, what was the condition of
12 the child - - on the 14th? I'm sorry. I apologize. Getting ahead
13 of myself a little bit.

14 A. Um, she was up taking a bottle, and she was playing, and by -
15 - by the time I was getting ready to head back to work, she - - she
16 was almost ready to go to sleep.

17 Q. Are you personally - - do you have any personal knowledge of
18 Aunt Lula coming and picking **Minor** up and taking her to her
19 apartment and keeping her? Any personal knowledge? Not something
20 you were told but you knew during that time?

21 A. No.

22 Q. And your indication from the defendant was - - or tell me your
23 indication of how - - where the child was kept when Lula would come
24 over to your apartment to watch the child.

25 A. Um, it was - - it was told to me that his aunt would come over

1 and watch her while he was taking naps, and, um, I - - I went with
2 that because I knew I had to have somebody there with her while I
3 was at work.

4 Q. But it was your understanding - - or tell me. Was it your
5 understanding that he was the sole care giver of that child during
6 that period of time?

7 A. Yes.

8 MR. VON HERRMANN: No further questions.

9 MR. AXELROD: A few follow-up, Your Honor.

10 RE-CROSS EXAMINATION BY MR. VON HERRMANN:

11 Q. You just told the Solicitor that you never gave **Minor** any
12 medicine from the 12th of February to the 14th. Correct?

13 A. Yes.

14 Q. And you - - and you said that the baby was fine. Correct?

15 A. Yes.

16 Q. But earlier when I talked with you, you did say that you gave
17 **Minor** medicine between the 12th and the 14th?

18 MR. VON HERRMANN: Your Honor, I don't agree with this
19 testimony. It's for the jury to determine.

20 MR. AXELROD: I - - I - - it's a follow-up cross, Your Honor.
21 The Solicitor might not like it. The jury will decide it, sir.

22 THE COURT: Well, I'll let that question but the jury will
23 determine what was said or if she said it.

24 Just ask her if she said it or didn't say it.

25 Q. Isn't it true that I asked you - - -

1 THE COURT: No, don't use that word "ish't it true". Just
2 ask her did she say that or not.

3 Q. Earlier, did you say that you gave Minor medicine between the
4 12th and the 14th?

5 A. I - - think I did.

6 Q. When you saw the police the next day on the 15th after Minor
7 had passed, were you upset?

8 A. Yes.

9 Q. And isn't it true the day Minor - - the day after died on the
10 Sunday morning isn't it true that Wesley was in a fetal position
11 crying holding her teddy bear.

12 MR. VON HERRMANN: Objection, Your Honor.

13 That's outside of the cope of direct exam - - cross
14 examination.

15 THE COURT: I sustain that. It's not subject to anything
16 that came out on his examination. Not a part of this re-redirect.
17 Go ahead.

18 MR. AXELROD: I'll do that question at a later point, Your
19 Honor.

20 Q. But your testimony is today is that you were upset when you
21 talked to the police?

22 A. Yes.

23 Q. Thank you.

24 THE COURT: Alright, sir.

25 MR. VON HERRMANN: No further questions, Your Honor.

1 We would ask that she be excused from her subpoena.

2 THE COURT: Well, I will excuse her as long as she's
3 available in the event that defense desires to call her for some
4 reason.

5 MR. VON HERRMANN: That's fine, Your Honor. Her attorney is
6 present in the courtroom.

7 THE COURT: Alright.

8 Just make sure that if he desires to call her back she would
9 be available.

10 You are excused.

11 You may come down, ma'am.

12 (The witness leaves the witness stand.)

13 MR. VON HERRMANN: Thank you, Your Honor.

14 Your Honor, the State calls Dr. Mallikarjun.

15 (The witness takes the witness stand.)

16 DR. ASHWIN MALLIKARJUN, being duly sworn,
17 testifies as follows:

18 CLERK OF COURT: Please be seated.

19 State your full name.

20 DR. MALLIKARJUN: Ashwin Mallikarjun.

21 CLERK OF COURT: Spell your last name for the Court.

22 DR. MALLIKARJUN: M-a-l-l-i-k-a-r-j-u-n.

23 DIRECT EXAMINATION BY MR. VON HERRMANN:

24 Q. Doctor, let me move this so I can see you a little bit better.

25 Doctor, can you please tell us - - -

1 MR. AXELROD: Your Honor, I'm just going to move that. It's
2 right in my way.

3 Q. Doctor, can you tell me where you're employed?

4 A. Healthcare Partners of South Carolina.

5 Q. Exactly what type of medicine do you practice?

6 A. Pediatrics.

7 Q. And how long have you done that?

8 A. Since December of 1998. That's nine and a half years.

9 Q. Can you please tell the jury and give them the benefits of
10 your qualifications as a Pediatrician and what you had to do to
11 become one?

12 A. Um, I did my med school in India and then did my residency in
13 Chicago, St. Luke's Medical Center via a residency course, and then

14 - - -

15 THE COURT: Are qualifications admitted as a Pediatrician?

16 MR. AXELROD: That's okay with me.

17 THE COURT: Alright, sir.

18 I find him an expert as a Pediatrician.

19 MR. AXELROD: He's a practicing pediatrician now, I do
20 believe.

21 THE COURT: Yes, sir.

22 MR. AXELROD: Absolutely.

23 MR. VON HERRMANN: Thank you, Your Honor.

24 THE COURT: It just saves the Court some time.

1 Thank you.

2 I find that this doctor is an expert in the practice of - - as
3 a Pediatrician.

4 Q. Doctor, have you had an opportunity to review your file in
5 this case where we're talking about Minor who passed away?

6 A. Yeah.

7 Q. And you're familiar that the child passed away of February 14th

8 - -

9 A. Yes.

10 Q. - - of 2004?

11 A. I do.

12 Q. Two days prior to that, February 12th, did you have the
13 opportunity to do a well-baby visit on that particular child?

14 A. I did.

15 Q. Would you please tell the jury the significant findings if
16 there were any and what you did during that physical exam?

17 A. The baby is brought back by the mom for a well-baby check
18 which we do two months, four months, six months shots and a
19 nutrition guidance and a (unintelligible) guidance, and she brought
20 the baby, and the baby was doing okay. A baby had an RS infection
21 about a month prior to that, and the baby still had a little bit
22 cough is what I recall from the records but the baby was doing good
23 when I saw the baby.

24 Q. Was there any indication at all as to wheezing or any of the
25 left over symptoms from the RSV?

1 A. That baby was definitely not wheezing or did not have any
2 signs of bronchiolitis which is RSV which cause the infection of
3 the lungs when I check the baby but according to history, the mom
4 said she still had little cough but when I check the baby, it was
5 doing good in the clinic.

6 Q. Did - - there was there any indication that they were giving
7 the child any medication at that point or did you prescribe any
8 medication for the child?

9 A. I don't think I prescribed any medication at that time.

10 Q. Would you have prescribed pseudoephedrine to that child under
11 any circumstances?

12 A. Not at that visit.

13 Q. Was there anything wrong with the child that needed to be
14 treated?

15 A. Not at that visit.

16 Q. And, specifically, did you do a head-to-toe exam and kind of
17 explain to the jury, maybe if some of them don't have kids, how you
18 go about it.

19 A. Okay.

20 We check them, you know, basically when, ah, we check the
21 baby's weight, height and head circumference and plot it on a curve
22 and see if they're growing well and they're getting proper
23 nutrition like they've been fed well and the right things. We
24 check with the history, too, if they're eating formula or solid
25 food or what they're being fed, and then, ah, we'll, ah, tell them

1 what to feed if they're not doing the right things, ah, and what to
2 feed because in when they're born we don't give them solid food.
3 We start from four and a half to five months.

4 So, we usually, ah, the proper instructions at the right age,
5 and I also check from head-to-toe from, you know, for the nails,
6 and the eyes, ears, nose, throat and the chest and the heart sounds
7 and the lung sounds and extremities. We do a full exam.

8 And if everything is okay and the baby's not having or we see
9 any problems, then we give the shots and then tell them, of course,
10 the feeding I told you and then I'll ask them to come back in two
11 months.

12 Q. Doctor, did you give the shots in this particular case to the
13 child?

14 A. No, it's always by my nurse has to give the shots.

15 Q. Did you expect her to give the shots, to administer the shots?

16 A. Yeah. The baby got the shots.

17 Q. What would you have done if the child had been under some form
18 of stress or what would you have been concerned about?

19 A. Could you repeat the question?

20 Q. What would you have done about giving her the shots? Would
21 you have - - -

22 A. I would not have given the shots if the baby had a high fever,
23 if the baby is still wheezing a lot or having problems in the lungs
24 or anything.

25 I would ask the baby to come back next day or we'll see to it

1 accordingly.

2 Q. Was the child under any distress whatsoever at the time?

3 A. No.

4 Q. What about a heart murmur? Did the child suffer from a heart
5 murmur at this particular time?

6 A. No. At this visit I didn't hear a heart murmur.

7 Q. Doctor, I have no further questions. Please answer any
8 questions the defense might have for you.

9 A. Thank you.

10 CROSS EXAMINATION BY MR. AXELROD:

11 Q. Do you remember when you saw the baby that day? Was it in
12 the morning?

13 A. I think it was in the afternoon.

14 Q. Uh-huh.

15 Was the baby fine?

16 A. The baby was fine.

17 Q. I have no further questions for you.

18 THE COURT: Doctor, you may come down.

19 Can this doctor now be excused?

20 MR. VON HERRMANN: Your Honor, we would request that he be
21 excused to return to his clinic. He's only a couple of miles away
22 from here, Your Honor.

23 THE COURT: Thank you, Doctor. You may return.

24 (The witness leaves the witness stand.)

25 MR. VON HERRMANN: Your Honor, can we approach for

1 scheduling?

2 THE COURT: Yes, sir.

3 (Bench conference held in the presence of the jury but outside
4 of the hearing of the jury.)

5 THE COURT: Mr. Foreman, ladies and gentlemen, the State is
6 nearing its completion of its witnesses. One of - - they've got
7 some chain of custody witnesses who will be very short relative to
8 the things that have been introduced in the trial but their last
9 witness as such is a doctor, a Forensic Doctor from Charleston who
10 was subpoenaed to be here and was suppose to be here but through no
11 fault of her own was unavoidably delayed today on another matter,
12 and we are assured that she will be available at 9:30 in the
13 morning.

14 Is that correct?

15 MR. VON HERRMANN: Your Honor, we have her hear at 10:30.
16 We'll have all of the other chain witnesses, and we'll be able to
17 go.

18 THE COURT: But I want that witness in the morning. I want
19 the State - - I want to make sure that we conclude the State's case
20 in the morning so we can move on with the defendant's case.

21 MR. VON HERRMANN: Yes, sir.

22 THE COURT: Alright.

23 So, at that time the State has no further evidence to present
24 other than your doctor and your chain witnesses. Is that what
25 you're saying?

1 MR. VON HERRMANN: That's correct, Your Honor.

2 THE COURT: Okay.

3 Then I want to make sure the jury understands why we are
4 recessing here at quarter til four, and that's simply because that
5 witness couldn't be here even though she was subpoenaed to be here,
6 and those things happen.

7 So, we're going to give you a little earlier break today and
8 respectfully request that you return in the jury room to 9:30 in
9 the morning.

10 Remember my admonitions. Do not discuss this case with
11 anyone. Let no one discuss it with you. Make absolutely no
12 independent inquiry, and under no circumstances would you discuss
13 it among yourselves.

14 I continue to request, too, that if you happen to see
15 something on television, please turn away from it. If you happen
16 to see something in the press, leave it alone. Not necessary - -
17 not necessarily would it be wrong for you to do it, but sometimes
18 questions arise, and I continue to tell you that the reason that we
19 request that respectfully is so that whatever your verdict is is
20 based on the law and evidence in this courtroom and not something
21 you may have heard or read.

22 And I think all of you understand that.

23 So, have a nice evening, and I'll see you back here at 9:30 in
24 the morning.

25 (The jury is released to depart the courtroom at 3:50 p.m. and

1 instructed to return at 9:30 a.m. on Wednesday.)

2 THE COURT: Alright.

3 The jury is gone.

4 Outside the presence of the jury and for my edification, now,
5 as I understand it you've got the one - - main one witness and some
6 short fact, ah, chain witnesses?

7 MR. VON HERRMANN: Yes, sir, Your Honor.

8 THE COURT: So you fully anticipate that sometime in the
9 morning you'll be able to rest the State's case?

10 MR. VON HERRMANN: Yes, sir, I do.

11 THE COURT: Now, Mr. Axelrod, will you and Mr. Taylor and
12 co-counsel here be ready to go in the morning if necessary?

13 MR. AXELROD: Well, when I talked to Mr. Von Herrmann, he
14 told me that his chain witnesses would take the entire morning. I
15 don't know if that's the case, and then he has Dr. Collins.

16 THE COURT: Well, I don't care what he told you. What I'm
17 telling you is you be ready to go in the morning.

18 MR. AXELROD: Well, we - - most of our subpoenas we put for
19 Wednesday at 2:00.

20 THE COURT: Well.

21 MR. AXELROD: Because Mr. Von Herrmann told me that his
22 anticipation was that he would finish, actually, Tuesday - -
23 Wednesday afternoon, and we put our witnesses - - -

24 THE COURT: Well, in the - - -

25 MR. AXELROD: And I do think we're going to be real near that

1 as it is, Judge. I think - - I think Dr. Collins will be somewhat
2 lengthy on Bert's part and, also, my cross. So - - and with this
3 chain, I don't think - - I think we'll be close.

4 THE COURT: Well, we'll see where we go. We'll quit - -
5 we'll quit at 12:00. If we quit at 11:00, we'll come back at
6 1:00. You'll just have to get some witnesses here.

7 MR. AXELROD: Yes, sir, Your Honor.

8 THE COURT: But I would guess probably that we'll be to
9 12:00 anyway, perhaps 1:00. You agree with that?

10 MR. VON HERRMANN: Yes, sir, Your Honor.

11 THE COURT: I just don't want to use this time - - this
12 jury's valuable time no more than necessary.

13 Alright. That's fine.

14 Just be prepared to go at 2:00 and certainly no later than
15 that. Alright?

16 MR. VON HERRMANN: Yes, sir, Your Honor.

17 THE COURT: Now, so we'll know. How many witnesses does
18 the defense have?

19 MR. AXELROD: Well, some of them have dwindled, Your Honor,
20 and some of them through their testimony and Mr. Von Herrmann the
21 State's witnesses. I'm not sure. Mr. Bailey has actually been
22 doing a witness count for us but we have - - we have some family
23 members. We have some other people. We have police officers. We
24 have some people. I'm not sure.

25 There - - there's - - Mr. Bailey might be able to enlighten us

1 a little more - - or Mr. Taylor. He's been working on it also.

2 THE COURT: What can you tell me, Mr. Taylor?

3 MR. TAYLOR: Your Honor, I don't want to hold myself to the
4 exact number right now. I'm not sure.

5 THE COURT: Oh, I wouldn't do that to you.

6 MR. TAYLOR: We're not going to have any more witnesses than
7 the State's had.

8 THE COURT: Well.

9 MR. TAYLOR: I don't see, in all honesty, I don't see us
10 going into Friday. So, then you'll be fine.

11 THE COURT: Sir?

12 MR. TAYLOR: I don't see this case going into Friday. I
13 think we'll be able to finish on Thursday.

14 THE COURT: Well, that's what I try - - want to try and do
15 if at all possible. It seems to me based on what I'm hearing you
16 can get your witnesses tomorrow afternoon and Thursday morning.

17 I'd like to work towards that end, you understand?

18 MR. AXELROD: Your Honor, I would think that we will have
19 witnesses that will go - - we probably will go through all Thursday
20 morning with witnesses - - Wednesday afternoon and Thursday
21 morning, and maybe - - -

22 THE COURT: Well, if at all possible, I'm going to give
23 this case to the jury sometime Thursday afternoon.

24 MR. AXELROD: And I know that the Court's not going to rush
25 me on the presentation of my case, and if it goes longer, it will

1 go longer.

2 THE COURT: It would be impossible to rush you if you
3 tried.

4 MR. VON HERRMANN: Your Honor, the only other thing that we
5 had talked about yesterday. Of course, it takes a few minutes.
6 If we can get their witness list as far as date of birth, social
7 security number.

8 THE COURT: Yes, sir. I think it the appropriate time now,
9 Mr. Taylor, that you give it to him.

10 MR. TAYLOR: Your Honor, I don't have it. Mr. Axelrod's got
11 it.

12 THE COURT: Sir?

13 Mr. Axelrod.

14 MR. AXELROD: Your Honor, we'll provide it tomorrow.

15 THE COURT: No, sir. Give him an opportunity so he can
16 check the records tonight. I don't want to be delayed.

17 MR. AXELROD: He can't check the record with just names, Your
18 Honor.

19 THE COURT: He - - -

20 MR. AXELROD: He can't check records with just names.

21 THE COURT: Give it to him.

22 MR. AXELROD: Yes, sir, Your Honor.

23 MR. VON HERRMANN: Thank you, Your Honor.

24 THE COURT: It will save some time, now.

25 MR. AXELROD: Absolutely. Anything to save the Court time.

1 THE COURT: Well, that's fine. Give it to him and that
2 will save some time.

3 Anything further?

4 MR. VON HERRMANN: No, sir, Your Honor, but if he has social
5 security numbers and date of birth, that would make it - - -

6 MR. AXELROD: I don't. I don't. I don't.

7 MR. VON HERRMANN: Well, then, if I can have telephone
8 numbers, we can contact them and get their date of birth and social
9 security numbers. We'll be fine doing that, too.

10 We'll do all the legwork he wants us to do.

11 THE COURT: Well, I could see why he may not necessarily
12 have - - if it was my wife, she wouldn't give you her social
13 security number. She just won't give it to anybody. And a lot of
14 people feel that way, and as a witness he may not be inclined to do
15 it.

16 MR. VON HERRMANN: I'll just receive the witness list, Your
17 Honor.

18 THE COURT: Give him whatever you got, and he can make the
19 necessary arrangements to find out the social security numbers if
20 you need that.

21 I can ask you this. Of course, the only purpose of this is
22 the opportunity to check and see if they have some prior record.

23 MR. AXELROD: Sure.

24 THE COURT: To save him some time and the Court some time,
25 have you had an opportunity to look into that whether they have

1 prior records or not?

2 MR. TAYLOR: I have no ability to get on NCIC, Your Honor.

3 THE COURT: I understand that but can you tell us from
4 personal conversations where you have any idea if they got private
5 record or not?

6 MR. TAYLOR: No, sir, Your Honor.

7 MR. VON HERRMANN: And, Your Honor, of course, a lot of these
8 we're not even concerned about. There are fifty-two names.

9 THE COURT: I know that.

10 Mr. Taylor, give him the names of those that you expect to
11 call, and I'm not holding you to the exact because things may
12 happen but you know those that you are going to call for sure and
13 give them to him?

14 MR. TAYLOR: Yes, sir.

15 THE COURT: Alright.

16 Mr. Axelrod, come back to the counsel table. That's not
17 appropriate back there for you - -

18 MR. AXELROD: I'm just talking to the witness.

19 THE COURT: - - while we're in a motion period.

20 If you choose to call somebody beyond those on the list give
21 him those names as soon as you know that.

22 MR. VON HERRMANN: Thank you, Your Honor.

23 THE COURT: Anything further?

24 MR. VON HERRMANN: Nothing from the State, Your Honor.

25 THE COURT: Alright.

1 Mr. Axelrod, do you or Mr. Taylor or Mr. Bailey have anything?
2 Anything further at this time?

3 MR. AXELROD: No, sir, Your Honor. Have a nice evening.
4 Have a good dinner. We'll see you tomorrow at 9:30.

5 THE COURT: Be here at 9:30.

6 Thank you.

7 MR. AXELROD: Yes, sir.

8 THE COURT: Mr. Taylor, thank you.

9 MR. TAYLOR: Yes, sir, Your Honor.

10 (The Court adjourns the trial of this case for the evening to
11 resume at 9:30 a.m. on Wednesday.)

WEDNESDAY, APRIL 16, 2008

(The Court reconvenes the trial of this case with all parties present at 9:49 a.m.)

THE COURT: Good morning, ladies and gentlemen. Please be seated.

Alright, sir. You ready to proceed?

DEFENDANT'S EXHIBIT #1 ADMITTED

MR. AXELROD: Your Honor, I just have a couple of things to put on the record if we may?

THE COURT: Well, if they relate to your side of the case, let's wait until we get there.

MR. AXELROD: Your Honor, it's just a matter of housekeeping, and I think it's important.

THE COURT: Okay.

MR. AXELROD: Yesterday - - I'm going to show it to Bert.

Your Honor, this is a report from Healthcare Partners. Dr. Cooper testified yesterday that she wrote that the mom - - she was afraid to go to the emergency room because they would - - she would be turned in for being a bad mom.

THE COURT: That was the testimony.

MR. AXELROD: Right.

And I forgot to admit it through her which I can.

Now, I have her under my own subpoena. Rather than bring her back to admit this, I'm asking - - -

THE COURT: Do you have any objection to that?

1 MR. VON HERRMANN: I - - I - - let me. Your Honor, that's
2 not what I thought he was doing.

3 THE COURT: That was the testimony.

4 MR. VON HERRMANN: That is her testimony, Your Honor.

5 MR. AXELROD: And I just forgot to admit it, and she's under
6 my - -

7 THE COURT: Well.

8 MR. AXELROD: - - no reason to bring a doctor back for one
9 piece of paper.

10 THE COURT: No, no.

11 Unless there's something else on there that, ah - - -

12 What you're saying is you want to admit it consistent with the
13 testimony concerning that issue?

14 MR. AXELROD: Yes, sir.

15 THE COURT: Any other statement on that not in testimony?

16 MR. AXELROD: Nah, nah.

17 THE COURT: Well, let him answer that question.

18 (The Solicitor reviews document.)

19 MR. VON HERRMANN: No objection, Your Honor. We would allow
20 him to admit that as a Defendant's Exhibit.

21 THE COURT: No objection.

22 MR. VON HERRMANN: No, sir, Your Honor.

23 THE COURT: Without objection, then, it is admitted.

24 MR. AXELROD: Thank you, Your Honor. Appreciate that. It
25 will save the doctor from coming.

1 THE COURT: Why, sure.

2 MR. AXELROD: And this would be Defendant's #1 I believe.

3 It's the report of Dr. Cooper for the 12/9/03 doctor visit.

4 (The Court Reporter accepts Defendant's Exhibit #1 into
5 evidence.)

6 MR. AXELROD: Your Honor.

7 THE COURT: Anything else?

8 MOTION AND RULING OF THE COURT

9 MR. AXELROD: Yes, sir, Your Honor.

10 Um, I want to address the matter if I could, Your Honor, of
11 Dr. Cross' testimony and I'd like to put it on the record. We
12 spoke with the Court yesterday out here and I don't know if it's on
13 the record. We spoke in chambers briefly that I wanted to bring
14 in Dr. Cross, Michael Cross from Columbia, South Carolina. He - -
15 he's a Psychiatrist. He - - he - - he did some work on the case,
16 and he reviewed records showing that Wesley has an I.Q. of
17 approximately sixty-seven percent, somewhere in that area,
18 borderline. We've had it on reports recently.

19 THE COURT: For what purpose - - obviously, diminished
20 capacity is not an issue in this case.

21 MR. AXELROD: I'm not trying to introduce the evidence for
22 diminished capacity but I think even if Wesley doesn't testify, the
23 State's position is that Wesley gave this baby too much medicine.
24 My position is that Wesley can't read, can't write, and we just
25 have - - -

1 THE COURT: Wait a minute, now. Let - - let's cut to the
2 chase real quick like.

3 If he doesn't testify, what difference does it make whether he
4 can read or write or understand unless he - - unless he testifies,
5 "I did through accident not knowing the severity of it."

6 MR. AXELROD: I think even if he doesn't testify, I think it
7 goes to the matter of the knowledge - - they - - they say that he
8 gave the baby too much medicine. Even if he doesn't testify it
9 goes to the fact that he would not understand the ramifications and
10 the dangers - - so, now - - -

11 THE COURT: Let me - - I got a jury waiting here.

12 Let me tell you one more time as I did here. You're entitled
13 to take your position for the record.

14 If he does testify depending on what he says I will then
15 consider whether or not to let that doctor testify. I would have
16 to listen to his testimony first and hear what he says.

17 Under no circumstances will that doctor or anybody else be
18 permitted to testify as to his lessened capacity unless he says, "I
19 did it."

20 Now, let that be enough of that on that issue.

21 MR. AXELROD: I'm not going to lessened capacity, Your Honor.

22 THE COURT: Well, whatever you going to his I.Q. is not at
23 issue in this case unless he testified period.

24 MR. AXELROD: Well, I think it is at issue, Your Honor.

25 THE COURT: I know you think so but I don't. So that ends

1 it.

2 Now, have a seat and let's bring it out.

3 If he testifies, I then will hear a motion from you as to
4 whether or not I'll let it in. I may or may not depending on what
5 he says.

6 MR. AXELROD: And I understand the Court's ruling. I take
7 exception that the Court has decided that unless he testifies that
8 he - - that Dr. Cross will not come in. I take exception to that.

9 THE COURT: Period.

10 MR. AXELROD: Alright, now.

11 If I may find Mr. Bailey?

12 THE COURT: No, Mr. Bailey knows this court is in session.
13 I'm going to start this jury, and you can send one of your
14 underlings out to find him. I'm not - - bring the jury in. I'm
15 ready to go. Mr. Bailey knows this court is in session.

16 Let's go.

17 I cannot wait any further time for this jury.

18 I'm going to have to have Mr. Bailey do like I told you. If
19 you want me to get some handcuffs and lock him to that chair, I'll
20 be glad to do that.

21 Alright.

22 MR. AXELROD: Your Honor, may we approach?

23 THE COURT: Alright.

24 Counsel for the defense.

25 (Bench conference held off the record and outside the presence

1 of the jury.)

2 THE COURT: Somebody bringing my jury in?

3 CLERK OF COURT: Yes, sir.

4 (The jury returns to the courtroom at 9:56 a.m.)

5 THE COURT: Solicitor, help him anyway you can to get those
6 witnesses here if you will.

7 MR. VON HERRMANN: I will, Your Honor. We're just getting
8 those addresses.

9 THE COURT: Alright, sir.

10 MR. VON HERRMANN: Your Honor, we have actually taken care of
11 it.

12 THE COURT: You ready to proceed?

13 MR. VON HERRMANN: Yes, sir, Your Honor.

14 THE COURT: Alright. Call your first witness.

15 MR. GRAVES: The State calls Yen Tuyen.

16 (The witness takes the witness stand.)

17 YEN TUYEN, being duly sworn,
18 testifies as follows:

19 CLERK OF COURT: Please be seated.

20 State your name your full name.

21 MS. TUYEN: Yen Tuyen.

22 CLERK OF COURT: Spell your last name for the record.

23 MS. TUYEN: T-u-y-e-n.

24 CLERK OF COURT: Thank you.

1 DIRECT EXAMINATION BY MR. GRAVES:

2 Q. Ms. Tuyen, what is National Medical Service?

3 A. It's a forensic laboratory.

4 Q. And what type of work do they undertake?

5 A. We do blood testings and urine testings for drugs and alcohol.

6 Q. Were you employed by National Medical Service or NMS in 2004?

7 A. Yes.

8 Q. And in what capacity did you work at NMS?

9 A. I was a specimen processor.

10 Q. And in this - - regards to this employment, did you come in
11 contact with material relating to Minor

12 A. Yes.

13 Q. And, ah, do you recall when you received it?

14 A. Like when I received it?

15 Q. Yes, ma'am.

16 A. Ah, I don't recall a date.

17 Q. And who did you receive it from?

18 A. From a FedEx courier.

19 Q. And do you recall in what condition it was received?

20 A. It was in a contained box of two sample blood tubes.

21 Q. And what did you do with these items?

22 A. I get the logging form, and I checked to make sure that the
23 tubes were named with Minor on the tubes and on the logging
24 form, and then I logged them into the system.

25 Q. And did you alter the material as to form or content while it

1 was in your custody and control?

2 A. No.

3 Q. On a later date at a similar time, did you again come into
4 contact with material related to Minor

5 A. Yes.

6 Q. And, ah, do you recall when that was?

7 A. Um, I don't recall a date.

8 Q. From whom did you receive the materials?

9 A. I went to the refrigerator to get it. It's in a closed,
10 contained refrigerator.

11 Q. And the items were marked and labeled Minor

12 A. Yes.

13 Q. Okay.

14 And, ah, could you please state what particular condition were
15 those items when you received them?

16 A. The tubes were paraffined because it had been previously
17 opened. So it was paraffined and I cut the paraffin tubes across
18 them.

19 Q. Was it in a box or any other container?

20 A. Yes, it was in a box.

21 Q. Um, would you have accepted the materials that were improperly
22 maintained?

23 A. No. I would have notified my supervisor.

24 Q. Let me ask you going back to the earlier contact with the
25 materials and everything. Would you have accepted them if they

1 had been improperly maintained - -

2 A. No.

3 Q. - - at the initial intake point?

4 A. No.

5 Q. Please describe with what you did with the items the second
6 time you came in contact with them with relation to Minor

7 A. I cut open the paraffin and I took out the test tube. Tore
8 open the paraffin and aliquotted samples. Transferred to different
9 tube - - labeled the tube with Minor name, and then I
10 paraffined both of the tubes and sent the alloquated tubes to
11 Pennsylvania.

12 Q. Other than the actions you just detailed, did you alter the
13 material as to form or content while it was in your custody and
14 control?

15 A. No.

16 MR. GRAVES: I have no further questions for this witness.

17 THE COURT: Mr. Axelrod.

18 MR. GRAVES: Please answer any questions Mr. Axelrod may
19 have.

20 CROSS EXAMINATION BY MR. AXELROD:

21 Q. Can I see the log-in form?

22 A. I do not have it with me.

23 Q. You didn't bring the log-in form?

24 A. No, because I don't - - no longer work for NMS.

25 Q. You know the numbers on the log-in form?

1 A. I don't know off the top of my head?

2 MR. AXELROD: I have nothing for this witness.

3 THE COURT: You may come down. Thank you.

4 MS. TUYEN: Thank you.

5 (The witness leaves the witness stand.)

6 MR. GRAVES: May she be released from her subpoena, Your
7 Honor?

8 THE COURT: Yes.

9 Next witness.

10 MR. GRAVES: The State calls Sheila Sherry.

11 (The witness takes the witness stand.)

12 SHEILA SHERRY, being duly sworn,
13 testifies as follows:

14 CLERK OF COURT: Please be seated..

15 Please state your full name.

16 MS. SHERRY: Sheila Sherry.

17 CLERK OF COURT: And spell your full name for the Court.

18 MS. SHERRY: First and last?

19 S-h-e-i-e-l-a S-h-e-r-r-y.

20 DIRECT EXAMINATION BY MR. GRAVES:

21 Q. Ms. Sherry, were you employed by National Medical Service,
22 NMS, in 2004?

23 A. Yes.

24 Q. In what capacity, please?

25 A. I was a Toxicologist.

1 Q. Did you in your capacity at NMS come in contact with materials
2 relating to Minor

3 A. Yes.

4 Q. Um, do you recall when you received that item?

5 A. I do not recall the date.

6 Q. Do you recall who you received it from?

7 A. I received it from Yen Tuyen. That's in processing.

8 Q. And do you recall the nature of the material?

9 A. It was a box containing two test tubes of blood.

10 Q. Were they labeled in anyway?

11 A. Yes. The box and the tubes were all labeled.

12 Q. Do you recall what the name on the label was?

13 A. Minor

14 Q. And what condition did you receive that?

15 A. I received the sealed tubes.

16 Q. Would you have accepted materials that had been improperly
17 maintained?

18 A. No, I would not.

19 Q. Please describe to the jury what you did with these items.

20 A. I verified the names and the control numbers on the tubes and
21 box, and I put labels on new clean test tubes for the ordered
22 tests, and then I broke the seals, and then I aliquotted for the
23 tests ordered.

24 Q. Please explain what aliquotting is.

25 A. A measured amount of blood from the primary test tube.

1 Q. Did you - - so it's a smaller amount of a greater test tube?

2 A. Yes, a smaller amount.

3 Q. And that allows you to do what?

4 A. Whatever test is ordered, screening or confirmation. Usually,
5 it's screening.

6 Q. You can do multiple tests - -

7 A. Yes.

8 Q. - - by aliquotting?

9 A. Yes.

10 Q. Did you - - did you conduct the tests or did you merely
11 prepare the items for testing?

12 A. I prepared them for testing. I just aliquotted the sample.

13 Q. There was an aliquot, and then there was a main sample.

14 A. Yes.

15 Q. What - - what particularly did you do to ensure those items
16 maintained their integrity?

17 A. I - - after aliquotting, I, um, resealed the test tube with
18 paraffin, and put them back in the box. I cover either cap or
19 paraffin the aliquots.

20 Q. Did you place them in any other container?

21 A. No.

22 Q. And other than the actions that you detailed today, did you
23 alter the materials in any way as to form or content - -

24 A. No.

25 Q. - - while in your custody?

1 A. No.

2 MR. GRAVES: That's all I have for this witness, Your Honor.

3 Q. Please answer anything the defense, Mr. Axelrod and Mr. Taylor
4 may have for you.

5 MR. TAYLOR: Court's indulgence, Your Honor.

6 THE COURT: Alright, sir.

7 CROSS EXAMINATION BY MR. TAYLOR:

8 Q. Good morning.

9 A. Good morning.

10 Q. Are you still working for the same company?

11 A. No, I'm not.

12 Q. You're not? When did you stop working for them?

13 A. I stopped working for them in August of 2004.

14 Q. Okay.

15 Where do you work, specifically? Were you on the West Coast
16 or are you on the East Coast?

17 A. West Coast.

18 Q. Okay.

19 Whenever you received these tubes, you heard the previous
20 testimony they'd been opened before but your testimony is that they
21 were sealed.

22 What form did you receive as far as saying where the blood had
23 come from?

24 A. I'm sorry. I don't quite understand your question.

25 Q. What form did you receive - - when you received the blood,

1 what form did you receive with it telling you where it came from?

2 A. A chain of custody.

3 Q. Okay.

4 Does it have the date on there as far as when the blood was
5 taken?

6 A. Yes.

7 Q. Okay.

8 And the date the blood was taken until the date you received
9 it, how many days was that?

10 A. I do not know. I do not have it in front of me.

11 Q. Was it over a month.

12 A. I do not know.

13 Q. Was it over two months? You have no idea?

14 A. No.

15 Q. Okay.

16 As a Toxicologist, is there anything that can happen to blood
17 if it stays in a test tube too long?

18 A. I don't know.

19 Q. Whenever you received these tubes, did it have coagulants
20 inside or preservatives inside the tube to protect the blood?

21 A. Yes. There were different tubes but yes.

22 Q. Let me rephrase that question.

23 When you received the tubes, did you check to see if had the
24 recognized preservatives to preserve the blood?

25 A. No.

1 Q. Okay.

2 So, you have no idea if the blood was - - well, you as a
3 Toxicologist would agree that blood that sits in a tube too long
4 will decompose? Is that correct? You have no idea?

5 Would you agree if it sits in a refrigerator too long, it will
6 decompose?

7 MR. GRAVES: Objection, Your Honor. That's clearly
8 irrelevant.

9 THE COURT: Well, I'm going to let him talk about decompose
10 a moment. I'll let her answer if she knows.

11 Q. But you agree as a Toxicology that blood decomposes like
12 anything else?

13 A. Yes. Yes.

14 Q. Did you check to see how if this blood decomposed in any
15 manner if it was a correct specimen for you to test at that time?

16 A. No. I don't quite understand.

17 I received the sample. There are in tubes the different
18 preservatives. It depends on how they were taken.

19 I aliquotted the sample. I broke the seal, and I aliquotted
20 the sample.

21 Q. Okay.

22 As a Toxicologist - -

23 A. Uh-huh.

24 Q. - - would you agree that if you were testing, say, alcohol in
25 blood and that tube sat too long, stayed outside of the

1 refrigerator too long that it actually creates alcohol and that the
2 alcohol content would be more? And my question there is in
3 following up with that would that also affect what you were
4 actually testing this blood for?

5 A. No.

6 Q. Okay.

7 So, then if this blood had actually broken down and the blood
8 had deteriorated, that would in no way affect your testing of this
9 blood?

10 A. I don't know that.

11 Q. Okay. Alright.

12 MR. TAYLOR: I have no further questions, Your Honor.

13 MR. GRAVES: No further questions, Your Honor.

14 THE COURT: Alright.

15 You may come down. Thank you.

16 MS. SHERRY: Okay. Thank you.

17 MR. GRAVES: And may she be excused, sir?

18 THE COURT: Yes, sir.

19 MR. GRAVES: Thank you, sir.

20 THE COURT: Thank you.

21 (The witness leaves the witness stand.)

22 THE COURT: Next.

23 MR. GRAVES: Your Honor, the State calls Christopher Dodson.

24 (The witness takes the witness stand.)

1 CHRISTOPHER DAVID DODSON, being duly
2 sworn, testifies as follows:

3 CLERK OF COURT: Please be seated.

4 Please state your full name.

5 MR. DODSON: Christopher David Dodson.

6 CLERK OF COURT: Spell your last name for the Court.

7 MR. DODSON: D-o-d-s-o-n.

8 DIRECT EXAMINATION BY MR. GRAVES:

9 Q. Mr. Dodson, are you familiar with National Medical Services?

10 A. Yes.

11 Q. Were you an employee of that company in 2004?

12 A. Yes.

13 Q. Are you still currently employed there?

14 A. No, I'm not.

15 Q. In what capacity did you work at NMS?

16 A. I was a specimen processor.

17 Q. And, ah, were you in the same office as Ms. Tuyen and Ms.
18 Sherwood?

19 A. No, I was in Willow Grove. That's in Pennsylvania.

20 Q. And where were they?

21 A. In California.

22 Q. And, ah, relating to your employment in that, did you have an
23 opportunity to come into contact with materials relating to **Minor**
24 Smith?

25 A. Yes, sir.

1 Q. And, ah, do you recall when you received these items?

2 A. Not the date, no.

3 Q. Do you recall who you received it from?

4 A. Yeah. Well; it would have just come in by the -- by Fed --
5 by the mail, and I would have received it from there and logged it
6 in.

7 Q. Would these items -- was it material particularly labeled?

8 A. Yes.

9 Q. And, um, what condition did you receive it?

10 A. It would have been sealed.

11 Q. Ahd, ah, would you have accepted the material if it were
12 improperly maintained?

13 A. No -- not -- not for testing, no.

14 We would -- we would log it in and mark it in that it wasn't
15 sealed.

16 Q. But would you have performed tests?

17 A. Ah, no.

18 Q. The, ah, please describe what you did with these items
19 relating to **Minor**

20 A. I would have received the aliquot from the parent sample in
21 California. I would have then -- the testing would have already
22 been in the computer. We were connected at that point, and I
23 would have just -- the test would have been there. So I would
24 have known the amount that would have gone out to the lab for
25 testing. So I would have aliquotted from the sample we received

1 from California and put it in another tube and sent it to the lab
2 for testing.

3 Q. Alright.

4 Do you know the name of the particular individual in
5 California who placed it in the mail?

6 A. No. At the time I didn't. No. I just met her.

7 Q. Okay. Alright.

8 Do you know who that is today?

9 A. Today, yes.

10 Q. Okay. And who was that?

11 A. Tulyn.

12 What - - I'm not - - I mean.

13 Q. Ms. Tuyen that was the first witness there?

14 A. Yeah, yeah.

15 Q. Thank you, sir.

16 And, ah, prior to your action making the smaller samples, ah,
17 were the seals intact - -

18 A. Yes.

19 Q. - - on this particular tube?

20 And what did you do with the remaining sample?

21 A. The remaining sample would have gone back into our
22 refrigerator for further - - if we needed any further testing.

23 Q. And what did you do with the smaller items that you had?

24 A. That would have been - - that would have gone out to the lab
25 for testing.

1 Q. Did you perform the tests?

2 A. No, I did not.

3 Q. Thank you.

4 Other than the actions that you detailed, did you alter the
5 material in any way while it was in your custody and control?

6 A. No.

7 Q. Okay.

8 MR. GRAVES: That's all I have of this witness, Your Honor.

9 Q. Please answer any questions Mr. Axelrod may have.

10 THE COURT: Mr. Taylor or Mr. Axelrod.

11 CROSS EXAMINATION BY MR. TAYLOR:

12 Q. I wasn't too good in science. When you say "aliquot" what
13 exactly is that?

14 A. It's just taking a smaller sample from a parent sample for
15 testing - - so we don't use up the entire sample at one shot.

16 Q. What exactly when you took the sample, how much did you take?

17 A. Offhand I don't know. I just saw it last night. For the
18 testing we were doing, it would have been a quarter of a mil. and
19 a tenth of a mil.

20 Q. Okay.

21 Well, what exact testing procedures? What do you have to
22 ensure that the product that you received is the correct product?

23 A. We make sure everything is sealed and labeled. We have - - we
24 have our on in-house stickers that we use. There's three different
25 forms with our identification on it that we would verify.

1 Q. Did you check to see the dates of when the sample was
2 originally taken as to when you received, and is there any
3 ramifications as a result of the dates they've been any excess in
4 time?

5 A. Ah, the date as of - - from the way this case went, I don't
6 see any dated - - just of when the sample was taken originally.

7 Q. The age of the sample, does that affect in any way?

8 A. In my knowledge I don't know.

9 Q. You don't know? Okay.

10 Would you agree that blood is something that can deteriorate?

11 A. Sure.

12 Q. Okay.

13 What exactly is your background so far as taking the blood?
14 What do you do with it whenever you take the sample? Are you the
15 one that actually tested it or is it somebody else?

16 A. No. I do - - I do no testing. All I get is we get the sample
17 into the lab - -

18 Q. Yes, sir.

19 A. - - and I would enter, you know, we have a requisition form.
20 It would be for what testing they want. I would enter the testing
21 in the computer, and then it would also give me - - tell me how
22 much I need to aliquot off of the parent sample to send to the lab
23 for testing. That's all I would do.

24 Q. Do you have any quality control procedures that you have to
25 follow as far as the - - the samples?

1 A. Yes.

2 Q. And what are those?

3 A. We need - - need to keep them in the refrigerator. They are
4 in a secure refrigerator, and when we pull them out, when we go to
5 aliquot it, there's three forms of identification - - -

6 Q. Why do you have to keep it in a refrigerator?

7 A. I - - um, keep the stability of the sample, I would suppose.

8 Q. In other words, keep it from deteriorating?

9 A. Yes.

10 Q. Okay.

11 And where exactly are you located again?

12 A. As far as?

13 Q. When you - - when you received the sample, where were you
14 located?

15 A. I'm in my own little separate compartment.

16 Q. What city, I'm sorry?

17 A. Willow Grove.

18 Q. And where is that?

19 A. Pennsylvania.

20 Q. Okay.

21 So, the sample came there from Conway?

22 A. Yes.

23 Q. Alright.

24 Do you know - - have any idea how long it took to get from
25 Conway to Willow Grove, Pennsylvania?

1 A. No.

2 Q. Thank you.

3 Do you have any idea whether it was refrigerated from Conway,
4 South Carolina, on its trip from here to Willow Grove,
5 Pennsylvania?

6 A. No, I don't.

7 Q. Okay.

8 Would you say given your quality control would it affect the
9 sample if it was not refrigerated from Conway, South Carolina, to
10 Willow Grove?

11 A. In - - in my - - I don't know how it would affect that. I'm
12 not - - -

13 Q. Then why you have quality control procedures at your company
14 that say that it has to be in a refrigerator?

15 A. Because there are tests that things can deteriorate quickly.

16 Q. Okay.

17 A. As far as this one I don't have any idea.

18 Q. Okay.

19 Alright, but you would agree that your normal procedure is for
20 all samples of blood to be put in a refrigerator?

21 A. Yes.

22 Q. When you received it what type of container was it in?

23 A. It would have been in a test tube.

24 Q. No. What type of - - you didn't actually receive the test tube
25 itself, did you?

1 A. No. It would have been an aliquot off - - in another test
2 tube.

3 Q. Okay.

4 And it came in a box, didn't it?

5 A. Yes.

6 Q. What type of box did it come in?

7 A. A cardboard box in Styrofoam.

8 Q. And that's not on dry ice, not any type of coolant?

9 A. That - - I don't recall that.

10 Q. Okay. Alright.

11 But you would have recalled it if you had opened up the box,
12 correct?

13 A. No. Not - - I mean, it was.

14 Q. So, it was just in a box, wasn't it?

15 A. It was - - that I don't know.

16 Q. Okay.

17 A. I mean, I could tell you if I had the chain of custody sheet
18 in front of me. I could tell you how I logged it in.

19 Q. Alright. Thank you.

20 A. Uh-huh.

21 MR. GRAVES: Nothing further from this witness, Your Honor.

22 THE COURT: Alright. You may come down. Thank you.

23 (The witness leaves the witness stand.)

24 Your next witness.

25 MR. GRAVES: The State calls Vy T. Le.

1 (The witness takes the witness stand.)

2 VY T. LE, being duly sworn, testifies
3 as follows:

4 CLERK OF COURT: Please be seated.

5 Please state your full name.

6 MS. LE: Vy T. Le.

7 CLERK OF COURT: And spell your full name for the Court.

8 MS. LE: V-y and then L-e.

9 DIRECT EXAMINATION BY MR. GRAVES:

10 Q. Ms. Le, in 2004, were you an employee of NMS?

11 A. Yes.

12 Q. In what location?

13 A. In Willow Grove, Pennsylvania.

14 Q. And, ah, in what capacity were you employed at NMS?

15 A. I was an HPLC Specialist.

16 Q. Could you explain that job duties were?

17 A. I was, um, perform, like, testing to detect drug concentration
18 using a HPLC instrument.

19 Q. What is HPLC?

20 A. It - - it's an um - - it's an acronym for High Performance
21 Liquid Chromatology. I'm not sure how that works because I've been
22 out of the field for too long.

23 Q. Um, so you no longer work at NMS?

24 A. No, not now.

25 Q. When did you leave NMS?

1 A. I would see March of 2006 - - or 2000 - - yeah, 2006.

2 Q. Related to your employment at NMS in 2004, were you employed
3 in March of 2004?

4 A. Yes, sir.

5 Q. And in that relation did you have an opportunity to come in
6 contact with the material relating to Minor

7 A. Yes, I did.

8 Q. Ah, did you - - how did you recognize it as being - -
9 belonging to Minor

10 A. Um, the only thing I did was after Chris aliquotted the, um,
11 the samples, um, usually at the time of the sample he would leave
12 us a chain of custody paper where we would - - someone would have
13 to sign off of it and to acknowledge that we received that sample
14 and would replace that sample in a secure refrigerator for further
15 testing.

16 Q. When you say "Chris", do you mean Mr. Dodson?

17 A. Yes.

18 Q. And is that who you received this item from?

19 A. Yes.

20 Q. And do you recall when you received it?

21 A. Um, no, I don't.

22 Q. Ah, what was the nature of the material that you received from
23 Mr. Dodson?

24 A. It was already in a test tube with a cap on it.

25 Q. And in what condition did you receive it?

1 A. Um, on a rack.

2 Q. Okay.

3 And, ah, would you have continued the process? Would you
4 have - - if this item had not been properly sealed and maintained,
5 would you have conducted the test - - or would you have continued
6 with the material in the chain?

7 A. No, I wouldn't.

8 Q. Um, could you please describe what you did with the items
9 relating to Minor [REDACTED]

10 A. I, basically, just signed my name off the chain of custody and
11 initial what I did with it. Placed it in a secure refrigerator and
12 returned the sheet back to Chris to let him know that I got the
13 sample.

14 Q. So, you, basically, verified that the lab received the
15 material.

16 A. Exactly.

17 Q. Okay, and prior - - did you in any way break the seal on the
18 container?

19 A. No, I didn't.

20 Q. And prior to any action you take - - any action you had taken,
21 were the seals in tact?

22 A. Yes.

23 Q. Um, regarding the form or content of the materials, did you
24 alter it in any way while it was in your custody and control?

25 A. No, I didn't.

1 MR. GRAVES: Your Honor, that's all I have for this witness.

2 Q. Please answer any questions Mr. Axelrod or Mr. Taylor may
3 have.

4 CROSS EXAMINATION BY MR. TAYLOR:

5 Q. Good morning.

6 A. Good morning.

7 Q. You say you were an HPLC Specialist?

8 A. Yes, sir.

9 Q. Okay.

10 And, again, what does that entail?

11 A. I'm sorry.

12 Q. What - - what - - what was your job duties with that again?

13 A. Um, just perform testing, whichever test ordered for HPLC and
14 determine the drug concentration using the HPLC instrument.

15 Q. Alright.

16 And how long did you exactly do t?

17 A. Three and a half years.

18 Q. Three and a half years?

19 A. Yes.

20 Q. Okay.

21 What type of training did you have to get in that position - -
22 become that type of specialist?

23 A. Um, well, basically, um, people that were there just kind of
24 trained me on how to do all - - all types of assays - -

25 Q. Okay.

1 A. - - that were performed in the lab, and they also sent me to
2 off-site training which I attended to one.

3 Q. You attended one off-site training?

4 A. Yes, uh-huh.

5 Q. And how long did that last?

6 A. It was two days training class.

7 Q. Okay.

8 Um, how much training did you have in the actually laboratory?

9 A. I went through like six months to a year.

10 Q. Okay.

11 Do you have any formal training as far as educational
12 background to do this type of work?

13 A. Um, a year in college but - - -

14 Q. And when you received this, um, do you remember the date that
15 you received it?

16 A. No, I don't.

17 Q. Okay.

18 And had it actually - - how many people had signed off on it
19 prior to you received it in your custody?

20 A. It would be - - it would be just Chris signing that and
21 indicating that he aliquotted the sample.

22 Q. Okay.

23 And, in fact, this actual sample had gone first to the West
24 Coast and then back to you in Pennsylvania, correct?

25 A. That's what I understood.

1 Q. Do you test any type of alcohol at this place as well? You do
2 alcohol testing and as well as drug testing?

3 A. I don't recall the alcohol but I do a lot of drug testing.

4 Q. Okay.

5 So, you never tested any alcohol?

6 A. Um, really, I don't remember.

7 Q. Okay. Okay.

8 Given the length of time from the date the sample was actually
9 taking - -

10 A. Uh-huh.

11 Q. - - or taken, sent to the West Coast and sent back to the East
12 Coast, in that length of time without any refrigeration being
13 transferred, would that affect in any manner your testing
14 procedure?

15 A. Um, I'm not quite sure.

16 Q. Okay.

17 In your training in your one and a half year or years at the
18 lab - -

19 A. Uh-huh.

20 Q. - - did you ever see anything that would give a mis-sample
21 based on that affect?

22 A. Um, I wouldn't say so because usually all the samples are
23 verified as soon as we get it, and there wouldn't be any, um,
24 misconception on that.

25 Q. Okay.

1 Well, what I meant to - - maybe I mis - - confused you here
2 with my question.

3 If the sample say - - well, let me backup before I ask that
4 question.

5 Your samples, are they kept in the refrigerator?

6 A. Uh-huh.

7 Q. You've heard that testimony?

8 Are all of your samples kept in a refrigerator?

9 A. Yes.

10 Q. Thank you.

11 How long did it take a sample to go from Conway, South
12 Carolina, to the West Coast? Do you know?

13 A. No, I don't.

14 Q. Would you say that it was a couple of days?

15 A. Um - - -

16 Q. Probably?

17 A. I believe so, yes.

18 Q. Okay.

19 And then about the same to come back to you?

20 A. Yes.

21 Q. Okay.

22 If it was not refrigerated through t
23 country twice, would that affect in any way

24 A. Um, some testing, yes. Some testing
25 understood, all the samples came with a, un

1 Q. Okay.

2 Whenever you got the sample, did it have an ice pack?

3 A. Um, I don't recall that.

4 Q. Okay.

5 What type of ice pack did it have?

6 A. I'm not sure.

7 Q. Okay.

8 Have you seen any ice that would last a across country trip
9 and forth twice?

10 A. Um - - -

11 Q. No?

12 A. I'm not sure.

13 If it's dry ice, I'm pretty sure, yes, but I'm not sure.

14 Q. : Alright.

15 Comparing alcohol to drugs, would you agree given your
16 training and what you saw in your lab that alcohol in a tube will
17 actually increase if it's - - the longer it stays in the tube?
18 Would that affect in any way drugs or would it give some type of
19 misread on the drug when tested?

20 A. Um, I'm not sure about that.

21 Q. Okay.

22 Thank you very much.

23 MR. GRAVES: No further questions for this witness, Your
24 Honor.

25 THE COURT: You may come down and are excused.

1 MR. GRAVES: Thank you, sir.

2 (The witness leaves the witness stand.)

3 THE COURT: Next witness.

4 MR. GRAVES: The State calls Dona Warrington.

5 (The witness takes the witness stand.)

6 DONNA WARRINGTON, being duly sworn,
7 testifies as follows:

8 CLERK OF COURT: Please be seated.

9 Please state your full name.

10 MS. WARRINGTON: Donna Warrington.

11 CLERK OF COURT: Spell your last name for the Court.

12 MS. WARRINGTON: W-a-r-r-i-n-g-t-o-n.

13 DIRECT EXAMINATION BY MR. GRAVES:

14 Q. Ms. Warrington, are you an employee of National Medical
15 Service?

16 A. Yes.

17 Q. You still currently employed?

18 A. I am.

19 Q. Were you an employee in 2004?

20 A. Yes.

21 Q. Particular March - - February and March of 2004?

22 A. Yes.

23 Q. And, ah, how long have you been employed by the company?

24 A. Since September of 2002.

25 Q. And what is your current position?

1 A. My current position is the Assistant Lab Supervisor.

2 Q. Um, were you - - did you work in that capacity in 2004?

3 A. No.

4 Q. Um, in March - - in February - March, 2004, what was your job
5 duties?

6 A. I was an analyst.

7 Q. In relation to this case, was there a particular test or tests
8 that you yourself performed?

9 A. Yes.

10 Q. Um, was any specialized equipment used to make this
11 determination?

12 A. Yes.

13 Q. And are you familiar with the equipment involved?

14 A. Yes.

15 Q. And, um, does this - - the equipment, what is it called?

16 A. It's, um, Liquid Chromatography with a Mass Spec for LCMS.

17 Q. What do you commonly refer to it as?

18 A. LCMS.

19 Q. Okay.

20 And, ah, how often do you operate this equipment - - at the
21 time did you operate this equipment?

22 A. Daily.

23 Q. Daily, alright.

24 How many years of experience do you have in operating the
25 LCMS?

1 A. Currently or at that time?

2 Q. Currently, about - - -

3 MR. AXELROD: Your Honor, I would think it's relevant at that
4 time and not currently.

5 MR. GRAVES: That's fine.

6 Q. At that time?

7 A. At that time it was about a year and a half.

8 Q. And you say you did it daily?

9 A. Yes.

10 Q. Um, and, ah, after that as Lab Supervisor, did you continue to
11 use the equipment?

12 A. Yes.

13 Q. And you still have familiarity with it?

14 A. Yes.

15 Q. Okay.

16 Um, Your Honor, - - -

17 Q. Do you have any specialized or technical knowledge in that
18 regard that will assist the jury to understand evidence to
19 determine the facts at issue?

20 A. Yes, yes.

21 MS. GRAVES: Your Honor, we would move Ms. Warrington as an
22 expert in the operation of the LCMS testing machine.

23 THE COURT: What is your position with regards to that? If
24 you have some issue with it you may cross examine her on it at this
25 time.

1 MR. TAYLOR: Your Honor, I would just ask how many times - -

2 THE COURT: Yes, sir.

3 MR. TAYLOR: - - she's been admitted as an expert witness in
4 this area. That would be my question to her.

5 THE COURT: You may do that.

6 I'm going to limit your cross examination at this time as to
7 her expertise and not her findings, you understand?

8 MR. TAYLOR: Yes, sir.

9 CROSS EXAMINATION BY MR. TAYLOR:

10 Q. How many times have you testified as an expert in this field
11 on Liquid Chromatology, I believe is what you called it?

12 A. None..

13 Q. None?

14 A. Alright.

15 What is your experience? What is your educational background
16 on being trained in Liquid Chromatology?

17 A. My educational background in college is a Bachelors in
18 Chemistry and Bio-Chemistry.

19 Q. Okay.

20 A. And then my experience with the LCMS was provided on the job.

21 Q. And how much experience did you get on the job - - at this
22 time that - - -

23 A. At that point, it would be a year and a half experience.

24 Q. Okay.

25 Who actually trained you? What was - - what training process

1 did you go through before you actually started testing?

2 A. Routine maintenance and use of the instrument.

3 Q. Whenever you started working for this company before you
4 started actually taking a sample yourself and submitting it into
5 the machine, what testing - - what length of testing or training
6 did you receive before you actually were handed a sample and told
7 to go and test it?

8 A. At this time I don't recall the exact amount of time?

9 Q. Was it under a month?

10 A. It may have been under a month?

11 Q. Okay.

12 MR. TAYLOR: Your Honor, we would ask that she not be
13 qualified as an expert based on her lack of experience and training
14 in that area.

15 THE COURT: Let me ask you this.

16 What specifically is involved in using this machine?

17 MS. WARRINGTON: At that point specifically what was
18 involved in using the machine is, um, uploading the proper vials
19 for the instrument to run the particular assay.

20 THE COURT: And you put it in the machine, and then the
21 machine runs it?

22 MS. WARRINGTON: Yes.

23 THE COURT: Do you have any other involvement other than
24 letting the machine do what it's designed to do?

25 MS. WARRINGTON: Not for running the sample, no. For, ah,

1 interpreting the data after it has been run.

2 THE COURT: Do you interpret the data after it has been
3 run?

4 MS. WARRINGTON: Yes.

5 THE COURT: What are your qualifications for interpreting
6 the data after it has been run?

7 MS. WARRINGTON: Again, that would just be the training I
8 have received on the job.

9 THE COURT: And not specifically to this case but,
10 generally, when you say "interpreting the data" what do you mean?

11 Not specific to this incident but generally on an average, if
12 you were interpreting the data, what expertise do you have to bring
13 to do that?

14 MS. WARRINGTON: An understanding of the data that's being
15 generated.

16 THE COURT: And when you interpret the data, what does your
17 interpret - - what does it mean?

18 MS. WARRINGTON: You would interpret the data to get a
19 quantification of the drug they were looking for in that case.

20 THE COURT: Do you in your work do you identify the
21 particular substance or you just identify the quantity based on the
22 what the machine does?

23 MS. WARRINGTON: You would identify both the particular
24 substance and the quantify.

25 THE COURT: What expertise do you have to permit you to

1 identify the substance?

2 MS. WARRINGTON: Only just doing it daily for the lab.

3 THE COURT: Is that - - is that a chemical approach to it?

4 MS. WARRINGTON: I don't understand what you mean by that.

5 THE COURT: Well, when you interpret the data you use your
6 expertise in running the machine or do you use your background in
7 Chemistry that you say?

8 I'm trying to see what experience do you have in saying what
9 a substance - - are you the one who says what that substance is?

10 MS. WARRINGTON: Yes.

11 THE COURT: And what qualifies you to identify a particular
12 substance is what I'm trying to say?

13 MS. WARRINGTON: The training received on the job.

14 THE COURT: In a scientific area?

15 MS. WARRINGTON: Yes.

16 MR. TAYLOR: Your Honor, if I may? My position would be
17 that - - and I respectfully to the Court I would ask that you went
18 along that line of questioning as well.

19 My position is that she provides the sample before it's
20 submitted to the machine, our position is that she doesn't have
21 enough experience at the time or at the time that it was taken to
22 actually submit it.

23 This would be like me taking an x-ray machine. There's no
24 doubt that this machine is a scientific machine. I have no proper
25 training in it, and this would be the same thing if I could come

1 around the radiology lab at Conway Medical Center - - -

2 THE COURT: Well, that's I'm trying to ascertain, and I'm
3 going to ask the Solicitor.

4 I could see why somebody might - - a technician might take a
5 picture of an x-ray but whether he's qualified to say what the x-
6 ray means is one - - is another thing.

7 Mr. Graves, what is your position?

8 MR. GRAVES: Your Honor, I believe - - -

9 THE COURT: Obviously, I would conclude that she's
10 qualified to operate this machine.

11 MR. GRAVES: Absolutely.

12 THE COURT: Now, my question is is she qualified to
13 interpret the results, and if so, why?

14 MR. GRAVES: She's got a chemical background, ah, through
15 the education as Mr. Taylor elicited, and, ah, and that's what she
16 does on a daily basis.

17 Now, she had a particular and specialized knowledge based on
18 the operation of the machine.

19 THE COURT: I can accept the fact that she knows how to
20 turn on the machine. She knows how to operate it.

21 I want to know what qualification she has to interpret the
22 results, and I use as an analogy an x-ray technician who takes an
23 x-ray not qualified to tell us what it means.

24 MR. GRAVES: Yes, sir.

25 Ah, the - - you know, perhaps we can ask some more questions

1 of her and elicit the response to - - -

2 THE COURT: Develop that.

3 I'm going to permit the testimony because I don't - - haven't
4 had enough hearing to know what - - what - - but, obviously, I
5 qualify her with sufficient expertise to operate the machine but I
6 want to hear something further whether she's qualified or not to
7 interpret the results and whether her interpretation is standing
8 alone or consistent with something else.

9 MR. GRAVES: Yes, Your Honor.

10 THE COURT: So.

11 MR. TAYLOR: If I may respond to what the State said?

12 THE COURT: Yes, sir.

13 MR. TAYLOR: No doubt in what the State said - - no doubt in
14 what the State said. She's got chemical experience through school
15 but my position and the defendant's position is that she had at
16 that time - - now, she may have today through experience that has
17 happened since four years ago.

18 THE COURT: Well, I'm going to let them - - I want you to
19 develop that a little further, counsel.

20 That's fine. I understand what you're saying, and we want to
21 know about it as of that date in 2004.

22 MR. TAYLOR: Thank you, Your Honor.

23 THE COURT: And I'll permit you - - I'll permit you to do
24 it.

25 MR. VON HERRMANN: Thank you, Your Honor.

1 REDIRECT EXAMINATION BY MR. VON HERRMANN:

2 Q. Ms. Warrington, at that particular time in your career how
3 many samples do you think you had run through that particular
4 machine?

5 A. At that time in my career I was probably running at least
6 forty-five a day.

7 Q. So, you'd estimate in excess of 1200, 1300 samples? Would
8 that be correct?

9 A. If you do the math, yes.

10 Q. And how many of those samples are meant for litigation and are
11 presented in court? Do you have any idea?

12 A. No.

13 Q. Is it your general understanding that the reason you're
14 running these samples is so it can be presented in court across the
15 country?

16 A. It is my general understanding that that is one of the reasons
17 I'm running the samples.

18 Q. And, in particular, have you ever had an opportunity or a
19 specific example - - -

20 MR. TAYLOR: Your Honor, I'd object to the leading
21 questions.

22 THE COURT: No, sir. This is trying to find her - - I'll
23 permit it in this case.

24 MR. VON HERRMANN: Thank you, Your Honor.

25 THE COURT: If you'll recall, we're trying to conclude what

1 her qualifications are.

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

3 THE COURT: Alright. Go ahead.

4 Q. Was there a specific instance where your findings or your
5 interpretation of the results have been rejected by any court?

6 A. No.

7 Q. Have you had the opportunity? Are you familiar with the
8 calculation, how to run the proper calculations based on the
9 generated results of the machine?

10 A. Yes.

11 Q. And do you feel comfortable in your ability to do so?

12 A. Yes.

13 Q. Have you had or are there checks and balances for which your
14 calculations are rechecked and checked through your department?

15 A. Yes.

16 Q. And have you had proficiency ratings?

17 A. Yes.

18 Q. And do you - - have you been defined or found proficient in
19 running these samples?

20 A. Yes.

21 Q. And have you had any problems or issues with what - - with
22 regard to your proficiency for administering or interpreting the
23 results?

24 A. No.

25 Q. And you say you indicated that you did that at that point for

1 a year and a half, I believe?

2 A. Yes.

3 Q. Up until this day have you had any of those issues arise where
4 you were in proficient at doing that?

5 A. No.

6 MR. VON HERRMANN: No further questions, Your Honor.

7 I believe this witness is qualified.

8 THE COURT: Alright.

9 I'm going to qualify this witness as qualified in this area to
10 operate the machine and to give the results of that based on,
11 first, her training in science; based on the fact that her
12 experience in this area coupled with the fact that she has done
13 this matter on hundreds of occasions.

14 Now, having qualified her in this area, I tell you that you
15 are the finders of the facts as to her expertise in this matter,
16 and even though I qualify her as qualified to testify in these
17 areas, the final decision to made as to whether or not based on the
18 testimony given you wish to accept it is yours.

19 You may bring your common senses to bear on this issue as to
20 whether or not you want to accept all of her testimony, none of it
21 or some of it.

22 Even though I have qualified her in this field, the ultimate
23 issues as to these qualifications and as to what she says is yours.

24 You understand that?

25 Alright.

1 Now, proceed, please.

2 MR. AXELROD: Your Honor, I'll take exception to the Court's
3 ruling that the Court has allowed her to become an expert in this
4 field without any specialized training.

5 THE COURT: Well, I understand that but I concluded that it
6 is ultimately for the jury to determine but based on her college
7 experience, years of training and use of this machine I conclude
8 she's competent to testify in these areas subject to the jury's
9 instruction as to that testimony.

10 You may proceed.

11 MR. GRAVES: Thank you, Your Honor.

12 CONTINUED DIRECT EXAMINATION BY MR. GRAVES:

13 Q. Ms. Warrington, what procedures, generally, do you use in
14 ensuring that your machine is calibrated or set up in the manner
15 which would result in accurate results?

16 A. Along with the preparation of the sample, we also prepare
17 calibrators which are a set of five known concentrations likened to
18 a blank matrix.

19 We also run quality control material with the patient sample.
20 That quality control material surrounds the patient sample and at
21 point was at two levels of quality control but we consider it a
22 higher level and a lower level.

23 Also, in that run there are blank matrices run to ensure no
24 contamination of the specimen. Those blank matrices need to come
25 back negative.

1 Q. So, um, basically, on your machine there are, ah, standards
2 that you know at the front and back of the machine and are first in
3 there so that when you get your results you should receive a known
4 quantity?

5 A. Correct.

6 Q. Additionally, if I am correct, you stated that there should be
7 some that have zero?

8 A. Yes.

9 Q. What do you do if the known quantities vary or if the blanks
10 vary?

11 A. If the known quantities vary outside a range of acceptability
12 or the blank proves to be positive in that run, we do not accept
13 the quantifications from that run, and we retest.

14 Q. Did you do - - or do you operate your machine in that manner
15 when you tested the materials for Minor Did you test the
16 materials from Minor

17 A. I did.

18 Q. And did you follow those procedures?

19 A. Yes.

20 Q. And safeguards in that - - were there any other procedures you
21 used in addition to blanks and the known quantities spiked in the
22 machine that you recall?

23 A. There would have, um, also a neat run prior to injecting this
24 run to ensure that the instrument was running properly.

25 Q. And you stated that you've been in contact with materials

1 related to Minor [REDACTED] Was it particularly labeled as belonging
2 to Minor [REDACTED]

3 A. They were labeled with a, um, identification number that
4 corresponded to the identification number given to Minor [REDACTED]

5 Q. Do you recall who you received that item from?

6 A. I received it - - I received it from the refrigerator.

7 Q. Do you recall when you received it?

8 A. March 10th.

9 Q. Um, what was the nature of the material that you received on
10 March 10th?

11 A. It was blood aliquotted into two tubes at two different
12 aliquot volumes.

13 As Mr. Dodson stated earlier, it was a quarter of a mil. and
14 a tenth of a mil.

15 Q. In what condition were these items when you received them?

16 A. They were in - - in tubes with caps.

17 Q. Sealed?

18 A. Yes.

19 Q. Um, if these items had been improperly maintained or the seals
20 broken, would you have accepted the materials and conducted your
21 tests?

22 A. No.

23 Q. Ah, what did you do with the items for Minor [REDACTED] Do you
24 recall what tests you performed?

25 A. Um, it was an phenylephrine and pseudoe

1 quantification.

2 Q. And I ask you. The - - the tubes, did they contain anything
3 else besides blood?

4 A. No.

5 Q. Were they - - the aliquots you were testing, were they - - did
6 they contain other things like anti-coagulants or, um, would there
7 be anything else in the tubes?

8 A. No.

9 Q. Okay.

10 And, ah, let me ask you in regards to the deterioration of
11 blood. In your experience would the breakdown of blood - - what
12 would - - if the blood were to break down, what would it do in
13 regards to pseudoephedrine in a sample?

14 A. I can't answer that.

15 Q. Okay.

16 Let me ask you.

17 What were the results of the tests, the particular tests that
18 you performed specifically relating to pseudoephedrine?

19 A. It was positive for pseudoephedrine.

20 Q. Um, were you able to determine the level of pseudoephedrine?

21 A. Yes.

22 Q. And what did you determine that to be?

23 A. The report states that it was 1300 nanograms per mil.

24 Q. Is that the same, um, result that was exited from the machine,
25 that came from the machine.

1 A. Yes.

2 Q. Um, so other than the actions you described, did you alter the
3 material in form or content while it was in your custody and
4 control?

5 A. No.

6 Q. Was there any useful blood remaining from the sample that you
7 had?

8 A. From the samples that I had, no. That was consumed.

9 Q. Okay.

10 And regarding the test results from the equipment, what did
11 you do with those test results?

12 A. I don't understand your question.

13 Q. Did you, um, machine - - I assume that the machine gave you a
14 result?

15 A. Yes.

16 Q. What did you do with those results?

17 A. Those are filed at the lab?

18 Q. Does anyone else - - are they passed to anyone else?

19 A. They are. They go through a second review.

20 Q. And, ah - - -

21 MR. GRAVES: That's all I have of this witness.

22 Q. Please answer any questions Mr. Taylor or Mr. Axelrod may
23 have.

24 CROSS EXAMINATION BY MR. TAYLOR:

25 Q. How exactly did you receive these samples? How did they come

1 in contact with you?

2 A. They came in contact with me when I retrieved them from the
3 refrigerator.

4 Q. Okay.

5 And how many samples do you have in that refrigerator?

6 A. At that time I couldn't say but as I said earlier. We do
7 about forty-five a day. So there had to be at least forty-five in
8 that refrigerator.

9 Q. Okay.

10 How many technicians other than yourself were handling these
11 samples?

12 A. At that time - - no more than five, I would think.

13 Q. How many machines, these Liquid Chromatography, I believe I'm
14 pronouncing that right, how many of those machined do you have?

15 A. Now or then?

16 Q. Then.

17 A. Then. Four I believe.

18 Q. Okay.

19 And you said that after the test results are completed and the
20 machine kicks them out you pass them on to somebody else.

21 A. Correct.

22 Q. Who is that person?

23 A. Dawn Sherwood.

24 Q. And you said that they do a second review. What does that
25 mean?

1 A. It means they review the work that I prepared and calculated
2 at that point.

3 Q. Okay.

4 What happens to the work then? What happens to the results
5 at that point?

6 A. The results are released to the client.

7 Q. Okay.

8 How many clients do you have?

9 A. That's out of my realm.

10 Q. Okay.

11 Do you have any estimation?

12 A. No.

13 Q. Have you ever had any results get misfiled, lost given that
14 you do forty-five a day?

15 A. Not to my knowledge.

16 Q. Okay.

17 Would you have any knowledge if it was lost?

18 A. No.

19 Q. Okay.

20 Let me ask you about this calibration of these machines.

21 How does the machine work, first of all?

22 A. The machine works by injecting the extracts that I would have
23 prepared using the patient's and the blank matrices and things of
24 that nature.

25 Ah, at that point it would be passed through a column and

1 passed through the mass spec.

2 Q. What is a blank matrices?

3 A. A blank matrix? That is either blank serum, urine, blood
4 where some other, um, fluid that is extracted along the run and is
5 expected to be negative.

6 Q. Okay.

7 Would that be - - is there like some blank pseudoephedrine
8 sample in there that it's with that like, say, a data master
9 machine compares - - are you familiar with that machine? It's also
10 a spectrometer machine, something like this?

11 A. I don't under - - I don't.

12 Q. I'll withdraw that question then.

13 Does the machine itself have a sample of, say, pseudoephedrine
14 that it - - that it pulls from to test for pseudoephedrine or
15 whatever the drug you're looking for?

16 A. The sample - - the machine will draw samples of known
17 concentrations that I've prepared through the calibrators if that's
18 what you're asking?

19 Q. That is what I'm asking.

20 These calibrators, what are they and how do you know what to
21 look for?

22 A. What are they? They are a mixed, um, in this particular
23 assay, it was analytes for five different analytes. It is a mixed
24 standard that we spike known concentrations of those five analytes.

25 Q. What are those five analytes that you were looking for?

1 A. Ephedrine, pseudoephedrine, nor-pseudoephedrine,
2 phenylpropinolamine and methoephedrine. (spelled phonetically)

3 Q. Okay.

4 Well, let's deal with the one that deals with pseudoephedrine,
5 the one you prepared. What was it made of? I mean, how did you
6 make it? How did you make that matrix?

7 A. You - - I don't make the matrix. I take a blank matrix and I
8 insert - - -

9 Q. Where does that blank matrix come from?

10 A. They're provided by a manufacturer.

11 Q. And how old was - - or where - - where did that sample come
12 from that you obtained?

13 A. The blank matrix?

14 Q. Uh-huh.

15 A. I'm not sure of the vendor at that point.

16 Q. Okay.

17 Does it have an expiration date?

18 A. Yes.

19 Q. Okay.

20 Did you check to see if this was expired whenever you made the
21 sample?

22 A. That's the normal protocol?

23 Q. Alright.

24 Have you ever - - how long does it last?

25 A. I don't know.

1 Q. Okay.

2 You don't know the normal life span of one of these blank
3 matrices that you use in - - in the year and a half basis at the
4 time it was taken?

5 A. No.

6 Q. Now, that sample, have you ever had a misread from that sample
7 being that sample is too high from what it actually was where
8 you've gone back later and tested and it's come down? Has that
9 occurred?

10 Say, for example, if the matrix was expired?

11 A. No. That's never happened.

12 Q. Never happened?

13 A. No.

14 Q. But you have no idea whether this was expired that day? You
15 don't know how long it lasts?

16 A. I don't know how long it lasts or when it was expired but I'm
17 confident in saying that it wasn't expired.

18 Q. How are you confident in saying that?

19 A. Because that would be normal protocol to check that.

20 Q. But with your experience how do you know that it's not expired
21 if you don't know how long it lasts?

22 A. Because it's dated on the bottle when it was expired?

23 Q. How often are those checked?

24 A. Daily if you're using them daily.

25 Q. Okay.

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1 How long - - how much is in one of these containers? How big
2 is the container?

3 A. About 500 mil's.

4 Q. And you say mil's. Can you break that down to - -

5 A. Milliliters.

6 Q. - - say what that would be in American gallons, pints?

7 Is it a pint?

8 A. It would be maybe about two sixteen ounce soda bottles.

9 Q. Okay. Alright.

10 Again, not experienced in a long time in science class, I was
11 wanting to make sure the jury understood what that would be, ah,
12 in normal - - normal language.

13 Now, you run forty-five of these a day on four machines. Are
14 all four machines used on a daily basis or just two machines used
15 on a daily basis - - or does it depend on how - - -

16 A. It depends on the volume.

17 Q. And how often - - are these seven days a week that these
18 machines are run or is it five?

19 A. At that point we were either a five or six day operation I
20 would say.

21 Q. Okay. Are you still working there today?

22 A. Yes.

23 Q. Okay.

24 How many times - - how much are they used today?

25 A. Very much more.

1 Q. Very much more?

2 A. Yes.

3 Q. Okay.

4 How often do you calibrate the machine?

5 A. The - - the instrument would be given a mass calibration
6 according to the maintenance schedule and then they are calibrated
7 everyday with the calibrators that we prepare for each run.

8 Q. What is the maintenance schedule?

9 A. The maintenance schedule determines what maintenance functions
10 need to be performed.

11 Q. Before the test is given on the sample that you've got, do you
12 run a blank sample off of your matrix that you receive?

13 A. Yes.

14 Q. You do?

15 Alright.

16 How long is that matrix used that's put in there? In other
17 words, when you make the sample and you put it in that machine, how
18 long does it stay in that machine before you change it out?

19 A. It's prepared fresh with every run.

20 Q. Every run? Okay.

21 So, how often is the machine - - do you have anybody that
22 comes in from the manufacturer to calibrate these machines?

23 A. Yes.

24 Q. Okay.

25 And how often does that occur?

1 A. That would have ben considered preventative maintenance, and
2 that was required about once every six months.

3 Q. So, twice a year.

4 A. Yes.

5 Q. Are you trained in maintenance on this machine or just the use
6 of it?

7 I'm just - - I'll - - I'll simplify that.

8 I know how to turn on my Dell Computer but I can't work on it
9 but I know how to use it. Is that - - it that - - say, say with
10 your use of this machine?

11 A. I'm trained in some of the daily maintenance, nothing, ah,
12 like mass calibration.

13 Q. Okay.

14 Again, would that be the same as me hitting the virus and
15 anti-spyware on my machine? Would that be the same comparison
16 with your maintenance of this machine?

17 A. Similar.

18 Q. Okay.

19 But you have no direct training in taking that machine apart
20 and working on it. Correct?

21 A. Correct.

22 Q. So, forty-five samples taken a day five and six days a week,
23 ah, three hundred and sixty-five days out of the year and it's only
24 calibrated two times a year?

25 A. That's the mass calibration. It's calibrated daily with each

1 run.

2 Q. Okay.

3 A. As well.

4 Q. But, again, if the machine is working improperly and you hit
5 that button, you don't know because you don't know the internal
6 workings of that machine, do you if it's working correctly or not -
7 - because you're not trained in that area, are you?

8 A. No, but there is, um, he asked me if I would have also run
9 anything off to ensure that the instrument was working properly,
10 and we do run a (unintelligible).

11 Q. Again, but how do you know if the machine is working properly
12 if you're not trained on the intricacies on the inside of the
13 machine?

14 A. By using the (unintelligible).

15 Q. Okay.

16 A. You would have to inject something and you -- and what we'd
17 be injecting, we know what we're expecting to get from it, and if
18 we get what we're expecting, then you would assume that the
19 instrument is working properly.

20 Q. After the maintenance comes in and maintains the machine to
21 recalibrate, does the machine work faster right after calibration,
22 work better, cleaner?

23 A. Not necessarily.

24 Q. No?

25 A. No.

1 Q. Okay.

2 Did you test whenever you tested this sample that was provided
3 to you for dextromathorphan, I believe I'm pronouncing that
4 correct?

5 A. I didn't test for dextromathorphan.

6 Q. You did not?

7 Okay.

8 Thank you. I have no further questions. Please answer any
9 the State may have for you.

10 A. Thank you.

11 THE COURT: Any further questions, Mr. Graves?

12 MR. GRAVES: I do, yes, sir.

13 REDIRECT EXAMINATION BY MR. GRAVES:

14 Q. Ms. Warrington, were there other laboratory workers who ran
15 other tests for other drugs?

16 A. There was.

17 Q. And were any of those for, ah, dextromathorphan or any other
18 chemicals? Do you know?

19 A. I don't know offhand what they looked for.

20 Q. Regarding the integrity of your results, would you have - - if
21 you had any doubt as to the integrity of your results, would you
22 have released them?

23 A. I didn't release them.

24 Q. Would you have, ah, would you have passed your results on if
25 you were not confident - -

1 A. No.

2 Q. - - of their accuracy?

3 A. No.

4 Q. No further questions.

5 THE COURT: Does that conclude?

6 MR. TAYLOR: I have no further questions, Your Honor.

7 THE COURT: Okay.

8 You may come down.

9 MS. WARRINGTON: Thank you.

10 THE COURT: Can she now be released from her subpoena?

11 MR. GRAVES: I would ask that she be.

12 THE COURT: How about it?

13 MR. AXELROD: No objection.

14 MR. TAYLOR: Without objection, Your Honor.

15 THE COURT: Without objection.

16 Thank you, ma'am.

17 (The witness leaves the witness stand.)

18 MR. GRAVES: Your Honor, we have a matter of law we'd like
19 to take up outside the presence of the jury.

20 THE COURT: Alright, sir.

21 I'll let you go to your jury room just a moment.

22 (The jury retires to the jury room at 10:58 a.m.)

23 THE COURT: What - - what's your issue, counsel?

24 MR. VON HERRMANN: Your Honor, we just wanted to put on the
25 record. That completes the chain of custody from the time the

1 blood was taken for National Medical Services with the exception of
2 our next witness who is Dr. Kim Collins who removed the specimen
3 from the child's body. She will be the last witness, and she will
4 testify as to the results.

5 THE COURT: Is that witness here?

6 MR. VON HERRMANN: Yes, sir, Your Honor.

7 THE COURT: Oh, I understand. Yes, sir.

8 He has concluded the chain of - - the chain other than the
9 doctor who took the sample initially.

10 MR. AXELROD: Well, Your Honor, at this point the chain would
11 still be incomplete. I would think - - -

12 THE COURT: In what way?

13 MR. AXELROD: Well, until the doctor testifies. So whatever
14 argument we would have we would have to reserve for after they put
15 forth their full chain.

16 THE COURT: I understand but do you have any problems with
17 the chain at this time?

18 MR. AXELROD: It's incomplete.

19 THE COURT: In what way?

20 MR. AXELROD: We don't know how the laboratory got it.

21 THE COURT: What's your response.

22 MR. VON HERRMANN: Your Honor, the doctor is going to testify
23 that she withdrew the blood - - -

24 THE COURT: Well, let's keep these witnesses - - we've
25 excused these various witnesses. Let's keep them here lest there

1 be some issue.

2 As of this moment assuming the doctor testifies as he has that
3 he took and who he presented it to, I see no problem with the
4 chain.

5 MR. TAYLOR: Mr. Axelrod is saying he has no problem with
6 the chain once the doctor testifies.

7 THE COURT: I understand, and that's what I thought.

8 MR. VON HERRMANN: And, Your Honor, if we could just have
9 about a five minute recess?

10 MR. AXELROD: Can we take about a fifteen minute break?

11 THE COURT: Well, ten.

12 Proceed.

13 We'll take a ten minute break. Thank you.

14 MR. VON HERRMANN: Thank you, Your Honor.

15 MR. AXELROD: Thank you, Your Honor.

16 (The Court recesses the trial of this case for a short break
17 and thereafter reconvenes the trial of this case.)

18 THE COURT: Alright.

19 Where is Axelrod? Be seated.

20 MR. TAYLOR: Your Honor, may we approach?

21 THE COURT: Yes.

22 (Bench conference held off the record and outside the presence
23 of the jury.)

24 THE COURT: Tell him I got a jury waiting, Josh. I want
25 him here now.

1 Alright. I want to get on the record, please.

2 I have told Mr. Axelrod to not leave this courtroom unless he
3 has my permission.

4 MR. TAYLOR: Yes, sir.

5 THE COURT: Now, you go get him, and he's got about two
6 minutes to get here or we going to start this trial. I'm not going
7 to keep this jury waiting any further, and I'm not going to keep
8 this distinguished doctor from testifying any longer.

9 So, your minutes are running.

10 (The Court awaits the arrival of Mr. Axelrod. Mr. Axelrod
11 returns to the courtroom.)

12 THE COURT: Next time, Axelrod, don't want -- if you need
13 to go, if you'd have called me and told me, I'd have made it
14 satisfactory to Judge Harrington to work your schedule later.
15 From now on, let me know so that I can help you.

16 MR. AXELROD: Yes, sir.

17 THE COURT: But I told you. Don't leave this courtroom
18 without my permission. The next time I'm telling you. You going
19 to spend some time in the county jail.

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

21 THE COURT: Alright.

22 Bring the jury.

23 MR. VON HERRMANN: Your Honor, one issue we can raise
24 beforehand.

25 Dr. Collins who absolutely is a very qualified pathologist in

1 the area of Forensic Pathology and also with Pediatric Abuse and
2 Neglect cases.

3 Your Honor, in this case, and I know that Mr. Axelrod would be
4 more than happy to stipulate her qualifications. In this
5 particular witness - - I haven't done it in any others - - I
6 believe the jury needs to hear her qualifications.

7 THE COURT: I do, too, in this particular case, and I'll
8 permit it and understand it.

9 MR. VON HERRMANN: Thank you, Your Honor.

10 THE COURT: Go ahead.

11 The jury would need - - she's eminently qualified. This is
12 outside the presence of the jury but the jury needs to know that.

13 MR. VON HERRMANN: Thank you, Your Honor.

14 (The jury returns to the courtroom at 11:22 a.m.)

15 THE COURT: Mr. Foreman, I apologize for keeping you out
16 later than I intended. One of the lawyers in this case had a short
17 matter that they had to deal with before Judge Harrington in the
18 next court. So, we had to delay this just a few minutes for that
19 occasion.

20 Alright, Solicitor, call your next witness, please.

21 MR. VON HERRMANN: Thank you, Your Honor.

22 The State calls Dr. Kim Collins to the stand.

23 (The witness takes the witness stand.)

1 DR. KIMBERLY ANN COLLINS, being duly
2 sworn, testifies as follows:

3 CLERK OF COURT: Please be seated.

4 Please state your full name.

5 DR. COLLINS: Kimberly Ann Collins, C-o-l-l-i-n-s.

6 DIRECT EXAMINATION BY MR. VON HERRMANN:

7 Q. Dr. Collins, can you please give the jury the benefit of your
8 educational background in regards to your Forensic Pediatric
9 Pathologist?

10 A. I attended college at the University of Georgia where I
11 received my Bachelor of Science in Micro-Biology.

12 Following college, I attended medical school at the Medical
13 College of Georgia, and I received my MD.

14 I then went to Wake Forest University School of Medicine for
15 a five year combined Anatomic and Clinical Pathology Residency in
16 Winston Salem, North Carolina.

17 Following my residency, I then went to the Medical University
18 of South Carolina in Charleston for my Forensic Pathology
19 Fellowship, and I'm currently a Professor of Pathology and
20 Laboratory Medicine at the Medical University in Charleston, and
21 I'm a Forensic Pathologist.

22 Q. Have you ever been qualified as an expert in Forensic
23 Pathology and in particular with pediatric aspect?

24 A. Yes, I have.

25 Q. An approximately how many times?

1 A. As far as being qualified doing testimony and depositions,
2 it's been over two hundred.

3 Q. And, Doctor, can you please explain to the jury if you have
4 any special interest in Pediatric Pathology or Forensic Pediatric
5 Pathology?

6 A. When I received my forensic training and became boarded in
7 Forensic Pathology, I then was very interested in Pediatric
8 Forensic Pathology, and that's an area of domestic violence that
9 I've done a great deal of speaking. I have organized conferences.
10 I'm Director of the annual Pediatric Forensic Conference that takes
11 place in Florida.

12 I have written textbook chapters and numerous articles about
13 pediatric blunt force trauma, child abuse, pediatric neglect, and
14 I am Director of the International Pathology Meeting which is going
15 to take place in Athens, Greece, and that topic is Pediatric
16 Forensic Pathology.

17 MR. AXELROD: Your Honor, we have no objection to Dr. Collins
18 being an expert. She's an excellent expert, and we stipulate to
19 that.

20 THE COURT: Dr. Collins has been found to be an expert in
21 all of the courts of this state and in my court on many occasions.

22 We are delighted to have you.

23 MR. VON HERRMANN: Your Honor, I, uh, respectfully would like
24 for the jury to hear some of her background on some of the things
25 she has done.

1 THE COURT: You may do that, yes, sir.

2 MR. VON HERRMANN: Thank you, Your Honor.

3 THE COURT: I find her qualified, obviously.

4 Q. Dr. Collins, can you tell the jury? Are you a member of - -
5 or just some of them. You've got thirty-five, at least, page
6 curriculum vitae or resume that you have written articles and
7 things. Can you just hit the highlights, in particular, Pediatric
8 Pathology and Child Abuse and Neglect as far as your professional
9 memberships and articles you written and things? If you need it,
10 I'll be happy to pass you a copy of it.

11 A. No. That's fine.

12 I'm a very active member of the College of American
13 Pathologists. Up until this year, I've been Chair of the Autopsy
14 Committee, and we have several publications that go out throughout
15 the country and the world on the autopsy and standards as well as
16 pediatric pathology and autopsy protocols, and I have been - -
17 authored chapters in forensic competencies of pathology which is
18 through the College of American Pathologists.

19 I'm also a member of the National Association of the Medical
20 Examiners as well as the American Academy of Forensic Sciences, and
21 this year I was National Director of the American Academy of
22 Forensic Sciences, Pathology-Biology, meaning the MD's, the
23 Forensic Pathologists program in D. C.

24 And one of the workshops that I was in charge of and spoke at
25 was the Pediatric Forensic Pathology.

1 Q. Thank you, Doctor.

2 I know we could go on for a while about your background in
3 Pediatric Pathology but let's get to the case.

4 Um, have you - - to start with this.

5 Have you or are you being paid by the Solicitor's Office or
6 the State of South Carolina or anybody right now for testifying?

7 A. No, I am.

8 Q. Have you ever testified in a court of law in criminal case
9 against the existing circuit, that's us, Solicitor's Office?

10 A. In a case against the Solicitor's Office?

11 Q. Yes. In a PCR hearing or anything like - - something like
12 that?

13 A. Um, I'm not sure. I'm subpoenaed many times for court in many
14 cases.

15 Q. Did you - - did you testify against the State's position with
16 the State vs. Regina McKnight?

17 A. Yes.

18 Q. And do you know who the prosecutor was, the prosecutor of that
19 particular case?

20 A. I believe it was you.

21 Q. Thank you, Dr. Collins.

22 MR. AXELROD: Your Honor, the relevance of that line of
23 questioning?

24 MR. VON HERRMANN: Your Honor, to eliminate the bias. We
25 just want to make sure that the jury understands that she is - - -

1 THE COURT: I'll permit that limited inquiry.

2 MR. AXELROD: Your Honor, this is an independent witness.

3 THE COURT: Proceed, please.

4 MR. AXELROD: I have no objection. She's a highly qualified
5 expert.

6 THE COURT: Okay. Thank you.

7 Q. Dr. Collins, have you had an opportunity to review everything
8 that you would require to make the opinions that we're going to ask
9 you to make today, that being statements, any DSS records, ah, the
10 autopsy which you did? Is there anything that you would like to
11 have seen that you haven't seen or haven't been provided to you to
12 base your opinions today?

13 A. No.

14 Q. Specifically, let's talk about the autopsy that you did on
15 Minor

16 Can you please tell the jury kind of an overview of what the
17 autopsy entails and what you're looking for when you're doing the
18 autopsy on Minor

19 A. Yes.

20 I think it might help if I start with what Pathology is, and
21 Pathology is the study of diseases as well as the treatment of
22 diseases in individuals - everything from strep throat to cancers
23 to HIV, and that is what we do as Pathologists. We study the
24 diseases, the prevalence. We study how they occur, the risk
25 factors as well as we work with physicians on how to treat patients

1 with these diseases.

2 Now, Forensic Pathology is using that knowledge and using all
3 of the Pathology Laboratories in trying to understand and
4 investigate unnatural deaths or trauma or unsuspected death.

5 And so we take those laboratories such as the Hematology
6 Laboratory, Chemistry Laboratory and the Autopsy Laboratory in
7 order to come up with the cause of death, the manner of death and
8 any other underlying possibly natural diseases that someone might
9 have.

10 And so in South Carolina we have forty-six counties, and each
11 county has a coroner, and at the Medical University we have
12 Forensic Pathologists, and the coroner will investigate a case, a
13 death that has occurred in his or her county, and then they will
14 consult with us and send the body or transport the body to the
15 Medical University for autopsy, and in this case that's what
16 happened with the coroner.

17 Here it was, um, Coroner Stan Bellamy, the Deputy Coroner, and
18 so he consulted us that an individual, Minor [REDACTED] had died on
19 February 14th, and then we received the body, and we autopsied her
20 on February 15th.

21 Q. Dr. Collins, we - - we're going to get into talking about the
22 rib fractures, the spiral fracture and other things. With regards
23 to any other parts of the body or any condition of this child, was
24 this child sick in any way?

25 A. We did not find any natural diseases in this child such as

1 pneumonia or any types of cancer or any signs of infection.

2 Q. What about any metabolic problems that would have caused the
3 child's bones to be brittle or break easily or anything like that?
4 Did y'all do testing for that when you did the autopsy?

5 A. Yes, we did.

6 On, um, our children, we do full-body skeletal surveys, and
7 what that means is you take an x-ray of each bone: The hand, the
8 forearm, the upper arm, and we have that interpreted by a Pediatric
9 Radiologist, and that is one area, one piece of evidence that you
10 can use to give you a hint that possibly there is a type of bone
11 disease or metabolic disease.

12 However, we also did metabolic testing on her blood, and we
13 sent that to a special laboratory, and that came back normal. So
14 no metabolic diseases were identified.

15 Q. Were there any reason that in the - - well, let's start off
16 with this.

17 Tell the jury exactly what you do here in a autopsy. How
18 does that - - is it done, the autopsy?

19 A. When the body arrives, we are in the autopsy room, and, first
20 of all, we will diagram how the body arrives, the clothes that's on
21 the body, etc., how the body is identified.

22 We do what's called an external examination, and we note any
23 types of identifying characteristics such as scars or in an older
24 person tattoos, and we also will take photographs.

25 After that, we take off any clothes the person might be

1 wearing, and, again, look for any identifying traits, any signs of
2 trauma, and, then, before we begin the autopsy, we do a full-body
3 skeletal survey by the Radiology Technicians.

4 Following the autopsy, we will then begin our - - excuse me.
5 Following the external, we'll begin the internal examination, and
6 we'll open up the body, and we will before dissecting various
7 aspects of the body, we'll then get blood and urine and body fluids
8 so that we can run special tests such as the metabolic testing and
9 toxicology.

10 Then we perform an autopsy by examining each organ, not only
11 those organs that you think might be related to death but every
12 organ from the brain to the ovaries to the liver, and we take
13 sections of those organs, and we also will process them to look
14 under the microscope.

15 Q. In this particular case when you indicated that you would draw
16 blood, did withdraw blood from this child, Minor

17 A. Yes, we did, and the blood that we draw are for several
18 reasons; one to be - - to save for possible DNA analysis later if
19 there was a question of, example, paternity.

20 Another reason we draw blood is for the metabolic testing,
21 and, importantly, we draw it for toxicology, and when we draw it
22 for toxicology, it's very important to draw it from the proper
23 location and to put the blood in the proper tube, the proper
24 vacutainer tube, and so we did that.

25 And in this case we were able to get what's called "peripheral

1 blood" and that is blood taken not from the heart itself but from
2 a vessel in the arms or legs, and we were able to put it in the
3 proper tube, and we overnight it. We ship it overnight, and then
4 it is analyzed by the Toxicology Laboratory.

5 Q. When you took the blood from Minor [REDACTED] was that blood
6 handled in accordance with all the proper procedures and sealed up
7 in a tamper resistant fashion?

8 A. Yes.

9 The - - we procure the blood. We label it. We at that moment
10 in the autopsy room, we will put it into the proper box so that it
11 can be mailed off, and it is sealed up.

12 It is then put into a plastic envelope that is then sealed,
13 and that is taken to the courier to overnight it to the laboratory,
14 and so it is not tampered with, and it is evidenced by when they
15 receive the box in the envelope that no one has opened the seal
16 because we seal it in a special way with a certain label.

17 And so then it is only opened by the laboratory.

18 Q. In this particular case, did you do all of those things to
19 send the blood to National Medical Services?

20 A. Yes, we did.

21 Q. Was it, ah, did you ultimately get results on the testing from
22 National Medical Service on those screenings - - on those panels?

23 A. Yes, we did.

24 Q. And can you please tell the jury what the results were for the
25 toxicology results?

1 A. Yes.

2 What we're looking for, we look for blood, alcohol, any types
3 of volatile such as drinking alcohol, rubbing alcohol, any of
4 those, and that was negative.

5 And then we also look for any drugs. These could be drugs
6 such cocaine, aspirin, morphine, heroine. There's a long, long
7 list that's very thorough.

8 We do more than just a screen for different families of drugs
9 but we actually look for a particular drugs that you can put a name
10 on. So, we know exactly what drug is present, and we also know
11 how much of the drug is present, and that's very important.

12 Q. And in this particular case was there presence of any drugs
13 that raised any concern to you in the autopsy?

14 A. Yes.

15 What was found was a drug called pseudoephedrine which is a -
16 - a - - one that I am sure most of you are familiar with. You can
17 get it over the counter, a decongestant like Sudafed, and the blood
18 level was to such a high amount. It was 1300 nanograms per
19 milliliter, and that is actually four times over the adult
20 therapeutic level, what you or I would have if we were taking
21 Sudafed for a cold. She had over four times the amount.

22 Q. Can you please tell the jury what impact that would have had
23 on a child that was, ah, such as chemical restraint and that type
24 of thing if it was administered at that level, pseudoephedrine?

25 A. This level is toxic or lethal in a child. Children under two

1 really shouldn't be given this type of medication at all.

2 Um, what could happen, it can adversely affect your heart
3 rate. It can cause your blood pressure to drop. It could be a
4 type of chemical restraint if the drug, the pseudoephedrine,
5 overcomes the child's ability to break it down because even though
6 an adult can take this type of medication, a little child
7 especially four months of age cannot handle it properly in order to
8 break it down in their system, and so it could have effects on the
9 brain and effects on the heart.

10 Q. Specifically, Doctor, can you tell me about the stomach, the
11 contents of the stomach in this particular case?

12 A. Yes.

13 We examine the contents of the stomach as well as the
14 intestines on all of our cases, and when we looked at the stomach
15 inside the stomach there was nothing in there, just a small amount
16 of mucus that you'd expect. So, the stomach was empty.

17 Q. Were you provided a time line that was provided to the
18 Department of Social Services and other folks with regards to when
19 the - - when the medication was administered and, ultimately, the
20 child had passed away?

21 A. I remember - - I recall - - I don't have it with me. I recall
22 that the - - the child was supposedly very shortly before the child
23 was reported deceased or EMS was contacted.

24 Q. Do you have an opinion as to whether the pseudoephedrine could
25 have been ingested and gone through the system and then - - I'm not

1 sure of the medical term - - but absorbed by the body in that
2 particular time line?

3 MR. AXELROD: Your Honor, I don't know if she's qualified to
4 answer to absorption rate in an infant. I'm not sure if she's
5 qualified.

6 THE COURT: Well, she's qualified in this area, and I find
7 her qualified to answer it.

8 The jury can use their experience and judgment in determining
9 whether they accept it or not but she's obviously qualified.

10 Go ahead.

11 MR. AXELROD: Yes, sir.

12 A. Can you rephrase - - just repeat it, rather?

13 Q. Knowing the time line as you or as it was explained to you by
14 the defendant, is it your - - do you have an opinion with regards
15 to whether or not the pseudoephedrine could have been absorbed by
16 the body during that time period prior to death?

17 A. It - - a lot will depend on how the pseudoephedrine is
18 administered as far as what form it is administered - whether it
19 was a liquid form or ground up tablets but I would have expected if
20 - - if it was ground up tablets we - - we could possibly see the
21 remains of the ground up pills for that high volume of that
22 pseudoephedrine.

23 Also, if the pseudoephedrine was given, let's say, with
24 formula, with some milk, then if it was within a short time period
25 you would expect to still see the formula or the milk within the

1 stomach.

2 Q. Dr. Collins, was there any evidence from the autopsy of the
3 toxicology that an inhaler was used at any moment?

4 A. No.

5 Q. Tell the jury. Is pseudoephedrine a cough syrup? Will
6 affect the cough?

7 A. I know pseudoephedrine. I don't think it would be as much of
8 a cough as much as it's more of a decongestant.

9 Many times it's hard to say because you have a cough with, um,
10 a stuffed up nose so to speak but it's more of a decongestant.

11 Q. And working, obviously, on however many autopsies - - with all
12 of the autopsies you've done, have you had the opportunity to see
13 chemical restraint being use or, excuse me, pseudoephedrine being
14 used as a chemical restraint to stop a child from crying and that
15 type thing?

16 A. We've seen pseudoephedrine and other, especially over-the-
17 counter drugs. We usually see some chemical restraint medications
18 as well as some illegal drugs, methadone and heroin being used as
19 chemical restraint.

20 And when you have these - - this type of a situation, often
21 the level of the drug is very, very high. It's more than the
22 therapeutic use of the drug because the whole point is not to
23 provide a so called therapy but instead to produce a type of
24 chemical restraint or listlessness or lethargy.

25 Q. And can you explain to them if you give a child and in

1 particular like Minor a four month old child this level of
2 pseudoephedrine what you would expect the child to act and how the
3 child would conduct herself in this case?

4 A. The child become initially very edgy because the heart rate
5 can increase with Sudafed. Also, with higher levels of Sudafed,
6 the blood pressure could drop, and they could get very - - the
7 child could get very, kind of lethargic and unresponsive.

8 Q. In this particular case when you did the autopsy, was there
9 any other concern other than we're going to get into the ribs and
10 the fractures of the ribs and the spiral fracture of the leg and,
11 obviously, the pseudoephedrine we talked about? Was there any
12 other concerns that you had about this child? Was it a well
13 child? Should it have ben taken medication?

14 A. There was nothing at autopsy either grossly meaning with the
15 naked eye or under the microscope that would have said to me that
16 this child needed any type of medication. I did not see any type
17 of inflamation in the lungs. I didn't see anything that looked
18 like the common cold if you could see that under the microscope.
19 I didn't see any type of phlegm or that type of substance within
20 the airways. I didn't see any type of natural disease that would
21 have led me to think that this child should have been on
22 medication.

23 Q. Dr. Collins, let's just kind of give an overview of the jury,
24 and then we're going to use an exhibit here that identifies the
25 particular injuries to the child.

1 Can you tell the jury what injuries you found and noted to the
2 child in terms of fractures and things of that nature?

3 Q. Yes.

4 What was very disturbing was when we actually began the
5 autopsy, the internal examination, we noticed that there were
6 multiple rib fractures and multiple healing rib fractures within
7 the child, and you could see these not only because we had x-rayed
8 the child, so you could see these on x-ray but we could also see
9 these with the naked eye.

10 What we do is we remove the heart and lungs and the liver so
11 that you're looking into the chest cavity, and you could see not
12 only the rib fractures but you could see some acute hemorrhage,
13 some blood around some of the rib fractures.

14 When I said what was also disturbing was that some of these -
15 - most of these, rather, were old and older, meaning they were from
16 one to three weeks of age, and, also, the femur was fractured, and
17 had a healing fracture.

18 Children's bones are very cartilaginous, are very rubbery.
19 It's not common for a child of this age, so we're not talking grade
20 school age where you have four arms or lower legs that are broken,
21 but a child of this age, the bones are very cartilaginous, and you
22 can pretty much bend them and not result in a fracture.

23 A way to think of it is like a green stick that you can bend
24 and bend and bend the piece of wood, and, then, finally, it will
25 snap. It is very bendable, and that's how children's bones are

1 because they're still developing and still growing. They don't
2 have the calcium in them that our bones have.

3 And, so, when we see rib fractures in children, it's very
4 worrisome because that does not occur accidentally.

5 The other areas that are red flag to us are the upper arm or
6 the humerus and the upper leg or the femur, the thigh bone. Those
7 are very uncommon to be accidental fractures.

8 When they are accidental fractures such as the femur fracture,
9 there is a good history to go with that, a motor vehicle accident,
10 a very difficult or traumatic birth, um, something that is going to
11 create enough force to actually be able to bend that bone or twist
12 that bone to such a degree that in this young age is able to break
13 in half.

14 Something else that's worrisome is when you have a femur
15 fracture is the type of fracture that you see on x-ray, and one
16 that we see in abusive fractures is a spiral fracture, a diagonal
17 fracture as apposed to one that is transverse or straight across
18 the femur because the ones that are straight across the femur we
19 may see in some severe accidents.

20 The spiral fracture is more or a twisting, yanking, motion,
21 and that's what we see more with abusive fractures.

22 Q. Dr. Collins, were you provided the, ah, x-ray reports and the
23 x-rays from January 15, 2004, with regards to Minor [REDACTED]

24 A. Yes.

25 Q. And did you have an opportunity to look at those?

1 A. Yes.

2 Q. Did you have an opinion as to whether that child had any rib
3 fractures as of January 15th?

4 A. My opinion is there were no rib fractures on, um, on that
5 date.

6 Q. Did you have an opportunity to look at the December 9th injury,
7 ah, x-rays with regards to the child's femur?

8 A. Yes.

9 Q. If I could, Doctor, if you could step down, we're going to use
10 State's Exhibit #5.

11 Doctor, have you had an opportunity to use this and kind of
12 take a look at it and figure out whether or not it would assist you
13 in helping the jury in finding out or determining or explaining to
14 the jury the injuries the child sustained?

15 A. Yes.

16 Q. Do you think it would assist you?

17 A. Yes.

18 Q. If you could please step down and maybe we can go through a
19 couple of these injuries and talk about it.

20 THE COURT: I find that it is appropriate to use this
21 demonstrative evidence based on the testimony of the doctor that it
22 will assist her in her presentation to the jury.

23 MR. VON HERRMANN: Thank you, Your Honor.

24 Q. Dr. Collins, first of all, let's just talk about the leg
25 injury, and I'm going to give you this black grease pencil for lack

1 of a better word.

2 Can you please just diagram to the jury where the spiral
3 fracture or the injury of the child occurred and try your best to,
4 obviously, diagram exactly or as best you can how it - - -

5 A. Okay.

6 The injury - - this is the femur. This is the upper bone,
7 and when the - - when the child was first diagnosed with the rib
8 fracture - - I mean, excuse me, the femur fracture before her
9 death, it was noted at this time there was already some healing
10 taking place. So there was a delay in fracture and presentation
11 to the doctor of about two to three weeks. So the child had this
12 femur fracture at this time.

13 And it was in the mid-shaft region, and it was a complete
14 fracture all the way through.

15 Q. And exactly what angle would that have been?

16 A. If I remember correctly, and I could be mistaken about without
17 the film in front of me, it was down - - -

18 Q. Doctor, we can actually get the film for you.

19 A. That would help.

20 Q. If that will help?

21 A. Yes. I just want to - - since this is going to be on there
22 permanently.

23 While they're looking I will say to elaborate on what I said
24 earlier with red flags and why it's worrisome with the femur is
25 that this child is not ambulatory, and so there is not even a

1 history or situation where this child could have a - - a severe
2 fall, or, you know, or have a severe injury to its leg. So it's
3 even more worrisome the age of the child.

4 Q. That's State's Exhibit #2.

5 A. So our right femur.

6 The child - - this is the child here. This is the femur, and
7 it's a complete break. It's going from the inner part of the thigh
8 down towards the outer part.

9 What you see here surrounding the fracture, it almost looks
10 like clouds or cotton or some people say it has a marshmallow
11 effect. This is the callus formation around here. This is the
12 healing. The body is trying to heal this fracture.

13 Q. With regards to the leg injury, Dr. Collins, and taking into
14 account abuse and neglect, can you tell us what concerns you have
15 with regards to that leg injury and what the indication is that
16 that would be abuse and neglect?

17 A. It's abusive in that this is an inflicted fracture. This is
18 not an accidental fracture.

19 Um, what else is worrisome is that this child had a delay in
20 presentation to the physician. This child was getting its diaper
21 changed umpteen times a day with the femur fracture doing this
22 motion movement. This is the largest bone in the body, and the
23 child, so, not only suffered the physical abuse but also suffered -
24 - suffered a neglect, a medical neglect just in this bone alone.

25 Q. Were you told the story that the defendant told or have - -

1 the story that the defendant related to the - - various different
2 stories? Were you, um, made aware of those?

3 A. Yes.

4 Q. Are those consistent with that injury?

5 A. Absolutely not.

6 Q. Doctor, if we could, let's get on to the rib injuries.

7 We know and we - - have you had a chance to look at the x-rays
8 of January 15th?

9 A. Yes.

10 Q. And were there any rib injuries that - - to the baby?

11 A. No.

12 Q. When was the next time where the rib injuries were discovered?

13 A. At autopsy, the 15th of February.

14 Q. Alright.

15 And how many rib fractures were there? Do you recall?

16 A. I can count them up. I've got them all listed as far as an
17 actual number.

18 Q. Well, I tell you what. Let's go ahead if you could if you can
19 use the - - just let's not deal with the hemorrhaging right now.
20 Let's just talk about the rib fractures.

21 Can we have you notate on here and describe to the jury the
22 rib fractures that you notated while you were doing the autopsy?

23 A. Yes.

24 Um - - we have - - I'll start on the right side, the child's
25 right side. I'll start on the left, and I'll read in order of my

1 report to make it easier on me.

2 Okay. On the left side we had posterior ribs 2, 3 and 4 that
3 were fractured and had a callus formation. So these are healing
4 fractures, 2, 3 and 4.

5 And then underneath rib #4 is rib #5, and then there is also.
6 We thought there was a fracture there but instead there is just a
7 lot of hemorrhage around that rib. So, 2, 3, and 4 on the back.

8 And then we had left posterior rib #11 back here also had a
9 previous fracture, and there was callus formation on it also.

10 I guess we can just stay with the back.

11 On the posterior right outside similar to the left side we've
12 got ribs 3, 4, 5 and 6, and these are fractured with hemorrhage,
13 and you could actually - - there was some healing going on but you
14 could actually see the fracture and see the hemorrhage that was
15 present. And so this looks like - - our interpretation was that
16 there was a fracture previously there, and now there has been a
17 more recent injury on top of the older fracture.

18 On the left front on the side we've got ribs 5, 6, 7, 8 and 9,
19 and then we also have on the left, we've got some callus on 7, 8
20 and 9.

21 And then on the right we've got a similar presentation with
22 ribs 5, 6, 7, 8 and 9.

23 And we also have up higher on the left lateral rib #2.

24 And I think that - - that's it.

25 Q. And with regards to - - if we can just do a quick count of how

1 many rib fractures this child had in various stages - - stages of
2 healing?

3 A. I count seventeen.

4 Q. And were those or could those have been caused by CPR?

5 A. No.

6 CPR does not cause rib fractures for the reasons I mentioned
7 earlier.

8 Now, recently, one of my colleagues, Dr. Lance, in North
9 Carolina has been studying them, and if there is going to be a type
10 of rib fracture secondary to CPR, it will occur right at the joint
11 with the back bone because it's like a fulcrum, and it can snap a
12 little bit.

13 However, you don't see hemorrhage around it with the naked
14 eye. These are just microscopic fractures that are even missed by
15 x-rays, and the only way to detect them would be taking out this
16 section and actually looking at it under the microscope.

17 So, these are totally different types of fractures.

18 What we're talking about here are posterior rib fractures and
19 anterior kind of lateral rib fractures, and this is made by more of
20 a squeezing movement of back and front, not CPR, that causes the
21 snap to occur here because it's the way the rib is made.

22 CPR is one - - or two finger method on the center of the
23 chest, nothing on the pushing, squeezing forward on the back. You
24 do not have this type of fracture pattern whatsoever if you have
25 anything at all.

1 Q. What about if the child was being slapped on back with regards
2 to trying to clear RSV or something of that nature? Would that be
3 consistent with those injuries?

4 A. No.

5 Q. Ah, do you have a medical opinion as to how these rib
6 fractures would have - - within a reasonable degree of medical
7 certainty how these rib fractures were inflicted on this child?

8 A. This is really classic for squeezing type of injury.

9 Q. Did you happen to bring a doll with you?

10 A. Yes.

11 Q. Let me get you the doll.

12 Please use this is you would to show the jury how you - - or
13 how you would expect the child to have sustained those.

14 A. This is just a demonstrative doll that I have used for
15 training purposes, and it's this type of a movement here. It's the
16 same movement that you might have heard or read about with Shaking
17 Baby. It's the same grasping movement, and when you squeeze in, it
18 results in bending of these ribs, and they will snap laterally as
19 well as when they get right past this point, this joint, this
20 fulcrum point, they can snap posteriorly.

21 And so that's very classic location and worrisome for a
22 squeezing type of movement such as this.

23 Q. So, it could be from the front or behind?

24 A. Definitely.

25 Q. And is there any striking injuries or just, you know, injury

1 of hitting this child that you are aware of?

2 A. No.

3 Q. So, would - - it's your opinion within a reasonable degree of
4 medical certainty the child was squuz - - squeezed?

5 A. Yes.

6 Q. Squuz, squeezed, squuzed.

7 Ah, did you have an opinion of whether or not this would be
8 child abuse or neglect?

9 A. The inflicted trauma is child abuse, yes.

10 Q. Can you tell us about how you date these injuries?

11 We, obviously, know January 15th, the child had no rib
12 fractures, and we know that when you see the child on February 14th,
13 we know that, obviously, what you testified to.

14 Can you give us an approximately time?

15 A. It's difficult to date injuries like this. What we do is we
16 work with Radiology and we try to correlate findings such as the
17 callus formation I showed you on the radiograph but as well it's
18 very important to look under the microscope, and what we did in
19 this case which is something that we do, at least I do, we all with
20 our pediatric cases with any type of any fractures, rib fractures
21 is, actually, take the ribs out.

22 So, we took all these ribs out, and then we x-rayed them
23 individually, and then I was able to section them, each rib and
24 look under the microscope and see what was taking place in here,
25 the healing that takes place.

1 And we know by studies that certain stages occur at certain
2 time frames, and what we saw under the microscope was soft and hard
3 callus which is the normal progression of healing of these rib
4 fractures, and that would be from about ten days to three weeks.

5 In addition, we saw on several of the ribs there was acute
6 hemorrhage which was about twenty-four hours old.

7 And so on top of that older rib fracture that was healing,
8 there was a new injury or a re-injury. So we call that acute on
9 healing rib fracture.

10 Q. Let's go ahead and if we could, we'll use the red pin.

11 You say within twenty-four hours. Can you diagram where the
12 acute hemorrhaging was?

13 A. We saw acute hemorrhaging to the right posterior ribs; 3, 4,
14 5 and 6, and there was also that area of hemorrhage that I
15 mentioned earlier that did not have a fracture underneath it on the
16 right - - I'm sorry, left back #5.

17 Q. And you indicated that within ten to twenty-one days we had
18 the rib fractures, and within twenty-four hours, we have the
19 hemorrhaging.

20 Do you have an opinion with how many times this child - - what
21 was - - scratch that.

22 Are those hemorrhages consistent with squeezing or striking?

23 A. The acute hemorrhages on the outside could be either. We did
24 not - - we, also, at the very end of the autopsy, we cut into the
25 arms, legs and back and we reflected the skin and muscle so that we

1 could look underneath to see if there were any underlying bruises.

2 This is especially important when you've got a dark-skinned
3 baby because it's hard to see some of the bruises.

4 The child just had a Mongolian spot on its little rear that
5 when we looked under the skin and saw tissue, we didn't see any
6 bruises that would have been blunt force trauma.

7 Just looking at hemorrhage alone around the rib fractures, you
8 can't tell if it's from squeezing or from being struck.

9 My opinion is that it was a re-squeeze.

10 Q. Dr. Collins, let me just make sure that I understand.

11 These four hemorrhages, these are re-injuries of already
12 broken bones?

13 A. Yes.

14 Q. So, in other words, the bones have started to heal, and then
15 they became re-injured?

16 MR. AXELROD: Your Honor, he is leading the witness at this
17 point.

18 THE COURT: Well, no, sir. I'm going to permit that
19 limited inquiry on that basis of this particular witness.

20 MR. AXELROD: It's been asked and answered already.

21 MR. VON HERRMANN: Thank you, Your Honor.

22 THE COURT: No, sir.

23 You may proceed.

24 A. These ribs in the back had that soft turning into hard callus
25 formation which does not have hemorrhage in it. We're beyond that.

1 We are ten days, three weeks out from the initial fracture.

2 MR. AXELROD: Your Honor, if the witness could tell us which
3 ribs she's speaking about at this point.

4 A. Right 3 - - -

5 THE COURT: You are - - you may direct those questions when
6 you have an opportunity to cross.

7 Go ahead.

8 A. The right 3, 4, 5 and 6 in the back had fresh hemorrhage on
9 top of healing fractures. So this is new injury to this area.

10 Q. And do you remember what Caucasian this child - - was it a
11 white baby or a black baby?

12 A. It was a black baby.

13 Q. Would that affect the ability of, say, a mother or a care
14 giver or anybody to detect bruising on this particular child?

15 A. It could, yes, because as I mentioned, it can be difficult to
16 delineate, and that's why we do the posterior pep-downs on all of
17 our children regardless of race but it could be difficult,
18 especially, as you know, we can have different shades of white and
19 different shades of black and brown, etc, and you can see - - it
20 could be an illusion that there is nothing there but, in fact,
21 there could be something underneath.

22 Q. Are those all the significant injuries with regards to this
23 child that you saw in your autopsy?

24 A. Yes.

25 MR. VON HERRMANN: Your Honor, at this time we would move

1 State's Exhibit #5 into evidence so the jury can observe those in
2 their jury room.

3 THE COURT: I will permit it. It's a part of her
4 demonstrative evidence, and I conclude that it will help the jury
5 in their factual finding, and I will permit it.

6 MR. VON HERRMANN: Thank you, Your Honor.

7 (The Court Reporter accepts State's Exhibit #5 into evidence.)

8 Q. Dr. Collins, within a reasonable degree of medical certainty
9 can you tell this jury the cause of these injuries?

10 A. Of the injuries or cause of death?

11 Q. Well, let's start with - - is it abuse?

12 A. Yes. It's inflicted trauma.

13 This child at four months of age, there was - - there's no way
14 that this occurred accidentally or naturally, no way whatsoever.

15 Q. What condition - - when I say condition, what affect would the
16 child - - how would the child be acting while he's under this
17 particular - - all these injuries? What would you expect the
18 child to be acting like at four months old?

19 A. Well, at four months old also remember that the rib fractures
20 occurred ten to twenty-one days before. So the child would be - -
21 they are very painful and the femur fracture. There would be
22 painful crying, irritable. Can't voice complaints because they're
23 only two to four months of age or three to four months of age.

24 Q. And then in your experience what do the offenders of the
25 abusers do to try to get that child quiet or to get it calm?

1 A. Ah, different cases. They could - - put the child - - isolate
2 the child in the back room. They could injure - - re-injure the
3 child. They could give the child its medication to make it go to
4 sleep.

5 Q. And with regards to the autopsy results and the toxicology
6 results, is there any belief - - any reason to believe that this
7 child was chemically restrained?

8 A. I don't know if it resulted in a restraint but definitely was
9 given too much medication, the pseudoephedrine. I'm not sure the
10 caretaker thought it would result in restraint.

11 MR. AXELROD: Your Honor, they're asking - - he's asking the
12 witness to speculate. She answered - - she can answer what she
13 knows but not for speculation.

14 THE COURT: Well, no. It's not speculation. The witness
15 has given her opinion based on years of experience in this area.
16 The jury is entitled to consider it and give it such weight as they
17 think should be given to it.

18 Go ahead.

19 MR. VON HERRMANN: Thank you, Your Honor.

20 Q. Dr. Collins, do you have an opinion within a reasonable degree
21 of medical certainty of the cause of Minor death?

22 A. Yes, I do.

23 Q. Can you please tell the jury what that cause was?

24 A. The cause of death of Minor is pseudoephedrine toxicity
25 with blunt force trauma to the chest.

1 Q. Is there any way for you to tell what caused the child's death
2 or are they both?

3 A. The pseudoephedrine toxicity in and of itself is fatal. Also,
4 we know that there was a squeezing movement, motion. There's
5 trauma to the chest, and that also could be fatal.

6 We've had children that are squeezed to death and have rib
7 fractures or that are squeezed, and they can't breath. Their heart
8 can't pump properly.

9 And, so, therefore, we listed together the pseudoephedrine
10 toxicity with blunt force trauma to the chest.

11 Q. And did you - - did you find a manner of death in this
12 particular case?

13 A. Yes.

14 The manner of death is homicide.

15 Q. And was that by child abuse or was that by some other means?

16 A. We in Forensic Pathology don't list homicide by a certain
17 means but it's - - there are five manners of death.

18 There is natural. There is suicide. There's accident.
19 There's homicide, and there's undetermined.

20 Undetermined is usually reserved for situations such as I find
21 skeletal remains from a hundred years ago in a wooded area, and I
22 really don't know why the individual died. So, I would say
23 undetermined.

24 This case is definitely not a suicide. It's not a natural.
25 It's not an accident. So, it's a homicide.

1 Q. And would that homicide have been associated with the child
2 abuse and neglect?

3 A. Yes. In this situation, yes.

4 Q. Thank you, Dr. Collins.

5 I have no further questions. Please answer anything Mr.
6 Axelrod may have.

7 MR. AXELROD: If we may approach, Your Honor.

8 THE COURT: Yes, sir.

9 (Bench conference off the record in the presence of the jury
10 but outside of the hearing of the jury.)

11 MR. AXELROD: Court's indulgence.

12 THE COURT: Doctor, can I get you some water or coffee or
13 anything?

14 DR. COLLINS: I'm fine, thank you.

15 THE COURT: You sure?

16 DR. COLLINS: Yes.

17 THE COURT: If at anytime you need to take a break, please
18 let me know.

19 DR. COLLINS: Okay.....

20 CROSS EXAMINATION BY MR. AXELROD:

21 Q. Doctor, do you need a break now?

22 A. No, I'm fine.

23 Q. Okay.

24 It's a pleasure to see you again.

25 A. Thank you.

1 Q. When you sent the - - when you sent the blood for testing, did
2 you yourself send the blood?

3 A. Yes. We sent it to NMS.

4 Q. Did you send it? Did you put it the box yourself and send it?
5 That's my question.

6 A. Either I did or the other Forensic Pathologist working with me
7 did. We were in there together.

8 Q. Can you see from your papers? Do you have papers to show
9 where you sent it?

10 A. Where I sent it?

11 Q. Yes.

12 A. National Medical Services.

13 Q. Alright.

14 And do you have proof of who sent it to NMS?

15 A. It was given to the courier for overnight and then Brad Marcus
16 and I were doing the autopsy, and he filled out the form. I don't
17 know exactly who - - he did or I did put in the box.

18 Q. Who gave it to the courier? Please tell the jury that.

19 A. It would have been the autopsy team. Probably the Autopsy
20 Assistant who runs to the laboratory courier.

21 MR. AXELROD: Court's indulgence, Your Honor.

22 Q. Tell the jury how the mail system works at the hospital when
23 you send something out.

24 A. The technician for our - - this particular case was Raymond
25 Edwards. And so we seal everything up, and then he goes to the

1 Pathology Mail Room, and that's where the FedEx people arrive.

2 Q. So, at some point - - alright.

3 When did you send the blood off?

4 A. On the 15th of February.

5 Q. And when was it actually tested in Pennsylvania by NMS?

6 A. It might say - - either you could ask them or it might say on
7 the report.

8 It says they tested it on - - it doesn't say exactly when they
9 tested it. It looks like the 17th - - between the 17th of February
10 and the 24th of February is when they were doing the various
11 analyses that I mentioned earlier.

12 Q. And what state was that report generated from?

13 A. You mean where are they located?

14 Q. Well, we had earlier testimony that it was tested in March is
15 the only reason I'm asking you. You say it was tested in
16 February, and we've had earlier testimony that it was tested in
17 March. Please check that for me.

18 A. The date they reported it to us, it says February 24, and it
19 was faxed over from Dr. Garvin in March. I'm reading the fax the
20 way the fax machine prints it on the page, March 21st.

21 Q. So, if - - if the laboratory testified today that they tested
22 it in March - - -

23 MR. VON HERRMANN: Objection, Your Honor. That's pitting
24 the witness.

25 MR. AXELROD: No, Your Honor. I'm not pitting the witness,

1 Your Honor. I'm just trying to state a fact.

2 THE COURT: I will permit this inquiry.

3 MR. AXELROD: Thank you.

4 THE COURT: Go ahead.

5 Q. If the medical - - if the National Medical Services testified
6 earlier today that they tested this blood in March, that would be
7 contrary to what you have?

8 A. That's contrary to this report. I don't know if they went
9 back and retested for confirmation. I don't know.

10 But reading the National Medical Services report, it's typed
11 in "reported 2/24/04."

12 Unless there was some confusion with Dr. Garvin who is our
13 Forensic Toxicologist. She sent a fax over in March, and she likes
14 to review everything that comes out of the laboratory because she's
15 our Toxicologist.

16 Q. I understand that but the testimony earlier was that the
17 person actually tested - - the person that tested the materials - -
18 -

19 MR. VON HERRMANN: Your Honor, that is commenting on the
20 facts of the case. That is his recollection. That is not
21 necessarily what was in the evidence. The jury is the finders of
22 the facts.

23 THE COURT: I understand but I'm going to permit the
24 question. The jury understands when it was tested and why but I'll
25 permit him to ask that.

1 MR. AXELROD: Thank you.

2 THE COURT: Go ahead.

3 Q. The person, the clinician that tested the blood today she
4 testified that she tested the blood for the first time for March.

5 A. Okay.

6 Well, let me - - let me look at my papers here.

7 Q. Okay.

8 Date reported February 24th. This is the blood alcohol.

9 "February 24th - we find there is pseudoephedrine from the
10 screen," and then there on the next page where I mentioned earlier,
11 you not only find out what drug is there but now you want a number.
12 So on the next page they actually do the quantitation. They're
13 getting a quantity, and "we find 1300 nanograms per milliliter",
14 and that was - - that number assigning was done March - - looks
15 like March 12th, '04. So that was the other half of the analysis,
16 I'm assuming.

17 Q. And I take it that you are assuming that.

18 A. Well, I can only go by what's typed on this report.

19 Q. Okay.

20 Okey-dokey.

21 Now, you spoke about drawing blood to test for metabolic
22 diseases. Tell the jury - - because you test for metabolic
23 disease and it is one of the things you initially do. Correct?

24 A. Yes.

25 Q. Tell the jury what metabolic diseases are and which ones you

1 tested for.

2 A. Metabolic diseases often known as inborn airs or metabolism.
3 That is done by a blood test that is dropped on filter paper, and
4 then it is sent off to a large laboratory. The one that we
5 currently use now is called Pediatrrix, ends in an x, and they test
6 for a number of metabolic - - metabolic diseases that could result
7 in the child's inability to possibly break down certain food
8 substances, um, for instance, scistic fibrosis can be tested, and
9 so we do this on all of our children just to rule out any
10 underlying disease that maybe we wouldn't know about.

11 Newborn babies in this state are tested for certain metabolic
12 diseases, and each state has a different listing of the diseases
13 they test for.

14 One that you know about is PKU, and PKU is tested in newborn
15 babies and because you can treat that disease by diet, and so PKU
16 is one of those metabolic disorders that's tested for but now we
17 know there are a lot of other disorders that can result in death of
18 a child that you maybe cannot tell grossly or under the microscope
19 that it would be apparent on the way they metabolize substances.

20 Q. What specific - - what specific metabolic diseases did you
21 test for?

22 A. I can tell you there is this three large families, the
23 umbrella groups that are tested, and then there's a list that I
24 don't have memorized that the company uses.

25 And this is the - - to my knowledge it's the largest metabolic

1 that all of the Forensic Pathologists use across the country.

2 Q. And - - and when you draw blood, you save blood, don't you?

3 A. We - - we save - - it's difficult in children. There's just
4 not that much blood but we save blood for a certain amount of
5 months.

6 Q. And, in fact, isn't it true that when I contacted you maybe
7 two years ago, sometime, that I asked you - - I told you that I
8 wanted to get the saved blood. Correct?

9 A. Yes.

10 Q. And at that time you told me. I actually sent a courier down
11 to Charleston, didn't I if you remember?

12 A. I don't remember meeting a courier but you could have sent one
13 down. I don't remember.

14 Q. Well, I sent one down there but tell the jury what happened
15 when you went or one of your colleagues went into the freezer to
16 look for the blood that was saved.

17 A. There was none left.

18 Q. It was thrown out?

19 A. Yes.

20 Q. Even with this pending case this blood was thrown out?

21 A. That's right.

22 Q. And do you remember the reason I asked you why I wanted the
23 blood?

24 A. You wouldn't tell me. I asked you, and you wouldn't tell me.
25 I was trying to assist in what type of specimen might be proper.

1 Q. That's a good answer.

2 Tell the jury what osteogenesis imperfecta is.

3 A. There's several different types. It's a disease that can
4 affect the way the bends form, and the severe types, the infantile
5 types are often diagnosed at the time of birth or soon thereafter
6 because the child will have multiple fractures, and they have a
7 characteristic look on x-ray. If you x-rayed a child with
8 osteogenesis imperfecta, you can see the abnormal formation of the
9 bones throughout the body.

10 Q. And is - - in laymen's terms a baby that has this disease
11 usually is associated with spiral fractures. Correct?

12 A. I don't know the association with spiral fractures.

13 Q. Well, fractures, just fractures, all the way - - -

14 MR. VON HERRMANN: I believe she was finishing she her answer
15 if she would be allowed to answer with regard to spiral fractures.

16 THE COURT: Dr. Collins can handle herself well. So - - -

17 A. I've had autopsies of these cases, and they can have many
18 fractures but they also have different features.

19 The whites of their eyes is often blue. They have a thin
20 skull bone that you can actually push into the bone with your
21 finger it's so bendable.

22 It's a totally different type of gross and microscopic
23 appearance with osteogenesis imperfecta and a traumatic fracture.

24 Q. And, actually, the ribs are to the point that you just touch
25 them almost, they can break if you have this disease. Correct?

1 A. Oh, no. You'd need more force than that.

2 Q. But not that much force.

3 A. I wouldn't say - - I mean, you don't break with trauma but you
4 end up just getting unusual fractures all over - arm, lower arm,
5 hands, feet.

6 Q. Femur?

7 A. Yeah, you could have one of the femur.

8 Q. Now, isn't it true that - - well, I'll move on.

9 You spoke about the pseudoephedrine toxicity, the 1300
10 nanograms per milliliter.

11 A. Yes.

12 Q. Do you know whether Wesley gave it to the baby?

13 A. No.

14 Q. There are no clinical studies to determine the half-life
15 breakdown of pseudoephedrine in a four month old child, is there?

16 A. No.

17 Q. So, in actuality, and correct me if I'm wrong, I think a lot
18 of this is because we have - - the organs are developing, the
19 kidneys, the liver, different organs are developing at that age,
20 and they're not small adults. They're children which have organs
21 that can't metabolize and break down these type of chemicals?

22 A. Yes.

23 Q. And they can occur at different rates that we don't know
24 about.

25 A. You mean the maturing organs?

1 Q. Yes.

2 Well, here's my question. I'll get to the question.

3 There's 1300 nanograms per milliliter. If you had an adult,
4 if you had a sixty-five year old man, you gave him so much
5 pseudoephedrine, you'd be able to break down based on clinical
6 studies in actuality when the pseudoephedrine was given based on
7 the half-life. You could extrapolate that to when maybe they
8 received it.

9 A. You could try. It's difficult to extrapolate back because
10 everyone has different metabolic rates. So the metabolic rates are
11 just averages.

12 Q. So, if it's - - if it's extremely - - if it's difficult in an
13 older gentleman where we have studies and reports and scientific
14 testing, it'd be almost nearly impossible in a four month old.

15 A. To determine the metabolic rate, the half-life?

16 Q. Yeah. Where - - to go back where it was started. Where it
17 was injected and how it was - - how it was broken down and how it
18 was stored because we don't know the half-life of the drug?

19 A. Right.

20 Q. Okay.

21 I believe you testified that you don't know whether this
22 pseudoephedrine was given as a chemical restraint but it might have
23 become one on its own.

24 A. That's - - that's true.

25 Q. Now, these rib fractures, we're going to go through them. Do

1 you have your autopsy?

2 Tell me when you're ready.

3 A. Uh-huh.

4 Q. Alright.

5 We're going to look - - we're going to look at the left
6 posterior ribs 2, 3 and 4. Okay?

7 A. Okay.

8 Q. Now, did they have callus formations by the results of the
9 autopsy?

10 A. Yes.

11 Q. Tell the jury what a callus formation is.

12 A. First, when you have injury, first you'll have the fracture,
13 and you can have hemorrhaging to the area, and then you'll have
14 what's called granulation tissue which is the new, early healing
15 response, and those cells that are in the bone normally called
16 osteo-class will start to produce new material to act as kind of a
17 framework or a mesh that will eventually be remodeled and made into
18 bone.

19 And so the beginning after that granulation tissue, the
20 beginning of the bone working to repair, it makes sub-periosteal new
21 bone formation or the soft callus, and then the soft callus is
22 remodeled by the tissues in our body in the bone to become a hard
23 callus and, eventually, will replace the space, the fracture line
24 and become a normal appearing bone.

25 Q. Okay.

1 So, on the posterior ribs 2, 3 and 4 up here, let's date that.

2 Now based on your microscopic analysis **Minor** died on February
3 14th. Date for us when you think this fracture occurred by the
4 amount of callus deposit that you saw under the microscope.

5 A. The best I could do with narrowing down a date when I said
6 earlier was around ten days to three weeks, so ten to twenty-one
7 days.

8 Q. Okay.

9 I'm going to go to - - to anterior. Try not to break it or
10 you'll yell at me. The anterior left ribs 5 through 9?

11 A. Yes.

12 Q. Um, they are these right here. Right?

13 A. Yes.

14 Q. We - - we - - we're missing something. Can you come down on
15 5 through 9? I think you made a mistake here.

16 I don't have - - I'll show you. I'll try not to break it.
17 It's kind of stable.

18 Is there a mistake here on 5 through 9?

19 A. I - - there are so many. Let me see.

20 Q. Well, take your time.

21 A. Now, which one are you asking about?

22 Q. 5 through 9, the anterior lateral left ribs.

23 (The witness examines State's Exhibit #5.)

24 A. Okay.

25 Now, what are we - - -

1 Q. Looking for the left posterior lateral ribs, 5 through 9.

2 A. Okay.

3 Q. 5 through 9.

4 A. Posterior?

5 Q. Posterior is the back. We understand that and we - we
6 address the ribs from the right side when you're trying - -

7 A. Right.

8 Q. The child's right?

9 A. Yes.

10 Q. So, this would be the right side?

11 A. Yes.

12 Q. Okay.

13 A. So, the 5 would be - - let me draw two more.

14 Q. So, I think whatever your report says because this is not in
15 conjunction with your report. The Solicitor went through with you,
16 and based on your report, I think that's wrong. So, can we just
17 correct it to get it correct because they're going to send this
18 back for the jury. So, I want it to be correct.

19 Can you mark the left posterior ribs 5 through 9, and then
20 I'll question you after that?

21 MR. VON HERRMANN: Your Honor, just for my edification.
22 We're saying that she just neglected to mention to mark two
23 additional broken ribs, Doctor?

24 A. Are you referring - - -

25 Q. The left-hand ribs 5 through 9.

1 I just want to get those because I want to get it correct.

2 So, now it's correct?

3 A. I believe so. Yes.

4 Q. Okay.

5 Looking at your report that you used the microscope for can
6 you tell the jury whether or not these ribs had callus formations?

7 A. Yes.

8 Q. Okay.

9 And to a reasonable degree of medical certainty what is your
10 opinion of the date of the injuries?

11 A. I'd still put it in that frame of ten days to three weeks.

12 So, my rib #9 had granulation tissue getting into the soft
13 callus. There wasn't as much of the hard callus present. It could
14 be a little bit younger.

15 Q. And when you say younger, tell the jury how much younger. To
16 a reasonable degree of medical certainty, what is your opinion?

17 A. It could - - in that same time frame to ten to like three
18 weeks. It could be just a little closer to the time of death,
19 maybe just a few days or it could have occurred at the same time of
20 the other ribs. Sometimes they don't heal exactly the same.

21 Q. Could this have occurred as an example? I'm not sure.
22 You're the expert. Could this have occurred within forty-eight
23 hours?

24 A. No.

25 Q. Longer than forty-eight hours?

1 A. Yes.

2 Q. How much longer?

3 A. Well, we don't even start to see the soft callus until a few
4 days. So.

5 Q. How - - how much is a few days?

6 That's why I asked. When you say a few days, I ask is forty-
7 eight hours a few days or is a few days longer than forty-eight
8 hours?

9 A. It's an estimate again. I'd say a few days is getting close
10 to the week.

11 Q. So, a few days would be seven days?

12 A. It would be close to when you start to see some good, soft
13 callus formation.

14 Q. Okay.

15 Posterior rib #11, the left rib #11.

16 A. Yes.

17 Q. Okay.

18 Looking at your report did it have a callus formation?

19 A. Not on the histology, no.

20 Q. Alright, but - - -

21 A. But it did on the, um - -

22 Q. Radiology?

23 A. - - radiology.

24 Q. Right. On the radiograph tell the jury whether or not this
25 had a callus formation.

1 A. Yes.

2 Q. And to the best of your ability and a reasonable degree of
3 medical certainty, tell the jury how long you think that has - -
4 the callus has been there or been forming.

5 A. Well, I - -

6 Q. When did the injury occur?

7 A. - - I can only say between ten and three weeks before death.

8 Q. Okay.

9 MR. AXELROD: Court's indulgence for a minute, Your Honor.

10 Q. Okay.

11 I'd like to direct your attention to the posterior right ribs
12 3 through 6. I think they're right up there.

13 Okay.

14 Let's see.

15 Alright. The ribs we're speaking about are the posterior
16 ribs right there, right, 3 through 6?

17 A. Yes.

18 Q. Okay.

19 And they're the right ribs, correct?

20 A. Yes.

21 Q. Now, looking at your report was there a callus formation?

22 A. Yes.

23 Q. And, once again, to a reasonable degree of medical certainty,
24 can you tell the jury of when you think these ribs broke.

25 A. Initially, ten to three weeks before death, - - as an estimate

1 range.

2 Q. And I understand. I totally do. I know it's just an
3 estimate. And it's a wide estimate, ten to twenty-one days?

4 A. Yes.

5 Q. So if today's the 16th - - well, let's just use the first of
6 the month. Let's just say on April 1st somebody breaks a rib on
7 April 1st.

8 A. Okay.

9 Q. We might not see callus formation until the 10th day of April
10 all the way until the 21st day of April?

11 A. No, you can start to see some callus forming.

12 I guess I don't know what you're asking.

13 Q. There's still a wide latitude when you say the break occurred
14 between ten and twenty-one days. That's an eleven day window in
15 there for that break?

16 A. Yes, before death. Right. That's correct. Yes.

17 Q. Almost two weeks.

18 A. Yes.

19 Q. And if we have - - if we have an extent of ten to twenty-one
20 days and even if it - - say it was the twenty-four days, we could
21 almost have two full weeks between the time that we would even know
22 when the break occurred and possibly even a little shorter time.

23 I'm not trying to confuse you.

24 A. No. That - - that's true because you can't in children who
25 break a bone you don't go in there and biopsy it. So, all of these

1 is just studies that we have to go back retrospectively.

2 Q. It would be fair to say it's not an exact science what we're
3 trying to do to date these injuries?

4 A. Correct.

5 Q. I want to look at the lateral right ribs which are 8 through
6 10.

7 Is - - is the 11th - - is the 12th the bottom rib?

8 A. Yes.

9 Q. So, you got the 12th and you got the 11th. You got the 10th.
10 You got the 10th through the 8th.

11 A. And all of these would have that same time frame.

12 Q. Tell the jury when you looked at was there a callus formation
13 on those ribs?

14 A. We're on the left, now. Okay.

15 Yes.

16 Q. And to a reasonable degree of medical certainty, the best
17 guess you can make when do you think these ribs were broken? In
18 the twenty-one days?

19 A. Yes. The same time frame.

20 MR. AXELROD: Court's indulgence, Your Honor.

21 Q. Now, you talked about the pseudoephedrine is basically
22 something bad to give a two month old?

23 A. Yes.

24 MR. AXELROD: Your Honor, I believe we're going to have a
25 matter we need to take up outside the jury.

1 THE COURT: Alright.

2 I'll let you go to the jury room for just a moment and I'll be
3 calling you back very shortly.

4 (The jury retires to the jury room at 12:44 p.m.)

5 THE COURT: The jury has departed the courtroom.

6 Yes, sir, Solicitor?

7 MR. VON HERRMANN: Your Honor, the defense has handed me an
8 Associated Press - - an Associated Press article, Your Honor,
9 talking about from 9th or from January 12, 2007, some three years
10 after this death occurred. It essentially indicates that more than
11 1500 toddlers and babies wound up in emergency rooms that were two
12 or three years of age I guess died because of some bad reaction to
13 - - -

14 THE COURT: I'm not about to let some Associated Press
15 article in.

16 MR. AXELROD: May I show it to the Court?

17 THE COURT: You can see it - - -

18 MR. VON HERRMANN: It's not a long treatise, Judge, or
19 anything.

20 THE COURT: You may - - this is cross examination, now.
21 I'm permitting wide latitude and will continue to do so but we not
22 going to talk about - - you can ask this expert witness if you wish
23 to but you're not going to Associated Press, no way, but I'll read
24 it for you.

25 What is it you to propose to show by this article?

1 MR. AXELROD: How bad pseudoephedrine is.

2 THE COURT: Well, ask her. I don't want - - I'm not going
3 to get it in by - - she'll be glad to tell you if you want to ask
4 her.

5 MR. AXELROD: I know. That's why I thought I could get in
6 in.

7 THE COURT: No, sir. No, sir. Not going to do that but
8 I'll - - that's not even close but I don't mind you asking her how
9 - - what it is and what the effects of it.

10 MR. AXELROD: Well, I just thought I'd - - -

11 THE COURT: No, no.

12 Bring the jury back.

13 MR. VON HERRMANN: Your Honor, one other issue if we could?

14 THE COURT: Yes, sir.

15 MR. VON HERRMANN: Just that I believe Mr. Axelrod has no
16 objection. We have folks here with National Medical Service flown
17 all over the country. They're going to try to get to the airport
18 and catch an earlier flight if Mr. Axelrod has no objection. I
19 think the chain has been established.

20 THE COURT: He's already by consent released them. Mr.
21 Taylor did. There's a chain. Let's get these people back.

22 MR. AXELROD: We didn't release them.

23 MR. TAYLOR: Your Honor.

24 MR. AXELROD: We're apposed to the chain, Your Honor. Mr.
25 Taylor is going to speak for the defendant.

1 THE COURT: Well, let me hear what it is.

2 MOTION AND RULING OF THE COURT

3 MR. TAYLOR: Alright.

4 Your Honor, at this time I'd move to suppress any of the blood
5 and address it at this time because I don't think the chain was
6 proven.

7 Going back to when the blood was first taken, whenever her
8 testimony and I couldn't interrupt and did not want to interrupt
9 his cross - - his cross of her.

10 THE COURT: I understand.

11 The record will speak for itself.

12 MR. TAYLOR: Yes, sir.

13 THE COURT: Clearly, and I note your objection. Clearly,
14 the chain is sufficient in my view.

15 MR. TAYLOR: Well, and my point that I'd like to make for
16 the record, Your Honor, is that she testified that she positively
17 testify that it was her or her colleague, the other doctor that was
18 working with her, that took the blood.

19 THE COURT: Well, she testified that her records which is
20 a part of this case, one of the two did it.

21 MR. TAYLOR: Yes, sir.

22 THE COURT: And I think for that is sufficient.

23 MR. TAYLOR: But I have a second part to that, Your Honor -

24 -

25 THE COURT: Alright.

1 MR. TAYLOR - - that I'd like to mention.

2 THE COURT: Sure.

3 MR. TAYLOR: She testified that whether it was her or her
4 colleague, they gave the blood to somebody else, not her. She
5 didn't put the blood - - and she put the blood in a box for a
6 courier to take and put it in FedEx. That person had control over
7 the blood, and they're the person put in it FedEx that sent it off
8 to this company that's there.

9 I think the chain was broken not from the company but where it
10 first started. I think that the courier who had control over the
11 blood needs to be here to say that it was that blood that they had
12 control over.

13 Yes, she took and, yes, the blood starts with her but the next
14 step, it's kind of like going from A through Z - - -

15 THE COURT: Well, let's here the answer. The testify from
16 the folks who have already testified that it had not been tampered
17 with based on the seal.

18 Now, what you want to say in response?

19 MR. VON HERRMANN: Your Honor, there's no need to argue it.
20 She indicated in her testimony that she put in a tamper sealed or
21 a tamper-proof sealed envelop. Deposited in the normal course of
22 business. It would be impractical to bring in - - -

23 THE COURT: Why, of course it is, and they indicated that
24 they received in the normal course and status.

25 I hear your objection but I don't think it's applicable.

1 MR. TAYLOR: I just wanted to make it for the record, Your
2 Honor.

3 THE COURT: You've got it for the record.

4 Now, bring the jury in.

5 I'm going to, now - - you don't have any further objection to
6 letting these witnesses go, do you?

7 MR. TAYLOR: Not at this time. Just note for the record,
8 Your Honor.

9 THE COURT: Are you objecting to it?

10 MR. TAYLOR: I would just - - I mean, I've made my
11 objections to the chain.

12 THE COURT: I understand but do you now object to me
13 releasing these so they can get back to California or where ever?

14 MR. TAYLOR: No, sir. I can't hold these people here until
15 the end of the trial. I don't want to.

16 THE COURT: Okay.

17 Then by consent of both parties, I'm releasing them from
18 subpoena. They're welcome to go or stay as they choose.

19 MR. VON HERRMANN: Thank you, Your Honor.

20 THE COURT: Thank you.

21 Alright.

22 Let's, ah, anybody need a short break?

23 Alright.

24 Let's take just a very short break, and we'll be right back,
25 now.

1 (The Court recesses the trial of this case for a short break
2 and thereafter reconvenes the trial of this case.)

3 THE COURT: Alright.

4 Let's get on the record.

5 Mr. Axelrod, you have had this witness for cross examination
6 for forty-five minutes. I want you to wind it up.

7 MR. AXELROD: I still have a little ways to go, Judge,
8 please.

9 THE COURT: Well, you ain't got to far to go.

10 Have a seat.

11 I permit wide discretion but I've permitted you to examine her
12 for forty-five minutes. She's been on the stand totally probably
13 an hour and half or two, and that's basically sufficient.

14 Now, unless you going to get on some new material, I'm going
15 to stand her down.

16 Bring the jury in.

17 MR. AXELROD: I'm going to definitely go on to new material.

18 THE COURT: Well, let's hear it.

19 MR. AXELROD: I'm finding it, Judge.

20 Judge, I'll wind it down.

21 THE COURT: Well, you got to do it. In fairness to the
22 jury, it's lunch time but I - - I'm not going to adjourn until
23 after lunch because this doctor needs to get back to Charleston.
24 So we gone to finish her testimony prior to breaking for lunch.

25 MR. AXELROD: I'm going to wind it up, Judge. I'll wind it

1 up in five minutes. Fair enough?

2 THE COURT: That's fair enough.

3 MR. AXELROD: Alright. Thank you.

4 Now, if he goes back up, I may have more.

5 THE COURT: I'll deal with it.

6 (The jury returns to the courtroom at 1:11 p.m.)

7 THE COURT: Mr. Foreman, I recognize it's 1:00, and it's
8 time for a lunch break but counsel for the defense, Mr. Axelrod,
9 assures me he has just a few more questions not more than five
10 minutes. So, I want to conclude all the examination of this
11 witness so that Dr. Collins can return to Charleston.

12 So, Mr. Axelrod, given the time constraints of the witness and
13 the jury, let us proceed with your cross examination.

14 MR. AXELROD: Thank you, Your Honor.

15 CONTINUED CROSS EXAMINATION BY MR. AXELROD:

16 Q. We know the femur was broken. Correct?

17 A. Yes.

18 Q. We don't know who broke the femur?

19 A. That's correct.

20 Q. We know ribs were broken. Correct?

21 A. Yes.

22 Q. We don't know who broke the ribs.

23 MR. VON HERRMANN: Your Honor, I'd like to object.

24 She might not know who broke the ribs but that's an issue of
25 fact.

1 THE COURT: Well, you may ask her if - - don't say, "we".

2 Ask her if she knows.

3 Q. Do you know who broke the ribs?

4 A. No, I do not.

5 Q. Do you know who gave this baby all this cough medicine?

6 A. No.

7 Q. So, we don't know whether Wesley did any of this, do we?

8 MR. VON HERRMANN: Again, Your Honor.

9 THE COURT: Wait a minute. No, that's not a proper
10 question.

11 Just ask her what - - you keep saying "we". The jury is the
12 finders of the facts. Ask her what she knows.

13 Q. You don't know whether Wesley did anything of what he's
14 accused of, do you?

15 A. I cannot tell from the autopsy. I know it was another
16 individual besides this child that administered the medicine and
17 inflicted the trauma but I cannot tell you who did it.

18 Q. My question.

19 Thank you so much, Doctor, for coming today.

20 THE COURT: Thank you.

21 MR. VON HERRMANN: Two questions, Your Honor.

22 REDIRECT EXAMINATION BY MR. VON HERRMANN:

23 Q. Doctor, and I probably am going to mispronounce this but
24 osteogenesis imperfecta.

25 A. Yes.

1 Q. Did this child have that?

2 A. No. I did not see any radiographic signs or any physical
3 signs of osteogenesis imperfecta.

4 We did have to because of space limitations have to dispose of
5 the samples we had frozen. I did inform both sides that we always
6 keep a blood spot on a piece of filter paper if the - - if a
7 certain type of laboratory could do that.

8 Q. And you indicated that you don't know who did it. In your
9 experience with, um, abuse and neglect cases is the care giver
10 often the one that - - -

11 THE COURT: Wait a minute, now. I'm not going to get into
12 that. She says she doesn't know. So, that's not proper cross
13 examination.

14 MR. AXELROD: Thank you, Your Honor.

15 MR. VON HERRMANN: No further questions.

16 MR. AXELROD: Your Honor, may I ask one question going back
17 to the osteogenesis?

18 THE COURT: One question.

19 RE-CROSS EXAMINATION BY MR. AXELROD:

20 Q. Isn't it true that and I had asked for the blood that I
21 requested a tube of blood to test for osteogenesis imperfecta?

22 A. Yes.

23 Q. Thank you.

24 And that wasn't available?

25 A. That's correct.

1 Q. Thank you.

2 THE COURT: Doctor, you may come down and are excused from
3 your subpoena, and we thank you.

4 Alright. We going to break for lunch in a minute.

5 Does that conclude the testimony of the State?

6 MR. VON HERRMANN: Your Honor, at this time the State rests.

7 THE STATE RESTS

8 THE COURT: Alright.

9 It's just a few minutes after 1:00. I'll ask, please, that
10 you come back at 2:30 this afternoon. The State has completed
11 it's testimony, and we'll move forward in the case at that time at
12 2:30. Be back in your jury room, please.

13 Thank you, so much. Have a nice lunch.

14 (The jury departs the courtroom for lunch at 1:15 p.m. to
15 return at 2:30 p.m.)

16 THE COURT: Alright. The State rests.

17 Is the defendant ready to proceed after lunch?

18 MR. AXELROD: Sir, yes, sir.

19 THE COURT: Do you have any motions of any kind?

20 MR. AXELROD: Would you like to hear them now, sir, or after
21 we break for lunch.

22 Whatever you want to do.

23 THE COURT: No, let's hear the motions now so that you'll
24 be ready to go.

25 MR. AXELROD: Yes, sir, Your Honor.

1 MOTIONS AND RULING OF THE COURT

2 MR. AXELROD: Your Honor, at this time - - Judge, at this
3 time I would like to ask for a directed verdict. The Court is well
4 aware and we dealt with one last week.

5 In a directed verdict there has to be at least a scintilla
6 of evidence that has to be able to go to the jury.

7 THE COURT: I understand.

8 What's your basis for me directing a verdict here?

9 MR. AXELROD: Well, the State's completed their case, and
10 there's nothing linking the cough medicine or femur or ribs to
11 Wesley. What it would be - - we're asking the Court to speculate
12 and for conjecture that he, in fact, was the one that inflicted.

13 THE COURT: Let me ask you this.

14 Have you read the particular statute upon which he's indicted?

15 MR. AXELROD: Do you understand that under that statute one
16 who aids or abets is guilty under this statute, though, outside the
17 presence of the jury, the penal statute is less.

18 So, the jury well may conclude under the totality of these
19 circumstances that he did it, and if he did not do it, they well
20 may conclude that since he was the care giver and the testimony
21 thus far is that only he or the mother could have done it. That's
22 the general testimony, that's he guilty of aiding and abetting.

23 So, I would respectfully tell you that there is believe,
24 certainly circumstantial, sufficient evidence to conclude that he
25 did, and if not, surely there's sufficient evidence to conclude

1 that he aided and abetted as the joint co-care giver if not the
2 sole care giver.

3 Somebody, first, broke that baby's femur. Somebody cracked
4 that baby's ribs, and that's basically admitted. Somebody gave her
5 a dose of pseudoephedrine four times the maximum that an adult
6 would have.

7 Now, a four months old baby couldn't have gotten it
8 voluntarily, couldn't have reached for it accidentally.

9 And so it is under one or both of those issues the jury may
10 well conclude, ah, that, ah, he's guilty of aiding and abetting
11 under the statute. I'm going to give the jury that option if they
12 care to.

13 MR. AXELROD: Now, Your Honor, I want to raise that point
14 because when I did my examination of Charlene yesterday, I was
15 prohibited to going into that she could have been charged with
16 homicide by child abuse but based on the Court's logic, if she had
17 aided and abetted also by keeping things away by telling Dr. Cooper
18 she would have been a bad mother, I thought I was - - should have
19 been allowed to go into the bias that she was never charged with
20 homicide by child abuse, and now the Solicitor has her testifying.

21 THE COURT: You went into significant bias as a basis for
22 her testimony when it - - when I let you get into the fact that
23 even under this statute she could go to jail for twenty years.

24 MR. AXELROD: But homicide goes to life, and I think that for
25 the bias I thought I should still be allowed when I bring her back

1 again to go into that she could have been charged with homicide
2 based on your logic that aiding and abetting would be homicide - -

3 -

4 THE COURT: I'll permit you to ask that question if you
5 want to bring her back and put her on the stand but when you do
6 that, now, you opening her up to further cross examination on any
7 issue.

8 MR. AXELROD: Absolutely. Absolutely.

9 I'm going to tell - - I'm going to ask her - - -

10 THE COURT: If you want - - if you want to bring her back
11 as your witness and ask her could she have been charged with
12 homicide by child abuse.

13 MR. AXELROD: Which carries twenty to life. Thank you.

14 THE COURT: I'll permit that.

15 Yes, sir.

16 MR. VON HERRMANN: The only thing I would object to is,
17 obviously, I don't want the penalty because she's not charged with
18 that and I don't want the jury to infer that he is charged with
19 that and hear the penalty for it and maybe have some difficulty.

20 THE COURT: Well, no.

21 MR. VON HERRMANN: If she - - if he wants to ask her, "Could
22 you have been charged with homicide by child abuse?", I've got no
23 problem with that. The penalty is absolutely irrelevant.

24 THE COURT: No, sir. I'm going to let - - the case law is
25 against you on that because, ah, while she's not charged with it,

1 she certainly could have been, and the jury may conclude that that
2 was the problem.

3 MR. VON HERRMANN: No, Your Honor. She could not have been
4 charged with homicide by child abuse.

5 THE COURT: Why not?

6 MR. VON HERRMANN: Because there's no evidence she committed
7 homicide by child abuse. We could not sustain probable cause.

8 THE COURT: I'm going to let her - - let him answer that
9 question if he wants to. She could have been charged in the same
10 token that he's charged in that she was the care giver at some
11 point in time.

12 You got him charged with it because at some point in time he
13 was the care giver.

14 MR. VON HERRMANN: But we have no evidence whatsoever that
15 she ever did anything to that child to harm that child.

16 THE COURT: But what specific evidence do you have in this
17 record that he did that?

18 MR. VON HERRMANN: The fact that he was the sole care giver
19 when the child died - - -

20 THE COURT: No, sir. Wait a minute.

21 He wasn't the sole care giver. She was on occasions.

22 MR. VON HERRMANN: At the time of the child's death he was
23 the sole care giver.

24 He was the only one present. He admitted giving the child
25 pseudoephedrine. There's an indication to avoid or to - - -

1 THE COURT: No, sir.

2 If he wants to call her back for that specific question, I'm
3 going to do it on the basis that she has some basis for testifying
4 the way she did.

5 MR. VON HERRMANN: That's fine, Your Honor.

6 THE COURT: And I'm going to do that.

7 MR. AXELROD: Your Honor, just briefly, I want to perfect my
8 record on several things.

9 THE COURT: You got it clear on the record that there was
10 some basis to believe that she was testifying to protect herself
11 when the record reflects that she could have been given twenty
12 years.

13 My view is that's sufficient.

14 MR. AXELROD: Your Honor, Your Honor.

15 THE COURT: But, ah - - -

16 MR. AXELROD: I'll go quickly, Judge, so we can all go to
17 lunch.

18 THE COURT: But I'm not sure you want to open - - this jury
19 understands that even under assistance she could have been given
20 twenty years. Now, whether you want to put her up and open up
21 further cross examination on that issue is up to you.

22 MR. AXELROD: Okay. Thank you, Your Honor.

23 THE COURT: But I tell you that if she gets on this stand
24 for any reason, I'm going to give the Solicitor wide latitude in
25 going through all the various issues in the case.

1 MR. AXELROD: Absolutely, Your Honor.

2 THE COURT: You - - you'll agree with me that the jury
3 knows that she could have been sentenced to twenty years?

4 MR. AXELROD: Yes, sir, Your Honor.

5 THE COURT: Alright.

6 MR. VON HERRMANN: Your Honor, it's up to thirty years is
7 what she testified.

8 THE COURT: I don't believe so.

9 MR. VON HERRMANN: Yes, sir. It's twenty under the aiding
10 and abetting the homicide by child abuse and ten under the
11 intentional infliction. She has two charges.

12 THE COURT: Oh, she - - - yeah.

13 MR. VON HERRMANN: We have absolutely no deal with her.

14 THE COURT: I understand that.

15 Then, I think the jury's entitled to know that - - he's trying
16 to raise the issue that that was the basis for her testifying
17 untruthfully.

18 MR. VON HERRMANN: I'll withdraw my objection, Your Honor.

19 MR. AXELROD: And, Your Honor - - -

20 THE COURT: But, now, you let it be clear that in my view
21 twenty years is sufficient penalty to want to dodge it if they
22 believe that.

23 MR. AXELROD: Yes, sir, Your Honor.

24 THE COURT: Whether or not you want to put her on the stand
25 and open up for further detailed cross examination I'll leave it to

1 you but I'm telling you. That's what's going to happen.

2 MR. AXELROD: Absolutely.

3 Now, I'll move forward.

4 I want to protect the record on several other issues, Your
5 Honor.

6 THE COURT: Alright.

7 MR. AXELROD: I want to renew my objection for the jury pool
8 that we did where the change of venue motions was denied.

9 THE COURT: That's properly done at the end of the case.

10 MR. AXELROD: Your Honor, I want to protect it at each point.
11 I'm just protecting these issues. You give me one minute, and
12 I'll go through them.

13 THE COURT: Go ahead. I will do that for you.

14 MR. AXELROD: Um, I want - -

15 THE COURT: I've ruled on that issue.

16 MR. AXELROD: - - I want to move for a mistrial on the
17 admission of the femur. I believe that State vs. Northcut was
18 completely on point and clearly prejudiced my client on Rule 404.

19 THE COURT: That's respectfully overruled upon the grounds
20 that I made at the time that issue was addressed, and it's in the
21 record.

22 MR. AXELROD: I would ask for a mistrial based on the fact
23 that, you know, we qualified Donna Warrington as an expert without
24 any specialized training. She was the woman from National Medical
25 Service.

1 THE COURT: The record will reflect the basis for my ruling
2 on that issue and my instruction to the jury with regards to her
3 testimony.

4 MR. AXELROD: And my last one, Your Honor, is that without a
5 doubt the chain was not perfected, and, clearly, with a fungible
6 item such as blood that our courts have said that you have to - -
7 on a blood chain you have to perfect each and every link, and,
8 clearly, two links were missing in today's testimony.

9 THE COURT: My view is that that should be denied and it is
10 but for the record let me get the State's position on those issues.

11 MR. VON HERRMANN: Your Honor, the State's position with
12 regards to the chain of issue is was as - - as far as practical it
13 was completed.

14 The only issue, Your Honor, would be the courier. We have one
15 individual that indicates, that's Dr. Kim Collins, indicates she
16 was present while the blood draw - - drew it herself. She put it
17 in a tamper-resistant seal, overnighted it. We have the
18 individual that received at National Medical Services. Say it was
19 in a tamper-proof seal. Said they would not have tested had it
20 been tampered with.

21 THE COURT: The record clearly reflects the chain, and it
22 is intact.

23 MR. VON HERRMANN: Thank you, Your Honor.

24 THE COURT: Now, Mr. Axelrod, I probably need to address
25 the issue at this time with the defendant as to whether he desires

1 to testify or not because I want to start the defendant's testimony
2 right at 2:00.

3 MR. AXELROD: 2:00, Your Honor?

4 THE COURT: What time I tell the jury? 2:30. Yeah, 2:30
5 rather.

6 MR. AXELROD: If I can have one minute to tell Wesley what
7 you're going to ask him about now.

8 THE COURT: That's fine.

9 MR. AXELROD: We've talked about it.

10 THE COURT: We probably need to address that now.

11 MR. VON HERRMANN: Your Honor, at this point at issue as to
12 while he is doing that now, maybe he can cut back on this. We now
13 have thirty-one people for which he's got as witnesses. I haven't
14 had any date of births.

15 MR. AXELROD: We - - we can get that. We can get the date of
16 births for you now.

17 THE COURT: Well, you indicated yesterday, I think. I'm
18 not holding you to it with specificity, it would be about five.

19 MR. AXELROD: Yes, we're breaking it down, and if you want -
20 - we'll get you that now. We have.

21 THE COURT: You - - -

22 MR. AXELROD: I can give him that list now.

23 MR. VON HERRMANN: The only one I've heard about, Your Honor,
24 is thirty-one names.

25 THE COURT: No.

1 Paul, that was your question.

2 At this point now with the State having rested, you know who
3 you going to call.

4 MR. TAYLOR: Yes, sir.

5 THE COURT: Tell him who you going to call. I'm not going
6 to require him to go here during lunch time and check thirty-one
7 names, and I thought you had done it yesterday.

8 MR. TAYLOR: Well, Your Honor, it's not my list. Mr.
9 Axelrod had a list of names.

10 THE COURT: Well, you were addressing that issue yesterday.

11 MR. TAYLOR: I was.

12 THE COURT: Well, I'm tired of fooling with it now. Tell
13 him.

14 MR. TAYLOR: Okay.

15 THE COURT: He indicated yesterday he was talking about - -
16 I'm not holding him to it exactly - - about five.

17 MR. TAYLOR: Yes, sir..

18 THE COURT: Well, of course, if one of his potential
19 witnesses is the mother of the child, you know who that is.

20 MR. VON HERRMANN: I'm sorry, Your Honor?

21 THE COURT: One of the potential witnesses. And one of
22 the potential witnesses is the defendant. You would know who that
23 is.

24 Who - - who are the other witnesses in this thing?

25 MR. TAYLOR: His mother and father and I believe an aunt,

1 and I believe a neighbor.

2 Stuart's got the names. I don't know who the names are.

3 THE COURT: Well, I've already told you now. The character
4 witnesses are going to be limited to three.

5 MR. TAYLOR: I don't even think there's going to be that
6 many as far as the character, Your Honor.

7 THE COURT: Okay.

8 MR. AXELROD: Your Honor, right - - right - - right now we're
9 at one, two, three, four, five, six, seven, eight, nine, ten,
10 eleven, twelve, thirteen - - thirteen plus the police officers,
11 thirteen plus three police officers.

12 And that's whittled it down further.

13 THE COURT: And you going to have to I think whittle it
14 down a lot less than that.

15 I can't imagine unless this alleged incident occurred in
16 William Brice Stadium, I can't imagine it be thirteen witnesses to
17 this incident.

18 MR. AXELROD: Well, Your Honor, the State's put up many, many
19 witnesses, and I would at least allow - - ask for a little
20 latitude, Your Honor, in presenting my case, please.

21 THE COURT: I'll give you all the latitude you entitled to
22 inconsistent with our legal principals but, ah - -

23 MR. AXELROD: That's all I ask for.

24 THE COURT: - - I'll see what they are as we go along, and
25 I'll let you know where they are.

1 MR. AXELROD: Thank you.

2 May we have lunch, now?

3 THE COURT: No, I want to address the one issue.

4 MR. AXELROD: Oh, I'm sorry.

5 CHARGE OF THE COURT TO DEFENDANT/RIGHT TO TESTIFY OR NOT

6 THE COURT: Alright. Have - - alright.

7 Now, Mr. Defendant, we are at that case - - status in the case
8 or time in the case where you, of course, will be permitted to
9 introduce any evidence that you have and appropriate witnesses, and
10 I'm understanding that there will be some at 2:30.

11 You understand that??

12 MR. SMITH: Yes, sir.

13 THE COURT: Alright.

14 Mr. Axelrod?

15 MR. AXELROD: Sir?

16 THE COURT: This is a crucial part of this case. Come back
17 to this table and stay there. This is a very vital part of this
18 whole case.

19 MR. AXELROD: Well, Your Honor, all - - -

20 THE COURT: I don't want you walking around - - -

21 MR. AXELROD: Mr. Taylor was the lawyer - - Mr. Taylor has
22 been with Wesley. He's been the lawyer of Wesley.

23 THE COURT: I want both of you so that if any one of you
24 have any additional inquiry you want me to make, I want you to make
25 it.

1 Now, I want you to fully understand that you have the absolute
2 right to testify under oath.

3 Do you understand that?

4 MR. SMITH: Yes, sir.

5 THE COURT: You have the absolute right not to testify.
6 You are presumed innocent, and you don't have to prove a thing.

7 Do you understand that?

8 MR. SMITH: Yes, sir.

9 THE COURT: If, and I say that advisedly. I don't suggest
10 it one way or the other. If you elected not to testify, I would
11 charge the jury that the failure - - that the fact, not failure,
12 but the fact that you did not testify cannot, must not be used
13 against you. That fact can't even go in - - be discussed in the
14 jury room.

15 You understand that?

16 MR. SMITH: Yes, sir.

17 THE COURT: Now, obviously, you would desire and this is
18 why I want both of you here, you would desire to discuss this issue
19 or have discussed it with your distinguished counsel but the
20 ultimate decision as to testifying or not testifying rests with
21 you.

22 You understand that?

23 MR. SMITH: Yes, sir.

24 THE COURT: You cannot be later heard to say that you
25 wanted to testify but your lawyers wouldn't let you.

1 You understand?

2 I don't suggest that is or is not occurring. I'm just telling
3 you - - we got to have some quiet over there or get them out of
4 there - - so that you will understand that you can't rely
5 ultimately on what the lawyers - - obviously, you would consider it
6 but the decision to testify or not testify is yours and yours
7 alone.

8 You understand that?

9 MR. SMITH: Yes, Your Honor.

10 THE COURT: Alright.

11 In fairness to you, do you have any questions about what I say
12 to you?

13 I be glad to answer them. You would not offend me if you have
14 any questions.

15 MR. SMITH: No, sir.

16 THE COURT: Alright.

17 Do you understand fully your right to testify or not testify?

18 MR. SMITH: Yes, sir.

19 THE COURT: Alright.

20 Can you tell me what your decision is?

21 MR. SMITH: To not testify.

22 THE COURT: Sir?

23 MR. SMITH: To not testify.

24 THE COURT: Alright.

25 And that is your decision?

1 MR. SMITH: Yes, sir.

2 THE COURT: Freely and voluntarily made?

3 MR. SMITH: Yes, sir.

4 THE COURT: The Court will certainly accept it, and I will
5 give the appropriate instructions.

6 Now, Mr. Taylor, on that important issue is why I need Mr.
7 Axelrod here, too.

8 MR. TAYLOR: Yes, sir.

9 THE COURT: Is there any further questions that you would
10 have be propound on that issue?

11 MR. TAYLOR: Only question that I'd ask you ask him is
12 whether or not I forced him to not testify just to make the record
13 clear and protect myself.

14 THE COURT: I understand.

15 Anybody force you not to testify?

16 MR. SMITH: No, sir.

17 THE COURT: I think he's covered it. I told him and I
18 don't mind asking him questions.

19 But you know that you are entitled to discuss their opinions
20 with them but the decision is yours?

21 You cannot be heard to say that somebody forced you not to
22 make that decision. You understand that?

23 MR. SMITH: Yes, sir.

24 THE COURT: I'm telling you if you say, "Judge, I want to
25 testify," I don't care who told you different, you would be

1 permitted to do that.

2 You understand that?

3 MR. SMITH: Yes, I do.

4 THE COURT: Alright.

5 Based on what you're saying now I accept your statement that
6 it is your decision not to testify.

7 Is that right? Sir?

8 MR. SMITH: Yes, sir.

9 THE COURT: You got that in the record, Mrs. McCall?

10 COURT REPORTER: Yes, Your Honor.

11 THE COURT: Mr. Axelrod, you have any questions that you
12 would have me propound?

13 MR. AXELROD: No, sir.

14 THE COURT: Alright..

15 We'll adjourn and be back at 2:30.

16 MR. VON HERRMANN: Thank you, Your Honor.

17 (The Court recesses the trial of this case for lunch and
18 thereafter reconvenes the trial of the case with all parties
19 present in the courtroom.)

20 THE COURT: Alright, sir.

21 Mr. Axelrod, are you ready to being the defense?

22 MR. AXELROD: Yes, sir.. I need to get Mr. Taylor - - -

23 THE COURT: Who?

24 MR. AXELROD: They were just here.

25 THE COURT: Who?

1 MR. AXELROD: My colleagues. Let me just look in the
2 hallway, Judge.

3 THE COURT: don't your colleagues the clock at 2:30.

4 MR. AXELROD: I just want you to be aware, Your Honor, I was
5 here.

6 THE COURT: Well, you be here. We going to bring the jury
7 in, and we're going to start with or without you.

8 Did you get that other issue resolved with Stuart?

9 MR. VON HERRMANN: No, Your Honor, we - - he wants to have
10 the Court hear about it. I don't know.

11 THE COURT: He didn't indicate that. Said that - - wait a
12 minute. You haven't got the jury yet, have you?

13 BAILIFF: No, sir.

14 THE COURT: Sir?

15 BAILIFF: No, sir.

16 MR. TAYLOR: I'm sorry, Your Honor.

17 Mr. Axelrod is wearing off on me.

18 THE COURT: Mr. Axelrod, is there any issues now before me
19 before we start testimony?

20 MR. AXELROD: No, sir.

21 THE COURT: Bring the jury in.

22 (The jury returns to the courtroom at 2:44 p.m.)

23 THE COURT: Good afternoon, Mr. Foreman, ladies and
24 gentlemen.

25 Alright. Call your first witness, please.

1 MR. AXELROD: Lasheka Walker.

2 (The witness takes the witness stand.)

3 LASHEKA WALKER, being duly sworn,
4 testifies as follows:

5 CLERK OF COURT: Please be seated.

6 Please state your full name.

7 MS. WALKER: Lasheka Walker.

8 CLERK OF COURT: Spell your name for the Court.

9 MS. WALKER: L-a-s-h-e-k-a, Walker, W-a-l-k-e-r.

10 DIRECT EXAMINATION BY MR. AXELROD:

11 Q. Lasheka, good afternoon.

12 A. Good afternoon.

13 Q. Can you, ah, can you tell - - tell the jury what you do for a
14 living?

15 A. At the present time I work for Horry County First Step.

16 Q. Okay.

17 I'll back it up.

18 On - - in January of 2004, December, 2003, January, 2004, tell
19 the jury what you did for a living.

20 A. I was employed by the Horry County Department of Social
21 Services as a foster care social worker.

22 Q. And tell the jury what your - - what - - were you a manager or
23 supervisor?

24 A. No. I was a foster care social worker.

25 Q. Okay.

1 A. Just a case worker.

2 Q. Case worker. Foster?

3 A. Foster care.

4 Q. So when a child goes into foster care, you then take over a
5 case?

6 A. Correct.

7 Q. Okay.

8 And tell the jury what you do as a foster care social worker.

9 A. As a foster care social worker, once a child is placed into
10 foster care, I create a treatment plan for the parents to get the
11 child back into their custody. Um, I monitor the case while the
12 child is in foster care. So I maintain contact with the parents,
13 the foster care parent and I set up services for the family.

14 Q. Okay.

15 And in our case in particular, did you become involved in the
16 case with Charlene, Wesley and Minor

17 A. I did.

18 Q. Okay.

19 Tell the jury how you became involved.

20 A. I became involved, um, with Wesley and Charlene and Minor
21 when, um, she was returned back to them.

22 Q. Okay, and do you remember when that was?

23 A. Ah, January, I think.

24 Q. Okay.

25 Now, did they have to have - - did they have to have a

1 babysitter?

2 A. They did.

3 Q. Okay.

4 And tell the jury what you do to tell whether the babysitter
5 or the babysitter's home is sufficient. What do you do?

6 A. Um, we submit a criminal background check for this caretaker,
7 for this babysitter for the child. Um, someone also goes into the
8 home to make sure that the home is suitable for the child to be
9 there during the day or while she's babysitting the child.

10 Q. Okay.

11 And if a home has more than one adult you do a criminal check
12 on the people that are in that home?

13 A. Yes.

14 Q. Okay.

15 I'm going to show you this.

16 THE COURT: Have you seen this document? I don't know
17 what it is.

18 MR. VON HERRMANN: He just showed it to me.

19 THE COURT: Sir?

20 MR. VON HERRMANN: He just showed it to me, Your Honor.

21 MR. AXELROD: He provided it to me.

22 I'll show it to the Court.

23 I'd like to get this marked, please, Defendant's #2.

24 THE COURT: For what purpose is that being introduced.

25 MR. AXELROD: Well, it's showing right now that they checked

1 - - -

2 MR. VON HERRMANN: Your Honor, I'm going to object. It's
3 hearsay. There's nothing in there that's admissible.

4 MR. AXELROD: It's a fax back to her from the police.

5 THE COURT: Well, what is it you think is admissible and
6 for what purpose?

7 MR. AXELROD: It shows they did a background on one person in
8 the home but they didn't do a background check on the other person
9 in the home.

10 MR. VON HERRMANN: Your Honor, that person was not even
11 living in that home.

12 THE COURT: There were two people living in this home, and
13 they only did a one person check.

14 MR. VON HERRMANN: That's not reflective of either one of
15 them.

16 THE COURT: Come here, gentlemen.

17 (Bench conference held off record and in the presence of the
18 jury but outside the presence of the jury.)

19 THE COURT: I don't mind you inquiring as to that
20 individual but that record has no bearing on any issue in this
21 case.

22 MR. AXELROD: It does, Your Honor.

23 THE COURT: I'm telling you - - let's hear your question.

24 MR. AXELROD: Okay. Then we'll determine.

25 Q. Was Patricia Wright the babysitter that was selected th

1 babysit **Minor**

2 A. Yes.

3 THE COURT: Don't ask her - - -

4 Q. Did you check - - -

5 THE COURT: I don't mind you asking her what they said but
6 I'm not going to let the document in.

7 Q. When you checked - - when you checked to see how many people
8 lived in that home - - -

9 THE COURT: Wait a minute, now. That document doesn't
10 have anything to do with how many people lives in the home.

11 MR. AXELROD: This one does.

12 THE COURT: Well, just ask her about it. I don't know
13 what you - - have you seen that one?

14 MR. VON HERRMANN: No, sir.

15 THE COURT: Would you show it to him?

16 MR. AXELROD: I provided it to him. He has a copy of this.

17 THE COURT: Well, he doesn't know which one - - which one
18 you doing unless you at least tell him what you're doing.

19 MR. AXELROD: I'll let him look at it.

20 It's a Rental Agreement that shows two people living in that
21 home.

22 THE COURT: Well, just ask her what she knows. We're not
23 going to put the Rental Agreement in there. Just ask her.

24 MR. AXELROD: Well, I'm going to let her see it.

25 THE COURT: No.

1 MR. VON HERRMANN: My only objection here is lack foundation.
2 This is not the home that Minor lived in. He's - - he's
3 acting like these people lived in the home with the child, and
4 that's not what happened. If he wants to say that it was the
5 next door neighbor or clarify that with some explanation - -

6 MR. AXELROD: Yes. I will.

7 MR. VON HERRMANN: - - I've got no objection but - - -

8 MR. AXELROD: I will - - no, I will. I will. I'll do
9 that.

10 THE COURT: Well, just ask her.

11 Okay.

12 Q. Patricia Wright, the babysitter lived next door. Correct?

13 A. Right.

14 Q. She did not live in the home?

15 A. Correct.

16 Q. And I'm going to show you this Rental Agreement for - - I'll
17 let you look at it for Patricia Wright and tell the jury how many
18 people lived in that home.

19 MR. VON HERRMANN: Your Honor, I object.

20 THE COURT: Wait a minute. What home are we talking about?

21 MR. AXELROD: The babysitter's home.

22 MR. VON HERRMANN: And how would she know?

23 THE COURT: She doesn't know that.

24 MR. AXELROD: I'm letting her look at a Rental Agreement from
25 that time.

1 THE COURT: No, sir.

2 Just ask her - - not from the Rental Agreement, ask her from
3 her own knowledge what she knows.

4 She may or may not ever have seen that Rental Agreement.
5 Take that out of her hand.

6 Just, please, ask her what she knows, and I'll permit you to
7 do it but you not going to put in some Rental Agreement that she
8 hasn't seen or heard of before.

9 Q. When you checked on the amount of people that lived in that
10 home, the babysitter's home, did you ever go to the rental office
11 to see how many people lived there?

12 A. No.

13 Q. Did you ever go to the babysitter's home?

14 A. No.

15 MR. AXELROD: I don't have any further questions.

16 CROSS EXAMINATION BY MR. VON HERRMANN:

17 Q. You don't know that there was ever a babysitter even there, do
18 you other than they provided you a name of a babysitter?

19 A. I'm sorry. Repeat that again.

20 Q. You don't know that - - that Patricia Wright ever babysat the
21 child at all, do you?

22 A. Yes.

23 Q. You under - - you know of at least three days, right?

24 A. Yes.

25 Q. You don't know anytime after February 18th, 19th, do you?

1 A. She fell and injured her leg or foot or something, and so,
2 therefore, she was unable to care for the child anymore.

3 Q. And that was around the 18th or 19th?

4 A. I'm not certain about the date.

5 Q. Three or four days after you took over this case?

6 A. I think so.

7 MR. VON HERRMANN: No further questions, Your Honor.

8 THE COURT: You may come down.

9 (The witness leaves the witness stand.)

10 THE COURT: Next witness.

11 MR. AXELROD: Tara Phillips, Tara Phillips.

12 MR. VON HERRMANN: Your Honor, we're going to have - - Your
13 Honor, I believe with this particular witness, we're going to have
14 an issue of law we need to take up and a motion in limini, Your
15 Honor.

16 THE COURT: Alright, sir.

17 Let you go to the jury room just a minute, and I'll be calling
18 you back.

19 (The jury retires to the jury room ast 2:58 p.m.)

20 THE COURT: Bert, come here a minute.

21 MR. VON HERRMANN: Yes, sir.

22 THE COURT: Both of you.

23 (Bench conference held off the record and outside the presence
24 of the jury.)

25 THE COURT: Alright, what's the issue, now, before me,

1 quickly.

2 MR. VON HERRMANN: Your Honor, if Ms. Reed is going to
3 testify, I have no problem. She was one of the case workers on the
4 DSS case workers. However, Your Honor, there are in her
5 statements particular opinions that where she opines in there that
6 perhaps the - - the mother was covering up for the father or things
7 of that nature in her opinion.

8 THE COURT: I'm not going to admit that. It's not her
9 opinion. That's for the jury to determine.

10 MR. VON HERRMANN: Thank you, Your Honor.

11 MR. AXELROD: Her report says - - she wrote a report - - -

12 THE COURT: Just because it's in the report doesn't
13 necessarily mean it's admissible, and all business records are not
14 admissible if they contain opinions.

15 MR. AXELROD: Her position was she felt - - let me just tell
16 the Court what she said. Okay?

17 THE COURT: I understand.

18 MR. AXELROD: She said that she thought that Wesley was
19 covering up for the mother based on the mother's actions.

20 THE COURT: I'm not going to admit that. I'll let - - you
21 can argue that to the jury.

22 That's for the jury to determine. I can't let her address the
23 final issue. I'm not going to do t.

24 MR. AXELROD: Okay.

25 THE COURT: Now, if you've got any other evidence she can

1 give, I'm not going to exclude her from testifying but she's not
2 going to testify as to one of the major issues in this case as her
3 opinion when she first hasn't heard all of the evidence. That's
4 for the jury to determine.

5 MR. AXELROD: She is the case worker of the case.

6 THE COURT: The case worker is not entitled to an opinion.
7 That's what we've got twelve people for who have heard all of the
8 evidence.

9 MR. AXELROD: She's only to the femur, only to the femur.
10 She was the case worker for the femur.

11 THE COURT: I've got medical testify about the femur. I'm
12 not going to let her opine or give her opinion. It's not
13 admissible in court. She's not a doctor. I'm not going to do
14 that.

15 Now, if you've got any other thing - - I'm not telling you to
16 exclude her. I'm not going to let her have an opinion, ah, based
17 on what she knew at that time. I'm not going to let her testify as
18 to a femur. I'm not going to do that.

19 I know she's competent in what she does, and I don't mean to
20 imply that she's not.

21 Alright.

22 What's your next witness?

23 Any other questions? I don't want to keep running the jury
24 back and forth, now.

25 MR. VON HERRMANN: Your Honor, I mean to be perfectly honest,

1 the only other thing that I can see. The defense has indicated to
2 us the diminished capacity which we've already addressed. He knows
3 better than to do it but - - I thought he would have known better
4 than having a DSS worker try to make an opinion.

5 So, I hate to keep making the jury run in and out. I just
6 don't know what he - - where he's going with it.

7 THE COURT: What's your next witness, Mr. Axelrod?

8 MR. AXELROD: Tara Phillips.

9 Let's just put her up because I won't ask her for her opinion.
10 I won't do that. Okay? I've heard the Court's ruling. I take
11 exception to it.

12 THE COURT: I understand.

13 Is this the same witness?

14 MR. VON HERRMANN: Yes, sir, Your Honor.

15 THE COURT: Alright.

16 Well, he's entitled to call her for whatever she can testify
17 to. I know she's very competent in that which she does.

18 Where is that witness?

19 MS. PHILLIPS: Right here, Your Honor.

20 THE COURT: Alright.

21 We didn't mean to be derogatory in anyway. Just wait right
22 there until the jury comes.

23 MS. PHILLIPS: Okay.

24 THE COURT: I'm not questioning your opinion at the time of
25 your work but it's a question of whether or not - - -

1 MR. VON HERRMANN: Your Honor, I'm not sure if there are any
2 other witnesses of Mr. Axelrod, but, obviously, we would have them
3 reciprocal - - -

4 THE COURT: Yes, if there are any other witnesses for the
5 State, please step out until called - - I mean the defense.

6 Any other witnesses in here.

7 MR. AXELROD: No. These are the family members that you
8 would not allow to testify. So we - - -

9 THE COURT: Wait a minute. I didn't say - - -

10 MR. AXELROD: We picked three or four. We got - - we got a
11 limit.

12 THE COURT: Those who are going to testify I want outside.

13 MR. AXELROD: Yes, sir.

14 THE COURT: Alright.

15 (The jury returns to the courtroom at 2:58 p.m.)

16 THE COURT: Alright.

17 Mr. Axelrod, call your witness, please.

18 MR. AXELROD: Tara Phillips.

19 TARA LYNN PHILLIPS, being duly sworn,
20 testifies as follows:

21 CLERK OF COURT: Please be seated.

22 Please state your full name.

23 MS. PHILLIPS: Tara Lynn Phillips.

24 CLERK OF COURT: Spell your last name for the Court.

25 MS. PHILLIPS: P-h-i-l-l-i-p-s.

1 DIRECT EXAMINATION BY MR. AXELROD:

2 Q. Good afternoon, Ms. Phillips.

3 A. Hi.

4 Q. Tell the jury who you worked for on December 9, 2003.

5 A. I was an investigator for the Department of Social Services.

6 Q. And did you have the opportunity to go to the, I think, the
7 Conway Hospital the evening of December 9, 2003?

8 A. Yes, sir. Yes.

9 Q. And did you go there, in fact, to investigate, um, an alleged
10 broken femur of Minor

11 A. That's correct.

12 Q. Okay.

13 And when you went there did you have the opportunity to meet
14 with both the mother and father?

15 A. Yes, I did.

16 Q. Charlene and Wesley.

17 A. Yes.

18 Q. And tell the jury, um, what was the demeanor of Wesley that
19 evening?

20 A. When I arrived at Conway Hospital, um, Wesley and Charlene and
21 Minor were all in the hospital room. Um, Wesley that night was
22 very attentive to Minor Um, he was caring for her. He was
23 worried about her. Um, he was worried about what was going to
24 happen to her.

25 Whenever we informed him and Charlene that we wer taking Minor

1 into protective custody, um, he became upset, worried, um, not
2 angry or violent upset, just a fear kind of upset attitude.

3 Q. Now, tell the jury the demeanor of Charlene.

4 A. Um, Charlene was quiet. She was standing beside the bed the
5 majority of the time. Um, she was focused on the television that
6 was playing in the room. She didn't ask many questions.

7 The only time that she really spoke was whenever we, myself
8 and the police officers, informed that **Minor** was going to be placed
9 in protective custody, um, and Wesley reacted, she just told Wesley
10 to let them do what they have to do, um, they need to do their jobs
11 kind of thing.

12 She didn't really have much an other - - no other effect. It
13 didn't seem to bother her.

14 Q. You stated in your report, I believe, that Mom seemed
15 uninterested.

16 MR. VON HERRMANN: Your Honor, I'm going to object.

17 A. I'd have to - - -

18 THE COURT: This is your witness, now. Remember that.
19 That's - - -

20 MR. AXELROD: Yes, sir.

21 Q. If you can refer back to your report of 12/10.

22 THE COURT: I'll let her refresh her memory based on her
23 report and then subject her to questions.

24 MR. AXELROD: Okay.

25 If I may, may I let her look at mine because it's different

1 than the one she's looking at?

2 It's her report, though.

3 THE COURT: If it's her report and she identifies it as
4 such, I'll let her refresh her memory.

5 Q. Is that your report?

6 Just look at it.

7 A. Yes, this is my report.

8 Q. If you want to just refresh your memory.

9 THE COURT: Just ask her what the demeanor was. She hadn't
10 contradicted her report.

11 MR. AXELROD: I want her to refresh her memory.

12 THE COURT: Now, you are. You didn't start out correctly.

13 MR. AXELROD: Yes, sir, Your Honor.

14 THE COURT: Alright, Mr. Axelrod. She had an opportunity.
15 Go ahead.

16 Q. Tell the jury specifically more about the mom if you remember
17 now that you've refreshed your memory.

18 A. My notes state that she appeared uninterested and showed no
19 emotion.

20 Q. And did she interact with **Minor** in your presence?

21 A. No. Not until we were getting ready to leave with - - we
22 needed to dismiss the parents from the hospital because **Minor** had
23 to spend the night in the hospital room, and we made arrangement
24 for a babysitter, and whenever we were dismissing Wesley and
25 Charlene, that was whenever - - that was her only time that she

1 showed any grief or - - or any emotion. She didn't want to leave.

2 Q. Which parent overall showed more emotion in your - - -

3 MR. VON HERRMANN: Objection, Your Honor. That's
4 speculation.

5 THE COURT: Well, she was there observing, and she's a DSS
6 working investigator. I'll let her give her impression.

7 She can answer, and if she doesn't know she can say so.

8 A. Wesley was more attentive.

9 Q. Thank you..

10 Answer any questions.

11 MR. VON HERRMANN: Just a couple of questions, Your Honor.

12 CROSS EXAMINATION BY MR. VON HERRMANN:

13 Q. Ms. Phillips, how long had you been employed with the
14 Department of Social Services at the time?

15 A. Between ten and - - nine and ten months, maybe.

16 Q. Had you received any specialized training with regards to
17 investigating?

18 A. I received a three week training upon my hire and training on
19 various topics about that time frame.

20 Q. Just specifically investigating these types of cases, did you
21 feel like you were adequately prepared to investigate these cases?

22 A. My experience from that time with this kind of a case with
23 this serious of an injury, um, some more guidance would have been
24 helpful.

25 Q. And you indicated that she - - that Ms. Dandridge had a fear

1 in your direct testimony. Is that correct?

2 A. Yes.

3 Q. Isn't it very possible that you misread her fear and her fear
4 of having the child taken away from her?

5 A. That is possible.

6 Q. And isn't it your experience as a DSS Worker that people deal
7 with stressful situations and pressure in a different way?

8 A. Yes, they do.

9 Q. And isn't it true that maybe she was relieved that DSS was
10 going to take this child away from them and not allow him to abuse
11 her?

12 MR. AXELROD: Your Honor - - Your Honor, he's asking - - -

13 THE COURT: No, sir. No, sir. That - - that goes beyond
14 your scope of cross examination. That's sustained. She can't
15 possibly - -

16 MR. AXELROD: Thank you, Your Honor.

17 THE COURT: - - know that.

18 Q. Isn't it true that in your investigation you were able to
19 determine that a story that Mr. Smith indicated - - -

20 THE COURT: Wait a minute, now. No.

21 MR. VON HERRMANN: Your Honor, this is a defendant's
22 statement, Your Honor.

23 THE COURT: I understand. Let's hear the question.

24 Q. The question is, "Didn't Mr. Smith give you an indication
25 about how the injury occurred to the femur?"

1 A. Yes, he did.

2 Q. And didn't you after your investigation determine that that
3 was completely inconsistent with the injury sustained by the child?

4 Let me show you - - -

5 A. I would need to refer back.

6 Q. Let me see if this helps you with that.

7 A. Yes.

8 That's correct.

9 Injuries were stated, um, in my investigation and the reports
10 that I received from the doctors in the hospital is that this was
11 a non-accidental injury.

12 Q. And, in fact, how long did you keep this case and investigate
13 it?

14 A. Um, the typical investigation is forty-five days. So,
15 whenever it involved a child in foster care it's right at about
16 thirty.

17 Q. Isn't it true that you transferred this case to the other DSS
18 Worker on 1/9/03?

19 A. The case - - that date is - - I mean, it's a round about date.
20 Um, that was - - those notes mean the actual case file, that my
21 file had to be ready for transfer. The transfers normally happen
22 the date of the merits hearing.

23 Q. Well, isn't it true at the merits hearing that there was a
24 determination made that Mr. Smith should not have this child in his
25 possession alone?

1 A. That is correct.

2 Q. And so if he had this child in his possession, that was in
3 violation of a court order and DSS requirements. Isn't that true?

4 A. Yes, it is.

5 Q. Didn't he indicate to you that he gave the child cough
6 medicine on that particular day?

7 A. Yes, he did.

8 Q. Did he indicate to you that this medicine had contained any
9 pseudoephedrine or any cough medicine?

10 A. When I interviewed Wesley at the police department, he
11 indicated to me that he gave her some cough medicine and is not
12 good with measurements and showed me with his fingertips and a
13 medicine dropper about how much, and it was about an inch, inch and
14 a half in the medicine dropper.

15 Q. And didn't he indicate to you that you didn't know how many
16 times he'd given the child because he couldn't remember how many
17 times he'd given the child the medication?

18 A. I'm going to have to look at my notes to refresh that
19 information.

20 Q. Just take your time.

21 A. Yes.

22 He stated to me that he gave her - - to one time he thinks but
23 cannot remember if he gave her more.

24 Q. And isn't it true that the DSS indicated abuse and neglect on
25 behalf of both parents?

1 A. That's correct.

2 MR. VON HERRMANN: I have no further questions, Your Honor.

3 MR. AXELROD: Yes, sir. I need to ask her.

4 THE COURT: Yes, sir.

5 REDIRECT EXAMINATION BY MR. AXELROD:

6 Q. Tell the jury what it is - - when - - when a case is
7 investigated sometimes the case is founded or unfounded.

8 A. Correct.

9 Q. Explain to the jury because they don't know the language of
10 DSS. Explain to them what founded means and what unfounded means.

11 A. In DSS the process is that we receive a report. We have by
12 law forty-five days to investigate unless it is a court involved
13 case where we have approximately thirty days to do an investigation
14 which was the case in, um, the investigation with the broken femur
15 also with Ebony's death.

16 When we do an investigation, we gather evidence from whoever
17 necessary whether it be schoolteachers, doctors, um, you know, any
18 collaterals, neighbors, any other people that can give us
19 information, and we gather that information.

20 Um, DSS has a founded case and an unfounded case.

21 An unfounded case means that there was no abuse or neglect
22 found in that home situation, and a founded case means that there
23 was abuse or neglect occurring in the home.

24 Q. In - - in the case concerning Wesley was it found for abuse or
25 was it unfounded?

1 A. Which case?

2 Q. The femur.

3 A. That case was founded against an unknown perpetrator for
4 physical abuse because we were unable to determine how the leg was
5 broken and who was responsible.

6 It was founded for medical neglect because - - for both
7 Charlene and Wesley because they failed to seek medical attention,
8 and her break was a few weeks old.

9 Q. Now, you said that Wesley said he gave cough medicine in a
10 dropper about yea much, about yea much.

11 Now, did Charlene tell you that she had bought generic cough
12 medicine for that baby?

13 A. Yes.

14 Q. Who showed more concern the night at the hospital, Wesley or
15 Charlene?

16 A. Wesley.

17 Q. Thank you.

18 RE-CROSS EXAMINATION BY MR. VON HERRMANN:

19 Q. Isn't it true that their six year old child was - - in the
20 home as well?

21 A. Yes, sir.

22 Q. Isn't it possible that Ms. Dandridge what she told you that
23 she bought - - -

24 MR. AXELROD: Your Honor, he's asking the witness to
25 speculate to something that she will not know.

1 THE COURT: Wait a minute.

2 Let me hear the ans - - let me hear the question.

3 Q. Isn't it possible that what she told you is that she bought
4 that medication for the six year old child?

5 A. She did not tell me that. I can't answer that question. She
6 didn't specifically tell me that the medication was for Tyrell.

7 Q. Okay, but she didn't tell you it was specifically for anybody?
8 She just said she bought it?

9 A. Correct.

10 Q. Okay.

11 MR. VON HERRMANN: No further questions.

12 MR. AXELROD: I have one more.

13 REDIRECT EXAMINATION BY MR. AXELROD:

14 Q. Is - - did you take Tyrell away from Charlene as well?

15 A. During this event - - this investigation after Ebony's death,
16 yes, he was removed from the home.

17 Q. And he's not with Charlene today?

18 A. No.

19 Q. Thank you.

20 THE COURT: Come down.

21 Thank you.

22 I'm going to excuse this witness from her subpoena.

23 MR. AXELROD: Yes, sir.

24 THE COURT: And thank you so much.

25 (The witness leaves the witness stand.)

1 MR. AXELROD: Your Honor, we call Isaac Collington.

2 (The witness takes the witness stand.)

3 ISAAC COLLINGTON, being duly sworn,
4 testifies as follows:

5 CLERK OF COURT: Please have a seat.

6 Please state your full name.

7 MR. COLLINGTON: Isaac Collington.

8 CLERK OF COURT: Spell your last for the Court.

9 MR. COLLINGTON: C-o-l-l-i-n-g-t-o-n.

10 DIRECT EXAMINATION BY MR. BAILEY:

11 Q. How you doing today, Mr. Collington?

12 A. I'm doing good, thank you.

13 Q. Good, good.

14 Could you tell the jury where you were employed between the
15 months of October in 2003 and February of 2004?

16 A. At Plantation Apartments, , and that's
17 where I was employed at.

18 Q. Are you still employed there today?

19 A. Yes.

20 Q. What's your job description there?

21 A. I'm a maintenance supervisor.

22 Q. What all does that entail?

23 A. That include, you know, like if somebody leave out the
24 complex, we clean it up, you know, go inside there, you know, and,
25 um, you know, like clean the floors, you know, just do the whole

1 nine yards.

2 If somebody leave out, um, you know, we get to take their
3 stuff out but we - - before we take their stuff out, we'll, um, you
4 know, go the Magistrate Office, um, you know, let them know that,
5 you know, the person, they haven't been back for a while, and then
6 we'll go in and clean it up, and then we just all have a police
7 come, you know, to verify that, you know, we can clean it up.

8 Q. Were you familiar with the location of where Wesley, Charlene,
9 **Minor** and Tyrell lived at Plantation Apartments?

10 A. Yes, I can..

11 Q. Do you know the person who lived next door to Wesley and
12 Charlene?

13 A. It was two preacher womens.

14 Q. Do you recall the names of those women?

15 A. Her name was, um, I know there was two, um - - there was - - -

16 Q. Was there a name that you called her by?

17 A. I called them "preacher woman", you know.

18 Q. Did anyone else in the complex just call her "preacher woman"?

19 A. Yes.

20 Q. Shortly after the incident took place with Wesley, Charlene
21 and **Minor** at their house, what did you observe around the house?

22 A. I observed - - -

23 THE COURT: You said "the incident". You want to clarify
24 what incident?

25 Q. The night that **Minor** was taken to the hospital on February 14,

1 2004, that incident. Okay.

2 Shortly thereafter what happened to the preacher women?

3 A. They left. I mean, I mean, ah, I noticed that, you know, they
4 wasn't there.

5 Q. When you mean they left, did they leave in the middle of the
6 day?

7 A. The middle of the night, you know, somewhere up in there.

8 Q. When you came to work the next morning, did you go to their
9 apartment?

10 A. I knows when I was - - the next day they had told me that the
11 young baby had died, you know, but I went to the apartment, you
12 know, and they was gone.

13 Q. What was the condition of the preacher ladies' house when you
14 arrived there?

15 MR. VON HERRMANN: Your Honor, I'm going to have to object.
16 I'm not sure what relevance any of this has to do with the facts of
17 this case.

18 THE COURT: I'm not either but I'm going to let the jury
19 step out just a minute so I can make inquiry as to where we going
20 with this.

21 Go ahead.

22 MR. VON HERRMANN: Thank you, Your Honor.

23 THE COURT: Be calling you back very shortly.

24 (The jury retires to the jury room at 3:18 p.m.)

25 THE COURT: Alright.

1 Somebody tell me where we going with this witness.

2 MR. AXELROD: Your Honor, Lasheka Walker testified that the
3 next door neighbor, the preacher lady Patricia Wright was the
4 babysitter. He's testifying to what happened to the babysitter's
5 home at some point after that, that the babysitter leaves in the
6 middle of the night and just leaves everything there - - and that -
7 - that's all he's here to testify to.

8 THE COURT: Well, what's that got to do with any issue that
9 the alleged babysitter left to go somewhere in the middle of the
10 night?

11 MR. AXELROD: Moved.

12 THE COURT: Sir?

13 MR. AXELROD: Just disappeared.

14 THE COURT: What's it got to do - - -

15 MR. AXELROD: Vamoose.

16 Or it might go to my case. They vamoosed. They disappeared.

17 If you want me to - - if you want me to ex parte you, I'll
18 come up and I'll tell you but I'm not going to tell the State at
19 this point. I'll tell you at the Bench if you want to hear it.

20 THE COURT: No, I'm not going - - I can't do that. I got
21 to be on the record.

22 If you limit it to the fact that she said she left. I don't
23 know - - I don't know what relevance it is.

24 You have any objection to that statement? I'm not going any
25 further.

1 MR. VON HERRMANN: Your Honor, I mean I don't have any
2 problem with what he's said thus far but I don't want it going any
3 further and what condition her apartment was in and things of that
4 nature.

5 There's no evidence that this child has ever been in this
6 apartment.

7 THE COURT: You talk - - you going to third-party guilt
8 here?

9 MR. AXELROD: No, but what I'm saying is that Social Services
10 testified that the babysitter took care of the baby. I just want
11 to testify that the babysitter moved out, left and left all her
12 belongings, the frozen peas in the freezer. Left her tv set. It
13 was just left. They left.

14 THE COURT: It could have been for a thousand reasons.

15 MR. AXELROD: That's okay but I just want to establish that's
16 what occurred in this instance. That's all.

17 I think he's allowed to do that.

18 THE COURT: Your Honor, I think we've without objection let
19 him do that. I think the inquiry needs to stop here.

20 THE COURT: It is going to stop here.

21 If you want him to say that the babysitter left that night
22 period.

23 MR. AXELROD: And left everything. When she moved out, the
24 day she moved out, she left. Left everything because they gave it
25 all away. I just want him to say that.

1 THE COURT: Well, he can say that. I don't mind that but
2 we not going to why or this, that and the other.

3 MR. AXELROD: No, we're not. We're absolutely not.

4 THE COURT: We're not going into the situation of what her
5 apartment looked like.

6 MR. VON HERRMANN: Your Honor, I believe that has been asked
7 and answered.

8 He indicated she left and left all her stuff there.

9 MR. AXELROD: No, he hasn't said that yet.

10 THE COURT: I'm going to let him say that and then, no
11 more, now.

12 MR. AXELROD: Okay.....

13 THE COURT: Because you hadn't shown me anywhere where that
14 babysitter left has any reference to this case, and you certainly
15 have told me that you're not implying third-party guilt.

16 MR. AXELROD: I'm not.

17 THE COURT: Bring the jury in.

18 Answer that question and that alone.

19 Don't tell me why. We not involved with all that.

20 You understand?

21 MR. COLLINGTON: Yes, sir.

22 THE COURT: You understand. You can ask him did the
23 babysitter leave. You can ask him did she ever come back and then
24 quit.

25 And I still want the record to reflect that as of now I don't

1 see any relevancy but he says he can tie it up, and the fact that
2 the babysitter left for some unknown reason, I'll permit that.

3 Mr. Bailey, you know under the two attorney rule, only one
4 attorney can examine one witness. So, Mr. Axelrod is going to have
5 to reluctantly stay seated.

6 MR. AXELROD: Thank you, Your Honor.

7 THE COURT: You're welcome.

8 (The jury returns to the courtroom at 3:21 p.m.)

9 CONTINUED DIRECT EXAMINATION BY MR. BAILEY:

10 Q. Mr. Collington, do you remember when the babysitter left her
11 apartment?

12 A. I know she left her apartment, you know, like the middle of
13 the night. She left all her belongings in there, I mean,
14 everything, all her clothes, um, everything in the refrigerator.
15 She left the place in a mess, and she never came back, you know.
16 She never came back.

17 Q. Answer any questions the State has.

18 MR. VON HERRMANN: The State has no questions, Your Honor.

19 THE COURT: You may come down, and thank you.

20 (The witness leaves the witness stand.)

21 THE COURT: Next witness, please.

22 You are released from your subpoena.

23 THE COURT: Alright.

24 Let's call your next witness, please.

25 MR. AXELROD: Michelle Conyers.

1 (The witness takes the witness stand.)

2 MICHELLE CONYERS, being duly sworn,
3 testifies as follows:

4 CLERK OF COURT: Please be seated.

5 Please state your full name.

6 MS. CONYERS: My name Michelle Conyers.

7 CLERK OF COURT: Spell your last name for the Court.

8 MS. CONYERS: C-o-n-y-e-r-s.

9 DIRECT EXAMINATION BY MR. BAILEY:

10 Q. How are you doing today, Michelle?

11 A. I'm fine.

12 Q. Good.

13 Can you explain to the jury your relationship with Mr. Wesley
14 Smith?

15 A. Um, he is my cousin. He is my baby cousin.

16 Um, we grew up as sister and brother in the neighborhood that
17 we grew. Everywhere I went, Kyndell went.

18 Q. When you refer to Kyndell, who do you mean?

19 A. Wesley. Wesley which is my best cousin.

20 Q. How much age separates the two of you?

21 A. I'm thirty-four. I can't remember how old Kyndell is.

22 Q. He's a little bit younger than you are, though?

23 A. Yes, a little younger.

24 Q. Do you have any kids, Michelle?

25 A. I have two.

1 Q. How old are your kids? ?

2 A. My kids is twelve and thirteen.

3 Q. The twelve year old, what's his name?

4 A. The twelve, he is - - one is eleven and one is thirteen.

5 Q. The eleven year old?

6 A. The eleven year old is Frederick Brown.

7 Q. And your oldest?

8 A. My oldest is Gregory Conyers.

9 Q. Does Gregory have some type of special relationship with
10 Wesley?

11 A. He love Wesley.

12 Q. When - - when he was born, did they have a special bond?

13 A. Yes.

14 MR. VON HERRMANN: Your Honor, I'm going to have to object as
15 to relevance.

16 THE COURT: I don't know where he's going with it but I'll
17 permit some limited testimony on this.

18 MR. BAILEY: Appreciate it, Judge.

19 THE COURT: Yes, sir.

20 Q. Was there a special bond between your son and Wesley?

21 A. Yes. Wesley was more like a godfather to my son Gregory.

22 Q. Did Wesley live with you at one point in time?

23 A. At one point in time, yes.

24 Q. And you had those children at that time?

25 A. Yes.

1 Q. Did Wesley ever watch those children for you?

2 A. Yes.

3 MR. VON HERRMANN: Objection, Your Honor, as to relevancy.
4 Absolutely nothing to do with this case.

5 THE COURT: Well, I don't know. I'll give Mr. Bailey an
6 opportunity to show me and the jury what it's got to do with it but
7 go ahead.

8 Get to where - - get to the point that you say it's relevant
9 in this case, please.

10 Q. How did Wesley act when he cared for your children?

11 A. He care for my kids like he was the father - -

12 MR. VON HERRMANN: Your Honor.

13 A. - - to them.

14 MR. TAYLOR: Your Honor, it goes directly towards character
15 issues.

16 She's a character witness. He's got to get there.

17 In other words, Rome wasn't built in day. He's got to get
18 there before he can ask the question.

19 THE COURT: Alright.

20 Under the rule, one lawyer at the time, and he's the lawyer.

21 If you - - if you propose to have her as some type of
22 character witness, I'll permit it on that basis. Otherwise, you
23 could have to agree with me it's got no bearing on the case.

24 MR. BAILEY: Judge, she is absolutely a character witness.

25 THE COURT: Well, go - - I'm going to let you do that, and

1 the jury can consider it as they choose.

2 Go ahead.

3 Q. Michelle, how was Wesley when he sat your kids for you?

4 A. He was a normal father like any father would do when they had
5 their kids.

6 Q. Did you know Wesley when he had Wesley, Jr.?

7 A. Yes, I know him. He's a good father to them kids.

8 Q. Did you ever see Wesley hurt Wesley, Jr.?

9 A. No, sir.

10 Q. What about Demetrius?

11 A. No, sir. He treated them like them was his kids. He spoiled
12 them. He do everything that a father will do to them.

13 Q. How about when Wesley had **Minor** How was he then?

14 A. He was a good father.

15 Q. Did you ever see him hurt **Minor** in any way?

16 A. No. No. No, I didn't. He would never hurt that child,
17 never.

18 Q. Would he spoil her?

19 A. Yes, he spoil her. He love her. He show her off to
20 everybody. He would never hurt her.

21 Q. Was he a proud father?

22 A. Yes, he was a proud father.

23 Q. Would you still ask Wesley to babysit your kids today?

24 A. Yes, I will.

25 Q. Please answer any questions the State would have for you.

1 CROSS EXAMINATION BY MR. VON HERRMANN:

2 Q. Ms. Conyers, you said he's your best cousin, brother and
3 sister?

4 A. Brother and sister. We grew up as he was my little brother.

5 Q. Okay, and you're tight with him?

6 A. Huh?

7 Q. You're tight with him? You love him?

8 A. I'm tight with him. I love him.

9 Q. You - - you'd do anything for him?

10 A. I'd do anything for him. He's a good man.

11 Q. You don't want to see him go to jail?

12 A. No, I don't.

13 MR. VON HERRMANN: Your Honor, we have an issue we'd like to
14 take up outside the presence of the, ah, the jury, Your Honor, an
15 issue of law.

16 THE COURT: Alright.

17 I'm going to let you to your jury room for just a minute, and
18 I'll be calling you back but let me say this, Mr. Foreman, so that
19 you'll know.

20 When an attorney ask you to be excused to discuss a matter
21 with me, either way, don't hold it against them. They are simply
22 calling to my attention a possible error of law in the case, and so
23 nobody would deprive you of that which you are entitled to hear but
24 sometimes things come up that has no bearing on the case.

25 So, don't hold it against the plaintiff, I mean the State or

1 the defendant when they ask that you be excused.

2 But I'll be calling you back in just a minute. It won't take
3 me long.

4 (The jury retires to the jury room at 3:30 p.m.)

5 THE COURT: Alright. Before we get too far, what's your
6 question of law?

7 MR. VON HERRMANN: Your Honor, we have a different issue of
8 law that I wanted to bring up to the Court's attention prior to
9 asking this witness because I don't want to - - if the Court rules
10 it is inadmissible, I certainly don't want to take - - run the risk
11 of, um, of a mistrial.

12 Your Honor, she indicated that she - - that she, ah, that
13 Wesley Smith would never hurt Wesley Smith, Jr., the child, and
14 would never to do anything to put that child in danger.

15 Your Honor, in - - in 2003, there was a report made to the
16 Department of Social Services and investigated where the
17 allegations were and, ultimately, Wesley, Jr., Wesley Smith, Jr.,
18 his son was taken into emergency protective custody based on a
19 fight that occurred between this defendant and his father in which
20 the child was struck in the back of the head during the particular
21 instance.

22 My only question is - - -

23 THE COURT: No, I don't want you to go that far. He has
24 not testified and, ah - - -

25 MR. VON HERRMANN: Your Honor, what I would propose to the

1 Court because I do believe if you get into the specifics it would
2 not be correct but I do believe that we would be entitled to ask
3 her if she was aware of the fact that he'd engaged in an
4 altercation in front of the child where the child sustained an
5 injury.

6 MR. TAYLOR: We would object to that, Your Honor.

7 MR. VON HERRMANN: If we can just get one lawyer on that
8 side, Judge.

9 THE COURT: No. I can handle all three of them. That's no
10 problem.

11 MR. VON HERRMANN: Alright.

12 THE COURT: No. It may be relevant but that would be
13 highly prejudicial more than probative. So I - - I'm not going to
14 permit that.

15 MR. AXELROD: Thank you, Your Honor.

16 MR. VON HERRMANN: Your Honor, and we would - - we would
17 offer this just so the Court would know. One of the things we were
18 not going to discuss and that we do believe would be more
19 prejudicial is there is the allegation that a gun or a knife was
20 involved. So we would not offer that but I do think, Your Honor,
21 and I'd ask the Court to at least look at the Department of Social
22 Services report because her indication is, clearly, that he would
23 never do anything around that child to where that child could get
24 hurt.

25 THE COURT: I'm not going to let that in. If he gets up

1 and testifies, we going to let it in.

2 MR. VON HERRMANN: Okay.

3 THE COURT: But I'm not going to let it in through this
4 witness.

5 MR. VON HERRMANN: Thank you, Your Honor, and that's really
6 what I wanted to do.

7 THE COURT: No, sir. I think that would be highly
8 prejudicial.

9 I've weighed it, and the prejudicial effect would be more than
10 the probative value because she is a character witness.

11 MR. VON HERRMANN: I understand, Your Honor.

12 THE COURT: Thank you.

13 MR. VON HERRMANN: That's the reason I wanted to do it
14 outside the presence of the jury.

15 THE COURT: No, I don't want to do that.

16 The jury understands he's like a brother to her, and I
17 appreciate that fact, and she said, "I'll do anything for him."

18 You've asked her to come down which is appropriate.

19 MR. VON HERRMANN: Thank you, Your Honor.

20 THE COURT: Alright.

21 I assume there's no other questions.

22 MR. AXELROD: No, sir, at this point.

23 MR. TAYLOR: No other questions of law. He's got one
24 further question.

25 MR. AXELROD: Well, I think Bert's still doing a re-cross, I

1 believe.

2 THE COURT: No, he's through.

3 MR. AXELROD: Well, we have one question - - we might have
4 one question.

5 THE COURT: What is it before the jury gets here?

6 What's your other question?

7 MR. BAILEY: I just want to ask her if she would lie to
8 protect Wesley.

9 THE COURT: I'll do that based on what he asked her.

10 MR. VON HERRMANN: And, Your Honor, I've got a couple more
11 questions.

12 THE COURT: Alright. Go ahead.

13 MR. AXELROD: I didn't - - I didn't think the Solicitor was
14 done with his re-cross. That's why I said that.

15 THE COURT: I'll handle it.

16 I will permit you to ask any other questions but not on the
17 line that we talked about.

18 And you can ask your one question.

19 (The jury returns to the courtroom at 3:33 p.m.)

20 MR. VON HERRMANN: Thank you, Your Honor. I just have two
21 questions.

22 CONTINUED CROSS EXAMINATION BY MR. VON HERRMANN:

23 Q. Ms. Conyers, you weren't present on February, or, excuse me,
24 December 14th when this child passed away, were you?

25 A. No, I wasn't.

1 Q. And how about any time in January, were you present?

2 A. No, I wasn't.

3 Q. So, in other words, your sister wasn't ever even asked to
4 babysit through January through February when he wasn't even to be
5 alone with the child? You weren't ask to come and babysit, were
6 you?

7 A. No, I wasn't.

8 Q. And are you aware that the child, the child being **Minor**
9 had a spiral fracture to the femur while he was in Mr. Smith's
10 custody and care?

11 MR. BAILEY: Objection, Your Honor.

12 THE COURT: I sustain that. That would be an issue for the
13 jury as to whether or not he was in the custody and care.

14 MR. VON HERRMANN: Thank you, Your Honor.

15 Q. Are you aware that **Minor** had a spiral fracture to her
16 leg?

17 A. No, sir.

18 Q. Are you familiar that the child had seventeen broken rib
19 fractures?

20 A. No, sir. I never aware of that.

21 Q. Are you aware that the child had four times the therapeutic
22 level of an adult of pseudoephedrine in the child?

23 A. No, sir.

24 Q. And you - - are you aware that the child was struck and ended
25 up having re-injured ribs and had four hemorrhaging - - hemorrhages

1 less than twenty-four hours before the child died?

2 A. No, sir. I heard a lot of this stuff after the child had
3 passed away.

4 Q. But you didn't have any involvement from January until
5 February with that child and you're like a sister to him?

6 A. Yes, I was like a sister to him but he was more to his mother
7 house than talking to me because I'm - - I'm basically working.

8 MR. VON HERRMANN: No further questions, Your Honor.

9 MR. BAILEY: Court's indulgence just one moment.

10 REDIRECT EXAMINATION BY MR. BAILEY:

11 Q. Michelle, I just have a couple more questions for you.

12 A. Alright.

13 Q. In the time that you spent with Wesley and Minor how was he?

14 A. He was a good father.

15 Q. Did he do anything specific with her?

16 A. He - - he would do anything that a normal father would do for
17 her.

18 Q. Did he cuddle her?

19 A. Yes.

20 Q. Did he play with her?

21 A. Yes.

22 THE COURT: Now, this is not in - - in answer to any
23 questions that the Solicitor brought up. This is re - - redirect
24 from you.

25 MR. BAILEY: I understand, Judge.

1 THE COURT: Well, follow the rule.

2 Q. Michelle, would you lie to protect Wesley?

3 A. No, I wouldn't.

4 MR. BAILEY: I have no further questions, Judge.

5 THE COURT: And you may come down, and thank you so much.

6 We appreciate your testify.

7 MS. CONYERS: Thank you.

8 THE COURT: Call your next witness, please.

9 (The witness leaves the witness stand.)

10 MR. BAILEY: Your Honor, our next witness will be Connie
11 Rains.

12 THE COURT: Is somebody getting that witness?

13 MR. AXELROD: Yes, sir, Your Honor.

14 (The witness takes the witness stand.)

15 CONNIE RAINS, being duly sworn, testifies
16 as follows:

17 CLERK OF COURT: Please be seated.

18 Please state your full name.

19 MS. RAINS: Connie Rains.

20 CLERK OF COURT: Spell your last name for the Court.

21 MS. RAINS: R-a-i-n-s.

22 DIRECT EXAMINATION BY MR. BAILEY:

23 Q. How are you Ms. Rains?

24 A. I'm good.

25 Q. Good.

1 Could you explain to the jury how you know Wesley?

2 A. Well, Wesley and my boys grew up together. I've known Wesley
3 since he was fourteen years old.

4 Q. What kind of boy was Wesley when he was growing up?

5 A. Funny.

6 Q. Okay.

7 A. Yeah. Usually, he was a little clown.

8 Q. Did you ever meet **Minor** when they brought **Minor** home from the
9 hospital?

10 A. Yes. I was over to the house about, maybe about three days
11 after **Minor** came home from the hospital.

12 Q. What was the atmosphere like in that house?

13 A. It was a lot of people around coming to see the baby, and
14 Wesley was, like, kind of very protective because there was so many
15 people in the house. He was, like, "Watch yourself. Don't get
16 too close. You know, she's young."

17 Q. Did he ever tell you why he was protective of **Minor**?

18 A. No, not really, but he's like that with all his kids.

19 Q. Did you get to hold **Minor** that day?

20 A. No, no, I didn't.

21 Q. Did any family members get to hold **Minor** that day?

22 A. No, I didn't see anybody hold her.

23 Q. But Wesley was protective?

24 A. Yes, he was.

25 Q. Of his newborn girl?

1 A. He was very protective, yes.

2 Q. Did you ever know Wesley when he had Wesley, Jr.?

3 A. Yes, yes.

4 Q. How was Wesley around Wesley, Jr.?

5 A. He was the doting father. That was his firstborn, his son,
6 his namesake, and he was loving and doting, a very doting father
7 towards Wesley?

8 Q. Did he spoil his kids?

9 A. Yes.

10 Q. What kind of things would he do to spoil his children?

11 A. Well, he would spend time with them, get them things, you
12 know. When they -- if he would go in the store and the kids would
13 cry, he would get them what they want even though they were little.

14 Q. Would he - - -

15 A. Toys and, you know, things like that.

16 Q. With **Minor** what kind of things would he get for **Minor**

17 A. I haven't witnessed him getting anything for **Minor** It's what
18 I - - I've witnessed him with **Minor**

19 I didn't go over there that much when **Minor** was born except
20 that time when I went over there to see her when she was born.

21 Q. Did you ever go to his any other time?

22 A. Yes. After she died, the day after she died.

23 Q. How was Wesley that day?

24 A. He was very upset. He was very upset. He was walking, pacing
25 back and forth, cuddling a little teddy bear.

1 Q. What kind of teddy bear?

2 A. Oh, it was brownish, a little brown-skin bear.

3 Q. Do you know whose teddy bear that was?

4 MR. VON HERRMANN: Your Honor.

5 THE COURT: Wait a minute, now. We're going to far. I
6 don't need no testimony about a teddy bear.

7 Go ahead.

8 Q. Did you observe anything else at his house the day after **Minor**
9 died?

10 A. Well, I very bemuffled. The reason I was very perturbed
11 because she was setting in the chair. She was cracking jokes and
12 laughing like, you know. She didn't seem upset to me.

13 Q. And you said this was the day after **Minor** died?

14 A. The day after she died.

15 Q. Answer any questions the Solicitor may have.

16 THE COURT: Thank you, Mr. Bailey.

17 Yes, sir.

18 CROSS EXAMINATION BY MR. VON HERRMANN:

19 Q. Ms. Rains, you've known him, the defendant in this case for a
20 long time, right?

21 A. Yes. Since he was a boy.

22 Q. You don't want to see him get into any trouble, do you?

23 A. No.

24 Q. You don't want to see him go to jail, do you?

25 A. Not really, no.

1 Q. And you'd do anything to protect him that you could?

2 A. Depends on what you mean by anything.

3 Q. You indicated that the last time you'd been over was three
4 days after, roughly, three days after the child was born?

5 A. Yes.

6 Q. So, that would have been, roughly, October 12, 2003?

7 A. I don't really know the date.

8 Q. And you indicated you're close to Mr. Smith. Is that right?

9 A. Yeah. I've known him since he was a boy.

10 Q. But you hadn't seen him from three days after his child was
11 born until the day after the child died?

12 A. Oh, no. I've seen Wesley off and on. Wesley was around me.
13 I haven't gone over to his house.

14 Q. Okay.

15 So you don't know what occurred in the house between October
16 11th and February 14th when the child died because you hadn't been
17 over there. Right?

18 A. No, not - - -

19 Q. So, you don't know if there were personality changes or any of
20 that stuff. You can't tell the jury that, can you?

21 A. No.

22 Q. And are you familiar that just real quick that the child had
23 a spiral fracture femur, four times the therapeutic level of
24 pseudoephedrine, seventeen rib fractures and at least four
25 hemorrhages? Are you aware of that?

1 A. No.

2 Q. So, nobody told you about that?

3 A. No.

4 Q. Is Wesley, Jr., you mentioned doting and how much he loves her
5 and all of that, does he live with her? Excuse me. Does he live
6 with Wesley Smith?

7 A. He did until he broke up with her mom, her mom, his mom.

8 Q. And so that was prior to Minor being born?

9 A. Yes.

10 MR. VON HERRMANN: No further questions. Thank you.

11 THE COURT: Alright. You may come down.

12 MR. BAILEY: Your Honor, I have a few questions.

13 THE COURT: Alright. Sure, that's fine.

14 MR. BAILEY: Thank you.

15 REDIRECT EXAMINATION BY MR. BAILEY:

16 Q. In your observation the day after Minor died, did you feel
17 that Wesley would have hurt Minor

18 THE COURT: Oh, no. Wait a minute, now. That's not a
19 proper question.

20 MR. BAILEY: Alright, Judge.

21 THE COURT: No, you can rephrase the question. That's a
22 question for the jury to determine, not her.

23 Q. Can you tell the jury a little bit more about what you
24 observed in Wesley the day after Minor died.

25 A. He - - he was very upset pacing back and forth. It was like -

1 - like he was lost.

2 Q. Did he talk to you?

3 A. Not really, no.

4 Q. How about Charlene?

5 A. Charlene was in there just like she was at a party. She was
6 just like setting in the chair just out, you know, talking to
7 everybody.

8 Q. Did you see Charlene cry?

9 A. No.

10 Q. One last question.

11 Would you lie to protect Wesley?

12 A. No.

13 MR. BAILEY: No further questions.

14 THE COURT: You may come down.

15 (The witness leaves the witness stand.)

16 THE COURT: Next witness, please.

17 MR. TAYLOR: Your Honor, we call Hazel Smith.

18 THE COURT: Okay.

19 (The witness takes the witness stand.)

20 MR. VON HERRMANN: Your Honor, can we approach briefly?

21 May we approach.

22 (Bench conference is held off the record and in the presence
23 of the jury but outside the hearing of the jury.)

1 HAZEL SMITH, being duly sworn, testifies as
2 follows:

3 CLERK OF COURT: Please be seated.

4 Please state your full name.

5 MS. SMITH: Hazel M. Smith.

6 CLERK OF COURT: Spell your last name for the Court.

7 MS. SMITH: S-m-i-t-h.

8 DIRECT EXAMINATION BY MR. TAYLOR:

9 Q. Good afternoon, Ms. Smith?

10 A. Fine.

11 Q. Ms. Smith, you need some water before we get started?

12 A. No, I'm fine.

13 Q. Okay.

14 Ms. Smith, how are you related to Mr. Smith sitting here
15 behind me over my left shoulder?

16 A. I'm his mother.

17 Q. Okay.

18 So, you're well aware of why we're here today?

19 A. Yes.

20 Q. Tell me how you felt about your grandchild whenever she was
21 born.

22 A. I felt fine. I loved her.

23 MR. AXELROD: Your Honor, if maybe the witness could move up
24 to that microphone a little bit more. I'm having a little hard
25 time hearing her.

1 MR. TAYLOR: I'm sorry, Your Honor.

2 Q. Ms. Smith, how did you feel about your grandchild?

3 A. I loved her. I felt fine.

4 Q. Now, how did you feel whenever she died?

5 A. I was very distraught.

6 Q. Okay.

7 Given the fact that you loved her and she was your grandchild,
8 would you want retribution for somebody if they were guilty?

9 A. Yes.

10 Q. Would you come to court and would you lie about them?

11 A. No.

12 Q. Would you want them to suffer? Would you want them to go to
13 prison?

14 A. Yes.

15 Q. Okay.

16 Therefore, you wouldn't come in here today and lie to this
17 Court and lie to these jurors - - this jury panel to protect your
18 son given the allegations against him?

19 A. No.

20 Q. Thank you.

21 Now, let's talk about the day this child died. Tell me what
22 you know as far as what happened that day concerning the mother,
23 Charlene Dandridge. Tell me what contact you had with her.

24 A. We'd been to the house that morning - - -

25 Q. What house?

1 A. To Charlene, um, apartment after the baby died.

2 Um, Wesley was - - -

3 Q. Okay.

4 How did you get notice that this baby had died?

5 A. Wesley called me.

6 Q. Okay.

7 And you live where?

8 A. I live in St. Stephens.

9 Q. How long did it take you to get here?

10 A. Um, two hours.

11 Q. Okay.

12 Did you meet them directly at the house or at the hospital?

13 A. At the house.

14 Q. Okay.

15 And describe to me how his mother acted who had just lost her
16 daughter.

17 A. She was walking around the house cleaning and then she said
18 she was getting ready to cook something and she was cleaning in the
19 kitchen.

20 Q. Was she crying?

21 A. No.

22 Q. Okay.

23 Anything that gave you - - made you feel weird about how she
24 was acting?

25 A. Yes. With me being a mother that had two children die, yes,

1 I did.

2 Q. Okay, but you discussed with her over what happened?

3 A. Yes.

4 Q. Did you feel she was in shock?

5 A. At first I thought she was in shock.

6 MR. VON HERRMANN: Objection, Your Honor. It calls for
7 speculation.

8 MR. TAYLOR: Your Honor, she was there.

9 THE COURT: I will permit her to give her observations
10 about it.

11 Q. Tell me how she acted.

12 A. She acted fine. She was walking around the house cleaning
13 and in the kitchen straightening up stuff in the kitchen.

14 Q. Okay.

15 Did you - - how long of a conversation did you have with her?
16 Over what period of time did you spend with her?

17 A. We were there all day.

18 Q. Okay.

19 Um, how long did you actually stay with Ms. Dandridge?

20 A. We stayed there until the detective came and took them both
21 for questioning.

22 Q. How long was that?

23 A. I think it was between six and seven hours.

24 Q. Okay.

25 Over that period of time, did she cry one time?

1 A. No.

2 Q. Tell me about your son. What was his reaction?

3 A. He was laying down on the chair crouched up with the teddy
4 bear, and I asked him what was wrong, and he said that he was
5 upset, and they had given him a lot of medicine because he couldn't
6 get his seizures under control after the baby died.

7 Q. Okay.

8 Alright.

9 Now, you've actually had previous contact with Ms. Dandridge
10 other than this. They were together for a while dating, weren't
11 they? How long did they date?

12 A. I think almost a year.

13 Q. Okay.

14 Now, let's talk about that.

15 Does she have - - does she have any other children?

16 A. She has a son.

17 Q. Okay.

18 Throughout that year of dating was there any allegations of
19 abuse by my client towards this other child?

20 A. No.

21 MR. VON HERRMANN: Objection, Your Honor.

22 THE COURT: No, sir. Now, I'm going to sustain that
23 because we're not concerned with any other situation. We concerned
24 with this one.

25 MR. TAYLOR: Yes, sir. I'll withdraw the question.

1 Q. Alright.

2 Well, let's talk about the mother then throughout the time the
3 child was born, this child being **Minor** the child why we're here
4 today.

5 Tell me how she acted with the child.

6 A. She acted a little distant.

7 Q. How did she act when the child cried is more important?

8 A. She seemed like she couldn't handle it. She always would pass
9 him off to Wesley.

10 Q. And how many people actually were around this child on a
11 constant basis?

12 A. Me, my husband, my daughter, Wesley and Charlene.

13 Q. The child was actually at your house - - has the child ever
14 stayed at your house?

15 A. Yes.

16 Q. How long?

17 A. She stayed every weekend.

18 Q. Okay.

19 Describe to me Charlene's temperament.

20 A. I never saw her with a temper.

21 Q. Uh-huh.

22 What about discipline with her son, Tyrell?

23 A. I've seen her once, like, grab him by the arm.

24 Q. Okay.

25 And what did she do?

1 A. She just tell him he couldn't go outside because he had
2 asthma.

3 Q. Okay.

4 Have you ever seen Minor give any cough medicine to this
5 child? I mean, excuse me, did you ever see Charlene give cough
6 medicine to the child Minor

7 A. No.

8 Q. Did she discuss with you that she was taking cough medicine?

9 A. She told me she was taking cough medicine and some other
10 medication. I think it was like an asthma pump.

11 Q. Alright.

12 Who was the primary caretaker of this child when this child
13 was staying with you, Wesley or the mother?

14 A. It was Wesley.

15 Q. Okay.

16 What exactly did Charlene do whenever the child was at your
17 house as far as care giving towards this child?

18 A. She would change her diaper sometimes, wash her off sometimes.

19 Q. Okay.

20 When you said sometimes, how often was that throughout, say,
21 the course of a day?

22 A. About twice.

23 Q. Okay.

24 How often would Wesley do it?

25 A. Wesley did it about three or four times.

1 Q. Okay.

2 Alright.

3 Whenever the child would cry during the night, who was the one
4 who would get up and take care of the child at your house?

5 A. Wesley.

6 Q. Did - - how did Wesley treat the child?

7 A. He treat her good.. He loved her.

8 Q. Okay.

9 When you say "good", I mean, how did he treat her as far as
10 taking care of the child throughout the day from the time the child
11 woke up?

12 A. He took very good care of her. He would hold her and rock her
13 in his arms like this - - and he would sing to her and talk to her.

14 Q. Did he ever lose his patience with the child?

15 A. No.

16 Q. Did he ever complain about the child crying all night?

17 A. No.

18 Q. Having to care for her?

19 A. No.

20 Q. Okay.

21 Did he ever complain about Charlene not helping him out with
22 the child - - the care of the child?

23 A. No.

24 Q. Alright.

25 Tell me about what happened the day of the funeral. Tell me

1 about how the mother was acting the day of the funeral.

2 A. We went to the funeral. Charlene went with us, me, her and
3 Felicia. We were all sitting around the coffin, and she was just
4 sitting there staring at the baby.

5 Q. Okay.

6 A. And I was like is she going to cry all over or what? And she
7 just sat there staring at the baby.

8 Q. At a point in time when you found that the child, you said
9 whenever they were arrested or the last contact that you had with
10 Charlene, how many times did you actually see her cry over this
11 baby, her baby dying?

12 A. None.

13 Q. How many times did you see your son cry over the same child?

14 A. I saw him cried a lot even when I visited him in jail.

15 Q. Again, let's go back to your children. You've lost two
16 children?

17 A. Yes.

18 Q. Given that fact and your experience with that, do you feel
19 that - - what is your position on this mother not crying?

20 MR. VON HERRMANN: Objection, Your Honor.

21 THE COURT: Wait a minute. I sustain that.

22 It's not her position. It's for the jury to determine from
23 the facts and testimony in the trial of this case. She hasn't
24 been her. Hasn't heard the testimony. Knows nothing about it.

25 I sustain that objection.

1 She's here as a character witness as I understand it?

2 MR. TAYLOR: Yes, sir.

3 Court's indulgence.

4 THE COURT: Yes, sir.

5 Mr. Taylor, of course, the record will reflect that I'm
6 permitting her to testify as a character witness, and I'm
7 permitting her to testify as to the demeanor of anybody that she
8 observed of interest in the case but I'm not going to let her give
9 the ultimate - - her position as to the ultimate issue.

10 MR. TAYLOR: I understand, Your Honor, and I'm - - -

11 THE COURT: Alright.

12 And as to those two issues as to what she observed and as her
13 character, I have not limited you in that regard.

14 MR. TAYLOR: Yes, sir.

15 Q. Ms. Smith, was there actually a period in time from January
16 15th to January 23rd when you had the child in your possession, had
17 **Minor** and both the mother, Ms. Dandridge, and your son were not
18 present. They were back up here, and you were caring for the
19 child?

20 A. Yes.

21 Q. Alright.

22 And why did the child come back to my client's possession as
23 well as the mother's custody, um, in January - - on January 24th?
24 What happened that caused the child to come back early?

25 A. We were just keeping her for a little while, and then we sent

1 her back with Wesley and Charlene.

2 Q. Alright.

3 So, they didn't actually have custody of the child for that
4 period of time in any way, shape or form?

5 A. I had -- I had her for those period of time.

6 Q. Ms. Smith, I have no further questions. Please answer any
7 that Mr. Von Herrmann may have.

8 A. Okay.

9 CROSS EXAMINATION BY MR. VON HERRMANN:

10 Q. Good afternoon.

11 A. Good afternoon.

12 Q. Ms. Smith, I have just a few questions.

13 Are you aware that as of December 9, 2003, that your son
14 wasn't to be with Minor alone?

15 A. Yes.

16 Q. You did know that?

17 Tell me again what the dates were that, ah, you had the child
18 alone in your custody?

19 A. It was from January 15th to, I think, the 25th.

20 Q. Are you absolutely sure about that?

21 A. I know in January somewhere along up in there we had the baby
22 for about a week.

23 Q. But you're not sure about the date?

24 A. I think it was January 15th.

25 Q. Okay, but you're not sure what the ending date was?

1 A. I know it was a week.

2 Q. Okay.

3 Mr. Taylor asked you on direct examination if it ended on the
4 23rd, and you indicated yes. So, it could have really been a
5 couple of days before or a couple of days after. Correct?

6 You're just not sure about the dates. I'm not trying to
7 confuse you.

8 A. I'm not sure about the dates.

9 Q. Okay. That's fine.

10 And you indicated that Mr. Smith, the defendant here, was on
11 a lot of medication after the child died.

12 A. Yes.

13 Q. And, obviously, you loved your grandchildren. There's no
14 question about that.

15 A. Yes.

16 Q. So that's the reason you let them stay with you every weekend,
17 right?

18 A. Yes.

19 Q. And that had become a regular habit for you to have had them
20 on the weekend.

21 A. Wesley and Charlene was there, too.

22 Q. Okay.

23 What day did Minor [REDACTED] pass?

24 A. I don't remember.

25 Q. Would it surprise you that if I told you that on February 14,

1 2003, that it was a Saturday afternoon, and they hadn't been to
2 your house on the weekend?

3 A. They hadn't been to my house - - -

4 MR. AXELROD: Your Honor, just for clarification, **Minor**
5 actually died in 2004.

6 THE COURT: Wait a minute.

7 MR. VON HERRMANN: Your Honor, I don't mind responding to
8 lawyers but it getting very difficult to respond to three lawyers.

9 THE COURT: I understand.

10 MR. AXELROD: Well, he had the wrong year. I think it's just
11 for the record.

12 THE COURT: Wait a minute, now. Listen.

13 This witness is Mr. Taylor's witness. If there's any problems
14 with her testimony, let Mr. Taylor tell me about it.

15 MR. TAYLOR: Your Honor, again, he's asking a specific date.

16 THE COURT: Yes, sir.

17 MR. TAYLOR: It was four years ago. There's no reason - - -

18 THE COURT: Well, no. He's asking her whether it was a
19 Saturday or a Sunday.

20 Go ahead.

21 MR. VON HERRMANN: We'll get it right.

22 THE COURT: I understand.

23 Q. In other words, when you told this jury that they came to your
24 house every weekend, that was not the truth?

25 A. They be to my house every weekend except for the weekend that

1 she died.

2 THE COURT: If there's any question about it, you tell me,
3 and I'll look at a calendar, and I'll take judicial notice of
4 whether that date was a Saturday or Sunday.

5 MR. VON HERRMANN: Yes, sir.

6 There's no problem. I think we all agree. I hope we all
7 agree it was a Saturday.

8 THE COURT: You don't disagree with the 14th, do you?

9 MR. TAYLOR: No, sir. I don't disagree.

10 THE COURT: Alright.

11 MR. TAYLOR: I've haven't looked at a calendar for four
12 years ago. I don't know whether it was a Saturday - - -

13 THE COURT: Well, if you need to look at one, I'll get one
14 for you but go ahead.

15 Q. You indicated that you were with Ms. Smith on the entire night
16 after **Minor** died. You said some six or seven hours.

17 A. Yes.

18 Q. What time did you get to that house?

19 A. It was in the morning between seven and eight.

20 Q. So, in other words, it wasn't the night the child died because
21 the child died about 8:00 on Saturday afternoon - - Saturday
22 evening?

23 A. Yes.

24 Q. So, really, you weren't around the child - - Ms. Smith between
25 Saturday night and, you know, for thirteen hours. Correct?

1 A. Yes. They called me from the hospital.

2 Q. I understand but you didn't see her. You don't know what her
3 demeanor was like for those thirteen hours?

4 A. No.

5 Q. You don't - - you don't know whether she was taking medication
6 and sedated, were you?

7 A. No.

8 Q. And you don't know, in fact, how she deals with stress?

9 You'd agree with me that some people deal with stress in
10 different ways? Some people might become quiet. Some people
11 might become erratic. You would agree with that, wouldn't you?

12 A. Yes.

13 Q. And Ms. Dandridge, there's no question, was a strong person in
14 your family, correct? She took care of your son. She took care
15 of your grandchildren. Correct?

16 A. Yes.

17 Q. And there's no question that part of what she had to do during
18 that time period is she had to take care of Tyrell, and she had to
19 take care of Wesley Smith, too. Isn't that true?

20 A. Yes.

21 Q. And you weren't really with her the entire six or seven hours
22 on Sunday afternoon, were you? She left at particular times,
23 didn't she?

24 A. She left with us. We took her to - - -

25 Q. Did she ever use the restroom during those six or seven hours?

1 A. They questioned her at the M. L. Brown Building.

2 Q. No, ma'am. What I'm saying is when you went over there
3 Sunday morning, you indicated to the defense counsel that you were
4 with her some six or seven hours, and you observed her demeanor?

5 A. Yes.

6 Q. But there were times in that six or seven hours you weren't
7 with Charlene Dandridge.

8 A. She never went to the bathroom. She was in there cleaning the
9 kitchen.

10 Q. So, she spent six or seven hours cleaning the kitchen?

11 A. Cleaning the kitchen and walking around the house talking to
12 us.

13 Q. And you were in the kitchen the entire six or seven hours?

14 A. I was with her.

15 Q. And there was a lot of people coming over, wasn't there?

16 A. No.

17 Q. There wasn't a lot of people that coming over, family,
18 friends, Aunt Lulu, people like that?

19 A. No.

20 Q. To check on the family?

21 A. No.

22 Q. With a child dying, wouldn't you expect people to come check
23 on the child?

24 MR. TAYLOR: Your Honor, that's been asked three times and
25 she - - three different ways.

1 THE COURT: I would think so. I sustain - - let's move on
2 to another issue.

3 Q. Would it be uncommon to clean the house if you believed that
4 a bunch of people are going to come over? Would that be uncommon?

5 A. No.

6 Q. Would it in your mind be uncommon to stay busy when you're
7 faced with such a tragedy of losing a child - - to try to keep your
8 mind off of it?

9 A. No.

10 Q. You indicated that Wesley was the primary care giver to this
11 child. Is that not correct?

12 A. Yes.

13 Q. And you never saw this child take any cough medicines, did
14 you?

15 A. No.

16 Q. And are you aware of the substantial injuries this child
17 sustained between December - - or November 23rd and the day the
18 child died?

19 A. I was told.

20 Q. What were you told about that?

21 A. That she had broken ribs.

22 Q. How many broken ribs were you told?

23 A. They didn't tell me how many. They just said she had broken
24 ribs and she had an overdose of cough medicine.

25 Q. Did they indicate to you that there was a spiral fracture that