

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2012-CP-40-01543
Appellate Case No. 2013-001287

Randy Thomas, ... Petitioner

v.

State of South Carolina, ... Respondent.

APPENDIX
VOLUME ONE

Matthew A. Abee, Esquire
Nelson Mullins Riley & Scarborough,
LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000
ATTORNEY FOR PETITIONER

Megan E. Harrigan, Assistant Attorney General
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3319
ATTORNEY FOR RESPONDENT

**APPENDIX
INDEX**

VOLUME ONE

Order of Dismissal May 7, 2013	1
Post Conviction Relief Hearing Transcript January 16, 2013 with Exhibits.....	23
Argument of Attorneys	25
Testimony of Randy Thomas.....	53
Direct of Goldberg	53
Cross of Corney.....	64
ReDirect of Goldberg	68
Testimony of John Trahune Burnett.....	69
Direct of Goldberg	69
Cross of Corney.....	72
Testimony of Kimberly Klasnic.....	73
Direct of Goldberg.....	73
Cross of Corney.....	76
Testimony of Lanelle Durant	107
Direct of Corney	107
Cross of Goldberg	120
ReDirect of Corney.....	126
Exhibits to Hearing.....	133
Amended Application for Post Conviction Relief December 21, 2012	163
Return to Application for Post Conviction Relief July 30, 2012	167
Post Conviction Relief Application February 23, 2012	174
Remittitur March 7, 2011	180
Supreme Court Order Denying Petition for Writ of Certiorari March 2, 2011	181
Appendix to Petition for Writ of Certiorari	183
Return to Petition for Writ of Certiorari to the Court of Appeals February 5, 2010.....	225
Petition for Writ of Certiorari to the Court of Appeals January 2010	250
Court of Appeals Order denying Petition for Rehearing October 26, 2009	277

Petitioner's Petition for Rehearing September 24, 2009	279
Record on Appeal Volume 1 October 27, 2008	294

VOLUME TWO

Record on Appeal Volume 1 October 27, 2008 - Continued	501
Record on Appeal Volume 2 October 27, 2008	1001

VOLUME THREE

Record on Appeal Volume 2 October 27, 2008 - Continued	1002
Final Brief of Appellant October 27, 2008	1141
Final Brief of Respondent October 22, 2008	1180
Transcript of PreTrial Motions Hearing February 2, 2006	1212
Supplemental Trial Transcript pages presented to PCR Court	1246
STATE Exhibit 72	1331

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Randy B. Thomas, #313802,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2012-CP-40-01543

ORDER OF DISMISSAL

PROCEDURAL HISTORY

This matter comes before the Court by way of an application for Post-Conviction Relief (PCR) filed February 23, 2012, and amended December 21, 2012. An evidentiary hearing into the matter was convened before this Court on Wednesday, January 16, 2013, at the Richland County Courthouse. Applicant was present at the hearing represented by attorneys Kristy Grafton Goldberg, Esquire; Lisa Armstrong, Esquire; and Jason Peavy, Esquire. Respondent was represented by Robert D. Corney of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Also testifying were Applicant's former trial attorney, LaNelle DuRant, Esquire, and two character witnesses for Applicant. This Court also had before it a copy of the transcript of the proceedings against Applicant, the records of the Richland County Clerk of Court, the documents related to Applicant's direct appeal and Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the February 2005 term of the Richland County Grand Jury for Criminal Sexual Conduct – First Degree, Assault and Battery of a High



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and Aggravated Nature and two (2) counts of Kidnapping (2005-GS-40-10296 through -10299). He was represented by then Richland County Public Defenders LaNelle DuRant, Esquire, and Jeanette VanGinhoven, Esquire, on the charges. On February 6, 2006, Applicant proceeded to jury trial before the Honorable James W. Johnson, Jr., where he was convicted of the charges as indicted. Judge Johnson sentenced Applicant to twenty-two (22) years imprisonment each for Kidnapping and Criminal Sexual Conduct, as well as ten (10) years imprisonment for ABHAN. All sentences were ordered to run concurrently.

A notice of appeal was filed and an appeal was perfected on Applicant's behalf. Chief Appellate Defender Robert Dudek of the South Carolina Office of Appellate Defense represented Applicant on the appeal. By unpublished opinion filed September 10, 2009, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. On March 2, 2011, the South Carolina Supreme Court denied Applicant's subsequent Petition for Writ of Certiorari. The remittitur was issued March 7, 2011.

In the current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons¹:

- a. Trial counsel failed to investigate allegations introduced through Lyle evidence and accordingly failed to sufficiently prevent this Lyle evidence from being introduced to the jury,
- b. Trial counsel failed to object or request a mistrial based upon admitted violation of the Sequestration order by witnesses,
- c. Trial counsel failed to object or request a mistrial based upon Solicitor's improper argument as to flight,
- d. Trial counsel failed to present positive character evidence during the jury trial,
- e. Trial counsel failed to sufficiently object or request a mistrial in response to the State offering testimony regarding the magistrate's denial of bond for the Defendant.
- f. Appellate counsel was ineffective in failing to raise the issue of the trial court's refusal to charge false imprisonment as a lesser

¹ At the start of the evidentiary hearing before this Court, Applicant expressly waived allegation (a) regarding the Lyle hearing.

10. State concisely and in the same order the facts which support each of the grounds set out in (9).

- a. Trial counsel's file reveals the existence of witnesses whose testimony would have been material to the pre-trial determination of whether prior conduct was admissible under *Lyle*.
- b. Trial counsel was ineffective by failing to object or move for a mistrial based upon the testimony of a defense witness who was contacted by the alleged victim, Lauren Byrd, during the trial and in violation of the Court's sequestration order, (ROA p. at 63, at p. 165). Ms. Byrd's actions were contempt of court and denied Applicant a fair trial.
- c. Trial counsel erred in failing to object to the Solicitor's improper argument that Applicant fled after the alleged crime. In an *in camera* setting, counsel for the state and defense agreed not to mention Applicant's hospitalization at a mental health facility to which he had been "committed" after the alleged crimes and prior to his arrest. Applicant did not "flee" from law enforcement. The lapse of time between the alleged crimes and Applicant's arrest was not due to anything even remotely akin to "flight" but was done by way of a mental health commitment. The prosecution knew this and either through inadvertence or intent argued "facts" that were erroneous and highly prejudicial to the Applicant. These types of arguments have been universally condemned. See *Napue v. Illinois* 360 US 264 (1959); *Giglio v. United States*, 450 U.S. 150 (1972).
- d. Trial counsel was ineffective by failing to present positive character evidence to rebut the character evidence introduced by the State. The character of a Defendant is generally admissible under South Carolina Rule of Evidence 404(a)(1). Furthermore, once the State was allowed to enter evidence of prior bad acts against the Applicant to disparage his character, the Defense would have been further entitled to submit evidence of character to rebut same. Defense counsel stated in mitigation that she was in possession of "16 letters of character references" which were provided prior to trial. Terry Burnett, an employee of the South Carolina Bar Association, provided one

of these letters and was present in court and spoke during the sentencing proceeding. The statement of Mr. Burnett in the transcript reflects what Mr. Burnett would have stated if called to testify in front of the jury and establishes prejudice.

- e. Trial counsel was ineffective by failing to request a mistrial or even object in response to the State offering testimony regarding the magistrate's denial of bond. An objection or request for a mistrial would have been necessary and proper under the South Carolina Rules of Evidence Rule(s) 401, 403 and the law regarding hearsay. This testimony was overtly prejudicial as it informed the jury that another judge had reviewed the case and determined it was appropriate to deny bond for the Applicant as it implied that he was a danger to the community and/or a flight risk.
- f. Appellate counsel failed to raise the trial court's error in denying defense counsel's request for a charge of false imprisonment as a lesser charge to kidnapping. There were sufficient in the record to support Applicant's entitlement to the lesser-included jury charge.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient

performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. This Court finds Applicant has failed to satisfy his burden in proving those elements as they relate to each of the allegations set forth by Applicant.

Cumulative Error Analysis

As a preliminary note, this Court would note it is an unsettled question in South Carolina at this time whether multiple deficiencies which, standing alone, do not sufficiently satisfy the prejudice requirement of the Strickland v. Washington test for ineffectiveness may be combined to prove resulting "cumulative prejudice". To date, this so-called "cumulative error analysis" has not been recognized as a sufficient legal standard by either the South Carolina Court of Appeals or South Carolina Supreme Court for satisfying the prejudice prong of Strickland v. Washington. See Lorenzen v. State, 376 S.C. 521, 535 n. 3, 657 S.E.2d 771, 779 n. 3 (2008); Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318 (2002); Walker v. State, 397 S.C. 226, 243, 723 S.E.2d 610, 619 (Ct. App. 2012). Accordingly, this Court declines to conduct its analysis under such an unendorsed standard, but rather will adhere to the sanctioned legal standard set forth in Strickland v. Washington. Additionally, as set forth below, this Court finds no instances of deficiency in counsel's performance; therefore, even if cumulative error analysis were proper for evaluating multiple deficiencies, such a standard is inapplicable in this instance.

Violation of Sequestration Order

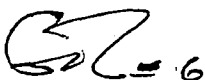
Applicant first contends counsel was ineffective for failing to object to and move for a mistrial based upon the testimony of a state's witness which Applicant alleges showed the court's sequestration order was violated by Victim during trial.

On February 2, 2006, a pretrial hearing was held on Applicant's case at which counsel made a motion for sequestration of witnesses. The trial judge responded by saying they would "deal with [that request] on Monday", when the trial was scheduled to start. At the start of trial that following Monday, a pretrial Lyle² hearing was held for the court to determine the admissibility of a prior sexual assault on Victim by Applicant. At the start of that hearing, prior to Victim's testimony, the trial judge granted counsel's motion for sequestration and instructed the courtroom that "all other witnesses, State and defense witnesses cannot be in the courtroom during the trial [a]nd...cannot discuss [their] testimony or anybody else's testimony with any other witnesses." The next morning, after clarifying the Lyle rulings admitting the prior incident, the Court reminded the two witnesses who remained in the courtroom of the sequestration order, its meaning and the penalties associated with violation of that order.

At the PCR hearing, Applicant contended counsel was ineffective for failing to object to the testimony of James Aakhus where he revealed Victim had contacted him during the course of the trial in violation of the sequestration order. Aakhus was a friend of Applicant's whose testimony was, in large part, related to his observations of Applicant and Victim's relationship. Aakhus testified he lived "right across" from Victim in her apartment complex in Clemson. Aakhus noted he was friends with both Victim and Applicant, and briefly discussed a visit he made to see Applicant in Columbia in 2004. Aakhus testified that visit occurred in 2004 and, although he wasn't "really sure of the time", he knew one of the trips he made to Columbia occurred in August. He testified Victim and Applicant were no longer together at the time of one visit, but described riding to Victim's house with Applicant for Applicant to speak with Victim.

On cross-examination, Aakhus stated he "wasn't really sure" when the trip to Victim's house occurred and said he "[didn't] recollect" talking to Victim on the phone on "Monday

² State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

 6

night". When questioned further, Aakhus agreed he remembered telling Victim at one point he believed that visit was in June or July of 2004, but later clarified, saying he wasn't "real sure" what month the visit occurred in and he "never really state[d] what month to be exact". Applicant did note Victim had "called [him] up asking...if [that visit] was in September", but said he "hadn't even thought about the timing at all at that point". Aakhus finished by noting he and Victim had talked about the case in the past and said Applicant had asked him to discuss the case with Victim previously.

Applicant contends this testimony from Aakhus should have been objected to by counsel and a motion for mistrial made as the testimony goes to show Victim contacted Aakhus during the trial to discuss his testimony in violation of the sequestration order. Applicant argues the timing of Aakhus's visit to Columbia was a "big part" of the trial as it went to show Applicant and Victim had personal interaction in the time between the two sexual assaults. At the PCR hearing, counsel testified she did not believe Aakhus's testimony was "that damaging" and stated she did not believe it changed the outcome of the case as there was plenty of evidence to convict Applicant, regardless of the timing set forth through Aakhus's testimony.

After a thorough review of the trial transcript, along with the arguments made at the PCR hearing, this Court finds Applicant has failed to carry his burden in proving counsel was ineffective in this regard. First, the failure to object to and/or move for a mistrial based upon Aakhus's testimony was not objectively unreasonable. The testimony given by Aakhus was imprecise and vague as to timing, and failed to establish a sufficient timeline to have any *real* impact on the outcome of the case, especially when considered with the entirety of the evidence and testimony presented against Applicant at trial. Therefore, counsel was not deficient in failing to object to the testimony given by Aakhus as a result of the alleged improper contact.

Further, this Court finds the record does not give any clear indication as to whether Victim *actually* spoke with Aakhus during the trial in violation of the sequestration order. Aakhus readily conceded at trial he and Victim spoke about the case over the year-and-a-half between the incident date and the start of trial as the two were neighbors and close friends. Aakhus's testimony about his conversations with Victim is unclear as to whether those conversations occurred prior to trial or during trial.

(From Trial Transcript Cross Examination of Witness James Sheldon Aakhus by Ms. Garfield):

Q: So did you go to Lauren's family home?

A: Yes, I did.

Q: Do you recall about when that was?

A: I'm not really sure.

Q: Do you remember talking to Lauren on the phone Monday night regarding that particular time?

A: I don't recollect.

Q: Do you recall telling Lauren that you believed that you went to the home around June or July of 2004?

A: Yes.

Counsel made this clear in her PCR testimony where she noted the state *contended* such a conversation had occurred, but she was unable to confirm such a conversation ever actually occurred. Based on the trial testimony, I am not convinced that there was a violation of the Sequestration Order sufficient to serve as a ground for PCR relief.

GR-8

Applicant also failed to establish how Victim's alleged "improper communication" with Aakhus affected the testimony he presented. In fact, this Court's review of the transcript reveals Aakhus could not provide a clear, precise timeframe of his visit to Victim's house with Applicant. Rather, the *only* clear testimony Aakhus could give regarding his visit(s) to Columbia was that they occurred while Applicant and Victim were no longer in a relationship. That testimony, if believed by the jury, clearly established Applicant and Victim maintained personal interaction after their July 2004 break-up. Additionally, it is important to note Victim herself readily conceded she and Applicant had personal interaction during that time, as she testified she had spoken with Applicant in-person at her parents' house while Aakhus waited in the car. Victim, too, stated she was "not sure about the date" of that visit, or if it occurred before or after the sexual assault in Clemson in August. With the entirety of the record and PCR testimony considered, this Court cannot find counsel's failure to object and/or move for mistrial to have been objectively unreasonable. Therefore, Applicant has not proven deficient performance.

This Court further finds Applicant has failed to prove that, had counsel objected and/or moved for a mistrial, there is a "reasonable probability" the outcome of the case would have been different. Counsel's objection to Aakhus's vague and non-specific testimony at trial would not have likely changed the outcome of the trial. Applicant was facing strong evidence of guilt at trial based upon Victim's detailed testimony and the multiple witnesses and pieces of evidence introduced to corroborate Victim's already very condemning testimony. Even had Applicant been able to unequivocally establish he and Victim spoke in-person between the August and October sexual assaults as alleged, this Court can find no reasonable probability the outcome of the trial would have been any different when taken in light of the entirety of the record. Accordingly, Applicant has failed to prove resulting prejudice.

GT 9

Evidence of Flight

Applicant next claims counsel was ineffective for failing to pose an objection to the state's closing argument on the jury's ability to consider evidence of flight. In particular, Applicant argues counsel should have objected to the state's commentary on evidence of flight after the crime as evidence of guilt as it violated the parties' pretrial agreement not to mention Applicant's hospitalization at a mental health facility after the incident.

At the PCR hearing, Applicant testified he is currently thirty-four years old and has been housed with the Department of Corrections for roughly eight (8) years at McCormick Correctional Institution. Applicant said after the incident with Victim in Irmo, he left the scene and drove to his family's home in Fort Mill, South Carolina, where he and his family discussed the mental health issues he was allegedly suffering from as a result of the incident, including suicidal thoughts and extreme distress. As a result of those conversations, Applicant said, he decided to commit himself to a mental institution in Charlotte, North Carolina. Applicant said his family drove him to Carolina Medical Center in Charlotte some time that same weekend, where he checked himself in for treatment. On the way to Charlotte, Applicant alleged, he called his probation officer to get permission to cross the border into North Carolina, which was approved.³

Applicant stated he was at the Carolina Medical Center institution for roughly two (2) weeks before being moved to a different institution. He said sometime in late 2004, he became aware he was wanted by authorities in South Carolina and informed the institution he would not fight extradition to South Carolina. On cross-examination, Applicant conceded there was testimony presented at trial he had jumped in his car and driven away from the scene when

³ Applicant failed to produce the testimony of his probation agent, cell phone records or any other tangible evidence at the PCR hearing (other than the probation violation warrant) to corroborate that this conversation ever actually occurred or to affirm he did in fact have his agent's permission to leave the state.



Victim ran to the neighbor for help, but stated he did not believe that was sufficient "flight" from the scene for the state to pose such an argument in closing.

Counsel testified she took over representation of Applicant from another attorney in the public defender's office in August of 2005. She noted Applicant claimed the sexual encounter was consensual, but denied committing the other charges. Counsel testified Victim was an extremely beautiful, very articulate and well-educated woman whose testimony the jury seemed to find very honest. Counsel said Victim's close friend, Ashley Mishoe, also testified at trial corroborating the precise details of Victim's story, and counsel noted she believed Mishoe also came across to the jury as a very well-educated, articulate and reliable witness for the state.

Regarding the state's commentary on evidence of flight, counsel stated she didn't object to the statement as she didn't want to draw further attention to that portion of the evidence. She noted her pretrial motion was made in an effort to suppress any mention of Applicant's *hospitalization* to avoid the jury questioning Applicant's credibility as a witness and mental health, but said the motion was never intended to suppress the state's argument on evidence of flight. Counsel agreed the undisputed evidence showing Applicant sped away from Victim's house while Victim ran for help was, by itself, likely sufficient to allow the state's argument on evidence of flight, regardless of Applicant's subsequent travel to Charlotte. She further noted she did not recall any conversations with Applicant regarding the alleged phone call to the probation agent on his drive to Charlotte.

On cross-examination, counsel stated she did not object to the introduction of Applicant's extradition form as they were not contesting anything related to Applicant's arrest including the time frame or way in which Applicant was ultimately detained. She stated that looking back in hindsight, perhaps she should have objected to the solicitor's argument on evidence of flight, but

said at the time she didn't want to draw any further attention to the issue by doing so. She also noted that without the state's argument on evidence of flight, the extradition form introduced at trial likely very wasn't relevant to the case.

This Court finds counsel was not ineffective in this regard. As a preliminary note, this Court finds Applicant's testimony to be **not** credible on the subject, while conversely finding counsel's testimony to be credible. Based upon the record and counsel's credible testimony, it is clear the pretrial agreement Applicant uses as the foundation for his argument was confined solely to restrain commentary on Applicant's commitment at a mental institution, but in no way was intended to restrict argument on Applicant's fleeing the scene and state after the incident. Therefore, Applicant's contention that counsel should have objected because the state violated the pretrial agreement is without merit.

Further, counsel was not ineffective for failing to object to the solicitor's argument on evidence of flight as such an argument was properly based upon the evidence submitted at trial. "Flight from prosecution is admissible as evidence of guilt." State v. Walker, 366 S.C. 643, 654, 623 S.E.2d 122, 127 (Ct. App. 2005); see also State v. Crawford, 362 S.C. 627, 608 S.E.2d 886 (Ct. App. 2005). "Flight or evasion of arrest is an issue for the jury to consider." Walker at 655, 623 S.E.2d at 128. "In South Carolina, we recognize that evidence of flight [is] proper [and] [w]e also recognize that it is oftentimes appropriate for counsel to argue to the jury the inferences growing out of flight." Id.; citing State v. Byers, 277 S.C. 176, 177 – 178, 284 S.E.2d 360, 361 (1981). The testimony and evidence introduced at trial were clear in showing the following: Applicant fled Victim's house in his car as Victim broke loose and ran to a neighbor yelling "help"; Applicant immediately left the Irmo area and drove to Fort Mill, South Carolina; Applicant then made the voluntary and independent decision to leave the state, and only returned

through the extradition process to face prosecution on the charges. Proof of any one of those instances alone would have properly set the stage for the state's argument on flight from prosecution as evidence of guilt.⁴ Therefore, the state properly argued flight in closing argument and counsel's failure to object was not objectively unreasonable.

Additionally, counsel was able to articulate a reasonable and valid trial strategy for not posing such an objection, stating she "did not want to highlight" the evidence of Applicant's immediate flight to the jury by objecting. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective."). The Supreme Court has previously noted counsel cannot assert trial strategy as a defense for a failure to object to comments which "constitute an error of law" and are "inherently prejudicial". Matthews v. State, 350 S.C. 272, 565 S.E.2d 766 (2002). However, as set forth above, the solicitor's comments in closing argument were proper and did not constitute an error of law. Therefore, counsel's decision not to pose a meritless and likely unsuccessful objection to avoid highlighting evidence of Applicant's post-incident flight was a reasonable, valid trial strategy. Therefore, this Court finds no deficiency.

Further, Applicant has failed to convince this Court such an alleged deficiency resulted in prejudice. Based on the record and relevant case law, any objection counsel posed would likely not have been successful as the state's argument was properly based upon the evidence presented. Assuming *arguendo* such an objection had been argued and the state's commentary was successfully stricken from the jury's consideration, this Court can find no reasonable probability verdict returned would have been any different when taken in light of the evidence and testimony presented at trial. See Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009)

⁴ This Court finds Applicant's testimony that he only became aware he was wanted by South Carolina authorities once he was admitted to the North Carolina hospital to be not credible.



("Although we find the PCR judge correctly determined that trial counsel was deficient in failing to object to the solicitor's...closing argument, we hold [Applicant] failed to prove that there was a reasonable probability that but for this error, the result of his trial would have been different."'). Accordingly, this contention is without merit and must be denied.

Character Witnesses at Trial

Applicant argues counsel was also ineffective in choosing to present numerous character witnesses on his behalf during the sentencing phase rather than during the guilt phase before the jury. Applicant testified he provided counsel with several letters written by character witnesses on his behalf prior to trial, but stated counsel told him because his character was not in issue, there would be no need to have those witnesses testify before the jury. Applicant said he did not recall counsel ever saying she would call any character witnesses at trial, aside from potentially Applicant's mother and father. Applicant now contends he thought it would have been a good idea to present those witnesses during the defense case rather than in mitigation. On cross-examination, Applicant acknowledged none of the character witnesses he referred to were present during the incident, nor did any of them have any personal knowledge of the details of the incident.

In addition to the numerous letters introduced to this Court on behalf of Applicant, Applicant also called two character witnesses at the PCR hearing to testify on his behalf. The first was Terry Burnette, the CLE Director of the South Carolina Bar Association. Burnette testified he met Applicant in 1996 when Applicant was serving as Burnette's son's recreation league basketball coach. Burnette stated he wrote a letter on Applicant's behalf on November 25, 2005, which was given to Applicant's attorney before trial. He said he was never asked to appear or testify at Applicant's trial, but stated he was present for the trial and would have testified for

GT 14

Applicant had he been asked to. Burnette testified based on his several years interaction with Applicant, he believed Applicant was a "fair", "hardworking" person with a "good character". He went on, saying he never saw Applicant lose his temper, abuse a child or otherwise behave improperly during the high stress situations involved in his son's basketball games. On cross-examination, Burnette conceded he had no personal knowledge of the facts of the underlying charges, nor was he present at the scene when the incident occurred.

The second character witness presented was Kim Clasnik, a self-employed business owner who met Applicant in 1999 while Applicant worked as a referee for recreation league sports. Clasnik noted three (3) of her children play baseball and/or basketball through the league. Clasnik stated she wrote a letter on Applicant's behalf on October 27, 2005, which she mailed to Applicant's mother to pass along to counsel. Clasnik said she was never contacted to testify at trial, but said she would testified at trial had counsel requested her to. She testified she believed Applicant was a very positive role model for her children. On cross-examination, Clasnik also acknowledged she had no personal knowledge of the facts associated with Applicant's charges, nor was she present at the scene when the sexual assault was alleged to have occurred.

Counsel testified she recalled introducing roughly sixteen (16) character reference letters to the trial judge during sentence mitigation, as well as the testimony of Terry Burnette and his son, Knox. She noted in retrospect, perhaps she should have called the witnesses as part of the defense's case before the jury, but said there are substantial risks associated with calling character witnesses as their testimonies may open the door for the state's introduction of evidence to rebut the character traits presented. Counsel understandably testified there was no way for her to account for everything Applicant had done in his lifetime and could never be sure

whether the state would be able to obtain and elicit extremely damaging testimony to rebut the character traits presented.

Further, counsel testified that even when she believes she knows exactly what a character witness will testify, it is risky to call such a witness at trial as his/her cross-examination could lead to detrimental testimony. Therefore, counsel said, calling the witnesses as part of the defense would have been a very risky choice which she chose to avoid in favor of presenting those witnesses in mitigation. Counsel stated she believed the presentation of the character witnesses' letters and testimony in mitigation was extremely effective as there was a common expectation Applicant would receive at least a forty (40) year sentence after being convicted, but was only given twenty-two (22) years. Counsel testified it appeared introducing the character witnesses' reference letters and statements during sentencing was a very effective use of those resources as it helped to significantly mitigate the sentence imposed.

This Court finds counsel was not ineffective in making the strategic decision to present Applicant's character reference letters and character witnesses to the trial judge during sentence mitigation rather than as part of the defense's case before the jury. First, this Court would find counsel was able to credibly articulate a valid, reasonable strategic rationale for not calling character witnesses on Applicant's behalf during the guilt phase of the trial. See Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) ("Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective.").

Under Rule 404(a), SCRE, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except...[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same." Evidence of such a character trait may be made "by testimony as



to reputation or by testimony in the form of an opinion", and on "cross-examination, inquiry is allowable into relevant specific instances of conduct" to rebut that trait. See Rule 405(a), SCRE. Applicant contends it was in fact the Victim who first impugned Applicant's character through her testimony about Applicant's work history and unwillingness to help "pay the bills". However, it is important to note such testimony would merely raise a question as to Applicant's character for hard work or ambition.⁵ Those character traits are *not* pertinent character traits of any of the crimes Applicant was charged with, nor do they in any way assist the jury in determining the veracity of Applicant's testimony. Therefore, this Court finds Applicant's argument to be of very little persuasion.

Additionally, in reviewing the character letters and character witness testimony presented to this Court at the PCR hearing, it appears that while all reference Applicant's overall good character or reputation as a role model for young athletes, they do not provide any insight to Applicant's character for veracity or truthfulness⁶. That trait alone would have been the "pertinent character trait" most useful to establish to the jury as the case turned in large part on his credibility versus Victim's credibility. Therefore, in addition to finding counsel was able to articulate a valid trial strategy in this regard, this Court also finds Applicant has failed to establish that counsel was objectively unreasonable in electing to present the character references in sentencing mitigation, as they would have done very little to assist in Applicant's defense other than to either rebut Victim's testimony that Applicant did not work, or to generally portray Applicant as a "good guy".⁷

⁵ Applicant did not allege counsel was ineffective for failing to object to the testimony of Victim regarding Applicant's inability to keep a job or unwillingness to help pay the bills associated with the apartment.

⁶ One character letter introduced does reference the term "trustworthy"; however, in context, the term is used in relation to Applicant's ability to be a good confidant and not to establish his veracity or honesty.

⁷ It is also important to note there was testimony presented to the jury by both James Aakhus and Applicant which referenced Applicant's prior work history and involvement in the community as a coach and referee in youth sports. Therefore, character references rebutting the testimony that Applicant "didn't have a job" would have likely been



Finally, after a thorough review of the character witnesses' statements and letters, this Court finds Applicant has failed to establish a reasonable probability that had these witnesses been presented during trial rather than sentencing, the outcome of the case would have been different. The testimony presented to the jury at trial by Victim and Ashley Mishoe created an extremely high hurdle for Applicant to overcome, especially in light of the state's evidence and additional witness testimony to corroborate Victim's recount of the incident. Counsel's credible testimony clearly indicated the two girls' made very appealing, convincing and reliable witnesses. With these things in mind and the entirety of the record considered, this Court finds Applicant cannot prove there is a reasonable likelihood the outcome at trial would have been different had the character witnesses been presented to the jury.

Testimony on Denial of Bond

Applicant alleges counsel was ineffective for failing to object to and/or request a mistrial based upon the testimony of Investigator Brian Godfrey concerning the magistrate judge's denial of Applicant's request for bond. Applicant argues this testimony was overly prejudicial as it allowed the jury to infer that another judge had considered the matter and determined Applicant was a danger to the community and/or flight risk. After evaluating Godfrey's testimony in its entirety, along with the testimony and arguments presented at the PCR hearing, this Court finds counsel was not ineffective in this regard.

During his trial testimony, lead investigator Brian Godfrey stated he met Victim on November 15, 2004, at the Alvin S. Glenn Detention Center for Applicant's bond hearing at 8:00 p.m. Upon learning the hearing wouldn't take place until 10:00 p.m., Godfrey and Victim met with the presiding magistrate judge in chambers to discuss having the hearing held earlier for

nothing more than cumulative or bolstering to Applicant's testimony, but as set forth above almost certainly would have had no impact on the outcome of the case.

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Victim's convenience. According to Godfrey's trial testimony, he did not attend Applicant's bond hearing that night, but knew "[e]ventually the judge denied his bond". It is this mention of the denial of bond that Applicant contends counsel should have objected to and/or moved for a mistrial upon.

Counsel testified she didn't object to the testimony from Godfrey as his testimony ultimately went on to reveal Applicant *was* granted bond by a circuit court judge after review of the magistrate's denial. She noted Godfrey readily admitted at trial he had participated in inappropriate *ex parte* communication with the magistrate judge by discussing the matter privately in chambers, which was the reason for the circuit court's subsequent review of the denial. Counsel agreed she believed Godfrey's testimony regarding Applicant's bond was, when taken in its entirety, advantageous for the defense as it called the lead investigator's credibility and character into question. Further, counsel acknowledged it would have been a reasonable analysis for the jury to conclude Applicant's bond was initially denied by the magistrate *only* as a result of Godfrey's improper conduct, especially in light of the circuit court's grant of bond once Godfrey was not involved.

This Court finds counsel's failure to object to Godfrey's testimony to not be "objectively unreasonable". As stated by counsel, Godfrey's testimony ultimately showed Applicant *was* granted bond. Further, when taken in its entirety, Godfrey's testimony in the matter was beneficial to the defense as it allowed Applicant to effectively call Godfrey's credibility and character into question as he readily conceded he had been involved in improper *ex parte* communications with the magistrate. Counsel's testimony at the PCR hearing, in conjunction with the record of her cross-examination of Godfrey, firmly convince this Court counsel undertook a valid and reasonable trial strategy in allowing Godfrey to testify about the initial

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bond hearing without objection to then allow counsel to highlight Godfrey's improper conduct to the jury. See Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) ("[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective"). Accordingly, this Court finds counsel was not deficient in this regard.

Further, this Court finds no "reasonable probability" that had counsel objected to the testimony, the outcome of Applicant's trial would have been different. As stated by counsel, Godfrey's testimony clearly reflected Applicant *was* ultimately granted bond by the circuit court. Additionally, as set forth previously herein, Applicant was facing the very detailed, corroborated condemning testimony of a well-educated and articulate Victim. After reviewing the entirety of the record, this Court can find no reasonable probability that had Godfrey not testified as to Applicant's denial of bond, the outcome of the case would have been any different. Therefore, Applicant has failed to prove resulting prejudice as well.

Ineffective Assistance of Appellate Counsel – False Imprisonment

Applicant finally argues appellate counsel was ineffective for failing to challenge the trial court's denial of request to charge the jury on false imprisonment as a lesser included offense to kidnapping on direct appeal. Applicant alleges had appellate counsel raised the issue, there is a reasonable likelihood the outcome of the case would have been different.⁸

This Court disagrees with Applicant's contention and finds appellate counsel was not ineffective in this regard. First, appellate counsel is not required to raise every non-frivolous issue properly preserved for appeal to be found effective in his representation. See Jones v. Barnes, 463 U.S. 754 (1983) (citation omitted). In fact, it is appellate counsel's professional duty to choose among the potential issues to be raised on appeal according to his judgment of their

⁸ As a side note, Applicant did not raise any issue regarding whether trial counsel appropriately preserved this issue for appeal; regardless, the record seems to reflect the issue was in fact properly preserved.

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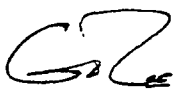
merit and the tactical approach counsel intends to use. Id. Here, appellate counsel opted to raise arguments challenging the Lyle evidence introduced from Applicant's alleged prior sexual assault on Victim, as well as a chain of custody issue caused by an absent witness in the chain. Both issues were meritorious challenges to be raised on appeal. This Court can find no deficiency in counsel's performance in failing to raise the trial court's denial of false imprisonment as a lesser included offense.

More importantly, false imprisonment is *not* a lesser included offense of kidnapping. See State v. Bernsten, 295 S.C. 52, 367 S.E.2d 152 (1988) ("The kidnapping statute is broad enough to include, yet not require, proof of the elements constituting false imprisonment...[t]hus, the crime of false imprisonment has been incorporated into § 16-3-910 as one method of proving kidnapping."). Therefore, appellate counsel was not "objectively unreasonable" in failing to challenge the trial court's ruling in that regard, nor can Applicant prove resulting prejudice as the trial judge properly denied the request and there is no "reasonable probability" the outcome of the case would have been different had appellate counsel raised the issue to the Court of Appeals. Accordingly, this allegation is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise all additional allegations raised in his application at the hearing and has, thereby, waived them. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway

 21

Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issues at the hearing indicates a voluntary and intentional relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

This Court notes Applicant must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed **with prejudice**; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 6th day of May, 2013.


G. THOMAS COOPER, JR.
Presiding Judge
Fifth Judicial Circuit

COLUMBIA, S.C.

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF RICHLAND
4 2012-CP-40-01543
5
6 Randy Thomas
7 vs.
8 State of South Carolina
9
10
11 Columbia, South Carolina
12 January 16, 2013
13 Before the Honorable G. Thomas Cooper, Jr.
14

15 APPEARANCES
16 For the State: Robert Corney
17 For the Defendant: Goldberg, Armstrong, Peavy
18
19 Reported by: Michael C. Watkins
20 Official Court Reporter
21
22
23
24
25

1	Arguments of Counsel:	3
2	Randy Thomas:	31
3	Terry Burnett:	47
4	Kimberly Klasnic:	51
5	Arguments of Counsel:	57
6	LaNelle Durant:	84
7	Certificate:	110

8

9

APPLICANT'S EXHIBITS

10

11	1	Request to Charge	6
12	2	Extradition Request	6
13	3	Calendar	11
14	4	Arrest Warrant	38
15	5	Collection of Letters	46
16	6	Affidavit	56
17	7	Affidavit	56
18	8	Affidavit	80

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ARGUMENTS OF ATTORNEYS

1 MR. CORNEY: Your Honor, the State calls the post
2 convict relief action of Randy Thomas, docket number
3 2012-CP-40-1543. Mr. Thomas was true bill indicted in the
4 February of 2005 term of the Richland County Grand Jury for
5 criminal sexual conduct in the first degree, assault and
6 battery of a high and aggravated nature and two counts of
7 kidnapping. He proceeded to jury trial February 6th of 2006
8 before Judge Johnson where he was convicted of the charges
9 as indicted. He received 22 years imprisonment for the
10 kidnappings -- each for each of the kidnappings and the
11 criminal sexual conduct in the first degree and ten years
12 imprisonment for assault and battery of a high and
13 aggravated nature all to run concurrently. He had a notice
14 of appeal filed and an appeal perfected. He was represented
15 by Chief Appellate Defender Robert Dudek on the appeal from
16 the office of appellate defense. The Court of Appeals
17 issued an unpublished opinion September 10th of 2009
18 affirming the conviction and sentences. Thereafter the
19 South Carolina Supreme Court denied the petition for writ of
20 certiorari, that was on March 2th of 2011 and remittitur was
21 issued thereafter on March 7th of 2011. He filed a timely
22 PCR application February 23rd of 2012, and I will turn it
23 over to his attorney at this point in time, Your Honor.

24 MS. GOLDBERG: Thank you, Your Honor.

25 THE COURT: All right. Ms. Goldberg?

ARGUMENTS OF ATTORNEYS

1 MS. GOLDBERG: Thank you, your Honor. Before we begin
2 I have a few housekeeping matters. First of all Your Honor
3 should have in the file an original application filed by our
4 client and an amended application filed December 21st.

5 THE COURT: Hold on. I do not have the amended
6 application I don't think. I got the transcript, the --

7 MR. CORNEY: If I may direct Your Honor, I have a copy
8 of it right here for you.

9 THE COURT: That's the amendment?

10 MR. CORNEY: Yes, sir.

11 THE COURT: All right. Thank you.

12 MS. GOLDBERG: Thank you, Your Honor. As a second
13 housekeeping matter I need to put on the record that
14 Mr. Thomas was tried in this courthouse February 6, 2006, he
15 was represented by LaNelle Durant and Jeanette VanGinhoven
16 of the Richland County Public Defender's Office. For the
17 record I was employed by the Richland County Public
18 Defender's office at that time, I was sworn in as an
19 attorney in November of 2005 so I had been an attorney for
20 only about four months. I discussed this with Mr. Thomas,
21 he actually recognized me the first time that we met, was
22 familiar with the fact that I worked with Ms. Durant and
23 Ms. VanGinhoven but I had no involvement in this particular
24 trial. In fact, when I read the transcript it was
25 completely new facts to me, I don't ever recall sitting in.

ARGUMENTS OF ATTORNEYS

1 So Your Honor, my client is aware of any possible appearance
2 of a conflict and does waive that conflict to the extent
3 that it would exist.

4 THE COURT: Is that correct, Mr. Thomas?

5 APPLICANT: Yes, sir.

6 THE COURT: You don't mind if she participates in this
7 post conviction relief?

8 APPLICANT: That's correct.

9 THE COURT: All right. Go ahead.

10 MS. GOLDBERG: I would also at this time ask the Court
11 if Mr. Thomas may remove one or both handcuffs so that he
12 can follow along with the transcript in front of him and
13 take notes?

14 OFFICER: Per your instruction I can remove one.

15 THE COURT: Yes, sir, go ahead.

16 MS. GOLDBERG: Thank you, Your Honor. The final thing
17 for me to cover right now, I've got two documents that were
18 taken from the trial evidence file that the clerk of court
19 has, I believe that the attorney general would consent, so
20 if we could just go ahead and admit these documents into
21 evidence since they were included in the original trial file
22 and I wanted to go ahead and get that out of the way.

23 THE COURT: What are they?

24 MS. GOLDBERG: The first one would be -- it was
25 actually admitted into evidence in the trial as exhibit 72,

ARGUMENTS OF ATTORNEYS

1 it was an extradition approval request. And the second
2 document is just two jury charge requests submitted to the
3 Court by Ms. Durant, if you want to look at these before
4 I --

5 THE COURT: I trust you properly identified them.

6 MR. CORNEY: And Your Honor, I'll stipulate to them,
7 I'm fine with them coming in right now.

8 MS. GOLDBERG: I would like to just enter them as
9 Defendant's Exhibits 1 and 2.

10 THE COURT: Make them a part of the record.

11 MS. GOLDBERG: Thank you, Your Honor.

12 (Applicant's 1 and 2 received into evidence.)

13 MS. ARMSTRONG: Thank you, Your Honor. May it please
14 the Court? I along with Jason Peavy and Kristy Goldberg
15 represent the applicant in this matter and that's Randy B.
16 Thomas, Mr. Thomas is present. And I believe as Counsel
17 Goldberg had just pointed out, Ms. Goldberg, we've filed our
18 final amended application with the Court December 21st of
19 2012. In this application we allege six different grounds
20 for post conviction relief, Your Honor, I want to make it
21 clear at the outset that ground 9A, which is cited more
22 fully at 10A, that that issue is being withdrawn on behalf
23 of Mr. Thomas. This is based upon further legal research,
24 development of facts in the case and also consultation with
25 Mr. Thomas.

ARGUMENTS OF ATTORNEYS

1 THE COURT: That's 9A and 10 sub 9A?

2 MS. ARMSTRONG: That's correct, Your Honor.

3 THE COURT: The Lyle issue?

4 MS. ARMSTRONG: Yes, Your Honor.

5 THE COURT: Any objection?

6 MR. CORNEY: None, Your Honor.

7 THE COURT: All right.

8 MS. ARMSTRONG: Okay. Your Honor, the remaining issues
9 that we're raising, some of these are record based, because
10 this case is being handled by three attorneys working in
11 conjunction we're going to handle different issues. The
12 first issue is based on violation of the sequestration order
13 that was issued by Judge --

14 THE COURT: Johnson.

15 MS. ARMSTRONG: Excuse me, that's right, at the time of
16 trial. Counsel was told twice not to have any of the fact
17 witnesses speak to anybody else, everybody else was supposed
18 to not talk about the case once the case got started, that
19 was in the trial record at page 63 as well as page 165. The
20 second issue that we are raising, and that's under 9C, is
21 the issue of the solicitor's office bringing up the fact
22 that Mr. Thomas had been extradited from the State of North
23 Carolina. We believe that that issue was improperly before
24 the jury, completely irrelevant that he was in North
25 Carolina. It was essentially used to raise the issue of

ARGUMENTS OF ATTORNEYS

1 flight which all parties had agreed -- everybody knew that
2 Mr. Thomas prior to his being arrested and sent to South
3 Carolina that he was receiving mental health treatment. He
4 was certainly not out and about the community running from
5 law enforcement and so we think --

6 THE COURT: Well, wasn't that a matter for -- I don't
7 know, I haven't read the record, but normally that's a
8 matter for comment by either the State or the defense
9 counsel and can bring it up in front of the jury. Was there
10 any instruction as to flight?

11 MS. ARMSTRONG: Your Honor, there was a pretrial
12 conference on --

13 THE COURT: No, I mean instruction to the jury.

14 MS. ARMSTRONG: About the issue of flight?

15 THE COURT: Uh-huh.

16 MS. ARMSTRONG: No, Your Honor.

17 THE COURT: Okay.

18 MS. ARMSTRONG: But certainly counsel had an
19 off-the-record, you know, in-camera or off-the-record
20 discussion about the fact that they were not going to bring
21 up Mr. Thomas' having received mental health treatment, and
22 the State used what couldn't be brought up as evidence of
23 him evading law enforcement, it was improper. Everybody
24 knew that they weren't going to bring up the mental health
25 issue, but to suggest to the jury that my client was out

ARGUMENTS OF ATTORNEYS

1 running from law enforcement was really improper quite
2 frankly.

3 THE COURT: You understand what my understanding of the
4 law is, but go ahead, that's your ground.

5 MS. ARMSTRONG: Okay. Thank you, Your Honor. The
6 fourth ground is ground 9D, that is the issue of failing to
7 produce positive character evidence. This ground will be
8 based on trial counsel's failure to object to evidence
9 concerning a denial of bond, again the bond was irrelevant,
10 bringing that up we believe was prejudicial to Mr. Thomas.
11 The bond matter is completely irrelevant and to suggest that
12 the State by way of a Judge had decided that Mr. Thomas was
13 a danger to the community and that he was a flight risk.
14 And the fifth issue raised is the issue of trial court's
15 denial counsel of their request for a lesser-included
16 offense of false imprisonment under the kidnapping statute.
17 False imprisonment is a misdemeanor that carries a ten year
18 potential sentence. Defense counsel at trial, Ms. Durant,
19 raised this issue and the Judge improperly denied it, the
20 issue is therefore reserved for appeal and direct review, it
21 was not, in fact, litigated. In lieu of his testimony Mr.
22 Dudek who handled this case for appellate defense has issued
23 an affidavit basically saying did he not raise the issue and
24 we would believe that had he testified he would say that he
25 would have raised it if he thought it was legitimate, he

ARGUMENTS OF ATTORNEYS

1 didn't and obviously then that's ineffective on his part,
2 but that would suffice. Because obviously anything that's
3 raised and preserved can be litigated on direct appeal and
4 he certainly did not intentionally choose to ignore a valid
5 issue.

6 THE COURT: All right.

7 MR. PEAUVY: Pleases the Court, Your Honor? Jason Peavy
8 for the applicant, Randy Thomas. Your Honor, I'm going to
9 start with what is now the first issue that we've got which
10 is the sequestration issue. In short, Your Honor, what
11 you've got is a sequestration order issued by Judge Johnson.
12 There was a violation of that sequestration order by the
13 alleged victim in this case.

14 THE COURT: Where is the evidence of that?

15 MR. PEAUVY: Your Honor, the first place that I would
16 like to direct the Court's attention is -- we have it in a
17 separate binder that I believe that the Court has been
18 provided, a February 2, 2006 pretrial hearing, that is the
19 very -- on page six.

20 THE COURT: Hold it. What binder are you talking
21 about?

22 MR. PEAUVY: Your Honor, you have a smaller -- if I may
23 approach, I think Mr. Corney gave you a smaller --

24 MR. CORNEY: It's the smaller of the two transcripts
25 that is in there, 34 pages.

ARGUMENTS OF ATTORNEYS

1 THE COURT: Oh I see, that's the pretrial transcript.
2 I thought it was something else that you --

3 MR. PEAVY: On that date, February 2nd -- this is
4 something I have shown to Mr. Corney, I've got a calendar if
5 I may approach because we're going to be flipping through
6 all of these different dates, this is February of 2006. And
7 if it pleases the Court -- and I don't know if there is any
8 objection -- we would introduce this as an exhibit into the
9 record as Applicant's 3, Your Honor.

10 MR. CORNEY: No objection, Your Honor, I think the
11 Court can take judicial of that.

12 THE COURT: I will.

13 (Applicant's 3 received into evidence.)

14 MR. PEAVY: Your Honor, beginning on February 2nd of
15 2006, that is the pretrial hearing, on page six of that
16 record beginning at lines 23 and 24 Judge Johnson for the
17 first time mentions the fact that he is going to be dealing
18 with the sequestration of witnesses. Your Honor, there is
19 no formal order at that point but everyone is on notice,
20 both attorneys for the State, both attorneys for the defense
21 are present at that hearing and that is the very first time
22 at which Judge Johnson mentions that.

23 THE COURT: That's the first time the word is
24 mentioned?

25 MR. PEAVY: Yes, sir, that is.

ARGUMENTS OF ATTORNEYS

1 THE COURT: All right.

2 MR. PEAVY: Now Your Honor, we now move to February 6th
3 which is essentially the very first day of trial and that is
4 included in the bigger portion of your transcript. There
5 was a Lyle hearing and during the pretrial Lyle hearing that
6 occurred on February 6th, that begins on page 63 of the big
7 record, Your Honor.

8 THE COURT: Got it.

9 MR. PEAVY: Okay. And at this point on page 63 is when
10 the State calls to the stand the alleged victim in this
11 case.

12 THE COURT: Lauren Byrd?

13 MR. PEAVY: Yes, Your Honor.

14 THE COURT: Okay. Were anybody sequestered at that
15 time?

16 MR. PEAVY: At that point, Your Honor, on page 63 the
17 Judge says, "I think I indicated that unless someone
18 objected to it I would grant that. Of course, the victim is
19 permitted to be in the courtroom and chief investigating
20 officers. All other witnesses, State and defense witnesses,
21 cannot be in the courtroom during this trial."

22 THE COURT: During the trial.

23 MR. PEAVY: Yes, Your Honor. And importantly, Your
24 Honor, this witness is on the stand, the victim in this
25 case, and the Court says, "And you cannot discuss your

ARGUMENTS OF ATTORNEYS

1 testimony or anybody else's testimony with any other
2 witness."

3 THE COURT: Okay.

4 MR. PEAVY: And, Your Honor, additionally on page 63
5 lines 15 and 16 that was where the State was specifically
6 inquiring as to the issue of sequestration. If I can then
7 move to pages 165 and 166 of the same record, Your Honor,
8 the same portion of the transcript actually beginning on
9 pages -- page 164 line 23.

10 THE COURT: 164?

11 MR. PEAVY: 164 line 23, Your Honor. This is the
12 Court, Judge Johnson saying "Yes. I would like for all" --
13 and this is the very first day of trial -- "I would like for
14 all witnesses that y'all have, bring them in, let me talk to
15 them for a minute, all State and defense witnesses are to
16 come in so I can explain to them what sequestration is all
17 about," and then the State goes through and they're
18 gathering all of the witnesses. And then on page 165
19 beginning at lines nine and continuing there on the Court
20 says, "Let me remind counsel that I don't know who any of
21 your witnesses are and I have to rely on you folks to keep
22 up with them and sometimes people sort of wonder in and take
23 a seat, you need to keep up with who is coming in -- who is
24 coming and going. And as far as the State is concerned if
25 there is any possibility that you want to recall a witness

ARGUMENTS OF ATTORNEYS

1 in reply they need to stay out of the courtroom after they
2 testify on the record. If they stay in the courtroom I will
3 not permit them to be recalled." And so Your Honor, what we
4 have here -- then we move to page 166 and this is where the
5 Court is making further instructions beginning on line -- at
6 line three, "All right. For the two witnesses in here right
7 now, all witnesses in this case are sequestered, that simply
8 means that you will be outside of the courtroom and will not
9 be hearing the testimony of any other witness. That is to
10 ensure that your testimony is based on what you know about
11 the case and not based upon" -- or excuse me -- "on what
12 somebody else may know or testify to. When a witness is
13 sequestered they are not permitted to discuss their
14 testimony or anyone else's testimony with anyone else
15 including any other witness who has found out what someone
16 may or may not have said in the courtroom. If you violate
17 the provisions of the sequestration order you are subject to
18 being held in contempt of court." So Your Honor, we have --
19 I think we all know that Judge Johnson was a very clear and
20 very concise man and this was a very clear and a very
21 concise instruction on what he believes sequestration meant
22 and what he believed would occur if you violated the
23 sequestration order, either the testimony not being allowed
24 or the fact that somebody was going to be held in contempt
25 of court. And let me just go through just very briefly,

ARGUMENTS OF ATTORNEYS

1 Your Honor, one of the main issues at Mr. Thomas' trial
2 concerned a prior incident, obviously there's a Lyle
3 hearing, there was an alleged sexual assault in Clemson and
4 we've just referred to that as the Clemson innocent.

5 THE COURT: Not the same victim.

6 MR. PEAVY: Same victim, Your Honor.

7 THE COURT: Same victim? Okay.

8 MR. PEAVY: Yes, sir, the Clemson incident. And Your
9 Honor, there was questions at trial and it became very
10 important about whether or not Mr. Thomas ever went to the
11 victim's home here in Richland County, her parents' home
12 after the Clemson incident but prior to the Richland County
13 incident. Because there was testimony about the fact that
14 he had gone to the Richland County residence while the
15 victim's parents were home and had interaction with her
16 parents and things of that nature which certainly gave rise
17 to a little bit of question as to the victim's credibility
18 about whether or not she would -- that's normal that she
19 would have acted that way and not said anything to her
20 parents after this alleged Clemson incident but prior to the
21 Richland County incident. That's why this is ultimately
22 important, Your Honor, and this was brought up at trial
23 repeatedly. Now, Your Honor, what we've got as the Court
24 has seen, we've got the victim testifying on February 6th,
25 we have the Judge definitively issuing very clear and

ARGUMENTS OF ATTORNEYS

1 concise terms of the sequestration order. Your Honor, if I
2 can direct the Court's attention beginning on page
3 approximately 677 of the record, this is where one of the
4 two witnesses that were called by the defense, actually the
5 only other witness other than the defendant who testified
6 was called to the stand. And this is --

7 THE COURT: By the defense?

8 MR. CORNEY: By the defense. And this is the direct
9 examination of this witness, Mr. James Addkus Your Honor,
10 and this is the direct --

11 THE COURT: 677?

12 MR. PEAVY: 677, Your Honor. And this is where
13 Ms. Durant was questioning this witness regarding whether or
14 not he had recalled coming to Columbia with Mr. Thomas on
15 multiple occasions and that, in fact, he had witnessed
16 Mr. Thomas visiting, Mr. Byrd and -- Ms. Byrd's parents'
17 home while her parents were there. And, Your Honor, what
18 I'm about -- as I said one of the two witnesses that was
19 called by the defense. Everyone knew that this was a
20 potential witness for the State, Judge Johnson on page 36 of
21 the record specifically called out this witness' name during
22 jury selection, everyone knew that this was a potential
23 witness for both the State and the defense. Now, Your
24 Honor, beginning on page 681 this is the cross examination
25 of this witness --

ARGUMENTS OF ATTORNEYS

1 THE COURT: 681?

2 MR. PEAVY: 681, Your Honor. Beginning on lines four
3 this is the solicitor asking this witness and I'm going to
4 go just in the question and answer format if it pleases the
5 Court.

6 THE COURT: What line?

7 MR. PEAVY: Sir?

8 THE COURT: What line?

9 MR. PEAVY: Line four, Your Honor, 681. "Question: So
10 did you go to the Lauren's family's home? Answer: Yes, I
11 did. Question: Do you recall about when that was? Answer:
12 I'm not really sure. Question: Do you remember talking to
13 Lauren on the phone Monday night regarding that particular
14 time?" Which Monday night is February 6, 2006, Your Honor.

15 THE COURT: Oh. Wait a minute, hold it.

16 MR. PEAVY: Line ten. Answer: I don't recollect. And
17 question --

18 THE COURT: Slow down.

19 MR. PEAVY: Yes, sir, I'm sorry.

20 THE COURT: It's your interpretation this is when he
21 talked about -- is this during the trial, is that what
22 you're saying?

23 MR. PEAVY: Yes, sir. This is the defense's first
24 case -- or first witness, and after the Monday sequestration
25 order the victim contacted this witness and they got their

ARGUMENTS OF ATTORNEYS

1 story straight about an issue, Your Honor.

2 THE COURT: The victim contacted --

3 MR. PEAVY: This witness.

4 THE COURT: Not the other way around.

5 MR. PEAVY: No, Your Honor. And I'm going to show you
6 the portion of that transcript where that comes in to play
7 later.

8 THE COURT: Go ahead.

9 MR. PEAVY: Okay, sir. Line 11: "Do you recall
10 telling Lauren that you believed you went to the home around
11 June or July of 2004? Answer: Yes. And do you recall
12 telling Lauren that you believed they coincided with a
13 particular John interview that you had? When? Question: A
14 particular job interview that you had which would have been
15 around July of 2004. Answer: This week? No, I didn't say
16 that. I said I was working on an intern at that time." And
17 Your Honor, it continues from that line over towards page
18 682. Beginning on line three on page 682 the witness is
19 answering: "I thought it was but I'm not sure, all I know
20 it was after I started my job. She called me up asking me
21 if it was in September and I hadn't even thought about the
22 timing at all at that point. And I said, you know, I
23 thought it was more closer to, you know, July." So Your
24 Honor, what we have at this point is Judge Johnson obviously
25 definitively issuing the sequestration order, we have the

ARGUMENTS OF ATTORNEYS

1 victim being present literally on the stand and specifically
2 being admonished by Judge Johnson as to the sequestration
3 order, thereafter we have additional admonishment by Judge
4 Johnson as to sequestration order. That very night is when
5 this alleged victim contacts the defense witnesses, or the
6 defense witness. Your Honor, there was no objection made to
7 this testimony, there was no motion for a mistrial or a
8 motion to strike the testimony.

9 THE COURT: The defense had this witness on the stand?

10 MR. PEAVY: Yes, Your Honor. And then on cross
11 examination this testimony was elicited by the --

12 THE COURT: Oh, this was on cross?

13 MR. PEAVY: Yes, sir, Your Honor.

14 THE COURT: I'm with you, by Ms. Garfield.

15 MR. PEAVY: Yes, sir. No objection was made, no
16 request for a mistrial, no motion to strike the testimony.
17 Your Honor, and no finding of contempt. And Your Honor,
18 obviously based upon the clear black and white transcript
19 this is something that was contemplated by Judge Johnson
20 when he said you may be held in contempt if you violate this
21 order, we may not allow that type of testimony. Your Honor,
22 based upon the record this was a critical issue at trial,
23 whether or not it was believable that this victim had
24 interaction with the applicant post-Clemson incident prior
25 to the Richland County incident, and if there was this

ARGUMENTS OF ATTORNEYS

1 interaction was it in the presence of her family, why didn't
2 she say anything and things of that nature. And, Your
3 Honor, if I can -- if the Court will indulge me on one
4 further issue, the reason that we say that she was trying to
5 get her story straight, if I can direct the Court's
6 attention back to the Lyle hearing, which the testimony
7 actually begins on 64 but I would like to move to page 101,
8 Your Honor. And at that point -- and this is going to be --
9 I apologize to the court reporter in advance, the testimony
10 is difficult to follow.

11 THE COURT: This is -- let me follow. 101?

12 MR. PEAVY: Yes, sir.

13 THE COURT: All right.

14 MR. PEAVY: Your Honor, beginning on line nine of page
15 101, "question: Isn't it true that the weekend after that
16 Randy was at your parents' home in Columbia. Answer: With
17 me there? Question: Uh-huh. Answer: I know that he had
18 driven by several times going by my house, my daddy --
19 because I know of one incident where my daddy was outside in
20 the garage and he had seen him drive by and then Randy had
21 occasion to talk to me. Question: So did Randy actually
22 talk to your parents? Answer: He didn't say anything to my
23 parents. My daddy didn't know what was going on, when he
24 saw my face that I was upset because he had told me at the
25 time that he had -- that he had wanted to kill himself and I

ARGUMENTS OF ATTORNEYS

1 felt bad, like I had done something wrong. Question: I'm
2 sorry. You're saying that Randy did drive by your house?
3 Yes. He had been driving by my house and then he stopped, I
4 think James was in the car. Question: James Addkus?
5 Answer: I believe he was. I think that's what James told
6 me because James had told me that he had (pause) that he
7 didn't know that they were stopping (pause) that he (pause)
8 he didn't tell me that day but he told in Clemson because
9 he's my neighbor, that he didn't know that they were
10 stopping by my house, that Randy had told him that they were
11 going somewhere else." And at this point Judge Johnson just
12 stops and he says, "Hold on," and specifically directs
13 questions to the witness. And he says, "Can you explain
14 what happened? And this is the weekend after the Clemson
15 incident; is that right? The witness: I'm not sure. The
16 Court: Were you there?" And the witness says, "I was
17 there. The Court: "So you were at your parents' home."
18 The witness said, "Yes. And I had a hard time of
19 understanding what you're telling Mr. Durant, you're saying
20 that your understanding was he came by and your father was
21 in the garage and that you saw him. Did you say that he
22 asked to speak with you? The witness: My father? Did he
23 ask my daddy? Question: I didn't understand what you said
24 or did you just say your father saw him drive by? And Your
25 Honor, this continues on to page 103 until finally Lee the

ARGUMENTS OF ATTORNEYS

1 Court is like, Okay. I think I have a good enough
2 understanding of what you're saying happened." So Your
3 Honor, this is what's occurring during the Lyle hearing,
4 this is the testimony. It's very confused, she's not sure
5 of all of the facts. But then, Your Honor, the following
6 day when she testifies in front of the jury beginning on
7 page 283 and 284 regarding essentially the same subject
8 matter her testimony goes much, much smoother. And Your
9 Honor, it's our contention that this is after she had called
10 James Addkus and talked to him about the subject matter on
11 whether he had come down, when he had come down with
12 Mr. Thomas and things of that nature. Your Honor, the
13 reason that this is important, the reason that this is so
14 critical as the Court is aware in sexual assault cases it
15 always comes down to credibility -- well, not always but
16 many times it comes down to credibility, believing the
17 victim versus believing the defendant. And Your Honor, one
18 of the ways that the State tries to build their case is by
19 showing consistency. They want to show consistency in their
20 testimony. They want to show consistency from the victim to
21 witness A to witness B, and even here they want to show
22 consistency to the defendant's own witnesses whom the victim
23 had contacted in violation of the sequestration order. Your
24 Honor, that consistency they contend, as all prosecutors do,
25 builds credibility, credibility is something for the jury to

ARGUMENTS OF ATTORNEYS

1 decide when making their determination as to guilt or
2 innocence with whom to believe. And Your Honor, this is not
3 something that we're just saying in the general terms in
4 this case. If I could respectfully direct the Court's
5 attention to the State's closing argument on page 849, Your
6 Honor.

7 THE COURT: Got it.

8 MR. PEAVY: Beginning at lines five through ten. Your
9 Honor, this is where the State is stressing to the jury that
10 the victim's story matched up to some -- or one of the
11 witnesses. Now, the witness that the State is referring to
12 in this specific instance is not Mr. Addkus, the one that
13 I'm alleging, but Your Honor, they are stressing how
14 important it is -- beginning on line six, "There has been a
15 witness sequestration order in place for this entire trial.
16 Ashley had no idea what Lauren testified to." Your Honor,
17 and so what the State is doing there is essentially saying,
18 Ladies and gentlemen of the jury, pay attention to the
19 consistency, pay attention to that consistency as it relates
20 to credibility, these witnesses are credible, these
21 witnesses are credible because their testimony matched up.
22 There's a sequestration order, they never could have gotten
23 their story straight, but in fact, there was definitive
24 proof that there was a violation of this order. It was not
25 objected to, there was no motion to a mistrial. We believe

ARGUMENTS OF ATTORNEYS

1 that this failure to object or move for a mistrial fell --
2 was deficient and we believe it falls below the objective
3 standards at this point. Now, Your Honor, I have looked
4 around the country for case law on this issue. It seems to
5 me, Your Honor, that most of the case law on this issue
6 probably never gets actually appealed, because if it's
7 declared a mistrial the State isn't really -- the State
8 isn't appealing it. But if I could direct the Court's
9 attention to a couple of them, and I brought a couple of
10 copies for the attorney general and the Court, the first one
11 is State versus Tisdale, Your Honor. This is the case --
12 I'll pass it up. Thank you. May I approach?

13 THE COURT: Yes, sir.

14 MR. PEAVY: This is the State versus Tisdale. This is
15 where the court of appeals has actually denied the
16 defendant's request for a mistrial based upon a violation of
17 sequestration order essentially where the witness was
18 present and during either opening statement or during the
19 testimony and it was only as to a minor issue like -- and
20 that was not what we've got in this case, Your Honor. And
21 so that is the type of issue that the courts around the
22 country seemed to have denied or said that a mistrial would
23 be inappropriate where it is essentially as to a relevant
24 issue as to a violation of a sequestration order. If the
25 witnesses are outside talking about, hey, why are you here

ARGUMENTS OF ATTORNEYS

1 and things of that nature, but here what we've got is the
2 victim, the victim in a sexual assault case contacting in
3 direct violation of both Judge -- both times that Judge
4 Johnson told her not to do it, contacting one of the two
5 main -- the two witnesses for the defense. And for those
6 reasons, Your Honor, we think that it was inappropriate
7 respectfully that it occurred, we think that it should have
8 been objected to or a mistrial been requested, or that the
9 testimony be stricken. The failure to do so had a very,
10 very difficult impact on Mr. Thomas --

11 THE COURT: Is this an issue that was raised for direct
12 appeal?

13 MR. PEAVY: No, Your Honor. And at this point --

14 MR. CORNEY: Your Honor, as we go through these it
15 might be easier as we go through them for me to address them
16 one by one, I don't know if y'all had any objection to that,
17 for me to address the issues as we go. I do plan on calling
18 LaNelle Durant who was trial counsel at some point, but just
19 from a purely from the record argument I would like to
20 address these one by one as well if they don't have an
21 objection to it.

22 THE COURT: Any objection?

23 MR. PEAVY: No, Your Honor.

24 THE COURT: All right. Go ahead.

25 MR. CORNEY: Your Honor, the State would submit that

ARGUMENTS OF ATTORNEYS

1 this isn't a direct appeal, this is a post conviction relief
2 action which is guided by the standards of Strickland v.
3 Washington which Your Honor is very well aware of. The
4 applicant has the burden of proving that counsel was
5 deficient and that the deficiency resulted in prejudice and
6 that prejudice has specifically been found to the burden
7 that it has to meet to show there was a reasonable
8 probability that the outcome of trial had been different had
9 counsel not been deficient in that individual regard. Your
10 Honor, the State would submit that the record itself is
11 pretty clear -- well, actually it is not clear. James
12 Addkus is on the witness stand testifying when they
13 specifically ask him, "Do you remember talking to Lauren
14 Monday night regarding this particular incident?" And his
15 answer is, "I don't recollect." It's not clear --

16 THE COURT: Where are you?

17 MR. CORNEY: That's on page 681 right there, that was
18 cited to earlier on lines eight through ten. And James
19 Addkus testimony is, "I don't recollect." I mean, we're
20 talking about a couple of days later where he says I don't
21 recall talking to her. The testimony goes on to say --

22 THE COURT: Well, he says, "Do you recall telling
23 Lauren you believed it?"

24 MR. CORNEY: It says, "Do you remember talking to
25 Lauren on the phone on Monday night regarding that

ARGUMENTS OF ATTORNEYS

1 particular time," and he says, "I don't recollect."

2 THE COURT: Well, read on.

3 MR. CORNEY: Yes, sir. And he continues to read on
4 where they cited it.

5 THE COURT: So obviously they had a conversation.

6 MR. CORNEY: Right. And that's what I was going to get
7 to, Your Honor. And there was testimony later on and I will
8 pick it up for you right now on page 684 at the top, his
9 testimony goes on on 682 and 683, and he says, "Me and
10 Lauren were friends, me and the victim in this case were
11 friends." Right there at the very top, "Did you and Lauren
12 ever talk about the case? Yes? And y'all are friends?
13 Yes, we are friends." I mean, they've talked about this
14 case and there's no indication as to when they talked about
15 this case. James Addkus and her may have talked about this
16 case months before it was ever called to trial. The fact of
17 the matter is they don't have James Addkus here to testify
18 today, at least I don't believe so, to get up here and say
19 yes, I was on the phone with her, I said this at this point
20 in time. This could have been said at any point in time, he
21 readily admits that he talked about this.

22 THE COURT: Well, counsel believes it took place on the
23 Monday of the trial.

24 MR. CORNEY: Well, I understand that's their position
25 but it's not clear -- I mean, the transcript is not very

ARGUMENTS OF ATTORNEYS

1 clear that it happened on Monday and the testimony that the
2 State would submit, he says he's talked to her about the
3 case before, there's no indication as to when that took
4 place, he's friends with her, nextdoor neighbors with her
5 and he's talked to her about the case before. Further going
6 to the prejudice issue, Your Honor, I would respectfully
7 disagree with opposing counsel's view that this was key
8 information, key evidence that had to come out. We had the
9 victim testify at trial. It's my contention and I submit to
10 the Court that Ms. Durant's testimony will provide a
11 background to the Court that the victim was a senior at
12 Clemson at the time studying pre-pharmacy, very articulate,
13 very credible, got up there and testified for I don't even
14 know, 100 pages, more, as to the specific events that took
15 place in detail. Counsel is correct in saying, I believe --
16 opposing counsel is correct in saying it is a credibility
17 issue. She took the stand and got up there and testified
18 for a long time as a credible witness as to what happened.
19 The State then called additional witnesses up there to
20 substantiate her timeline of what happened, outgoing phone
21 calls she had, she had called 911 and there was a record
22 that she had called 911 during the assault and left her
23 phone on until 911 hung up, it was kind of stuck in the
24 couch at the time. There's a lot more evidence here than
25 just the victim versus defendant, there's a lot of evidence

ARGUMENTS OF ATTORNEYS

1 and witnesses to substantiate what she says. Further I
2 think that the victim on page 284 doesn't deny potentially
3 that it could have been -- on 284 right there at the top
4 says, "I know he came by my house at one point in time, I'm
5 not sure about the date, I'm even not sure if it was after
6 the date at Clemson" --

7 COURT REPORTER: Excuse me, Your Honor, I need him to
8 slowdown, please.

9 MR. CORNEY: Sorry, and when I get to reading I get to
10 going faster, I apologize. The victim in her testimony
11 before the jury at trial says right there at the top, "I
12 know at one point he did come by the house, I'm not sure
13 about the date, I'm not even sure if it was after the
14 incident in Clemson but I know that he did come by the house
15 at one point." And the question is, "Who was at the house
16 with you when he stopped by? His friend, James." I mean,
17 right then and there the victim was on the stand saying
18 yeah, he did come by the house, I'm not sure what the date
19 was. She doesn't contest the fact that it may have been
20 after this Clemson incident in between the Clemson incident
21 and the incident in Irmo. I don't see how James Addkus'
22 testimony that it may have been between those two incidents
23 is just earth shattering and one piece of evidence that
24 wasn't objected to that made the ultimate outcome in this
25 case completely different, which is the standard they have

ARGUMENTS OF ATTORNEYS

1 to be held to, a reasonable probability he wouldn't have
2 been convicted or it would have been overturned on appeal
3 had she objected to that and preserved it for appeal. Your
4 Honor, I think the entirety of the transcript will reflect
5 first of all they haven't met their burden in proving that
6 that even took place that Monday, based on the record it's
7 pretty unclear. James Addkus, I don't believe, is here to
8 testify that that happened on that Monday or even how the
9 conversation went and it's the applicant's burden. And this
10 trial testimony is just replete with the victim's testimony
11 and subsequent State's evidence that are essentially
12 bolstering her side of the story against the defendant's
13 story. I don't think that that one particular incident of
14 sequestration is enough to meet a reasonable probability
15 that the outcome of the trial is going to be different.
16 Thank you, Your Honor.

17 THE COURT: All right. Let's move on. Next issue?

18 MR. PEAVY: The next issue -- Your Honor, if I may --

19 THE COURT: Just go ahead and respond to the attorney
20 general.

21 MR. PEAVY: Your Honor, in response, Your Honor. Your
22 Honor, as he said, Your Honor, the transcript is replete
23 with people who back up each other's story but we know that
24 her story deviated from the pretrial hearing to the trial
25 and the reason they were able to get their story straight is

TESTIMONY OF RANDY THOMAS

1 because she had contact with this witness after the
2 sequestration order. As such we think it's prejudicial and
3 we think the failure to object falls within the reasonable
4 standard.

5 THE COURT: All right.

6 MS. GOLDBERG: Thank you, Your Honor. The next two
7 issues are not only record based but at this time we do need
8 to put up some testimony.

9 THE COURT: All right. Call your first witness.

10 MS. GOLDBERG: Your Honor, at this time we would call
11 Randy Thomas to the stand.

12 The witness, RANDY THOMAS, was first duly sworn
13 and testified as follows:

14 THE COURT: Have a seat in the witness box and state
15 your full name for the record.

16 THE WITNESS: My name is Randy Thomas.

17 DIRECT EXAMINATION

18 BY MS. GOLDBERG:

19 MS. GOLDBERG: Thank you, Your Honor.

20 Q. Good morning, Mr. Thomas.

21 A. Good morning.

22 Q. How old are you?

23 A. Thirty-four.

24 Q. Where are you incarcerated?

25 A. At McCormick Correctional Institution.

TESTIMONY OF RANDY THOMAS

- 1 Q. How long have you been incarcerated?
- 2 A. I have been incarcerated over eight years.
- 3 Q. What charges and what sentence are you being held on?
- 4 A. I'm being held on criminal sexual conduct, kidnapping
5 and assault and battery of a high and aggravated nature for
6 a total of 22 years.
- 7 Q. When was your trial?
- 8 A. In February of 2006.
- 9 Q. Who was your attorney?
- 10 A. LaNelle Durant and Jeanette VanGinhoven.
- 11 Q. You understand here today that we are here for post
12 conviction relief hearing, correct?
- 13 A. Yes, ma'am.
- 14 Q. You understand that this is not a retrial in your
15 original case, correct?
- 16 A. Yes, ma'am.
- 17 Q. And do you also understand if it were to be successful
18 your charges aren't dismissed but you have to start over and
19 face them again.
- 20 A. Yes, ma'am.
- 21 Q. Are you willing to go forward here today?
- 22 A. Yes, ma'am.
- 23 Q. And what are you ultimately hoping the Court will do
24 here today?
- 25 A. Reverse the decision and give me a new trial.

TESTIMONY OF RANDY THOMAS

1 Q. Thank you. Mr. Thomas, just some facts that we need to
2 enter into the record. Back in around the time that these
3 allegations came up, these incidents allegedly happened, was
4 there a time that you checked yourself into a mental health
5 facility?

6 A. Yes, ma'am.

7 Q. Do you recall when that was?

8 A. I want to say right around Halloween of 2004.

9 Q. Do you think it was the day of Halloween 2004?

10 A. It was either the day or the day after of Halloween of
11 2004, it was that weekend, I know it was that weekend.

12 Q. And whose decision was it for you to be committed into
13 the facility?

14 A. Basically it was mine, and we had had -- I had had a
15 discussion with my mother and father and my grandparents.

16 Q. Did any of your family members actually take you to a
17 facility?

18 A. Yes, ma'am.

19 Q. Who did that?

20 A. I believe my mother and father went.

21 Q. Which facility did they take you to?

22 A. Well, we originally -- they took me to Carolinas
23 Medical Center.

24 Q. Is there any particular -- where is that located?

25 A. That's in Charlotte, North Carolina.

TESTIMONY OF RANDY THOMAS

1 Q. Any particular reason you went to that facility?

2 A. Yes. My father's wife at the time was employed there
3 as well as my former stepmother who helped raise me, they
4 were both were employed at Carolinas Medical Center at the
5 time.

6 Q. And where were you -- in what city were you with your
7 parents when all of this came about?

8 A. I was in Fort Mill, South Carolina.

9 Q. So it was near Charlotte.

10 A. Yes.

11 Q. And generally speaking what made you and your parents
12 decide that you may need to be committed?

13 A. I was very distraught and wanting to cause harm to
14 myself.

15 Q. You were suicidal.

16 A. Correct.

17 Q. Do you recall how long you remained in that facility?

18 A. Approximately two weeks. Well, let me say that I
19 didn't stay at that facility, I was transferred to an actual
20 mental institution.

21 Q. Do you know the name of that institution?

22 A. Broughton.

23 Q. And you said you stayed until approximately when?

24 A. I want to say approximately November 12th.

25 Q. So to recap, you were admitted either November 31st

TESTIMONY OF RANDY THOMAS

1 (sic) or November 1st and discharged about November 12th?

2 A. That's correct.

3 Q. When you were discharged from the facility where were
4 you discharged to?

5 A. I was actually released into custody of -- I'm not even
6 sure exactly what county, but I was released into the
7 custody of police officers from that area.

8 Q. To a detention center?

9 A. Correct.

10 Q. When you were released into the custody of the officers
11 and the detention center, were you told why you were being
12 held?

13 A. I think all I was told was that South Carolina wanted
14 me.

15 Q. That you were being held for South Carolina.

16 A. Correct.

17 Q. And.

18 THE COURT: What year was this?

19 MS. GOLDBERG: Go ahead and answer the Judge.

20 THE WITNESS: This would have been in 2004, sir.

21 THE COURT: Four.

22 Q. When you were informed that you were being held for
23 South Carolina, were you asked to do anything, sign
24 anything?

25 A. Well, actually when I first left Broughton in custody I

TESTIMONY OF RANDY THOMAS

1 was taken to -- I don't know, I guess it was some type of
2 magistrate office, it wasn't a courtroom that I went to but
3 it was -- I guess it might have been a judge's chambers that
4 I was taken to and they discussed extradition with me.

5 Q. And what was your response to that discussion?

6 A. I told them that I would not fight extradition.

7 Q. You would not fight extradition. And did you
8 voluntarily sign off agreeing to come to South Carolina?

9 A. Yes, ma'am.

10 Q. And this was immediately after you were released from
11 the facility?

12 A. This was before I even went to the county jail or
13 confinement facility.

14 Q. And then how long did you remain at that particular
15 detention center?

16 A. I'll say roughly three days maybe, two to three days.

17 Q. You were -- and what was the delay, what were you
18 waiting on?

19 A. South Carolina to come get me.

20 Q. When you originally -- back on October 31st or
21 November 1st when you originally made the decision to be
22 committed into a mental health facility, did you call a
23 probation officer at that time?

24 A. Yes, ma'am, I did.

25 Q. Tell me about that conversation.

TESTIMONY OF RANDY THOMAS

- 1 A. Well, I was on probation at the time and the terms of
2 my probation were that I could not leave the state without
3 permission. So even though it was only a 20 minute drive to
4 Charlotte I wanted to let me probation officer know where I
5 was going to be and request permissions to actually leave
6 the state, so I called him on his cellphone, I had his
7 cellphone number, I called him on his cellphone and
8 basically just asked him was that all right, and he gave his
9 blessing and said that was fine.
- 10 Q. What was his name?
- 11 A. His name was Richard Hilton.
- 12 Q. Were you later served with a warrant for a probation
13 violation?
- 14 A. Yes, ma'am, I was.
- 15 MS. GOLDBERG: Your Honor, may I approach the witness?
- 16 THE COURT: Sure.
- 17 Q. Mr. Thomas, if you'll look at that document. Is that a
18 copy of the arrest warrant you received for that probation
19 violation?
- 20 A. Yes, ma'am.
- 21 Q. And that looks familiar to you, that's what you have
22 previously seen?
- 23 A. Yes, ma'am.
- 24 Q. And based on that record why were you violated for
25 probation?

TESTIMONY OF RANDY THOMAS

1 A. Because I was charged or convicted -- I don't know if
2 it was because I was charged or convicted but I think it was
3 after I actually was convicted because I violated my
4 probation because I received those charges.

5 Q. You were not violated because you had left the state,
6 correct?

7 A. No, ma'am, I was not.

8 Q. Do you believe that was because you informed your
9 probation officer that you were leaving the state?

10 A. Yes, ma'am.

11 Q. And you had his consent so do so?

12 A. Yes, ma'am.

13 MS. GOLDBERG: Your Honor, if I could ask to have this
14 document marked as Defense Exhibit I think 4 at this
15 point -- or Applicant's Exhibit?

16 MR. CORNEY: No objection by the State.

17 (Applicant's 4 received into evidence.)

18 Q. All right. Mr. Thomas, switching gears, who was your
19 main attorney during this trial I guess I should say, or
20 your first chair attorney?

21 A. Ms. LaNelle Durant.

22 Q. And did she meet with you in preparation for this
23 trial?

24 A. Yes, ma'am.

25 Q. At some point while Ms. Durant was preparing for your

TESTIMONY OF RANDY THOMAS

1 trial did you provide her with any letters?

2 A. Yes, ma'am, I did.

3 Q. Tell me about that.

4 A. Well, basically I just felt like after seeing what was
5 being said about me that it was going to be important to
6 show what kind of person I was and what I did in the
7 community or how I was perceived. So I contacted people and
8 also had my mother contact some people that I was not able
9 to reach from the county jail and just basically, you know,
10 asked them to write character references on my behalf.

11 Q. Did you receive a copy of those letters?

12 A. Yes, ma'am. Some of them were made directly to me and
13 some of them were mailed to my mother who then forwarded
14 them to me.

15 Q. So at some point in time you had all of the letters,
16 correct?

17 A. Yes, ma'am.

18 MS. GOLDBERG: Your Honor, may I approach the witness?

19 Q. Mr. Thomas, if you would take just a second to look at
20 the stack of papers I've handed you and just when you're
21 ready let me know if those are copies of the letters that
22 you had.

23 A. Yes, ma'am.

24 Q. Those are the letters, in fact.

25 A. Yes, ma'am.

TESTIMONY OF RANDY THOMAS

1 Q. Did you provide those letters to Ms. Durant?

2 A. Yes, ma'am, I did.

3 Q. Do you recall when you gave her those letters?

4 A. I was probably -- it wasn't immediately after she
5 became my attorney, I had a prior attorney before Ms. Durant
6 but I would probably say it was maybe the third time LaNelle
7 and I met.

8 Q. And just to clarify, you mentioned you had a prior
9 attorney, that attorney wasn't relieved because you fired
10 them or had any disagreement with them, correct?

11 A. No, ma'am.

12 Q. That was just a changeover within the public defender's
13 office?

14 A. That's correct.

15 Q. So you did give these letters you said maybe the third
16 time you met with Ms. Durant?

17 A. Yes, ma'am.

18 Q. Was it prior to this trial in February?

19 A. Yes, ma'am, well before the trial.

20 Q. Well, before the trial. Weeks before the trial?
21 Months before the trial?

22 A. I would venture to say it was months before the trial.

23 Q. Months before the trial. Were any of those witnesses
24 named on those letters, were any of those called on your
25 behalf during your trial?

TESTIMONY OF RANDY THOMAS

- 1 A. No, ma'am.
- 2 Q. Were those letters used in any way during your trial?
- 3 A. Yes, ma'am.
- 4 Q. And how were they used?
- 5 A. I'm not sure what they called it, what the terminology
- 6 is but it was used at my sentencing.
- 7 Q. At your sentencing?
- 8 A. Correct.
- 9 Q. Ms. Durant handed those letters up to the Judge --
- 10 A. Yes, ma'am.
- 11 Q. -- and asked the Judge to consider them at that time.
- 12 A. Yes, ma'am.
- 13 Q. Did you believe that any individuals were going to be
- 14 called in front of the jury to testify as to your character?
- 15 A. I know that I had asked Ms. Durant on several occasions
- 16 about people coming up and testifying and she basically said
- 17 that my character was not an issue and so that's why she
- 18 wasn't really worried about doing that.
- 19 Q. Did you want individuals to testify in your trial
- 20 regarding your character?
- 21 A. I felt like with all of the negative things that were
- 22 being said about me I thought it would be very beneficial to
- 23 have somebody say something positive, yes, ma'am.
- 24 Q. Were you involved in any decisions by Ms. Durant not to
- 25 call any of these people? Did you say that was okay, you're

TESTIMONY OF RANDY THOMAS

1 fine with her decision?

2 A. No, ma'am.

3 Q. Do you remember during the actual trial let's say at
4 the beginning of the trial if Ms. Durant ever did say she
5 intended on calling character witnesses?

6 A. I cannot recall that.

7 Q. What about your parents?

8 A. She did say at the beginning that she was -- that she
9 may call my mother or my father.

10 Q. As a result of that statement were your mother and
11 father sequestered during the entire trial?

12 A. Not for the entire trial. I think at a later point
13 Ms. Durant asked that they be allowed to come in to the
14 courtroom, but certainly for I would say half of it they
15 were not allowed to.

16 MS. GOLDBERG: Beg the Court's indulgence.

17 (Break in proceedings.)

18 MS. GOLDBERG: That's all of questions we have at the
19 time, thank you.

20 THE COURT: Cross examination.

21 MR. CORNEY: Yes, sir, Your Honor, very briefly.

22 CROSS EXAMINATION

23 BY MR. CORNEY:

24 Q. Mr. Thomas, none of those witnesses that those letters
25 were just handed up from were at the scene of either one of

TESTIMONY OF RANDY THOMAS

1 these incidents, the Clemson incident or the alleged Irmo
2 incident, correct?

3 A. The people in the letters?

4 Q. Right.

5 A. That's correct.

6 Q. So they all just were essentially setting forth that
7 you were a good guy, you coached youth sports, things you
8 did in the community, correct?

9 A. Correct.

10 Q. And at trial James Addkus and you both testified,
11 correct?

12 A. Correct.

13 Q. And James Addkus actually for a moment talked about how
14 you were a coach for youth sports, how you were involved in
15 the community, didn't he?

16 A. I believe that he was asked what kind of work I did,
17 correct.

18 Q. And you testified as well that you were a coach for
19 youth sports, that you worked at the -- I think it was some
20 kind of daycare or ministry of some sort?

21 A. Correct.

22 Q. So the jury got to hear some of the stuff at least that
23 set forth in those letters by witnesses, correct, by your
24 character witnesses?

25 A. Not other than myself.

TESTIMONY OF RANDY THOMAS

1 Q. Terry Burnett and his son, Knox, both spoke on your
2 behalf in mitigation at the end, that was in the sentencing
3 phase when they spoke on your behalf, correct?

4 A. Yes, sir, that's correct.

5 Q. You were facing I believe 100 years imprisonment total
6 on the charges?

7 A. Correct.

8 Q. And you received 22 years from Judge Johnson, correct?

9 A. That's correct.

10 Q. Terry Burnett, him and his son, Knox, both said some
11 pretty nice things about you in sentencing mitigation,
12 correct?

13 A. That's correct.

14 Q. So it's possible that those nice comments that they
15 both said could have played into the fact why you didn't get
16 100 years, you got 22 years, correct?

17 A. I would certainly hope so.

18 Q. So they could have been beneficial at that point in
19 time when they were brought up by Ms. Durant at sentencing.

20 A. Could they have been?

21 Q. Yeah.

22 A. Sure. I can say I don't recall the Judge taking very
23 long after receiving those letters to render his decision.

24 Q. In your testimony at trial you don't deny the fact that
25 when you came walking out of Lauren Byrd's house, the victim

TESTIMONY OF RANDY THOMAS

1 in this case, that you went to the car, put her son in the
2 car and essentially -- you drove off down the road when she
3 ran to the neighbor's, correct, you don't contest that?

4 A. Say it again how you were saying it.

5 Q. Based on your trial testimony you don't contest the
6 fact --

7 A. I don't contest the fact that Zach was in my car,
8 correct.

9 Q. And you drove down the road and stopped before you let
10 him out, correct?

11 A. That I got on the road, sure.

12 Q. That you drove down the road.

13 A. I drove about two blocks down. I didn't leave the side
14 of the house so I don't want to let it be perceived that I
15 was down the road.

16 Q. And that was after Lauren Byrd essentially took off
17 running to the neighbor's screaming for help, right?

18 A. Correct.

19 Q. Wouldn't you agree that's flight, that's trying to
20 escape the scene, driving two blocks away when the victim
21 goes running for help?

22 A. Not coming back, sir.

23 MR. CORNEY: I believe that's all of the questions I
24 have. Thank you.

25 THE COURT: Redirect.

TESTIMONY OF RANDY THOMAS

1 MS. GOLDBERG: Your Honor, initially I did intend to
2 introduce these letters that the defendant authenticated as
3 evidence, I neglected to formally do that, I would ask to do
4 that at this time?

5 MR. CORNEY: I have no objection to it, Your Honor.

6 THE COURT: No objection.

7 (Applicant's 5 received into evidence.)

8 MS. GOLDBERG: Thank you, Your Honor.

9 REDIRECT EXAMINATION

10 BY MR. CORNEY:

11 Q. Mr. Thomas, you actually testified in the trial,
12 correct?

13 A. Yes, ma'am.

14 Q. And you explained all of your actions; is that correct?

15 A. Yes, ma'am.

16 Q. And then as to some of the charges your defense was
17 consent, correct?

18 A. Correct.

19 MS. GOLDBERG: No further questions.

20 THE COURT: All right, sir, you may come down. Does
21 the defense team plan to recall him on other issues?

22 MS. GOLDBERG: Not at this time unless we decide that
23 we need to. Your Honor, at this time I would call Terry
24 Burnett.

25 The witness, TERRY BURNETT, was first duly

TESTIMONY OF TERRY BURNETT

1 sworn and testified as follows:

2 THE COURT: Have a seat in the witness box and state
3 your full name for the record.

4 THE WITNESS: John Trahune Burnett, I go by Terry.

5 DIRECT EXAMINATION

6 BY MS. GOLDBERG:

7 Q. Thank you, Mr. Burnett. Where are you employed?

8 A. At the South Carolina Bar.

9 Q. How do you know Randy Thomas?

10 A. I met Randy in I think it was about 1997, '98, '96,
11 somewhere in there, when he began to coach my son, Knox, in
12 rec. league and in tournament YBOA basketball.

13 Q. And when that began how old was Knox?

14 A. My recollection was that he was probably 11 or 12 years
15 old.

16 Q. Did there become a point where somebody asked you to
17 write a letter on Randy Thomas' behalf due to this court
18 situation?

19 A. Yes, ma'am.

20 Q. And did you do that?

21 A. I did, yes, ma'am.

22 MS. GOLDBERG: Your Honor, if I may approach?

23 Q. Mr. Burnett, I'm going to hand you Applicant's Exhibit
24 Number 5, the top letter. Can you confirm that that's a
25 letter you wrote?

TESTIMONY OF TERRY BURNETT

- 1 A. I can, yes, ma'am, that's my letter.
- 2 Q. What's the date on that?
- 3 A. November 25th of 2005.
- 4 Q. Do you recall who you gave that letter to?
- 5 A. I actually don't, I'm not sure if I sent it to Randy
- 6 directly or to his attorney.
- 7 Q. Did you write that letter intending that it be used in
- 8 order to help him in some way in his criminal trial?
- 9 A. Yes, ma'am.
- 10 Q. When his criminal trial came were you aware that it was
- 11 going on?
- 12 A. Yes, ma'am, I was aware.
- 13 Q. Were you present for any of his criminal trial?
- 14 A. I was. I did not sit through the entire trial but I
- 15 did walk across the street from the bar building on a couple
- 16 of occasions during those days of that trial and witnessed
- 17 part of the trial, yes, ma'am.
- 18 Q. Did anyone ask you to be here for that trial?
- 19 A. No, ma'am.
- 20 Q. You just came as a friend?
- 21 A. That's correct.
- 22 Q. Were you ever asked by defense counsel to testify in
- 23 the trial as to Randy's character?
- 24 A. I don't recall that I was ever asked to testify. I do
- 25 believe I had at least one conversation with Randy's

TESTIMONY OF TERRY BURNETT

1 attorney and just offered to do whatever I could to help.

2 Q. And you stated that you were here and present for parts
3 of the trial, correct?

4 A. Correct.

5 Q. So you were in town and available that week.

6 A. Yes, ma'am.

7 Q. If you had been asked to testify in the trial can you
8 say if you would have or not?

9 A. Yes, ma'am, I would have.

10 Q. You would have. And testified in front of the jury.

11 A. I would have, yes, ma'am.

12 Q. And you believe your schedule was such that you were
13 available to do so also.

14 A. Yes, ma'am.

15 Q. A very short summary, can you tell us just for the
16 record basically what you did tell the Court during
17 sentencing and what you would have said about Randy's
18 character if you had been called to trial?

19 A. Sure. My personal experiences with Randy were not
20 short in duration, they were over several years of time from
21 about the time that my son was, as I said, 11 or 12 until
22 basically the time that he graduated from high school which
23 was in 2004. My association with Randy was concentrated
24 more in those early years when he was actually my son's
25 coach. Randy lived with us, he lived at our house for

TESTIMONY OF TERRY BURNETT

1 several months and I had no problem leaving him alone with
2 my kids, I also had a daughter younger than my son who would
3 have been nine or ten at that time. He's a man who is very
4 gifted with kids. I saw him in many, many, many pressure
5 situations in basketball games when games were on the line,
6 never saw him lose his temper, never saw him get a technical
7 foul, never saw him abuse a child, trusted my kids with him
8 implicitly. And I believed him to be and do believe him to
9 be a man of character who is a great teacher of basketball
10 to young kids, and just a man of character, and also hard
11 working and a fair person.

12 MS. GOLDBERG: Thank you very much. No further
13 questions.

14 MR. CORNEY: Just one question.

15 CROSS EXAMINATION

16 BY MR. CORNEY:

17 Q. Mr. Burnett, I don't mean to sound like a smart aleck
18 when I'm asking this, but you weren't at the scene of the
19 incident when it happened in both Irmo and Clemson.

20 A. No, sir, absolutely not.

21 Q. You have no personal knowledge as to anything that
22 happened with that.

23 A. None whatsoever.

24 MR. CORNEY: Thank you very much, that's all I have.

25 MS. GOLDBERG: Nothing further, Your Honor.

TESTIMONY OF KIMBERLY KLASNIC

1 THE COURT: You may come down, sir. May this witness
2 be excused?

3 MR. CORNEY: Yes, Your Honor.

4 MS. GOLDBERG: At this time we would call Kim Klasnic.
5 The witness, KIMBERLY KLASNIC, was first duly
6 sworn and testified as follows:

7 THE COURT: Please have a seat in the witness box and
8 state your full name for the record.

9 THE WITNESS: Kim Klasnic.

10 DIRECT EXAMINATION

11 BY MS. GOLDBERG:

12 Q. Can you state your full name, please?

13 A. Kimberly Ann Klasnic.

14 Q. Thank you, Ms. Klasnic. Where are you employed?

15 A. I'm a self-employed business owner.

16 Q. Do you live here locally?

17 A. I do.

18 Q. In Columbia?

19 A. Yes.

20 Q. How long have you lived in this area?

21 A. Since 1999.

22 Q. And how do you know Randy Thomas?

23 A. I initially met Randy, he was a referee at Friars Gate
24 Recreation Park.

25 THE COURT: She's going to have a speak up a little

TESTIMONY OF KIMBERLY KLASNIC

1 bit.

2 Q. If you could just speak a little louder.

3 A. I met Randy in 1999 where he was a referee at Friars
4 Gate Recreation Park.

5 Q. Why were you involved with that recreational park?

6 A. Three of my children played basketball there and
7 baseball all around Friars Gate.

8 Q. So your association with him was through your children
9 playing sports?

10 A. That's correct. And my husband was also a coach at
11 Friars Gate so we became friendly.

12 Q. How old were your children when you first met Randy if
13 you can recall?

14 A. Three, six and eight.

15 Q. Did there become a time later on when you were asked to
16 write a letter on behalf of Randy to be used in court?

17 A. Yes.

18 MS. GOLDBERG: May I approach, Your Honor?

19 Q. Ms. Klasnic, if you will look at Applicant's Exhibit
20 Number 5 at the second letter in that stack, if you can
21 confirm that that is the letter you wrote.

22 A. Yes, it is.

23 Q. What's the date on that letter?

24 A. October 27, 2005.

25 Q. Do you remember who you gave that letter to?

TESTIMONY OF KIMBERLY KLASNIC

1 A. I want to say that I mailed it to Randy's mother, she
2 left me a voice mail.

3 Q. Did you intend that that letter be used to help Randy
4 in his criminal matter?

5 A. Absolutely.

6 Q. Were you ever contacted by Randy's attorney, Ms.
7 Durant?

8 A. No.

9 Q. Were you -- when he had his jury trial were you aware
10 that the jury trial was going on?

11 A. I had no idea.

12 Q. No one contacted you?

13 A. No.

14 Q. Did anyone ever ask you to testify on his behalf during
15 that jury trial?

16 A. No.

17 Q. This would have been in February of 2006, were you in
18 Columbia at that time?

19 A. Yes, I was.

20 Q. Living in Columbia?

21 A. Yes.

22 Q. If you had been asked by Ms. Durant to testify for
23 Randy's behalf, do you know what you would have said or do
24 you know if you would have been able to?

25 A. Absolutely.

TESTIMONY OF KIMBERLY KLASNIC

1 Q. Would you have been willing to also --

2 A. Yes.

3 Q. -- testify in front of the jury?

4 A. Of course.

5 Q. If you would have been called to testify in front of
6 the jury, can you give the Court just a brief summary on
7 what you would have said regarding Randy's character?

8 A. Well, I certainly would have, you know, said that he is
9 a man of character. I had him with my children. He
10 discovered my daughter as a runner, she's now a collegiate
11 runner. Loved my children. I have pictures of him holding
12 my kids, playing with them, talking to them. He came to
13 baseball games. Even though he didn't referee at their
14 baseball games he would show up just to watch them play,
15 coached my middle son in AAU basketball and traveled with
16 him so I trusted him implicitly, I didn't have a problem
17 with it. And I have a daughter that I left with him, he
18 also helped her with basketball, with her running and
19 encouraged them, a very positive role model for them.

20 MS. GOLDBERG: Thank you very much.

21 THE COURT: Any questions?

22 CROSS EXAMINATION

23 BY MR. CORNEY:

24 Q. Ms. Klasnic, along the same line as what I asked

25 Mr. Burnett a few minutes ago, you were not at the scene of

ARGUMENTS OF COUNSEL

1 this incident and you don't have any personal knowledge of
2 the facts, do you?

3 A. No, sir.

4 Q. You don't have any personal knowledge about the facts
5 of what happened that were alleged by the State, do you?

6 A. None.

7 MR. CORNEY: Thank you very much, I appreciate it.

8 THE COURT: You may be excused.

9 MS. GOLDBERG: Your Honor, at this time I believe that
10 is the extent of the testimony that we have to offer. I do
11 have two additional affidavits that I --

12 THE COURT: Just tell her she can be excused.

13 MS. GOLDBERG: She can be excused. Your Honor, I have
14 two additional affidavits. The stack of letters that I
15 entered in evidence as Applicant's Number 5, that's a stack
16 of 15 letters, I did not intend on calling 15 people up here
17 all day.

18 THE COURT: You weren't going to.

19 MS. GOLDBERG: Right. I do have two additional
20 affidavits from two of those people that simply say I wasn't
21 asked to be a witness. If I had been asked I would have and
22 I would have testified consistent with the letter. I would
23 ask to offer these two affidavits into evidence if the
24 attorney general --

25 MR. CORNEY: And I don't have any objection to the

ARGUMENTS OF COUNSEL

1 affidavits.

2 THE COURT: All right. Go ahead.

3 MS. GOLDBERG: Thank you, Your Honor.

4 (Applicant's 6 and 7 received into evidence.)

5 MS. GOLDBERG: Your Honor, at this time I believe what
6 we have remaining is our argument regarding flight,
7 character and the remaining issues.

8 THE COURT: Tell me why you think all of that would
9 be -- would have been admissible during the course of the
10 trial.

11 MS. GOLDBERG: Which issue, Your Honor? The character?

12 THE COURT: Yeah.

13 MS. GOLDBERG: As far as character goes, Your Honor,
14 the defense in a criminal trial -- the defense of the
15 accused is allowed to present positive character evidence as
16 a general rule, that's under 404A1. It says, "Evidence of a
17 personal character or trait is not admissible to prove
18 actual conformity therewith except as evidence of a
19 pertinent of character offered by the accused." Defense is
20 always allowed to put up this type of evidence, the State is
21 not allowed to put up evidence of character to prove
22 conformity therewith unless they're doing so to rebut
23 something the defense already offered or unless they can get
24 it in through Lyle those are the only times they can, the
25 defense always can. Your Honor, when this information is

ARGUMENTS OF COUNSEL

1 presented, when there is positive good character evidence
2 presented the defendant is also further entitled to a jury
3 instruction on it. I have a -- I can hand this up, but just
4 to read from State v. Harrison the jury instruction is
5 generally that when it's requested and when evidence of good
6 character is presented the defendant is entitled to an
7 instruction to the affect that the evidence of good
8 character and good reputation may in and of itself create
9 doubt as to guilt and should be considered by the jury along
10 with all other evidence in determining the guilt or
11 innocence of the defendant. Your Honor, I will hand -- this
12 concept is addressed in State v. Harrison and also in State
13 v. Lee-Grigg. State v. Lee-Grigg is actually a 2010 case so
14 relatively recent, both of these cases are not PCR's,
15 they're appeals. And in each of those cases defense counsel
16 did present positive good character evidence for the
17 defendant. One of the cases the issue was a cordially or a
18 truth related charge but in the other one it wasn't, it was
19 a drug charge, in both cases they were overturned because
20 the Judge didn't give the instruction which I introduced
21 just to show the point when it is available and when it is
22 introduced it is very important, it is so important that the
23 Judge must give that jury instruction to let the jury know
24 they can consider it strongly. In this particular case Ms.
25 Durant had an immense amount of positive character evidence

ARGUMENTS OF COUNSEL

1 she could have introduced, she had letters from 15
2 individuals well prior to trial. She only called two
3 witnesses to the stand for the defense, one of which was the
4 defendant who, granted, was able to testify as to his work
5 history and his community involvement but he's also the
6 defendant which the jury is going to question a little bit
7 more his credibility just because he's on trial. The only
8 other witness the defense called is James Addkus who we
9 discussed earlier. James Addkus from my reading of the
10 testimony did not testify as to character other than the
11 fact that they were friends. I believe he said that he was
12 a loving person and he wasn't a fighter, but he did not go
13 in to anything about his hard working nature and his
14 trustworthiness and his responsibility. Your Honor, the
15 reason that this is important is because the State made this
16 an issue at trial. If you will look at page 189 on line 11.
17 Let me know when you're ready.

18 THE COURT: Number what?

19 MS. GOLDBERG: 189.

20 THE COURT: All right.

21 MS. GOLDBERG: Your Honor, at that point it's the
22 alleged victim testifying and she states, "He did not have a
23 job and I sort of felt sorry for him. He stayed with me
24 often, I tried to convince him to get a job and help me out.
25 He knew my bank card number and I didn't even know it. He

ARGUMENTS OF COUNSEL

1 had taken money out, it was beginning to get excessive. He
2 was just sort of sponging off me and my parents so I told
3 him to leave several times. He didn't." Further on page
4 190, she states on page -- well, it's on page 189 on line
5 24, "He didn't have a place to stay, he was very good with
6 words, he was able to convince me that things were going to
7 work and that he could get a job. Did he help pay bills?
8 He did not help pay bills. Did he pay rent? He did not pay
9 anything." Your Honor, this testimony was emphasized in the
10 closing argument by the State, which is on page 829. This
11 is when the State had last closing, this was the very
12 beginning, very first thing out of the solicitor's mouth
13 during that last closing portion. Beginning on page 14 you
14 can see generally that she starts speaking about the victim,
15 the alleged victim and talking about how good of a person
16 and how respectable she was, she's about to graduate, she's
17 managed to continue with her life despite being a teenage
18 mother. She got into Clemson University. Then on line 22
19 the solicitor specifically states, "Randy Thomas was a
20 freeloader. He admitted on the witness stand that when he
21 lived with her he didn't pay a single bill, he didn't have a
22 job. Oh yeah, he worked maybe a week. He admits he had no
23 direction whatsoever and that's why Lauren wanted to end
24 this relationship, what's best for her and her son she chose
25 to end the relationship." Another big issue in this case

ARGUMENTS OF COUNSEL

1 was whether or not Randy was often babysitting the child who
2 was allegedly kidnapped, whether he was with him all the
3 time, referred to him as a father figure, whether he could
4 be trusted around small children. Your Honor, our argument
5 is that Ms. Durant had an abundant amount of evidence that
6 she could have looked in to further and could have used to
7 prove his character and we believe that she should have done
8 that and should have been prepared for it. However once the
9 State began eliciting testimony from the victim as to things
10 not at all related to this crime, this incident, just
11 whether he was lazy, whether he was a good person or not,
12 once that came into evidence Ms. Durant should have been
13 prepared to use the information she had to combat that
14 testimony. Your Honor, when the alleged victim originally
15 made those statements about Mr. Thomas Ms. Durant did object
16 on the ground of relevance, I think there should have been
17 an objection as to improper character evidence at that time.
18 The Judge did overrule her but I think that at that point
19 her hands were tied in a way that she should have been
20 prepared to present additional witnesses and additional
21 evidence which we've presented to you today. And again, of
22 course the defense -- the defense actually did put up a
23 defense in this case, they put up two witnesses so there's
24 no argument as to last closing or anything like that, it
25 became a very relevant issue and that's why we believe she

ARGUMENTS OF COUNSEL

1 should have -- it was prejudicial not to act in that way.

2 THE COURT: All right. Mr. Corney, do you want to
3 address both the flight issue -- Ms. Goldberg do you want to
4 address the flight issue?

5 MS. GOLDBERG: Ms. Armstrong is going to address that.

6 THE COURT: Kind of hard to keep it straight.

7 Mr. Corney do you want to address the character issue?

8 MR. CORNEY: Your Honor, in doing so I would like to
9 call a witness if I may, I know we're getting a little out
10 of sync here. I can present argument on it or I -- I would
11 like to call Ms. Durant to the stand please.

12 THE COURT: Approach the bench, please.

13 (A bench conference was held.)

14 THE COURT: All right. It appears that this hearing is
15 going continue for some time, we've been at it since 9:30
16 with only short breaks, so I'm going to take a longer break
17 for 45 minutes at this time.

18 (A recess was taken.)

19 THE COURT: All right, counsel. Are we ready to
20 proceed?

21 MS. GOLDBERG: Yes, sir, Your Honor.

22 MR. CORNEY: Yes, sir.

23 MS. ARMSTRONG: May it please the Court?

24 THE COURT: Yes, ma'am.

25 MS. ARMSTRONG: An additional issue that was raised by

ARGUMENTS OF COUNSEL

1 the applicant is 9C. This argument came about in kind of an
2 unusual way. Ordinarily evidence that a defendant fled the
3 scene or tried to evade capture or being served with a
4 warrant, while that's ordinarily allowed in as evidence of
5 guilt, in this case we have a slightly unusual situation in
6 that Mr. Thomas was actually committed to a mental health
7 facility shortly after the alleged event in Irmo and so the
8 following day he was actually in a facility in Charlotte,
9 North Carolina. The way he got to Charlotte, North Carolina
10 is that he had relatives that lived in York County and he
11 had insurance and he had access to some mental health
12 facilities in that area and so he was there, he was on
13 probation, the agent didn't seek to revoke him for failure
14 to --

15 THE COURT: Let me get a little factual background
16 this -- the underlying event took place on what day
17 allegedly?

18 MS. ARMSTRONG: October 30th, Your Honor, of 2004.

19 THE COURT: All right. And then he said --
20 October 30th?

21 MS. ARMSTRONG: Yes, Your Honor.

22 THE COURT: His testimony is he checked into a mental
23 health facility on Halloween.

24 MS. ARMSTRONG: Which would have been the following
25 day, Your Honor.

ARGUMENTS OF COUNSEL

1 THE COURT: The following day.

2 MS. ARMSTRONG: Yes, Your Honor.

3 THE COURT: And the incident date was in Columbia. So
4 he left Colombia -- just wait a minute, just following the
5 facts. He left Columbia immediately or some time close in
6 time after the event?

7 MS. ARMSTRONG: That's correct, Your Honor.

8 THE COURT: Went to Fort Mill right where his parents
9 lived, or parents were and was checked in immediately?

10 MS. ARMSTRONG: Essentially, yes.

11 THE COURT: Isn't that the sequence of events?

12 MS. ARMSTRONG: Yes, Your Honor.

13 THE COURT: And you say the State should not be able to
14 create any inference from that series of events?

15 MS. ARMSTRONG: Well, Your Honor, let's back up a
16 couple of days as far as the trial. On February 2nd the
17 issue of these mental health records were addressed pretrial
18 and everybody agreed that it was sort of a double-edged
19 thing, they were going to stay away from it, they were not
20 going to talk about Mr. Thomas being --

21 THE COURT: Show me where that is.

22 MS. ARMSTRONG: February 2nd of 2006, there is a
23 transcript.

24 THE COURT: I've got it.

25 MS. ARMSTRONG: Yes, Your Honor.

ARGUMENTS OF COUNSEL

1 THE COURT: And where in that transcript?

2 MS. ARMSTRONG: I apologize, page seven.

3 THE COURT: Seven?

4 MS. ARMSTRONG: Yes, sir.

5 THE COURT: All right. And this is Ms. Durant's
6 motion?

7 MS. ARMSTRONG: Yes, Your Honor.

8 THE COURT: Suppress any reference to the defendant's
9 hospitalization, is that it?

10 MS. ARMSTRONG: Yes, Your Honor.

11 THE COURT: Okay. Go ahead.

12 MS. ARMSTRONG: Okay. So essentially our ground is the
13 solicitor's office knew good and well where Mr. Thomas was
14 between October 30th and the date that Mr. Thomas was
15 brought back from North Carolina, and by making this
16 argument that the jury should infer guilt based on his not
17 being under arrest during that 15 day period, and you'll see
18 her argument, her closing argument to the jury pages 818
19 through 819.

20 THE COURT: All right, let me find it. I've got 818.

21 MS. ARMSTRONG: Thank you, Your Honor. Line 18,
22 "Evidence of flight is admissible to show guilty knowledge,
23 intent and that the defendant sought to avoid apprehension.
24 Another legal matter evidence of flight, there's testimony
25 that Investigator Gottfried on November 1st after he

ARGUMENTS OF COUNSEL

1 interviewed Lauren Byrd that he had arrest warrants issued
2 for the defendant's arrest. There's also testimony for you
3 and you can consider that it took 16 days -- I'm sorry, 15
4 days, he was not arrested until November 15 in North
5 Carolina, remember the extradition paperwork." So
6 essentially what the State did is they created some
7 impression that they knew good and well wasn't true, he
8 wasn't out on the lamb, he wasn't hiding under a bridge,
9 they knew good and well where he was, and it was agreed that
10 everybody was going to stay away from the mental health
11 issue.

12 THE COURT: When did they find that out?

13 MS. ARMSTRONG: Beg your pardon?

14 THE COURT: When did they find out that he was in North
15 Carolina?

16 MS. ARMSTRONG: Mr. Thomas called his probation agent.

17 THE COURT: When?

18 APPLICANT: Directly before I went to the hospital I
19 called the probation officer and asked permission to leave
20 the state to go to the hospital.

21 THE COURT: You impute that knowledge to law
22 enforcement?

23 MS. ARMSTRONG: There's nothing in the record, Your
24 Honor -- all counsel on the record agreed they weren't going
25 to get near this and they all knew where he was and why he

ARGUMENTS OF COUNSEL

1 was there.

2 THE COURT: Well, I'm not sure just from -- maybe I
3 should listen to the argument. But I can understand staying
4 away from mental health records in terms of why he was
5 there, HIPPA violations, that sort of thing, but I'm not
6 sure I understand it to be that we can't comment on the fact
7 that he left the state, so --

8 MS. ARMSTRONG: Well, Your Honor, our argument would be
9 that the State is not allowed to create this false
10 impression, that he was out trying to avoid being prosecuted
11 when he had already let his probation agents know.

12 THE COURT: Well, he was attempting to not being
13 prosecuted but being arrested, the police issued a warrant
14 the day of and were looking for him.

15 MS. ARMSTRONG: The 1st of November I believe is when
16 the arrest warrant was executed.

17 THE COURT: Well, same thing.

18 MS. ARMSTRONG: Yes, Your Honor.

19 THE COURT: Go ahead, I understand.

20 MS. ARMSTRONG: I guess our point is they knew where he
21 was and to make the argument that he was out running trying
22 to avoid responsibility or being brought to trial for 15
23 days, that that is a very disingenuous argument to have made
24 and it was very prejudicial. Clearly the whole point was
25 they could use -- the jury could rely on the fact that he

ARGUMENTS OF COUNSEL

1 was gone during that window of time as evidence that he was
2 guilty. And quite frankly, Your Honor, I don't think there
3 was any question that that's a false impression and the
4 State is not allowed to misrepresent what they know as facts
5 of the case, and certainly it would not be -- in the
6 interest of fair play and honesty and holding the State to
7 its burden beyond a reasonable doubt, you can't rely on
8 these sorts of arguments that are based on making a clever
9 argument but not an honest one. And we're not alleging
10 prosecutorial misconduct because there's no evidence that it
11 was intentional overstepping, but I think that in the heat
12 of battle at the end of a case when they are trying really
13 hard they may slip up and say things that later on when
14 we've got people looking back and say, "Wait a minute, you
15 weren't supposed to do that." We don't allege this is
16 prosecutorial misconduct but certainly based on the
17 agreement that was made between all counsel and the Judge
18 prior to the case that there should have been an objection
19 lodged. That's our argument on the flight issue. And Your
20 Honor, I'm sorry, if I could just add one more thing Mr.
21 Peavy just brought to my attention, on page seven, line 23
22 of the pretrial hearing with Judge Johnson Ms. Durant
23 reminds everyone at this pretrial conference that any
24 admission of the state mental facility they thought would be
25 prejudicial to him. So it was pretty clear everybody knew

ARGUMENTS OF COUNSEL

1 where he was, what they were talking about and they were all
2 agreeing as colleagues that they were going to stay away
3 from that. Oh, and I would also point out line 19, the
4 Court says directly to counsel, "or the time period between
5 the alleged incident date and the date of the arrest." So
6 it was pretty clear everybody knew what the time frame was
7 and what they were supposed to stay away from, and in this
8 case for whatever reason the State got a little overly
9 enthusiastic in their closing argument and they crossed that
10 line. And in a case where it is he said/she said, which is
11 what it comes down to in a lot he respects, that type of
12 misrepresentation whether it's intentional or not is clearly
13 prejudicial. Note also on page 627 of the record that the
14 State talks about the extradition. Again, the whole point
15 of that is to just say we had to go track him down and we
16 had to go drag him back because he was trying to get out of
17 something and try to avoid coming to answer these charges
18 and that's just simply not true. And thank you, Your Honor,
19 that's our argument as to that one.

20 MR. CORNEY: Your Honor, if I may just do a brief reply
21 to that. In the record on page seven what Ms. Armstrong
22 just referred to, I just want to put that in context because
23 I think the way she read that is a little bit of a
24 misrepresentation. In fact, the Court -- right above that
25 on line 16 on page seven, Ms. Durant says, "Your Honor,

ARGUMENTS OF COUNSEL

1 we're not contesting the way he was arrested or anything to
2 do with the officers, and Ms. Copper and I" -- and she is
3 cut off by the Court, and the Court says, "Or the time
4 period between the alleged incident and the date of the
5 arrest." And Ms. Durant says, "No, sir." Obviously that
6 response is in to her statement prior to that saying we're
7 not contesting that, we're not contesting there was a 15 day
8 time lapse between the time that this incident occurred and
9 he was actually detained by South Carolina. I think Your
10 Honor makes an interesting point in the fact that they're
11 alleging no flight here, they're alleging that it shouldn't
12 have been commented on flight when the motion is clear at
13 the top making a motion to suppress -- top of page seven --
14 any reference to the defendant's hospitalization. It
15 doesn't say a word about not mentioning his flight to Fort
16 Mill prior to that, his taking -- and the testimony in the
17 record reflects his taking of the victim's son and driving
18 down the street as she's running to the neighbor's house
19 requesting that 911 be called. That right there, the two
20 blocks with the son in the car is evidence of flight, he
21 took off when the victim started screaming for somebody to
22 call 911. That standing alone, let alone this other 15
23 daytime period, that's evidence of flight that the solicitor
24 can argue in closing argument. But when it goes to this he
25 didn't -- it's not like he came and got picked up from the

ARGUMENTS OF COUNSEL

1 scene and went and got committed, he drove to Fort Mill and
2 voluntarily committed himself to a North Carolina state
3 institution is my understanding. We don't have any records
4 from that institution to validate when he was taken in,
5 under what conditions he was taken in and I didn't see
6 anything produced by him that he -- to substantiate that he
7 claimed he called his parole officer or probation officer, I
8 haven't seen anything to substantiate that claim. But Your
9 Honor, I think it's pretty clear the motion was to suppress
10 any mention of his hospitalization, not his flight and I
11 would submit that the State's argument on evidence of flight
12 in closing argument wasn't improper and it certainly wasn't
13 agreed to prior to the trial, it was just to not reference
14 the fact that he was hospitalized for the exact purposes
15 that Your Honor mentioned earlier, we have HIPPA laws, we
16 have a lot of things that the State didn't want to get
17 involved in by getting into hospitalization and that's what
18 they had agreed upon not to argue about.

19 THE COURT: Well, I think Ms. Armstrong's point is that
20 defense counsel should have objected to that argument on 818
21 and 819.

22 MR. CORNEY: And Your Honor, assuming that that's the
23 Court's position on that, I'm not saying it is, I am
24 saying --

25 THE COURT: No, I said that's the defendant's position.

ARGUMENTS OF COUNSEL

1 MR. CORNEY: And even if we take that as true then Ms.
2 Durant -- and I'm not conceding that, but even if we take
3 that as true and saying that Ms. Durant was deficient, they
4 still have to prove evidence of prejudice, that that one
5 error alone is the one thing that's a reasonable likelihood
6 to change the outcome at trial. I think that had Ms. Durant
7 made that objection it would have been overruled. There is
8 evidence of flight in this case and they never agreed to
9 talk about evidence of flight. The testimony is clear and I
10 asked Mr. Thomas about it before and he -- when he was on
11 the stand and he readily admitted he drove two blocks down
12 the street as the victim fled and screamed for help as they
13 walked out of the house, that's flight, that's enough to
14 argue that.

15 THE COURT: Well, it may but that's not -- at least so
16 far that's not what the solicitor argued to the jury.

17 MR. CORNEY: Right.

18 THE COURT: The solicitor argued to the jury about 15
19 days.

20 MR. CORNEY: Right. And obviously the jury is charged
21 by the Court that what is said in closing arguments is not
22 to be considered, that's the solicitor take on things. She
23 objects, the Court moves to strike that portion of it,
24 there's still evidence of flight to where she can say you
25 can look into evidence of flight as a guilty mind, and

ARGUMENTS OF COUNSEL

1 obviously his going to Fort Mill in the first place is
2 evidence of flight. So I don't think there was any
3 agreement that they weren't going to talk about evidence of
4 flight and this motion to suppress referenced to the
5 hospitalization, that wasn't mentioned and I don't think
6 there's been sufficient evidence here to prove the
7 allegations that they are putting forth in that regard.
8 Thank you, Your Honor.

9 THE COURT: All right.

10 MS. ARMSTRONG: Your Honor, I would just point out that
11 my client went to a family member in York County and if he
12 was deemed to be on the run his probation agent, certainly
13 they would have had evidence of some sort of warrant by
14 probation --

15 THE COURT: It's probably pretty common that following
16 a crime that people tend to head for their family. All
17 right, what's your next issue?

18 MS. GOLDBERG: Your Honor, our next issue has to do
19 with the fact that there was testimony elicited to the fact
20 that the defendant's bond was denied prior to trial.

21 THE COURT: Hold on a minute. I thought there was a
22 lesser-included argument.

23 MS. GOLDBERG: There is, we've got that too, this one
24 is brief. Your Honor, for a small overview or snapshot of
25 the facts of what happened, basically after the defendant

ARGUMENTS OF COUNSEL

1 was arrested there was a bond hearing at night at the county
2 jail. The alleged victim, Ms. Byrd, came from Clemson where
3 she lived to the hearing but had to leave the bond hearing,
4 was running late. What happened was her and the
5 investigator went into chambers and spoke with a Judge
6 outside of the hearing privately and so there's some
7 allegation that may have been ex parte but ultimately the
8 Judge denied the bond. Your Honor, as far as the
9 transcript, if you would go to page 643.

10 THE COURT: Got it.

11 MS. GOLDBERG: This is the direct examination by the
12 State of the lead investigator in this matter, it's all
13 testimony elicited by the State. Your Honor, on 643 the
14 investigator kind of explains to the jury what bonds are
15 about. Beginning on line 22, "Obviously if you get charged
16 with something you will go in front of a Judge, the victim
17 has a right to be there and the Judge will establish a bond
18 depending of the crime. There's a lot of factors that the
19 Judge (sic) for how much it will cost you to get out of jail
20 or even if you get to get out of jail they'll set a bond for
21 you, it could be a PR bond, it could be a surety bond, you
22 may have to put something up, you may not have to put
23 something up. So that was the purpose of the hearing that
24 night." Your Honor, if you go forward on to page 645 on line
25 11 he states, "The magistrate Judge told me to go get the

ARGUMENTS OF COUNSEL

1 victim and bring her into the office." They asked, "At what
2 point did that happen, were you present?" He said he was.
3 And it was -- and then the question is, "As a result of the
4 Judge hearing from the victim did you learn what the Judge
5 decided later on?" And the investigator said, "Right, I
6 didn't attend that bond hearing I don't believe. In fact, I
7 know I didn't attend it but eventually the Judge denied his
8 bond." Your Honor, my argument is that that entire line of
9 testimony elicited by the State was improper, it's
10 irrelevant and it's highly prejudicial. As Your Honor can
11 see the facts here presented infer that a prior Judge, a
12 neutral and detached magistrate Judge in a prior hearing
13 heard from the victim, heard the facts and based on that
14 that Judge made an independent decision that Mr. Thomas
15 should remain in jail and should not receive any bond, that
16 the circumstances were so believable, that the victim was so
17 credible that the Judge denied the bond. Your Honor, the
18 problem here is that the jury could possibly likely have
19 taken those facts and incorporated them as your own. As
20 Your Honor is aware, in every single trial we do in, every
21 single trial that Your Honor does before and after in jury
22 instructions you made clear to the jurors, "I'm not a Judge
23 of the facts, I'm not making any decision on the facts,
24 don't take anything that I say as being an interpretation of
25 the facts," because it's a very dangerous situation for a

ARGUMENTS OF COUNSEL

1 juror to determine what they think is Judge may have
2 interpreted the facts to be. Jurors look to judges as
3 intelligent, they look to them for guidance. In this
4 particular case because of that it gave credibility to the
5 victim and to the allegations. Even a little further, Your
6 Honor, on page 645 there was a subsequent bond hearing, a
7 bond reduction hearing.

8 THE COURT: 645?

9 MS. GOLDBERG: That's wrong, 647. It's actually the
10 bottom of 646, I apologize, Your Honor. And at the second
11 bond hearing on line number 24 it states there was an order
12 of no contact with the victim made. So again, the jury is
13 aware that there was a second general sessions judge who
14 passed judgment on this case and found it believable enough
15 that there should be a no contact order between the victim
16 and the defendant. Your Honor, what the jury does not know
17 is what circumstances and what elements a Judge considers in
18 making a bond. Juries don't know that at bond hearings the
19 standard is not proof beyond a reasonable doubt, the
20 standard is not guilt or innocence, it's much lower.
21 Instead they were just led to believe that two other judges
22 passed judgment on the facts and found them to be very
23 serious and credible. Your Honor, our argument is that
24 there should have been an objection to this point as to
25 relevance and under 403 as more prejudicial than probative.

ARGUMENTS OF COUNSEL

1 The State had no obvious reason to get into these facts,
2 they weren't as I said relevant in any way, they weren't
3 probative to the case of what happened or didn't happen,
4 therefore there should have been an objection and a request
5 for a mistrial or at least a request for a limiting
6 instruction and there was not.

7 THE COURT: All right. Yes?

8 MR. CORNEY: Your Honor, the State submits that when
9 you take that testimony in context and as a whole it's clear
10 that that testimony, in fact, was beneficial to Mr. Thomas
11 in this case. This testimony was elicited from Investigator
12 Gottfried, Investigator Gottfried was one of the lead
13 investigators in this case and one of the State's big
14 witnesses as to statements given and things of the like in
15 the case. The testimony elicited on direct examination
16 clearly shows that he participated in an improper conduct
17 with the magistrate judge, I don't see how that could be
18 anymore beneficial to Mr. Thomas to show that the lead
19 investigator has participated in improper conduct with the
20 Judge and because of that his initial bond hearing was
21 thrown out and he got a new one. And the testimony right
22 after that on the top of page 647 is, "Now, a bond was then
23 granted, correct? Yes, ma'am." I mean, I don't see how it
24 could be any better for him than to say you had a bond
25 hearing where Investigator Gottfried participated in

ARGUMENTS OF COUNSEL

1 improper conduct and contact with a magistrate judge, you
2 were denied bond because of that, thereafter as soon as they
3 found out about the improper bond he got a new hearing where
4 he got bond, that directly calls Investigator Gottfried's
5 credibility and testimony into question. And to highlight
6 that on cross examination, and I believe -- I'll get you a
7 page number here -- but on cross examination that's one of
8 the first things Ms. Durant goes into, to highlight the fact
9 that he had been a part of improper conduct. It's on page
10 652, line 11, she says, "Are you aware that the circuit
11 court judge at the second bond hearing ruled that it was not
12 appropriate for you and the victim to meet with the Judge
13 prior to the first bond hearing?" Investigator Gottfried
14 answers, "I am aware of that. I was not at that hearing but
15 I am aware that occurred, yes, ma'am." Ms. Durant says,
16 "You are aware that that's not appropriate." And he says,
17 "I am aware now." Obviously the first thing Ms. Durant
18 jumps into is highlighting that to the jury. The lead
19 investigator is participating in improper conduct with a
20 magistrate judge, you can't trust this guy's testimony, he
21 is up there admitting that he undertook improper conduct
22 with a Judge. I don't see how that could be anything but
23 beneficial to show that his bond was denied when the
24 investigator was conducting improper conduct and as soon as
25 that was taken out he was granted bond at the next hearing.

ARGUMENTS OF COUNSEL

1 So the State would submit that that was not prejudicial and
2 Ms. Durant was not deficient in her duties in not objecting
3 to it where it's calling the investigator's practices into
4 question for the jury and making it a credibility issue that
5 he is okay with apparently having improper conduct with a
6 Judge. So the State would submit there's no deficiency or
7 prejudice in that regard, Your Honor.

8 THE COURT: All right.

9 MS. GOLDBERG: Your Honor, if I may?

10 THE COURT: Sure.

11 MS. GOLDBERG: I understand Mr. Corney's argument but
12 the problem here is that as the State elicited the
13 testimony, as the State brought it out the State didn't make
14 it sound like it was improper communication because
15 obviously that wasn't their goal to make it appear that way.
16 It was not revealed to be improper communication until
17 Ms. Durant asked those questions on cross examination, but
18 at that point the damage had already been done, because at
19 that point the jury already knows that bond has been denied
20 and that there was a no contact order issued by two separate
21 neutral detached judges in this case. If the State was very
22 concerned about any allegations of this improper bond
23 hearing then I think the appropriate thing for them to have
24 done would have been to request in limine that no talk of
25 that, of any bond hearing come out, that would have been the

ARGUMENTS OF COUNSEL

1 easiest way for this to be handled but they didn't go about
2 that. Instead they brought the evidence, the information
3 out in testimony and they elicited testimony that his bond
4 was denied and a no contact hearing was at issue, because
5 they did that approach Ms. Durant should have objected.

6 THE COURT: All right. Next issue.

7 MS. ARMSTRONG: Your Honor, may it please the Court?
8 Your Honor, as our final issue we have raised the evidence
9 of Judge Johnson's refusal to charge the jury with the
10 lesser-included offense of false imprisonment.

11 THE COURT: Where is that?

12 MS. ARMSTRONG: Your Honor, that's -- where is the --

13 THE COURT: Transcript?

14 MS. ARMSTRONG: Yes, one second, Your Honor. May I
15 approach, Your Honor? And I will give a copy to the
16 attorney general as well.

17 THE COURT: All right.

18 MS. ARMSTRONG: Court's indulgence, Your Honor, I
19 believe it has already been entered as Applicant's Exhibit
20 Number 1.

21 THE COURT: I don't know.

22 MS. ARMSTRONG: May I approach?

23 THE COURT: Sure. So she did request it.

24 MS. ARMSTRONG: She did, Your Honor. And if I may
25 approach again, I have a copy of an affidavit I would like

ARGUMENTS OF COUNSEL

1 to submit to Mr. Corney as well as to Your Honor from Robert
2 Dudek who handled the direct appeal, this is in lieu of his
3 live testimony concerning his failure to raise the issue.

4 MR. CORNEY: And I have no objection to that, Your
5 Honor, I am fine with that coming in.

6 THE COURT: Was there a charge conference?

7 MR. CORNEY: Your Honor, it's my understanding that it
8 was held off the record. I think that they submitted all of
9 their charges I believe in chambers or in writing and that
10 he just came back on record and said these are the ones I'm
11 charging.

12 THE COURT: Okay.

13 MS. ARMSTRONG: That's correct, Your Honor. May I
14 approach?

15 THE COURT: Sure.

16 (Applicant's 8 received into evidence.)

17 MS. ARMSTRONG: That is Applicant's Number 8 and I
18 believe that's without objection. And Your Honor, the
19 transcript at page 801 is where the Judge addresses the fact
20 that jury charge requests were submitted.

21 THE COURT: All right. Well, that's the way to do it.

22 MS. ARMSTRONG: Thank you, Your Honor. And I have
23 three cases I would also like to submit to Your Honor that
24 goes to the issue of false imprisonment being a
25 lesser-included offense to the charge of kidnapping.

ARGUMENTS OF COUNSEL

1 Obviously false imprisonment is a ten year misdemeanor, in
2 other words the maximum sentence you can get is ten years
3 and would calculate very differently as with kidnapping
4 which in this case Mr. Thomas had two counts and the most
5 lengthy sentence he received was on the kidnapping charges
6 of 22 years. But we have three cases we would like to
7 submit and Mr. Corney has a copy of it but I will give him a
8 packet as well of three cases starting with the State versus
9 Bernsten, B-e-r-n-t-s-e-n (sic), it's 295-SC-52 at 1998 and
10 it addresses the issue of kidnapping and the fact that
11 common law false imprisonment is in fact a lesser-included
12 offense.

13 THE COURT: In what, Bernsten?

14 MS. ARMSTRONG: Two kidnappings.

15 THE COURT: In Bernsten?

16 MS. ARMSTRONG: Yes, Your Honor, I apologize, that's
17 correct.

18 THE COURT: I don't see that, I happen to have Bernsten
19 right here.

20 MR. CORNEY: That was actually a case that I handed
21 Your Honor but that was for the opposite proposition that it
22 was not a lesser-included.

23 COURT REPORTER: Excuse me, I need you to repeat that,
24 I didn't hear you.

25 MR. CORNEY: I was just going to say that was a case I

ARGUMENTS OF COUNSEL

1 was going to hand up to Your Honor, that stands for the
2 opposite position that false imprisonment is not a
3 lesser-included.

4 THE COURT: I looked it up over lunch.

5 MR. CORNEY: Thank you very much, Judge.

6 THE COURT: What are your other two cases?

7 MS. ARMSTRONG: Your Honor, our other two cases are
8 State versus Whitten (phonetically). These are all
9 attached, I believe, to the requests that were submitted by
10 defense counsel, as well as State versus Tisdale which is
11 378 South Carolina 122, this case is a little different in
12 the sense that --

13 THE COURT: What year is that?

14 MS. ARMSTRONG: That is 2008.

15 THE COURT: Well, you show me a case that says false
16 imprisonment is a lesser-included of kidnapping.

17 MS. ARMSTRONG: Your Honor, by inference, and I believe
18 this is also cited in defense counsel's request in its
19 charge, the State voluntarily dismissed where the defendant
20 was convicted of both kidnapping and false imprisonment, the
21 false imprisonment was voluntarily dismissed. And I think
22 the point is that -- excuse me, Professor Mackenich's
23 (phonetically) book also suggests very strongly.

24 THE COURT: Suggested.

25 MS. ARMSTRONG: Yes, Your Honor, it was a

ARGUMENTS OF COUNSEL

1 lesser-included offense. And the bottom line is certainly
2 the request was made, it was denied and it was preserved for
3 the record. And we think that the element in this case
4 would fit in a scenario where there was false imprisonment
5 but not kidnapping.

6 THE COURT: Okay.

7 MR. CORNEY: Your Honor, just very briefly, I actually
8 was going to hand up State v. Bernstein, it's clearly based
9 on that case.

10 THE COURT: I just got a little bit a head of you.

11 MR. CORNEY: Sir?

12 THE COURT: I'm sorry I got a little bit ahead of you.

13 MR. CORNEY: That's all right, Your Honor, you did
14 steal a little bit of thunder from me. That case
15 specifically read, and I'm quoting the second page right
16 there in the opinion, it says, "Thus the crime of false
17 imprisonment has been incorporated into section 16-3-910 as
18 one of the methods of proving kidnapping." As Your Honor is
19 very well aware for it to be a lesser-included offense it
20 has to have the same elements, and essentially false
21 imprisonment has been subsumed into the kidnapping statute
22 in our state, but kidnapping can be proven by elements other
23 than false imprisonment whereas that makes it not a
24 lesser-included offense. The only way it's a
25 lesser-included offense is if every element of the lesser

ARGUMENTS OF COUNSEL

1 offense is necessary to prove the greater offense and
2 obviously there are other ways to prove kidnapping outside
3 of false imprisonment so that's not the case here, it's
4 clearly not a lesser-included offense. Counsel was not
5 ineffective for failing to raise that on appeal, or
6 appellate counsel wasn't, and certainly no prejudice as it
7 wouldn't have overturn the conviction. Thank you, Your
8 Honor.

9 THE COURT: All right. Anything further on behalf of
10 the applicant?

11 MR. PEAUVY: No, Your Honor, nothing -- additional
12 arguments from us at this point. It's my understanding that
13 the attorney general is going to be calling trial counsel
14 and after the conclusion of trial counsel's testimony it may
15 be necessary to engage in some type of final argument.

16 THE COURT: I understand. All right. At this point
17 the applicant rests.

18 MR. PEAUVY: Yes, sir.

19 THE COURT: Mr. Corney?

20 MR. CORNEY: Yes, sir, Your Honor. The State would
21 call LaNelle Durant to the stand, please.

22 THE COURT: Now -- come on, Ms. Durant.

23 The witness, LANELLE DURANT, was first duly
24 sworn and testified as follows:

25 THE COURT: Have a seat in the witness box and state

TESTIMONY OF LANELLE DURANT

1 your full name for the record. Now, procedurally counsel
2 for the applicant, I'm not going to allow you to have three
3 shots at her. You can --

4 MS. GOLDBERG: Your Honor, I'm going to be the only one
5 cross examining her.

6 THE COURT: All right, fine, just wanted to get that
7 straight up front.

8 MS. GOLDBERG: Yes, sir.

9 THE WITNESS: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MR. CORNEY:

12 Q. Ms. Durant, do you recall your representation of Randy
13 Thomas in this case?

14 A. I do.

15 Q. And you represented him in your capacity as a former at
16 the time assistant public defender?

17 A. Yes.

18 Q. And you have been in the courtroom today and heard the
19 arguments made before the Court.

20 A. Yes.

21 Q. As well as Mr. Thomas' testimony.

22 A. Correct.

23 Q. Now, do you recall meeting with Mr. Thomas to discuss
24 the charges he was facing?

25 A. Yes, I do.

TESTIMONY OF LANELLE DURANT

1 Q. And were you able to review the indictments with him
2 and the elements of the charges and the potential sentences
3 he was facing?

4 A. I reviewed the discovery with him, the indictments,
5 that was what I usually do with clients.

6 Q. Going into the discovery, let's just jump right into
7 that. Well, first of all there were two incidents that were
8 brought out at trial, correct?

9 A. Correct.

10 Q. One that was in Clemson -- allegedly in Clemson at the
11 victim's apartment in August of 2004?

12 A. Right.

13 Q. And that was an uncharged incident, there was no
14 conviction or anything.

15 A. No.

16 Q. And the second incident was one in Irmo at the victim's
17 house -- parents' house.

18 A. Right.

19 Q. And there was a pretrial -- just for the record there
20 was a pretrial Lyle hearing on whether that first Clemson
21 incident could come in or it wasn't the subject of this
22 indictment.

23 A. Right. We tried to suppress that August incident in
24 Clemson.

25 THE COURT: What was the result of that?

TESTIMONY OF LANELLE DURANT

- 1 MR. CORNEY: I'm sorry, Judge.
- 2 THE COURT: What was the result of that?
- 3 Q. The result of the Lyle hearing was that the Court did
- 4 allow the State to introduce testimony as to that first
- 5 incident in Clemson, correct?
- 6 A. Correct.
- 7 Q. That was after a full Lyle hearing and Lyle analysis by
- 8 the Court.
- 9 A. Right.
- 10 Q. They found they were similar enough in nature to come
- 11 in either under a motive or intent or under a common scheme
- 12 and plan, right?
- 13 A. Right, correct.
- 14 Q. And I want to get into the discovery materials with
- 15 you. Do you recall receiving that and reviewing it with
- 16 Mr. Thomas?
- 17 A. I can't say specifically but I'm sure my records shows
- 18 I did do that. He did have an attorney before me, Deborah
- 19 Erins (phonetically) I think when we got his case in
- 20 November of 2004 and she had his case until -- I mean,
- 21 August of 2004, she had his case until August of 2005 I
- 22 believe when I took over.
- 23 Q. And when you took over did you receive her file and
- 24 everything she had done up to that point?
- 25 A. Right.

TESTIMONY OF LANELLE DURANT

1 Q. Now, do you recall specific items contained in the
2 discovery materials that you were able to review with
3 Mr. Thomas or that you recall from the case?

4 A. Mostly what we talked about today. There was evidence
5 that -- I don't think he gave a written statement to police
6 but that they had talked to him, there was a Jackson/Denno
7 hearing but I don't think that hurt him because he was
8 denying -- his -- our defense was that the sex was
9 consensual and we supported that. There was a DNA issue as
10 far as chain of custody but since it was -- we were saying
11 consensual it really wasn't that much of an issue. I don't
12 remember specifically all of the other items.

13 Q. And along those lines the DNA was on the comforter
14 recovered from the victim's house.

15 A. Right. There were several pieces of DNA.

16 Q. There was some witness statements in there from some
17 neighbors, do you recall that?

18 A. Right, neighbors and friends of the victim testified,
19 statements.

20 Q. And the victim gave statements as well?

21 A. Correct.

22 Q. I apologize for speaking over you. And I want to talk
23 about -- the victim had a friend in this case Ashley -- I
24 don't know if I'm saying that correctly.

25 A. Mishou (phonetically).

TESTIMONY OF LANELLE DURANT

1 Q. Do you recall reviewing her statements to the police?

2 A. I don't remember exactly what she said but I do
3 remember that she gave a statement.

4 Q. And she testified at trial as well, correct?

5 A. Correct.

6 Q. Along those lines how would you describe the victim and
7 Ashley Mishou's testimony at trial and how it came across to
8 you at least sitting there as defense counsel?

9 A. I can't remember exactly. What I do remember is that
10 the victim was a very beautiful, very intelligent, very
11 educated young woman and all of that went straight to the
12 jury influence, I think. But exactly -- I think she called
13 Ashley, I believe, the night of the incident but I don't
14 remember exactly the details.

15 Q. And Ashley and the victim both in this case were
16 students at Clemson at the time.

17 A. Correct.

18 Q. And they were both in pre-pharmacy?

19 A. I know the victim was, I'm not sure about Ashley.

20 Q. But it is your recollection they came across very
21 educated and articulate on the stand?

22 A. Yes.

23 Q. Did you have concerns about that the jury's credibility
24 with believing what she would say on the stand, was that a
25 pretty big issue at the trial?

TESTIMONY OF LANELLE DURANT

1 A. It was. And, in fact, in my closing argument I said,
2 "Don't be fooled by tears and drama." Sometimes people like
3 that.

4 Q. Regarding this flight that we talked about today that
5 you were in here, there was, in fact, a pretrial hearing
6 held on February 2nd of 2006?

7 A. Right.

8 Q. And have you had an opportunity to look at that
9 transcript?

10 A. I did scan that transcript, yes.

11 Q. You made a motion in there to suppress any mention of
12 Mr. Thomas' hospitalization, correct?

13 A. Yes, I did.

14 Q. What was the purpose in doing that?

15 A. Well, we felt that that would affect his credibility
16 with the jury. He wanted to testify and we supported him in
17 doing that, it was his decision but we felt that he would be
18 a good witness. He's a nice clean-cut young man who
19 obviously was very sincere in what he believed so we felt
20 like that would be good. But we did not want evidence that
21 he had been -- had mental problems to come before the jury,
22 we felt that would have affected his credibility.

23 Q. Was it ever your intention when you were making that
24 motion to, I guess, keep out evidence of flight as has been
25 argued here today?

TESTIMONY OF LANELLE DURANT

1 A. Well, flight -- we didn't see it as flight so I think
2 that never occurred to me that they would do that. We -- I
3 did say in the motion hearing that we were not contesting
4 the time period that he had been in the hospital or the way
5 he was arrested or any of that as you said previously, that
6 is very clear on the record.

7 Q. Do you recall Mr. Thomas ever mentioning to you that he
8 had called his probation agent or anything along those lines
9 on his way to the hospital?

10 A. I'm sure he probably told me, I just don't remember but
11 I'm sure he did if he said that.

12 Q. Did you have anything in your file documenting that or
13 anything in your file with that regard?

14 A. I don't remember, I'm sorry.

15 Q. In the closing argument as we referred to on page 818
16 the solicitor did make comments about evidence of flight, do
17 you recall that being made, those arguments?

18 A. Well, when I looked at the allegations and his
19 transcript, scanning the transcript, yes. I didn't remember
20 it of my own.

21 Q. Okay. Anything come to your mind as to why you may not
22 have objected to that?

23 A. In hindsight I probably should have objected. I think
24 I probably did not because maybe I just didn't want to draw
25 attention to it.

TESTIMONY OF LANELLE DURANT

1 Q. And that's a strategy sometimes at closing argument
2 that you will use; is that correct?

3 A. Right. You hate to object during closing argument
4 because it can have an affect on the jury.

5 Q. And it was Mr. Thomas' testimony at trial and the
6 victim's testimony at trial that he had driven off from the
7 scene as the victim fled to the neighbor's house to ask for
8 help, correct?

9 A. Right.

10 Q. In your estimation and I guess in your experience as a
11 criminal defense attorney do you think the State would be
12 able to use that as evidence of flight after he had fled the
13 scene in the car afterwards?

14 A. Well, they may use it as evidence of flight. But I
15 would take this opportunity to say that I don't think Randy
16 had any idea of kidnapping that child. Randy thought of
17 himself as the father and that the child was his, the child
18 called him daddy. So I don't think -- and I think there is
19 law that says that a kidnapping doesn't apply to the parent,
20 but the fact that he stopped the car, I don't think Randy
21 had any intention of kidnapping the child. But as far as
22 using it as evidence of flight, technically I guess it could
23 be considered as flight.

24 Q. During the testimony of James Addkus, I'm not sure how
25 he says his name, you called him as a defense witness at

TESTIMONY OF LANELLE DURANT

- 1 trial, correct?
- 2 A. Right.
- 3 Q. And that was a friend of Mr. Thomas'?
- 4 A. Yes.
- 5 Q. He testified he was a neighbor of the victim in
- 6 Clemson.
- 7 A. Right.
- 8 Q. Do you recall that the solicitor questioned him about a
- 9 phone call that was made by the victim?
- 10 A. I didn't until I looked at the transcript.
- 11 Q. And that was about the time -- that was essentially the
- 12 timing of when he had gone to the victim -- when Mr. Thomas
- 13 had gone to the victim's house after the first incident,
- 14 correct?
- 15 A. Right.
- 16 Q. Do you feel that was just the linchpin of the case that
- 17 made all of difference as to what he --
- 18 A. No. Because I don't think what Addkus said had that
- 19 much impact. He finally said -- if you look at the
- 20 transcript Addkus really said what month it was.
- 21 Q. Do you feel there was sufficient other evidence in the
- 22 record to convict Mr. Thomas even if you would have gotten
- 23 Mr. Addkus' testimony thrown out?
- 24 A. I don't think his testimony made that much difference.
- 25 Q. There's been allegations made about the testimony of

TESTIMONY OF LANELLE DURANT

1 Investigator Gottfried about the denial of Mr. Thomas' bond.

2 Do you recall that testimony?

3 A. Only as it was talked about today.

4 Q. And have you had a chance to review that transcript in
5 that regard?

6 A. No.

7 Q. What is your interpretation of that testimony and how
8 it came across to the jury?

9 A. Well, I think just as you explained a moment ago, I
10 think it made Gottfried look bad, and the fact that Randy
11 was eventually -- he was given a bond, I don't think it was
12 that prejudicial. But I think it made -- that's what we
13 were trying to do is cast doubt on the credibility of law
14 enforcement.

15 Q. So that testimony would have been something you wanted
16 to come in to question his credibility.

17 A. Right. And I think it also affected the way that the
18 victim was operating, she was talking to the Judge ex parte.

19 Q. Now, as far as these character witnesses, you presented
20 16 letters to the Court in mitigation during the sentencing
21 phase.

22 A. Yes.

23 Q. You also presented the testimony -- not testimony but
24 statements of Terry Burnett and his son, Knox, on their
25 behalf.

TESTIMONY OF LANELLE DURANT

- 1 A. Yes.
- 2 Q. And they obviously had very nice things to say about
- 3 Mr. Thomas.
- 4 A. Yes.
- 5 Q. Did you ever consider putting them up in your defense
- 6 in this case?
- 7 A. I did not, but I think in hindsight I think I should
- 8 have done that. I think in all honesty I think I probably
- 9 should have called character witnesses.
- 10 Q. You've obviously heard the testimony of Mr. Burnett
- 11 that was presented today as well as what was presented at
- 12 trial.
- 13 A. Right.
- 14 Q. At any point in trial did you hear -- was there any
- 15 testimony from him at trial and in mitigation as to
- 16 Mr. Thomas' character for truthfulness that you recall?
- 17 A. Character for what?
- 18 Q. For truthfulness.
- 19 A. I think the fact that he said he would trust Randy with
- 20 his children all goes to integrity and character and
- 21 truthfulness, which I think is tied in with truthfulness.
- 22 Q. And obviously the defense today has said the State was
- 23 the one that called his character into evidence first by
- 24 saying he didn't have a job and things of that nature.
- 25 A. Right.

TESTIMONY OF LANELLE DURANT

1 Q. You didn't object to that when that was brought up.

2 A. No.

3 Q. Is it your reading of that as being character evidence,
4 the fact of their underlying relationship? How would you
5 analyze that testimony?

6 A. Well, as I said in hindsight it probably could be
7 interpreted as character evidence, I don't know that I
8 thought of it at that time as that.

9 Q. And assuming that the Court disagreed that that was
10 character, if the Court assumed it wasn't character
11 evidence, are there risks involved in calling character
12 witnesses to the stand in the defense and impugning the
13 defendant's character?

14 A. Yes. Because you don't know what the State may dig up
15 and present that you had no idea about. There could have
16 been a concern about mental health issues or whatever that
17 they may have tried to go into although we had said we
18 wouldn't, I think there would be risks in doing that.

19 Q. And if you had impugned his character at that point the
20 State would be able to call their witnesses or introduce
21 their own testimony to rebut that in specific instances,
22 correct?

23 A. Right.

24 Q. And not to sound like a smart aleck here, but you
25 certainly don't know everything that Mr. Thomas had done in

TESTIMONY OF LANELLE DURANT

1 his lifetime.

2 A. No.

3 Q. There's a risk that he had done something and that the
4 State could find a witness out there to rebut the character
5 evidence.

6 A. Right. And that is your fear when you start thinking
7 about character evidence.

8 Q. And at the end of the trial did you have the
9 opportunity to speak to any of the jurors?

10 A. I did.

11 Q. How did that conversation go? What did they tell you?

12 A. If I remember I think they said that they simply found
13 the victim more credible than Randy, they felt that Randy
14 didn't come across as a really good witness, which surprised
15 me because I thought that he was. That was not all of the
16 jurors, that was just one or two that I spoke with.

17 Q. But they said they didn't like the testimony that
18 Mr. Thomas had to offer at trial.

19 A. Basically, yes.

20 Q. You've had the opportunity to read State v. Bernstein
21 before coming in?

22 A. I did, right.

23 Q. Is it your reading of that case that false imprisonment
24 was not a lesser-included offense of kidnapping?

25 A. I think the case said that it's consumed in the

TESTIMONY OF LANELLE DURANT

1 kidnapping now.

2 Q. Would you agree that the testimony that was pointed out
3 earlier as to Mr. Thomas, the victim as to Mr. Thomas not
4 having a job, those type of things, those don't impugn his
5 character of truthfulness, do they?

6 A. No.

7 MR. CORNEY: That's all of the questions I have, thank
8 you.

9 THE COURT: Ms. Goldberg?

10 MS. GOLDBERG: Thank you, Your Honor.

11 CROSS EXAMINATION

12 BY MS. GOLDBERG:

13 Q. Good afternoon, Ms. Durant. I'm just going to save
14 everyone some time and go through these issue one at a time.

15 A. Okay.

16 Q. You do agree that there was a sequestration order in
17 place during the trial, right?

18 A. Right.

19 Q. And that there was even one initially ordered during
20 the Lyle hearing on the first day.

21 A. I don't remember it but I think it was, yes.

22 Q. And you only called two defense witnesses; is that
23 correct?

24 A. Correct.

25 Q. One was the defendant and one was Mr. Addkus.

TESTIMONY OF LANELLE DURANT

1 A. Right.

2 Q. Is my understanding, correct, that Mr. Addkus was
3 called for the sole reason of testifying that Randy and the
4 victim had interacted after that Clemson incident.

5 A. Well, that was one of the reasons. Another reason was
6 I think he testified about Randy's relationship with the
7 child and the child referring to him as his parent, you
8 know, daddy, that kind of thing, and that he hadn't observed
9 any fighting or anything like that between Randy and the
10 victim. So I think all of those things were part of the
11 purpose of calling him.

12 Q. That's fair. During the trial when Ms. Garfield with
13 the solicitor's office mentioned that the victim and the
14 witness had spoken Monday night, do you recall why you
15 didn't say anything?

16 A. I don't know why.

17 Q. And based on that statement the solicitor then went in
18 to completely impeach his credibility for that reason, is
19 that your memory of the transcript?

20 A. I just don't remember.

21 Q. As to the flight information, there was the extradition
22 document which has been entered into evidence, let me grab
23 that for you. This is Applicant's Exhibit Number 2 but it
24 was the State's Exhibit Number 72 actually admitted in the
25 trial and submitted to the jury. Based on the record you

TESTIMONY OF LANELLE DURANT

1 did not object to admission of that. Do you remember why?

2 A. Well, as I said earlier I think it went back to the
3 hearing where we were -- I told the Judge we weren't
4 contesting the time or the way he was arrested and that sort
5 of thing so I think that was one of the reasons I did not
6 object to it.

7 Q. Because you weren't -- because at that point in time in
8 your mind you weren't objecting.

9 A. Right.

10 Q. But on direct today I believe you said that in
11 afterthought in looking back at it you probably should have
12 objected to flight, the argument of flight in closing?

13 A. I think when the solicitor talked about creating the
14 inference of flight based on what's exactly in the
15 transcript I think it would have been appropriate to object
16 to that.

17 Q. Aside from the solicitor intending to argue flight,
18 would that document as to extradition be relevant in that
19 case in any other way?

20 A. Probably not, but I don't know that the jury would have
21 related extradition with flight necessarily.

22 Q. Until the solicitor brought it out in her closing
23 argument.

24 A. Probably.

25 Q. And I believe -- do you have the transcript there with

TESTIMONY OF LANELLE DURANT

1 you?

2 A. I do.

3 Q. I believe you actually said on direct that in hindsight
4 you should have probably objected to flight and maybe the
5 only reason you didn't was because you wouldn't want to
6 object while another attorney is talking?

7 A. Or draw attention to what they were calling flight.

8 Q. Okay. If you will look with me on the transcript on
9 page 819.

10 A. Okay.

11 Q. You'll see the beginning of that page is our argument
12 regarding flight and then as you can see right after that
13 argument she actually ends her closing altogether and you
14 begin. Do you see where I'm looking at?

15 A. Right.

16 Q. Do you acknowledge that at that point you probably
17 could have objected and addressed the issue of flight
18 without bringing attention to it in front of the jury?

19 A. Maybe, I don't know. Continuing with it may have
20 highlighted it or it may have just been a progression.

21 Q. And it is possible to object in situations like those
22 and to just have the argument stated to the Judge without
23 the jury actually hearing it, correct?

24 A. I guess if you do it at the bench or in chambers,
25 right.

TESTIMONY OF LANELLE DURANT

1 Q. Ms. Durant, do you agree in Randy Thomas' trial the
2 solicitor made an effort to emphasize that Mr. Thomas was
3 lazy?

4 A. I think the victim brought some of that out, I don't
5 know that the solicitor was necessarily emphasizing, I guess
6 in having her bring that out. I don't remember it
7 necessarily being emphasized but I do know that it was
8 talked about.

9 Q. Based on that do you think that called his character
10 into question more than in a normal trial?

11 A. Well, as I said earlier in hindsight probably so.

12 Q. And based on that you agree that you should have called
13 character witnesses.

14 A. Yes. I think that would have been the appropriate
15 thing to do.

16 Q. And you did state on direct that some times there is
17 risks in calling character witnesses if you don't know what
18 they're going to say.

19 A. Right.

20 Q. But did you --

21 A. Even if you know what they're going to say the State
22 can still rebut it.

23 Q. Agreed. But did you actually speak with any and
24 actually weigh that risk in this particular situation or did
25 you just not call any character witnesses?

TESTIMONY OF LANELLE DURANT

1 A. I think I spoke with Mr. Burnett and I can't say
2 exactly how much I did or at what point I did, but I do not
3 remember speaking with any of the others, no.

4 Q. Do you remember specifically deciding that calling him
5 was going to be risky or anything about that?

6 A. I don't remember necessarily making that decision.

7 Q. As to the bond, I believe you said on direct that you
8 believed that the improper bond procedure made Investigator
9 Gottfried looked bad and you were okay with that information
10 coming out; is that correct?

11 A. Right.

12 Q. However, the procedure coming out while you wanted that
13 information in did you also intend to have the fact that his
14 bond was denied?

15 A. Well, he was eventually granted bond so I really didn't
16 see that -- and that came out too, so I really didn't see
17 that necessarily as an issue.

18 Q. Okay. And you did request a lesser-included offense of
19 false imprisonment, correct?

20 A. I did, right.

21 MS. GOLDBERG: Thank you, no further questions.

22 MR. CORNEY: Just one follow-up, Your Honor.

23 THE COURT: Okay.

24 MR. CORNEY: I guess one series of follow-up.

25 REDIRECT EXAMINATION

TESTIMONY OF LANELLE DURANT

1 BY MR. CORNEY:

2 Q. Ms. Durant, I think we referenced before this you
3 introduced 15 or 16 character reference letters in
4 mitigation for Mr. Thomas.

5 A. Correct.

6 Q. Do you think those were effective for the purpose they
7 were put up for in mitigating the sentence?

8 A. Well, what the solicitor told me afterwards she had
9 expected him to get 40 years so she thought the mitigation
10 was really good. That's not in the record anywhere, that
11 was what she said to me.

12 Q. So it's your testimony that they were effective in
13 being used for mitigation.

14 A. Right.

15 Q. And you think that it was appropriate to put that up as
16 mitigation to help him get a lesser sentence in front of the
17 Judge.

18 A. Well, Judge Johnson was known to be a strict sentencer
19 so I wanted to be prepared as much as possible.

20 MR. CORNEY: That's all I have. Thank you, Judge.

21 THE COURT: Recross?

22 MS. GOLDBERG: No, Your Honor.

23 THE COURT: Okay. You may come down. Any further
24 witnesses for the State?

25 MR. CORNEY: No further witnesses from the State.

1 THE COURT: From the applicant?

2 MR. PEAVY: No, Your Honor. I have discussed this
3 matter with Mr. Thomas and he is satisfied at this point.
4 If I may briefly just do a general summary of the arguments?
5 I don't want to belabor any of the points, Your Honor.

6 THE COURT: Go ahead.

7 MR. PEAVY: Your Honor, as you can see we believe
8 strongly that the applicant would be entitled to relief on
9 each and every one of these counts. With regard to the one
10 that I personally addressed the Court with regarding the
11 sequestration issue as well as the issue concerning the
12 flight and the character evidence, there was testimony from
13 trial counsel that looking back that maybe she should have
14 done something different. And, Your Honor, these are all
15 critical, critical issues when it comes to this specific
16 type of case. As I addressed in my argument to the Court
17 this morning or earlier this afternoon, this is a case where
18 the prosecution was preaching consistency, consistency from
19 the witness, to witness, to witness, to the defense witness
20 is consistency and is apparently supposed to have built
21 credibility, that's what they always argue and that's what I
22 would have argued as a prosecutor as well. Credibility
23 makes these witnesses more believable and you should believe
24 them as opposed to the defendant who is on trial for as the
25 attorney general said for 100 years, and Your Honor, we

1 think that credibility was a critical factor in this case.
2 We think that -- one of the issues that the attorney general
3 brought up earlier was a case called Walker where the Court
4 seems to have left open the question of whether -- if you
5 can prove the cumulative nature of some of these related
6 deficiencies. Now, I believe personally that each and every
7 one of these entitle this applicants for relief. However,
8 if the Court disagrees with this opinion it seems that these
9 deficiencies are so interrelated when it comes to the
10 credibility issue and the consistency issue as it relates to
11 what is more or less a he said/she said sexual offense case
12 that the cumulative nature can have -- meet the requisite
13 threshold and because of that, Your Honor, we do believe
14 that this applicant is entitled to relief. And in speaking
15 with the attorney general we respectfully request the
16 opportunity to submit briefs to the Court for consideration
17 if it meets with the Court's approval. And if I can beg the
18 Court's indulgence.

19 (Break in proceedings.)

20 MR. PEAVY: Nothing further, Your Honor.

21 THE COURT: All right. I'll grant you that leave if
22 you will do so in the form of an order.

23 MR. PEAVY: Yes, sir.

24 THE COURT: Not just a separate brief.

25 MR. PEAVY: No. I'm not talking about a post-trial

1 brief, just proposed orders, and that's what the attorney
2 general and I discussed, sir.

3 THE COURT: That's fine.

4 MR. CORNEY: If I may make just very brief points and I
5 will be very brief, I promise.

6 THE COURT: Sure.

7 MR. CORNEY: It's funny Mr. Peavy brings that up
8 because that was one of the points I wanted to raise with
9 the Court is that to date the South Carolina Supreme Court
10 has not recognized a cumulative error analysis under the
11 Strickland v. Washington standard that guides us in PCR's.

12 THE COURT: What was that case that you cited?

13 MR. CORNEY: It was Walker v. State is one of them,
14 Green v. State is one, there's a couple out there where
15 essentially the court decides that the issue doesn't deal
16 with it. There's a 4th Circuit Court of Appeals opinion,
17 Fisher v. Angelone (phonetically) to that regard also about
18 cumulative -- about taking several deficiencies and showing
19 that cumulatively they prove prejudice, to date the South
20 Carolina Supreme Court hasn't recognized that. I would
21 submit that each of these deficiencies has to prove
22 prejudice standing alone to prove that there's a reasonable
23 probability that the outcome of this trial would have been
24 different and that one particular deficiency is the standard
25 that he has to meet under the standard of Strickland v.

1 Washington. I know it is very long but I would urge this
2 Court to read the trial transcript and read the victim's
3 testimony, the State's witnesses that collaborate her
4 timeline and exactly what happened throughout the entirety
5 of the State's case and it's clear to see why the jury found
6 her credible and convicted Mr. Thomas. And I would submit
7 that Ms. Durant was not deficient in her duties and it
8 certainly did not prejudice the outcome of this case and it
9 would have maintained the same outcome regardless if any one
10 of these things would have been done. Thank you very much,
11 Your Honor.

12 THE COURT: What was the case you quoted? You said
13 there was a 2012 case, I missed that earlier.

14 MR. CORNEY: It was Walker v. State.

15 THE COURT: Walker was '12?

16 MR. CORNEY: Yes, sir, it was February of 2012. And
17 the 4th Circuit Court of Appeals dealing with cumulative
18 error analysis Fisher v. Angelone, there's a Green v. State
19 case. But essentially the South Carolina Supreme Court has
20 failed to recognize cumulative prejudice analysis. Thank
21 you, Judge, and I will sit down and be quiet now.

22 THE COURT: Mr. Peavy?

23 MR. PEAVY: Thank you, Your Honor.

24 THE COURT: Oh, I'm sorry, I thought you had something
25 to add. How much time do you need?

1 MR. PEAVY: Would 30 days be okay with the Court?

2 THE COURT: Yeah, I think so since we are already
3 stacked up on ten days, 15 days and 20 days. Thirty days is
4 fine.

5 MR. PEAVY: Thank you, Your Honor.

6 (End of the hearing.)

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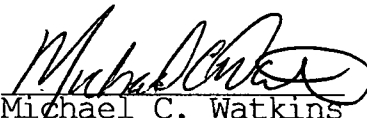
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25

1 I, the undersigned, Michael C. Watkins, Official Court
2 Reporter for the Sixth Judicial Circuit of the State of South
3 Carolina, do hereby certify that the foregoing is a true,
4 accurate and complete transcript of the proceedings had
5 (reported by Elizabeth Harris, edited by Michael Watkins) and
6 evidence introduced in the trial of the captioned case,
7 relative to appeal, in the Court of Common Pleas for Richland
8 County, South Carolina, on the 16th day of January, 2013.

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

11
12 October 3, 2013

13
14 
15 Michael C. Watkins
16 Court Reporter
17
18
19
20
21
22
23
24
25

RECEIPT FOR EXHIBITS

Case No. 12-CP-40-1543
 Plaintiff: Thomas, Randy B.
 Defendant: State
 Date Trial Started: 1-16-13

Judge G. Thomas Cooper
 State's Atty. Robert Corney
 Applicant's Atty. Jason Peavy
 Date Trial Ended: 1-16-13

Received of Elizabeth Harris, Court Reporter for the above case, these exhibits:

		Clerk of Court Use
1	Applicant's 1: Request to Charge	EV
2	Applicant's 2: Extradiction Request	EV
3	Applicant's 3: Calendar	EV
4	Applicant's 4: Arrest Warrant	EV
5	Applicant's 5: Collection of Letters	EV
6	Applicant's 6: Affidavit	EV
7	Applicant's 7: Affidavit	EV
8	Applicant's 8: Affidavit	EV
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20		

This 17th day of Jan. 2013.

Page 1 of 1

By: Brandy [Signature]

Richland County Clerk of Court

Clerk should retain white copy in Civil cases, yellow copy in Criminal cases.

Revised 3/96

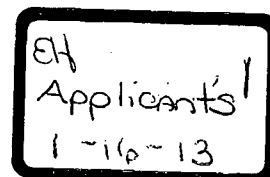
STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND) OF THE FIFTH JUDICIAL CIRCUIT
)
) INDICTMENTS: 2005-GS-40-10297,
2005-GS-40-10296, 2005-GS-
40-10299, 2005-GS-40-10298
THE STATE OF SOUTH CAROLINA)
) LESSER INCLUDED CHARGES
)
) VS.)
)
)
Randy Thomas,
Defendant)

The defense will request the following lesser included charges:

1. Criminal Sexual Conduct in the First Degree:
 - a. Criminal Sexual Conduct in the Third Degree
 - b. Assault and Battery of a High and Aggravated Nature
2. Assault and Battery of a High and Aggravated Nature
 - a. Simple Assault and Battery
3. Kidnapping
 - a. False Imprisonment

Respectfully submitted,

LaNelle Cantey DuRant,
Assistant Public Defender
Attorney for the Defendant
Date: February, 2006

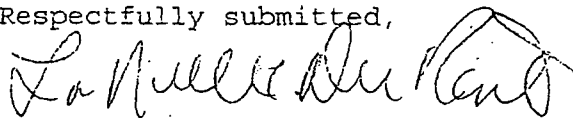


STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND) OF THE FIFTH JUDICIAL CIRCUIT
) INDICTMENTS: 2005-GS-40-10297,
) 2005-GS-40-10296, 2005-GS-
) 40-10299, 2005-GS-40-10298
THE STATE OF SOUTH CAROLINA)
) JURY CHARGE
)
VS.)
)
Randy Thomas,
Defendant)

The defense will request the following jury charge:

At common law, false imprisonment is unlawful restraint or detention of another against his will, without authority of law, by actual force or reasonably apprehended force. State v. Bernsten, 295 S.C. 52, 367 S., E. 2d 152 (1988).

Respectfully submitted,



LaNelle Cantey DuRant,
Assistant Public Defender
Attorney for the Defendant
Date: February, 2006

RICHLAND COUNTY SHERIFF'S DEPARTMENT
EXTRADITION APPROVAL REQUEST

DATE: 11/01/04

The below defendant has been approved for entry into NCIC and for extradition back to South Carolina by agents or designees of the Richland County Sheriff's Department:

DEFENDANT Randy Thomas

CHARGE CSC 1st, ABHAN, Kidnapping (2 counts)

WARRANT NO H-712683, H-712684, H-712685, H-712686

Authorized Approving Officer:

D.C. Wilson [Signature]
Major David Wilson

STATE'S
EXHIBIT

72 2-9-06 of

EN Applicant
2
1-16-13

FEBRUARY 2006

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
			1	2 Groundhog Day	3	4
5	6	7	8	9	10	11
12 Lincoln's B'day	13	14 Valentine's Day	15	16	17	18
19	20 President's Day	21	22 Washington's B'day	23	24	25
26	27	28				

www.RocketCalendar.com

Applicant's
3
1-16-13
CBH

arrant
eneral
3-160
1978

STATE OF SOUTH CAROLINA
COUNTY OF York

Probation

ARREST WARRANT

Indictment Number 03-GS-³²~~46~~-2075

Warrant Number W-46A-05-099

State Identification No. (SID) 01332597

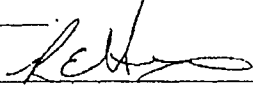
TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR COUNTY OR OF THE MUNICIPALITY OF Rock Hill, AND ANY CONSTABLE OF THIS MAGISTERIAL DISTRICT:

It appearing from the attached affidavit that there are reasonable grounds to believe that Randy Thomas, did on the 16 day of March, 2005 violate the criminal laws of the State of South Carolina as set forth below:

DESCRIPTION OF OFFENSE:

Probation violation pursuant to Section 24-21-450.

Now, therefore, you are empowered and directed to arrest the said defendant and bring Randy Thomas before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable. Done at Rock Hill, S. C. this 16 day of March, 2005


Signature of Probation and Parole Agent

(L.S.)

County of York

STATE OF SOUTH CAROLINA

AFFIDAVIT

Personally appeared before me, one Richard Hilton, who, first being duly sworn, deposes and says that Randy Thomas did within this County and State on the 16 day of March, 2005, violate the criminal laws of the State of South Carolina in the following particulars:

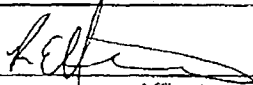
DESCRIPTION OF OFFENSE:

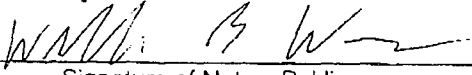
Probation violation concurrent to Section 24-21-430 in that the Defendant violated the conditions of his probation sentence as imposed by Judge Westbrook at the May 20, 2003 term of General Sessions Court holden in Lexington County, Lexington, SC.

The affiant states that there is probable cause to believe that the defendant named above did commit the crime(s) set forth, and that such probable cause is based on the following facts:

Subject has failed to follow the advice and instructions of his supervising agent by failing to refrain from violating a Federal, State or Local Law (arrested by the Richland Co. Sheriffs Office on 11-15-05 for Criminal Sexual Conduct 1st; 2 counts Kidnaping and ABHAN and by failing to pay his supervision fees (being \$40 in arrears). Such actions constitute a willful violation of conditions 6, 7 and 10 of the probation agreement signed and dated on 5-20-03.

Sworn to and Subscribed before me
this 16 day of March, 2005


Affiant


Signature of Notary Public

(L.S.)

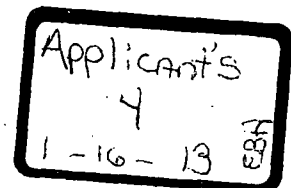
5/14/14

My Commission Expires

Address:

1070 Heckle Blvd.
Suite 201, Box 14
Rock Hill, SC 29732
(803)909-7282

(Form Continues on Back)



RETURN

STATE OF SOUTH CAROLINA
COUNTY OF
York

THE STATE
against

Randy Thomas

ARREST WARRANT

Offense: Violation of Probation

Offense Section: 24-21-450

Date: March 16, 2005

Officer and Agency: SC Department of Probation,
Parole and Pardon Services

Richard Hilton

Constable or Law Enforcement Officer

This Warrant was delivered by me to the
following defendant:

Randy B. Hilton

on the

19th day of April, 2005

Constable or Law Enforcement Officer

Richard B. Hilton

This Warrant is certified for service in [County of warrant
Certification] County. The accused is to be arrested and brought
before me to deal with according to law.

Signature of Judge _____ (L.S.)

INFORMATION ON DEFENDANT

Name Randy Thomas
Address unknown

Phone

Sex M Race W Height 6-3

Weight 165 Birth date 6-7-78

Social Security Number 241-59-0405

INFORMATION ON WITNESSES

Name

Address

Phone

Name

Address

Phone

Name

Address

Phone

Name

Address

Phone

PRELIMINARY HEARING held by

Magistrate

on

with

Attorney for the Defendant.

Decision

Decision

BAIL

Date Set

Magistrate

Amount

Surety

AGDC

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

INDICTMENT#:

County of Richland
STATE VS.

03 -GS- 32 - 2075

AKA: Randy B. Thomas JRC/W#: 12-464-05-299Race: W Sex: MName of Original Offense: Criminal ConspiracyDOB: 6-7-78Conviction S.C. Code §: 16-17-410SSN: 241-59-0905Conviction CDR Code #: 010 11 9SID#: 1332597Date of Original Offense: 9-9-00Original Sentence: 5 years ss 2 years probation

ORDER

The above named defendant has been charged with violating the conditions of probation ordered on 5/30/00 in the Court of General Sessions of Richland County as set forth in the attached warrant or citation dated 3/16/05. After hearing the evidence and being duly advised, in the (presence/absence) of the defendant, I find that the above named defendant has violated the following condition(s) of probation: (List by number or indicate special condition as provided in the affidavit) 6, 7, and 12

Therefore, IT IS ORDERED that:

- ☒ the suspended sentence be revoked and the above named defendant be required to serve 5 months/years, the remainder of the original sentence, and/or pay \$ XXXX probation terminated.
- ☐ the suspended sentence be revoked and the above named defendant be required to serve _____ months/years of the original sentence and/or pay \$ _____; thereupon to be reinstated on probation, subject to the conditions set forth in the attached order and not inconsistent with this order.
- ☐ the above named defendant is continued on probation as provided for in the original sentence, subject to the conditions set forth therein and not inconsistent with this order.
- ☐ probation is reduced to time served under supervision and the defendant is discharged from supervision on this date.

☒ Additional Conditions ordered by the Court:

This sentence is to run concurrent w/all sentences from 2/10/00

- ☒ The defendant is given credit for pre-revocation hearing detention time on current probation violation to be calculated and applied by the SC Department of Corrections.

- ☒ The defendant has previously served 0 months/years on this sentence.
(split sentence time and/or prior partial revocation time)

This 10 day of Feb, 2006Columbia

SC.

Presiding Judge St. Johnson

Judicial Circuit

You are hereby advised that, under the law the Court may at any time revoke or modify any condition of this probation; impose any lawful conditions it deems proper; or extend your period of probation not to exceed five (5) years. At any time within the period of your probation, the Court may require you to serve any part of the original sentence imposed.

This is to certify that I have read, or have had read to me, the order and the conditions set out therein. I agree to comply with such conditions and the conditions of my attached probation order during the period of my probation. I have received a copy of this Court's order and all attachments.

Offender's Signature Randy B. ThomasWitnessed by [Signature]Signed this 10 day of Feb, 2006, at Columbia, SC

Form 9 (Stock)

Revision: B Revision Date 03-24-2003

Copy Distributions - White-Clerk of Court; Yellow-SCDC; Pink-Offender File; Gold-Offender



950 Taylor Street
PO Box 608
Columbia, SC 29202-0608
803-771-0333 Phone
803-252-8427 Fax
www.schar.org

November 25, 2005

ADVANCING JUSTICE,
PROFESSIONALISM
AND UNDERSTANDING
OF THE LAW.

To Whom It May Concern:

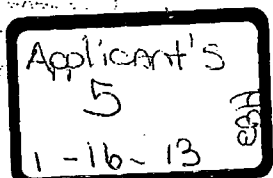
My name is John T. Burnett and I am the Continuing Legal Education Director for the South Carolina Bar. I am writing this in support of Randy Thomas.

I have known Randy Thomas for approximately ten years. I met him when he began coaching my son, Knox, in the youth basketball leagues at Friarsgate Park when Knox was about 10 or 11 years old. Randy coached my son, who is now 20 and a sophomore at Clemson, on and off for the next 5 years both in recreational league play and in YBOA tournaments all over South Carolina. I have spent many hours observing Randy as he coached my son individually in the gym, and in team practices and games, and as he worked with literally hundreds of other boys. My family and I have also had the opportunity to observe Randy in a home environment, since for a period of approximately two months he lived with us.

Randy is an unusually gifted coach and teacher. He is a tremendous motivator, instructor, and communicator. He is fair-minded with his players and does not show favoritism. He is even-tempered even in the most stressful and competitive of game environments. I have never seen him lose his temper at a player, parent, official, opposing player or coach even though I have watched him in at least 100 practice and game situations, many of which were tournament games with championships at stake.

I am personally grateful to Randy for the many hundreds of hours he has spent with my son, mentoring him in basketball and life skills. He has taught my son to work hard, compete with maximum effort, and at all times display sportsmanship and fairness. From personal experience, I know that Randy cares deeply about the children he has coached. Even after my son moved to a higher level of play as a varsity basketball and baseball player at Dutch Fork High School, Randy has kept up with his career. He has called to inquire about his well-being and has come to games to watch him and other former players in action.

I believe Randy Thomas is a young man of good character. I do not say this merely because he is a talented coach; I say it because I have spent time with him. I have watched him closely in pressure situations. I have seen him handle stress in public and private. I have lived with him. I would unhesitatingly state that I believe that any parent could entrust their youngster to Randy's care and coaching.



If you have any questions, or if I can be of further assistance, please do not hesitate to contact me.

Very truly,

A handwritten signature in cursive script, appearing to read "John T. Burnett", with a long horizontal flourish extending to the right.

John T. Burnett
CLE Director
South Carolina Bar
950 Taylor St.
Columbia, SC 29201
803-576-3780 (w)
803-932-0600 (h)

October 27, 2005

To Whom It May Concern:

We have known Randy Thomas for over 6 years. We initially met Randy while he was a college student and referee for youth sports at Friarsgate Park in Irmo, South Carolina. During this time Randy has been a friend and has coached our three children on various basketball teams. He has also spent hours of his free time just teaching them skills that they need to play the game. While he spent time with them, he was always respectful towards them and a positive role model. We have even taken Randy to dinner on several occasions and spent time with him outside of the gym. During these occasions we were impressed with his manners, attitude and concern for others.

As Randy began to date a girl who had a child, we were also very impressed with the way he took care of the child. He would bring the child to our children's' baseball and basketball games on numerous occasions. During these events, he appeared to' be natural' at being a Dad. We were very excited to see him so happy.

Our relationship with Randy Thomas has always been positive.

Sincerely,

Gary & Kimberly Klasnic
Columbia, South Carolina

October 30, 2005

To Whom it May Concern,

It was approximately 10 years ago that I first heard about Randy. I lived in a different state at that time, but my son, Matthew Estes lived in Irmo and played ball at the neighborhood park. That was where Randy entered our lives. Matthew talked about Randy often, how very good he was in basketball and how much help he was in giving Matthew tips and pointers. Randy eventually coached some of the teams Matthew was on. Through Matthew's high school years, Randy was always there to cheer him on, encourage him, and continue giving those special pointers.

Seven years ago I moved back to Irmo and had the pleasure of finally meeting Randy Thomas. Randy has always been polite, respectful, helpful, responsible, caring. He became like a third son to me and has been a regular and frequent fixture in my home.

Over the years I have watched Randy and Matthew become very close friends. Basketball may have been the initial draw, but since that time they have shared their hearts on many issues – sports, the happy occasions, the sad days, the difficult struggles, girlfriends, life goals, and their relationships with God.

As I have grown to know Randy more, I have envisioned great things for him in the areas of coaching, leading and working with young kids in the sport of basketball. He is uniquely gifted not only in the knowledge and skill of basketball, but he is also extraordinarily gifted in relating and interacting with people. He is a vibrant, friendly, encouraging, intelligent, out-going people person.

I do not know the details of the incident that has put Randy in jail, but I do know that it is absolutely not the norm for Randy. Wrong place, wrong time, wrong response? I don't know. But I do know that it is not the pattern by which I have seen Randy live his life.

I am thankful for the place Randy has in my heart and my home and most especially for the wonderful friend, mentor, coach and "other brother" he has been to my son Matthew.

Sincerely,

A handwritten signature in cursive script that reads "Anita Marcy".

Anita Marcy

To Whom it may concern:

This letter is regarding Randy Thomas. Please use this letter in as best a way possible.

Randy has been like a brother to me. He is always wanting the best for me. Randy was my basketball coach for a couple of years and I really enjoyed playing for him. When I had to move, I was sad because he wouldn't be able to watch me play. He ended up moving to Clemson, about 30 minutes from where I live. Since then, he has been able to watch me and coach me as I did play ball. Randy would do anything for me. I knew I was safe as long as I was with Randy. Randy didn't only teach me basketball, he taught me about life. I knew from the first time I met him he would be special to me. I know that if we were both starving, and he only had enough money for one of us, then he would buy me the food. That is just the way he is. He is so caring and loving. Randy is a brother to me, and he also became my best friend.

Thanks for your time for reading this letter.

Sincerely,
Ado Riddlehoover
Adam Riddlehoover

September 15, 2005

TO WHOM IT MAY CONCERN:

We are writing this letter on behalf of Randy Thomas and consider it a privilege to speak on his behalf.

As parents of three boys, Randy would be the first person we would call if we needed someone to watch the children for us. We did this with no hesitation whatsoever. Randy would then and still would today always put the safety of our children first.

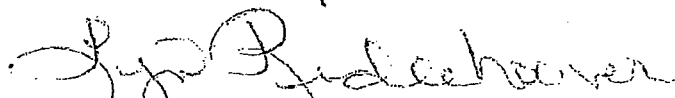
We met Randy when he was in high school and our boys were young. Randy worked at the neighborhood recreation center where our boys played basketball and baseball. Randy was our boys' basketball coach. The children loved playing for Randy and we never had any problem with him as their coach. He, like any other coach, was competitive and taught the boys that you could be competitive but also taught them good sportsmanship.

Randy is from a broken home and many, many times he would walk to the gym after school and work until late at night and then walk home. His mother was always working trying to make ends meet for their family. Because of this situation, Randy basically was on his own a lot of time to work, study and to feed himself. We were always very proud of Randy and all he did to be so young and to have done so well for himself. He is an extremely talented, athletic young man and has so much to offer in working with young teens. He would be a great asset to a community where children need that extra attention having survived this same type environment. Please use Randy's talents and dedication to helping others in an area where there is a need.

I hope you will consider this letter as our sincere love and appreciation for Randy and all he did to help our boys learn a lot of lessons in life. Thanks for your time.

Sincerely,


Steve Ridlehoover


Lyn Ridlehoover

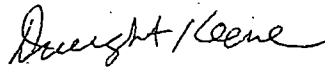
October 24, 2005

To Whom It May Concern:

This letter is to serve as a character reference for Randy Thomas. I have known Randy since 1995. Randy has been an icon at the Friarsgate's gym, devoting much of his time coaching and teaching basketball to many of the youth of that area. I coached with and against Randy on many occasions over these past ten years. At no time have I known Randy to be nothing other than a great competitor and respectful to his players, their parents, coaches and officials.

I have also known Randy off and away from the court as well. Randy has attended church service with our family on several occasions. Randy has always been respectful to me and my family.

Sincerely,



Dwight Keeve
Human Resources Information Systems Manager,
SCANA Service, Inc.

October 30, 2005

To whom it may concern,

It is difficult to put onto paper the impact that Randy has had in my life, and how much he truly means to me. When I was 10 years old I met Randy Thomas at the local basketball gym. He saw me playing and decided to start helping me out by giving me a few pointers to help my game. This was the beginning of one of the relationships I treasure most in my life, outside of my family. I am now 21 years old and still consider Randy one of my best friends. During the past 11 years he has been my coach on several AAU and YBOA basketball teams, and has also helped me through four years of high school basketball. Randy is by far the best coach I have ever had, but looking back he taught me much more than just how to play basketball. He has, in a way, taught me how to be a man. If I ever needed any kind of advice, he was there; if I ever needed to borrow any money, he was there; if I ever needed anything he would be there for me no matter what. I have two sisters and a brother by blood, but I will always consider myself having two brothers. Randy has so much potential because he is truly a "people person" and he has the type of upbeat and outgoing personality that is extremely contagious. It is hard not to laugh and just be in a good mood when you are with him. When he enters a room his personality just radiates onto everyone. I have always looked up to Randy and how he has always been his own person no matter what. Randy will always have my respect not only as a coach, but more importantly, as a man. I am one of many, many more people who Randy has been a blessing to. Randy has made mistakes, but I hope he will be given the opportunity to prove that is exactly what they are, mistakes. I know Randy has an unlimited amount of potential to be extremely successful with his life, and I hope he is given the opportunity to fulfill his potential.

Matthew Estes

October 28, 2005

To Whom It May Concern:

I Victor Sims Sr. have known Randy Thomas for at least 7+ years. I came to know Randy when my son, Vic Sims Jr. played on one of his AAU basketball team. Randy have had an AAU basketball team for many years and has always been a positive figure to the young boys in this community. If Randy was not coaching he was being a ref at Friarsgate gym.

Randy has been to my home on several occasions, we have gone to games together in state and out of state to watch basketball games that he coached and my son played in. Even after Vic became involved in high school sports, Randy was still loyal in coming to his games and following his career until his death in April 2003. Randy along with many others was there to express his love for Vic doing this tragedy in our lives.

Randy has always try to help our young people by inspiring them to be the best that they could be. I am glad that he was apart of my son life.

Respectfully,

A handwritten signature in cursive script that reads "Victor Sims Sr.".

Victor Sims Sr

October 28, 2005

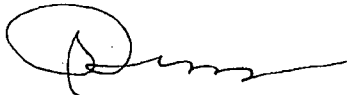
To Whom It May Concern:

I Patricia Sims have also known Randy Thomas for at least 7+ years. I came to know Randy when my son, Vic Sims Jr. played on one of his AAU basketball team. Randy have always been respectful and a positive influence to the young boys in this community.

Randy has been to my home on several occasions. Most of the time just to visit with my husband and son and talk about basketball. He was always polite to me and made sure that he acknowledged me wherever our path crossed. Basically, every time I saw Randy it was at the gym or high school. Randy was still loyal in coming to my sons games and following his career until his death in April 2003.

Randy has always try to help our young people by inspiring them to be the best that they could be. I am glad that he was apart of my son life.

Respectfully,

A handwritten signature in black ink, appearing to be 'Patricia Sims', with a large, stylized initial 'P'.

Patricia Sims

10/28/05

Monday, September 19, 2005

To Whom It May Concern:

I am writing this letter on behalf of Randy Thomas. I have not seen Randy in several years, but have been associated with him in the past. Randy coached both my son and daughter in recreation basketball and was a very caring and talented coach. He coached many of the neighborhood children in recreation basketball for several years and basically watched them grow into productive young men and women. He also occasionally visited my home to talk to the family, stay in touch and to see how every one was doing.

My son also played on a traveling YBOA and AAU basketball team during the summer. Randy was the coach and he often provided transportation for some of the young men to ensure that they had a way to get back and forth to the ball games. He loved the game of basketball and it was displayed through his coaching of our children.

As far as Randy's character, he seemed to have a caring nature and was very protective towards young children. He tried to ensure a positive attitude in sports and encouraged the children that through effort and self-respect they could accomplish whatever goals they set their minds towards.

In conclusion, I believe Randy has been a very humble and caring individual in all the years I have known him.

Respectfully,

A handwritten signature in cursive script, appearing to read "Charles Reese".

Charles Reese

Monday, September 19, 2005

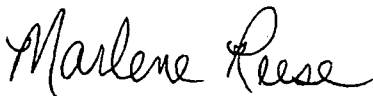
To whom it may concern,

Randy Thomas was a youth basketball coach and mentor to many children in our neighborhood, including my own son and daughter. He took his job as coach very seriously as he encouraged the children on his teams to always do their best, never give up, and practice good sportsmanship. Randy also helped the children to set and work to accomplish personal goals on and off the basketball court. He would follow up with each member of his team to check on their progress and celebrate their accomplishments.

Randy would frequently stop by to visit with our family. He was always genuine in his concern and willing to help out in any way he could. Even after our children moved on to middle and high school sports, Randy would make a point to attend their games to cheer them on and would often stick around to talk with them after the game.

Randy touched the lives of many young people, including my own children, in a positive way through his caring and leadership.

Sincerely,

A handwritten signature in cursive script that reads "Marlene Reese". The signature is written in dark ink and is positioned above the printed name.

Marlene Reese

Monday, September 19, 2005

To whom it may concern,

I have known Randy for many years now through basketball and friendship. Randy coached my friends, my sister, and I in basketball all the way up to high school. He not only taught us about basketball but he also taught us lessons in life that helped make us into who we are today. I always trusted Randy for advice and I trusted him with my friendship. He was always welcome into our home, and he frequently visited us not only for basketball but just to see how we were doing. As long as I have known Randy he has been a good influence and a trusting person who I could always look to for advice and guidance.

Sincerely,

A handwritten signature in black ink, appearing to read "Chad Reese", with a stylized, looping initial "C".

Chad Reese

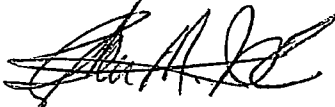
10/10/05

Randy Thomas

I am the father of 12-year-old Carson Joye. Approximately 3 years ago Randy Thomas befriended Carson and began helping him with his basketball skills. On several occasions Randy came to my home and worked with Carson. Also, Randy took Carson to the local gym to play basketball and assist him in honing his skills. Randy was a talented individual that enjoyed working with athletes to improve their skills. He had passion for basketball and wanted others to enjoy the game and sport. I trusted Randy when he worked with Carson, and Carson is a better young man and basketball player. When I was around Randy, he was always respectful, pleasant, and gave positive reinforcement to my son. At one time, I offered to introduce Randy to a local restaurant owner who was a friend of mine to obtain a management job for Randy. At that time Randy was living in Charlotte and declined my offer.

My involvement with Randy Thomas has been focused on his work with my son, and Randy was helpful in teaching my son basketball skills, good character, and how to have fun.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris M. Joye", with a stylized flourish at the end.

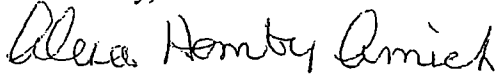
Christopher M. Joye
Advanced Automation Consulting Partner
An Information Technology Consulting Company

September 18, 2005

To Whom It May Concern,

I have known Randy Blalock Thomas since he was born. Over the years, Randy has coached youth basketball and has demonstrated that he has a lot of love and interest in children as well as in coaching young children in basketball. Randy was raised in an environment where he learned many valuable life lessons of love, wisdom, family, faith, friendship and forgiveness. He is surrounded by lots of loving family members and friends with lots of support from everyone.

Sincerely,

A handwritten signature in cursive script that reads "Alexa Hemby Amick".

Alexa Hemby Amick

September 29, 2005

To Whom it May Concern:

It was with great shock and sadness that I learned several months ago that Randy Thomas had been incarcerated as a result of some actions he took apparently under great emotional distress. I have not seen Randy since that time, so I cannot speak to his current state, but I would like to offer some insight into the Randy Thomas I do know, who worked tirelessly to help ^{many} young boys become better athletes for a number of years in the Irmo, SC community.

My family and I have known Randy for about 10 years, mainly through my two sons' participation in sports. He assisted me or coached my sons in recreational basketball for a number of years, and often called to check on their progress as they participated in other sports. Randy was known throughout the community, as he did the same for many other boys in the area. He encouraged the boys, and taught them details of the game at a level above what I or other coaches could provide.

Due to his love of coaching, I had a number of conversations with other parents through the years, speaking of our hope that he would go back to college and earn a degree so that he could become a high school basketball coach. I firmly believe that his knowledge of the game and on-the-floor coaching skills are better than most high school coaches I have seen, and he would be a real asset to any school given the chance to achieve that goal.

Randy is not an angel, but I do believe he has a good heart, and just has some growing up to do. I do not believe that he represents a threat to society, and my hope is that he will be given the chance to prove that.

Sincerely,
Russell Tomlinson
Irmo, South Carolina

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Randy Thomas, SCDC # 313802)

2012-CP-40-01543

vs.)

AFFIDAVIT OF STEVE RIDLEHOOVER

The State of South Carolina,)

Defendant.)

PERSONALLY appeared before me, Steve Ridlehoover, who first being duly sworn, deposes and states that:

1. In 2005 I drafted a letter regarding the good character of Randy Thomas that I hoped would be used to help him with his criminal trial. That letter is attached to this affidavit.
2. Randy's defense attorney for his criminal trial never asked me to testify on Randy's behalf during his trial.
3. If Randy's defense attorney had informed me that Randy's trial was being held in Columbia during the week of February 6 - 10 of 2006 I would have made every effort to attend court and testify on his behalf.
4. My testimony about Randy's character would have been consistent with the statements made in the attached letter.

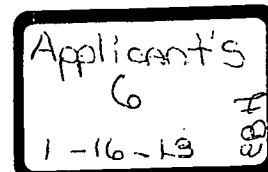
Cheryl Machay
 Sworn and Subscribed before me

Steve Ridlehoover
 Signature of Affiant

15TH day of JANUARY 2013

Notary Public for South Carolina.

My Commission expires: JAN 18, 2021



September 15, 2005

TO WHOM IT MAY CONCERN:

We are writing this letter on behalf of Randy Thomas and consider it a privilege to speak on his behalf.

As parents of three boys, Randy would be the first person we would call if we needed someone to watch the children for us. We did this with no hesitation whatsoever. Randy would then and still would today always put the safety of our children first.

We met Randy when he was in high school and our boys were young. Randy worked at the neighborhood recreation center where our boys played basketball and baseball. Randy was our boys' basketball coach. The children loved playing for Randy and we never had any problem with him as their coach. He, like any other coach, was competitive and taught the boys that you could be competitive but also taught them good sportsmanship.

Randy is from a broken home and many, many times he would walk to the gym after school and work until late at night and then walk home. His mother was always working trying to make ends meet for their family. Because of this situation, Randy basically was on his own a lot of time to work, study and to feed himself. We were always very proud of Randy and all he did to be so young and to have done so well for himself. He is an extremely talented, athletic young man and has so much to offer in working with young teens. He would be a great asset to a community where children need that extra attention having survived this same type environment. Please use Randy's talents and dedication to helping others in an area where there is a need.

I hope you will consider this letter as our sincere love and appreciation for Randy and all he did to help our boys learn a lot of lessons in life. Thanks for your time.

Sincerely,


Steve Riddlehoover


Lyn Riddlehoover

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Randy Thomas, SCDC # 313802)

2012-CP-40-01543

vs.)

AFFIDAVIT OF ANITA MARCY

The State of South Carolina,)

Defendant.)

PERSONALLY appeared before me, Anita Marcy, who first being duly sworn, deposes and states that:

1. In 2005 I drafted a letter regarding the good character of Randy Thomas that I hoped would be used to help him with his criminal trial. That letter is attached to this affidavit.
2. Randy's defense attorney for his criminal trial never asked me to testify on Randy's behalf during his trial even though I was present and available during the week of Randy's trial.
3. My testimony about Randy's character would have been consistent with the statements made in the attached letter.

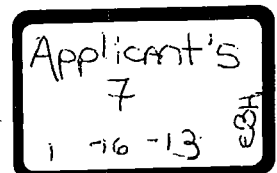
Anita Marcy
Signature of Affiant

Sworn and Subscribed before me

15th day of January 2013

Notary Public for South Carolina.

My Commission expires: 3/23/19



October 30, 2005

To Whom it May Concern,

It was approximately 10 years ago that I first heard about Randy. I lived in a different state at that time, but my son, Matthew Estes lived in Irmo and played ball at the neighborhood park. That was where Randy entered our lives. Matthew talked about Randy often, how very good he was in basketball and how much help he was in giving Matthew tips and pointers. Randy eventually coached some of the teams Matthew was on. Through Matthew's high school years, Randy was always there to cheer him on, encourage him, and continue giving those special pointers.

Seven years ago I moved back to Irmo and had the pleasure of finally meeting Randy Thomas. Randy has always been polite, respectful, helpful, responsible, caring. He became like a third son to me and has been a regular and frequent fixture in my home.

Over the years I have watched Randy and Matthew become very close friends. Basketball may have been the initial draw, but since that time they have shared their hearts on many issues – sports, the happy occasions, the sad days, the difficult struggles, girlfriends, life goals, and their relationships with God.

As I have grown to know Randy more, I have envisioned great things for him in the areas of coaching, leading and working with young kids in the sport of basketball. He is uniquely gifted not only in the knowledge and skill of basketball, but he is also extraordinarily gifted in relating and interacting with people. He is a vibrant, friendly, encouraging, intelligent, out-going people person.

I do not know the details of the incident that has put Randy in jail, but I do know that it is absolutely not the norm for Randy. Wrong place, wrong time, wrong response? I don't know. But I do know that it is not the pattern by which I have seen Randy live his life.

I am thankful for the place Randy has in my heart and my home and most especially for the wonderful friend, mentor, coach and "other brother" he has been to my son Matthew.

Sincerely,

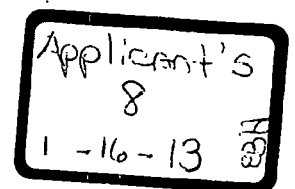
A handwritten signature in cursive script that reads "Anita Marcy".

Anita Marcy

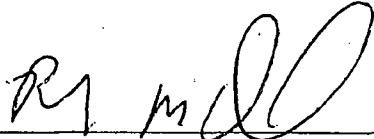
STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
	)	2012-CP-40-01543
RANDY B. THOMAS, #313802,	)	
	)	
Applicant,	)	
	)	Affidavit of Robert M. Dudek in re:
v.	)	POST-CONVICTION RELIEF
	)	
STATE OF SOUTH CAROLINA,	)	(ACTION FILED FEBRUARY 23, 2012)
	)	
Respondent.	)	
_____	)	

Having been duly sworn, I, Robert M. Dudek hereby state the following:

- i. I am the Chief Appellate Defender with the Appellate Division of the Office of Indigent Defense. I am obviously an attorney licensed to practice in the State of South Carolina and I have been an Appellate Defender for approximately twenty-two (22) years.
- ii. I was assigned to represent Randy B. Thomas on his direct appeal as an Appellate Defender. I do not recall the issue of his trial counsel seeking a lesser-included jury instruction for false imprisonment on the kidnapping charge. I do remember the alleged victim's child being briefly "detained" in the automobile with Mr. Thomas before the child was relatively quickly released.
- iii. Since I did not raise this lesser-included offense issue on appeal I can only conclude -- correctly or incorrectly -- that I did not consider it a highly meritorious issue and that the issues I raised for Mr. Thomas provided him a better chance of winning his appeal and obtaining a new trial.
- iv. I am available for a deposition or other questioning concerning my involvement in this case, should either party or the Court wish to further question me.



FURTHER AFFIANT SAYETH NOT.


Robert M. Dudek

This 15th day of January, 2013

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

RANDY B. THOMAS, SCDC # 313802,
Applicant,

v.

STATE OF SOUTH CAROLINA
Respondent.

IN THE COURT OF COMMON PLEAS

2012-CP-40-01543

AMENDED APPLICATION FOR
POST-CONVICTION RELIEF

(ACTION FILED FEBRUARY 23, 2012)

1. Place of Detention: McCormick Correctional Institution.
2. Name and location of Court which imposed sentence: Richland County Court of General Sessions, Richland County Courthouse, Columbia, South Carolina.
3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - a. 2005-GS-40-10296 Criminal Sexual Conduct First Degree
 - b. 2005-GS-40-10297 Assault and Battery of a High and Aggravated Nature
 - c. 2005-GS-40-10298 Kidnapping
 - d. 2005-GS-40-10299 Kidnapping
4. The date upon which sentence was imposed and the terms of the sentence:
 - a. February 10, 2006 22 years concurrent to other sentences
 - b. February 10, 2006 10 years concurrent to other sentences
 - c. February 10, 2006 22 years concurrent to other sentences
 - d. February 10, 2006 22 years concurrent to other sentences
5. A finding of guilty was made after a plea of not guilty.
6. Did you appeal the judgment of conviction or the imposition of sentence? Yes
7. If you answered "yes" to (6), list
 - a. The name of each Court to which you appealed:
 - i. South Carolina Court of Appeals
 - ii. South Carolina Supreme Court
 - b. The result in each such Court to which you appealed:
 - i. Conviction Affirmed
 - ii. Writ of Certiorari Denied
 - c. The date of each such result:
 - i. September 10, 2009
 - ii. March 2, 2011
 - d. If known, the citations of any written opinion or orders entered pursuant to such results:
 - i. Unpublished Opinion No. 2009-UP-437
 - ii. Letter from clerk dated March 2, 2011. Remittitur issued March 7, 2011

8. Not applicable.
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- a. Trial counsel failed to Investigate allegations introduced through Lyle evidence and accordingly failed to sufficiently prevent this Lyle evidence from being introduced to the jury,
 - b. Trial counsel failed to object or request a mistrial based upon admitted violation of the Sequestration order by witnesses,
 - c. Trial counsel failed to object or request a mistrial based upon Solicitor's improper argument as to flight,
 - d. Trial counsel failed to present positive character evidence during the jury trial,
 - e. Trial counsel failed to sufficiently object or request a mistrial in response to the State offering testimony regarding the magistrate's denial of bond for the Defendant.
 - f. Appellate counsel was ineffective in failing to raise the issue of the trial court's refusal to charge false imprisonment as a lesser
10. State concisely and in the same order the facts which support each of the grounds set out in (9).
- a. Trial counsel's file reveals the existence of witnesses whose testimony would have been material to the pre-trial determination of whether prior conduct was admissible under Lyle.
 - b. Trial counsel was ineffective by failing to object or move for a mistrial based upon the testimony of a defense witness who was contacted by the alleged victim, Lauren Byrd, during the trial and in violation of the Court's sequestration order, (ROA p. at 63, at p. 165). Ms. Byrd's actions were contempt of court and denied Applicant a fair trial.
 - c. Trial counsel erred in failing to object to the Solicitor's improper argument that Applicant fled after the alleged crime. In an *in camera* setting, counsel for the state and defense agreed not to mention Applicant's hospitalization at a mental health facility to which he had been "committed" after the alleged crimes and prior to his arrest. Applicant did not "flee" from law enforcement. The lapse of time between the alleged crimes and Applicant's arrest was not due to anything even remotely akin to "flight" but was done by way of a mental health commitment. The prosecution knew this and either through inadvertence or intent argued "facts" that were erroneous and highly prejudicial to the Applicant. These types of arguments have been universally condemned. See *Napue v. Illinois* 360 US 264 (1959), *Giglio v. United States*, 450 U.S. 150 (1972).
 - d. Trial counsel was ineffective by failing to present positive character evidence to rebut the character evidence introduced by the State. The character of a Defendant is generally admissible under South Carolina Rule of Evidence 404(a)(1). Furthermore, once the State was allowed to enter evidence of prior bad acts against the Applicant to disparage his character, the Defense would have been further entitled to submit evidence of character to rebut same. Defense counsel stated in mitigation that she was in possession of "16 letters of character references" which were provided prior to trial. Terry Burnett, an employee of the South Carolina Bar Association, provided one

of these letters and was present in court and spoke during the sentencing proceeding. The statement of Mr. Burnett in the transcript reflects what Mr. Burnett would have stated if called to testify in front of the jury and establishes prejudice.

- e. Trial counsel was ineffective by failing to request a mistrial or even object in response to the State offering testimony regarding the magistrate's denial of bond. An objection or request for a mistrial would have been necessary and proper under the South Carolina Rules of Evidence Rule(s) 401, 403 and the law regarding hearsay. This testimony was overly prejudicial as it informed the jury that another judge had reviewed the case and determined it was appropriate to deny bond for the Applicant as it implied that he was a danger to the community and/or a flight risk.
- f. Appellate counsel failed to raise the trial court's error in denying defense counsel's request for a charge of false imprisonment as a lesser charge to kidnapping. There were sufficient in the record to support Applicant's entitlement to the lesser-included jury charge.

11. Prior to this application have you filed with respect to this conviction:

- a. Any petition in a State Court under South Carolina Law? No
- b. Any petitions in State or Federal Courts for habeas corpus or post-conviction relief? No
- c. Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in # 7? No
- d. Any other petitions, motions or applications in this or any other Court? No

12. Not applicable.

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

14. Not applicable.

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented: All issues in Section (9) are being presented for the first time and were not presented because issues of ineffective assistance of counsel and after-discovered evidence of a Brady violation were not cognizable on direct appeal.

16. Were you previously represented by an attorney at any time during the course of:

- a. Your arraignment and plea? N/A
- b. Your trial, if any? Yes
- c. Your sentencing? Yes
- d. Your appeal, if any, from the judgment of conviction or imposition of sentence? Yes.

17. If you answered "yes" to one or more parts of (16), list:

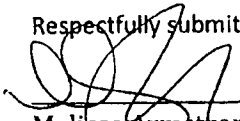
- a. The name and address of each attorney who represented you:

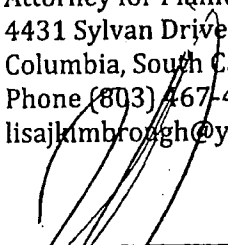
- i. Lanelle Durant, Esquire, and Jeanette VanGinhoven, Esquire, all of Richland County Bar;
 - ii. Robert Dudek, Esquire, of the South Carolina Office of Appellate Defense.
- b. The proceedings at which each such attorney represented you:
- i. Trial
 - ii. Appeal

18. State clearly the relief you seek in filing this application: Conviction reversed with remand for new trial.

19. Are you now under sentence from any other court that you have challenged? No.

Respectfully submitted,


Melissa Armstrong
Attorney for Plaintiff
4431 Sylvan Drive
Columbia, South Carolina 29206
Phone (803) 467-4541
lisajlambrough@yahoo.com


Jason P. Peavy
Attorney for Plaintiff
Law Office of Jason P. Peavy, LLC
1720 Main Street, Suite 301
Columbia, South Carolina 29201
Phone (803) 799-4857
Jason@peavylaw.com


Kristy Goldberg
Attorney for Plaintiff
Law Office of Kristy Goldberg, LLC
1720 Main Street, Suite 301
Columbia, SC 29201
Phone (803) 252-2299
kristy@kristygoldberglaw.com

Columbia, South Carolina
This 20th day of December, 2012

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

THOMAS Randy B -
00313802,

2012CP4001543

Applicant,

v.

RETURN

State of South Carolina,

Respondent.

RICHLAND COUNTY
FILED
2012 JUL 30 AM 11:54
JEANETTE W. MCBRIDE
C.C.P. & G.S.

The Respondent, making its Return to the application for post conviction relief (PCR) filed February 23, 2012, would respectfully show this Court:¹

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was true bill indicted at the February 2005 term of the Richland Grand Jury for Kidnapping, CSC - First Degree, and ABHAN (05-GS-40-10299;96;97).² He was represented by Jeanette VanGinhoven, Esquire, and LaNelle Durant, Esquire, on the charge(s). Applicant proceeded to jury trial before The Honorable James W. Johnson, Jr.. On February 10, 2006, he was found guilty and sentenced to twenty-two (22) years imprisonment each for Kidnapping and CSC -

¹<http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40&Casenum=2012CP4001543&CourtType=G&CaseType=Civil&CourtAgency=40002>

² <https://sword.doc.state.sc.us/scdc-public/inmateDetails.do?id=+00313802>

First Degree, and to ten (10) years imprisonment for ABHAN. All sentences were to run concurrently.

Direct Appeal

A Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. He was represented by Robert M. Dudek of the South Carolina Commission on Indigent Defense, Appellate Defense Division, on the appeal. By order filed on or about September 10, 2009, the South Carolina Court of Appeals affirmed the convictions and sentences. State v. Thomas, Op. No. 09-UP-437 (S.C. Ct. App. filed September 10, 2009). Applicant's subsequent Petition for Rehearing was denied on October 26, 2009. On March 2, 2011, the South Carolina Supreme Court denied Applicant's Petition for Writ of Certiorari as well. The Remittitur was issued March 7, 2011.

The current application for post-conviction relief (PCR) was filed February 23, 2012.

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the trial transcript, and the Applicant's applicable direct appeal files.³ The Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended

³ The Respondent will utilize the Record on Appeal if the direct appeal was an Anders appeal.

Return to reflect any amended allegations and/or to provide a more detailed procedural history.

III.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following:

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective Assistance of Counsel

(b) Ineffective Assistance of Appellate Counsel

(c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) Failure to subpoena witnesses; Failure to conduct a thorough investigation;
Failure to object; Failure to meet with client

(b) Failure to raise significant issues

(c) _____

IV.

For the purposes of this Return, the Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

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

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability

is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

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

V.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law. Further, the introduction of any allegation at the evidentiary hearing which was not specifically set forth herein or otherwise raised through a properly filed and served amendment will be adamantly opposed by Respondent.

VI.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Kristy Grafton Goldberg, Esquire, regarding when the hearing should be set.⁴

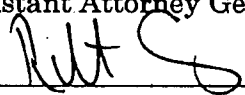
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney
General

ROBERT D. CORNEY
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

July 27, 2012

⁴ The current PCR Roster for the 5th Circuit is available at <http://www.scag.gov/criminal-litigation/postconvictionrelief>
THOMAS Randy B - State's Return - (2012CP4001543)
Page 6 of 6

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

THOMAS Randy B -
00313802,

2012CP4001543

Applicant,

v.

CERTIFICATE OF SERVICE

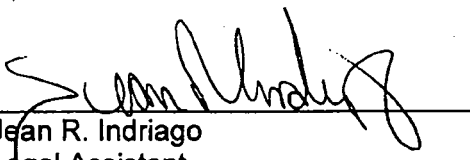
State of South Carolina,

Respondent.

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

Kristy Grafton Goldberg, 1720 Main Street, Suite 301 , Columbia, SC 29201

DATED July 27, 2012.


Jean R. Indriago
Legal Assistant

RICHLAND COUNTY
FILED
2012 JUL 30 AM 11:54
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Richland)

2012 CP4001543

Randy B. Thomas #313802)

Full name and prison number, if any, of applicant)

v.)

State of South Carolina)

Name of Respondent)

APPLICATION FOR

POST-CONVICTION RELIEF

RICHLAND COUNTY
FILED
2012 FEB 23 PM 4:35
JEANNETTE W. MCBRIDE
C.O.P. & C.S.

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention McCormick Correctional Institution
2. Name and location of Court which imposed sentence Richland County Court of General Sessions
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2005-65-40-10296 Criminal Sexual Conduct First Degree
 - (b) 2005-65-40-10297, 10298 Kidnapping (Two Counts)
 - (c) 2005-65-40-10299 Assault and Battery High and Aggravated Nature
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) February 6, 2006 22 years
 - (b) February 6, 2006 22 years
 - (c) February 6, 2006 10 years

5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
- (b) after a plea of not guilty X _____
- (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? Yes _____
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Conviction Affirmed
- ii. Writ of Certiorari Denied
- iii. _____
- (c) the date of each such result:
- i. September 9, 2009
- ii. March 3, 2011
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State vs. Thomas 2009-UP-437 September 9, 2009
- ii. State vs. Thomas SC Supreme Court March 3, 2011
- iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) N/A
- (b) _____
- (c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
- (b) Ineffective Assistance of Appellate Counsel
- (c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) Failure to subpoena witnesses; Failure to conduct a thorough investigation;
Failure to object; Failure to meet with client

(b) Failure to raise significant issues

(c) _____

11. Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law ?

No

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

No

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any,
already specified in (7) No

(d) any other petitions, motions or applications in this or any other Court?

No

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or
application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) First appropriate proceeding to raise issues
- (b) _____
- (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? Yes
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
Yes
- (e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? N/A

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Lanelle Durant and Jeanette Van Ginhoven Columbia, SC
- ii. Robert Dadek Appellate Defense
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. Trial
- ii. Appeal
- iii. _____

18. State clearly the relief you seek in filing this application.

New Trial or Charges Vacated

19. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
)
COUNTY OF McCormick)

VERIFICATION

I, Randy B. Thomas, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Randy B. Thomas

Sworn to and subscribed before me

This 03 day of Feb, 2012

J. Frankler L.S.
Notary Public for South Carolina

My Commission Expires 12-16-2019

RICHLAND COUNTY
FILED
2012 FEB 23 PM 4:35
JEANNETTE W. MCGRIDE
C.C.P. & G.S.

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Randy B. Thomas, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

Randy B. Thomas
Applicant

Sworn to and subscribed before me

This 03 day of Feb, 2012

J. Frankler L.S.
Notary Public for South Carolina

My Commission Expires: 12-16-2019



The South Carolina Court of Appeals

TANYA A. GEE
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

March 7, 2011

REMITTITUR

The Honorable Jeanette W. McBride
1701 Main Street, Room 205
PO Box 2766
Columbia, SC 29202

Re: The State v. Thomas, Randy B.
2005-GS-40-10296 2005-GS-40-10297
2005-GS-40-10298 2005-GS-40-10299

Dear Mrs. McBride:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

The exhibit being returned is: State exhibit 68 (Audio Tape). Please sign attached copy of this letter and return to acknowledge receipt of this item.

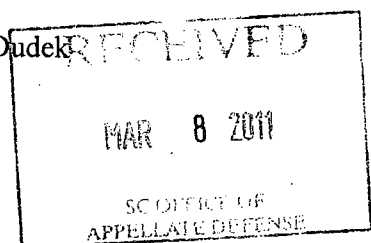
Sincerely,

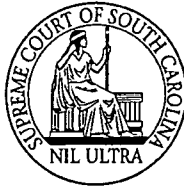
A handwritten signature in cursive script that reads "V. Claire Allen".

V. Claire Allen
Deputy Clerk of Court

VCA/lf

cc: Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek
Attorney General Alan Wilson





The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

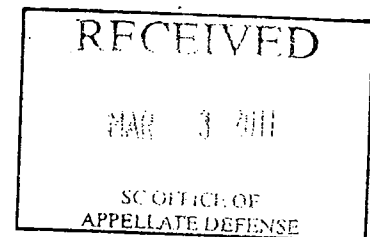
(803) 734-1080

FAX (803) 734-1499

March 2, 2011

Acting Chief Appellate Defender Robert M. Dudek
South Carolina Commission
on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: The State v. Thomas, Randy



Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

“Petition for Writ of Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

Justice Kaye G. Hearn, not participating.

March 2, 2011.”

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,


CLERK

The State v. Thomas, Randy
Page Two
March 2, 2011

DES/lda

cc: Assistant Attorney General William M. Blitch, Jr.
The Honorable Daniel E. Johnson
The Honorable Jeanette W. McBride
The Honorable Tanya Gee

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

James W. Johnson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RANDY B. THOMAS,

PETITIONER

APPENDIX

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589

ATTORNEY FOR PETITIONER

HENRY DARGAN MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

P. O. Box 11549
Columbia, S. C. 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....	i
OPINION NUMBER 2009-UP-437	1
PETITION FOR REHEARING.....	4
ORDER DENYING THE PETITION FOR REHEARING	19
MEMORANDUM OF LAW FILED BY APPELLANT.....	21
MEMORANDUM REGARDING APPLICABILITY OF <u>MELLENDEZ-DIAZ V</u> <u>MASSACHUSETTS</u> , 129 S. Ct. 2527 (2009) FILED BY RESPONDENT.....	31

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

Randy B. Thomas,

Appellant.

Appeal From Richland County
James W. Johnson, Jr., Circuit Court Judge

Unpublished Opinion No. 2009-UP-437
Heard May 27, 2009 – Filed September 10, 2009

AFFIRMED

Deputy Chief Appellate Defender for Capital
Appeals Robert M. Dudek, of Columbia, for
Appellant.

Attorney General Henry Dargan McMaster,
Chief Deputy Attorney General John W.

McIntosh, Assistant Deputy Attorney General
 Salley W. Elliott, Assistant Attorney General
 William M. Blitch, Jr., and Solicitor Warren
 Blair Giese, all of Columbia, for Respondent.

PER CURIAM: Randy Thomas appeals his convictions of first-degree criminal sexual conduct (CSC), assault and battery of a high and aggravated nature (ABHAN), and two counts of kidnapping, asserting the circuit court erred in admitting evidence of a previous, alleged, and un-charged CSC under the motive, intent, or common scheme or plan exceptions to Rule 404(b), SCRE. Thomas also contends the circuit court erred in finding the State had satisfied its requirement of proving chain of custody with respect to certain evidence admitted at trial, and in denying his right of confrontation under the Sixth Amendment of the United States Constitution. We affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

1. Based on the supreme court's recent opinion in State v. Wallace, we affirm the circuit court's admission of prior bad acts evidence under Rule 404(b). Op. No. 26703 (S.C. Sup. Ct. Aug. 17, 2009) (Shearouse Adv. Sh. No. 37 at 18) (stating a close degree of factual similarity between the alleged bad acts and crime charged is sufficient to admit the evidence under the common scheme or plan exception to the general rule under Rule 404(b) and State v. Lyle, 125 S.C. 406, 11 S.E. 803 (1923)). We find the allegations against Thomas were proven by clear and convincing evidence, and that the evidence is relevant. See State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); see also Rule 401, SCRE. Additionally, we find the non-exhaustive list of factors to consider in determining whether there is a close degree of similarity between the bad act and the crime charged leads to our affirmance of the circuit court. Wallace, (Shearouse Adv. Sh. No. 37 at 22) (listing the factors to consider: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery). Furthermore, we find the probative value of

victim's testimony substantially outweighs the danger of unfair prejudice. See Rule 403, SCRE.

2. We find any violation of the chain of custody requirement in the admission of the DNA evidence to be irrelevant and harmless to the outcome of the verdict, as Thomas himself testified that he had consensual sex with the victim in the vicinity of the items which produced the DNA. Sligh v. Johnson, 288 S.C. 364, 367, 342 S.E.2d 620, 622 (Ct. App. 1986) (finding any error in the admission of evidence through a defective chain of custody is harmless when it is merely cumulative to other evidence properly admitted). We additionally find any error in the admission of the investigative report to be harmless as cumulative to the photographs and testimony otherwise admitted without objection. See State v. Holder, 382 S.C. 278, 285, 676 S.E.2d 690, 694 (2009) ("Violations of the Confrontation Clause are subject to a harmless error analysis. . . . A Confrontation Clause error is harmless if the evidence is overwhelming and the violation so insignificant by comparison that we are persuaded, beyond a reasonable doubt, that the violation did not affect the verdict. . . . Considerations include the importance of the witness's testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case."); State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008) (stating error in the admission of evidence is harmless when it is cumulative to other evidence that was properly admitted).

Accordingly, the circuit court is

AFFIRMED.

HEARN, C.J., THOMAS, J., and KONDUROS, J., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RANDY B. THOMAS,

PETITIONER.

Appeal from Richland County

James W. Johnson, Jr., Circuit Court Judge

Opinion No. 2009-UP-437

PETITION FOR REHEARING

Pursuant to Rule 221 (a), SCACR, petitioner Randy Thomas seeks rehearing because the Court respectfully has overlooked the fact there was not a close degree of factual similarity between the alleged bad act in Clemson and the crime charged in Irmo in this case. Further, State v. Wallace Op. No. 26703, Shearouse Adv. Sh. No. 37 (filed August 17, 2009) was a child sex case, and an adult sex case between two people who lived together in a sexual relationship is -- respectfully -- not correctly comparable to the factors involved in child sex cases: age of the victim; the relationship of the victim and the perpetrator; the location of the abuse; the use of coercion and

threats; and the manner of the occurrence cited in this Court's opinion. For these reasons alone rehearing should be granted.

Randy Thomas and the alleged victim, Byrd, lived together in Clemson, South Carolina. He kept a key to her apartment when he moved out, and that appears to have been with her consent. When the alleged prior bad act occurred in Clemson on August 22, 2004, Zach, Byrd's three-year-old son by another man was *not present*. Petitioner entered the apartment using his key. R. 7, l. 12 – 15, l. 6.

Byrd said petitioner accused her of being with another man. However, there were no threats made against Byrd. After talking, petitioner carried her up the stairs and had sex with her. She told petitioner during the sex – or when the sex was just over – that this was “rape.” Petitioner began to cry, told Byrd how terrible he felt, and he left. The alleged rape was not immediately reported, the Clemson police detective obviously found her behavior unusual as seen below, and the “crime” was never prosecuted because Byrd did not want to prosecute. R. 7, l. 12 – 15, l. 6.

Clemson Detective Peppers remembered that Byrd told him that petitioner had come into the apartment using his key, and started questioning her about some other man. Byrd said petitioner carried her upstairs, and “I can't remember if she said he assaulted her, but I think she did.” Peppers said he recalled Byrd telling him she told petitioner “what he was doing was wrong. He immediately stopped and left.” Detective Peppers said that Byrd wanted a restraining order, and he told her that a trespass notice was actually the proper legal document to keep petitioner away from her apartment in the future. R. 58, l. 3 – 60, l. 24.

Detective Peppers said he was never able locate petitioner to serve the trespass notice. However, Peppers steadfastly maintained that Byrd did not want to file criminal charges against petitioner whom she referred “as an ex-boyfriend.” R. 60, ll. 2 – 25.

Byrd said she returned to her apartment about a week after this incident and she said petitioner "called me from different telephone numbers. Byrd said petitioner also sent her emails listing "everything that we had done together and he basically was trying to get me back." R. 16, ll. 7 – 25.

Petitioner testified they had consensual sex in her Clemson apartment that day until Byrd suddenly said: " Stop, stop . . . we're are not suppose to do this. You shouldn't have done that. And I was kind of bewildered." R. 606, l. 24 – 607, l. 21. Petitioner said he was upset by Byrd's reaction, and he left the apartment. Petitioner recalled that Byrd's new boyfriend, Mike, later confronted him and said that "Lauren's saying that you raped her." Petitioner said he argued with Mike about that accusation. R. 606, l. 22 – 610, l. 12.

In contrast, the incident in Irmo, South Carolina on October 30, 2004 occurred while Zach was present. Byrd was watching a football game, and petitioner knocked on the door and entered. He talked to Byrd and Zach in the living room.

Byrd said petitioner sat in a chair while she sat on the couch when he first arrived. Byrd claimed petitioner "started apologizing for the Clemson incident. Byrd recalled that she left the living room and went to the bathroom "because it got heated." Byrd stated when she got to the bathroom she text messaged Ashley on her phone -- "saying help me." R. 19, ll. 2 – 15.

Byrd said that petitioner brief left the house, but he came back inside. She claimed: "I told him to leave, but he did not leave." R. 19, l. 16 – 20, l. 15.

Byrd maintained she felt uneasy because petitioner "wasn't supposed to be there." Byrd said: "[A]nd he was basically just trying in a weird way to console me" about the Clemson incident. "[T]hat was his way of showing me he loved me." R. 20, ll. 13 – 22.

Byrd maintained that petitioner touched her knee, and she "jerked away" from him. Byrd said petitioner became offended by her actions. Byrd testified that "Zach already had left and was on the ground or in the floor and then [petitioner] had hovered over me." R. 21, ll. 1- 14.

Byrd testified that petitioner then "picked me up as a child." She said petitioner also touched her breast. R. 21, l. 15 - 22, l. 11. When petitioner began to carry her upstairs, the ex-girlfriend described the fight she put up, even grabbing an upstairs beam to stop petitioner from getting her into the bedroom. R. 18, l. 19 - 19, l. 1. Byrd claimed as she struggled with petitioner, that petitioner threatened her, asking her, "Do you love Zach?" Byrd responded, "Yes, I loved Zach." "He was like 'are you going to do or willing to do anything?'" R. 23, ll. 1 - 11. Byrd maintained petitioner told her "I won't hurt Zach," and Byrd testified Zach was downstairs watching cartoons at the time. R. 23, ll. 12 - 20.

Byrd said that she continued to struggle with petitioner, and that he took her into her parent's bedroom. Petitioner, according to Byrd, told her to "calm down." Petitioner "told me to take off my shirt. He told me and I couldn't do it, so he did . . . he kept asking me in between, do you love Zach?" R. 23, l. 18 - 24, l. 23. Byrd testified petitioner took off her clothes and placed her on her parent's bed. Byrd maintained petitioner told her to "perform oral sex on him," and she said she did perform oral sex. R. 25, l. 9 - 26, l. 5.

Byrd said petitioner ejaculated, and she spit "it out." Byrd stated petitioner was upset by her reaction. Byrd testified petitioner *then attempted* to "penetrate me" vaginally, and she told him to stop. Byrd said she started crying, and "I told him that he was raping me again, and he stopped in the middle of it. . . he freaked out." R. 27, l. 22 - 28, l. 8.

Byrd also maintained petitioner pretended to be calling 911 on himself. Byrd stated that petitioner also told her to calm down because she did not want "Zach to see you like this." Byrd

said her face was red, and that she did try to compose herself. Byrd "dialed 911 and left an open line." R. 29, l. 11 – 30, l. 16.

Byrd testified that she then sat down on the couch with Zach, and that petitioner followed her downstairs. She claimed *she struggled once again* with petitioner. Byrd maintained that she picked up a lamp, and that petitioner asked her if she was going to hit him with it. Byrd said she told petitioner: "No, I just wanted him to leave, and he grabbed it and pulled it." Byrd said she fell over a stool, and the lamp must have been thrown to the side. Byrd maintained petitioner told her before the lamp incident *that he wanted to take Zach with him.*" R. 31, ll. 1 – 20. (emphasis added).

Byrd further claimed at some point petitioner *put a knife to her neck*, and that she was terrified. She said she calmed down and told petitioner she didn't want her mother "to see me like this." Byrd said petitioner then responded: "Let's go for a ride." Byrd said she was attempting to tell petitioner anything he wanted to hear including "that I loved him, that I understood what he was doing . . . he was crying. He was upset." Byrd said she then saw petitioner put the knife in his pocket, he picked Zach up and told her "don't do anything stupid" as they went outside. R. 33, l. 15 – 34, l. 25.

Byrd testified that once outside she saw her neighbor mowing the lawn, and she attempted to mouth to her neighbor -- "Help me." Byrd said as she walked towards her neighbor's house she saw Zach sitting on petitioner's lap inside the car. She heard the car door slam and she ran after the car as petitioner drove it down the street. R. 35, l. 10 – 36, l. 3. Byrd said petitioner stopped the car and dropped Zach off "in the middle of the road." R. 35, l. 10 – 36, l. 22.

Petitioner testified they had consensual oral sex upstairs which was normal for them, and he then started having intercourse with Byrd but she told him to stop. "I don't want to do this. I said okay, and I was upset." Petitioner said Byrd told him she had cheated on me with one of my

supposed good friends . . . so at this point I was very upset and I said, what are you trying to do? Do you want me to kill myself? She said, Randy, you love yourself too much to kill yourself.” R. 617, l. 23 – 619, l. 18. Petitioner testified that he went outside with Zach and Byrd. He panicked when Byrd ran towards her neighbor’s house, and he drove away with Zach in the car. Petitioner said he quickly realized what he was doing, and he made a U-turn and brought Zach back. Petitioner said he had no intention of kidnapping Zach. R. 619, l. 19 – 621, l. 22.

Evidence is only admissible under State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1983) if the prior bad act establishes: (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish proof of the other, or (5) the identity of the person charged with the crime. Petitioner strongly maintains the evidence between the Clemson incident and the Irmo event did not establish a close degree of factual similarity necessary to establish a common scheme or plan. That was true before State v. Wallace, and it is true after State v. Wallace

The Clemson and Irmo incidents as described by Byrd were not sufficiently similar. Petitioner and Byrd were alone in Clemson in the apartment they had shared, there were no threats, no fighting, no weapons involved, and no struggle that turned over furniture.

In Irmo, Byrd described her fight with petitioner as he carried her upstairs with her son present, forced her to have oral sex, put a knife to her throat, engaged in a struggle that knocked over furniture and kidnapped her son.

Finally, petitioner respectfully requests that this Court reconsider its finding that the probative value of admitting evidence of the Clemson matter substantially outweighed its unduly prejudicial effect under Rule 403, SCRE. This is the very type of extraordinarily prejudicial

evidence -- the prior Clemson matter -- that can confuse the jury in its mission of determining whether the state proved petitioner's guilt beyond a reasonable doubt in the Irmo case for which he was on trial.

Chain of custody, Confrontation Clause violation, and harmless error

Petitioner requests rehearing because petitioner's testimony that the sex was consensual did not make the error harmless. The alleged victim testified petitioner forced her to have oral sex and that she spit his semen out. Conversely, petitioner testified they had oral consensual sex, and that everything was normal for the couple in that regard. Because the semen found on the comforter and Byrd's clothes, which were involved in the chain of custody, could be viewed as "matching" the alleged victim's version of what occurred, and contradicting petitioner's testimony, the error was not harmless.

Investigator Brown was a key link in the chain of custody. This Court found the any Confrontation Clause violation involving the absent Brown, harmless beyond a reasonable doubt. For the reason above, the reasons contained in petitioner's memorandum of law requested by this Court following oral argument, and the reasons that follow in this petition, this Court should respectfully reconsider that holding. Further, photographs and testimony allegedly indicating a struggle in the Irmo house do not resolve the issue of whether the sex occurred as petitioner described it -- consensually -- or whether petitioner forced the alleged victim to have oral sex and then spit his semen out onto the materials involved in the defective chain of custody.

A brief review of the context of the testimony at trial shows why the Confrontation Clause violation, and the defective chain of custody were not irrelevant and harmless. As this Court will recall, a major dispute erupted over what happened with the evidence, including the comforter, pants, shirt, and panties, taken from Byrd's Irmo home between October 30, 2004 and

November 2, 2004. Brief of Petitioner at 23. The state did not produce Investigator Brown at trial but the state was able to “back door” Brown’s testimony before the jury by introducing the contents of her report, without her being subject to cross-examination. The defense strongly objected that this evidence was inadmissible hearsay and that it denied petitioner his right to confrontation under the United States Constitution. R. p. 392, l. 4 – 437, l. 1. Petitioner’s brief at 24. This Court found this Confrontation Clause violation harmless in its opinion.

Lieutenant Padgett testified about how Brown processed the scene in great detail from her “crime scene analysis report.” She arrived “at 15:42, which would be 3:42 in the afternoon” . . . and “she observed things out of place, a lamp overturned, *an area where a struggle may have took place and some items in disarray*. And she also listed items that she collected at the scene and at the hospital. And she also states here that she processed for latent prints . . . There was nothing of value that she could get (fingerprints) . . . which is not unusual. (emphasis added). Padgett also said Brown’s report indicated she “*detected semen on the bed comforter*,” after using a “black light to detect semen.” R. 424, l. 15 – 440, l. (emphasis added). Brown was acting as an analyst in this regard, and her conclusions are directly controlled by the United States Supreme Court’s holding in Melendez–Diaz v. Massachusetts. 129 S.Ct. 2527 (decided June 25, 2009).

Padgett also sought to deflate speculation about what Brown did with this evidence for these three days. He testified that Brown would not have kept the items “in her car over the weekend . . . That’s against our protocol.” R. 436, l. 25 – 437, l. 18. That obviously is akin to asserting that no law enforcement would intentionally, or out of incompetence, or out of laziness mishandle or incorrectly report findings regarding forensic evidence. See Melendez–Diaz v. Massachusetts. 129 S.Ct. at 2536-2537.

Despite this gap in the chain of custody, and petitioner's inability to cross-examine Investigator Brown, the judge admitted the results of the DNA from the items that could not be accounted for between October 30, 2004 and November 2, 2004, Dr. Amick was able to testify about DNA "matches" to petitioner on the items. This was very significant evidence given that Byrd described a sexual assault on her parent's bed that afternoon, and petitioner testified *it was "consensual normal oral sex" for the couple.* (emphasis added).

As this Court will recall, Byrd testified petitioner took off her clothes and placed her on her parent's bed. Byrd maintained petitioner told her to "perform oral sex on him," and she said she did perform oral sex. R. 25, l. 9 – 26, l. 5. Byrd said petitioner ejaculated, and she "*spit it out.*"

Q. Where did you spit out?

A. *On the comforter.*

R. 174, ll. 10-11. (emphasis added).

Byrd stated petitioner was upset by her reaction. Byrd testified petitioner then *attempted* to "penetrate me" vaginally, and she told him to stop. Byrd said she started crying, and "I told him that he was raping me again, *and he stopped in the middle of it.* ... he freaked out." R. 27, l. 22 – 28, l. 8; R.171, l. 2 – 174, l.11. (emphasis added). Therefore, the jury could have concluded the spit out semen on the comforter "matched" Byrd's corroborated testimony, and contradicted petitioner's testimony.

Petitioner, as seen, testified they had consensual oral sex upstairs *which was normal for them*, and he then started having intercourse with Byrd but she told him to stop. "I don't want to do this. I said okay, and I was upset." R. 617, l. 23 – 619, l. 18. (emphasis added).

Dr. Amick testified that petitioner *had two matches of his DNA on the comforter found in the bedroom* of the parent's home in Irmo. R. 512, l. 4 – 518, l. 22. Dr. Amick further testified

that petitioner's DNA was also found on Bryd's pants. R. 560, ll. 6 – 21. Only Bryd's DNA was found on her panties. R. 507, ll. 4 – 13. Dr. Amick acknowledged he could not say petitioner's DNA being found on the comforter meant that that DNA came from his semen. R. 537, l. 7 – 539, l. 16. However, as seen, *Brown's report concluded semen was found on the comforter.*

The DNA evidence was thus damaging to petitioner's defense of consent because he testified the oral sex was normal. Bryd, on the other hand, maintained that she spit out petitioner's semen after her forced her to perform oral sex. The jury could believe Byrd's version provided the explanation for why petitioner's DNA was found on the comforter since both petitioner and Byrd testified that oral sex was the only completed sex act that afternoon on her parent's bed.

However, the inability of petitioner to cross-examine Brown regarding what she did with this evidence from October 30, 2004 until November 2, 2004, given that this evidence may well have been co-mingled, and therefore spoiled, violated petitioner's right to confrontation. R. 363, l. 18 – 370, l. 21. That error was not harmless merely because petitioner said the evidence was consensual. It was *how the oral sex occurred that was critical in this case.*

Given that petitioner and Bryd were the only witnesses to what occurred in the bedroom that afternoon the Confrontation Clause errors as to the chain of custody and the use of Brown's report were -- respectfully -- not harmless.

Further, as seen, Brown's report was used to "corroborate" Bryd's testimony regarding the alleged "extreme struggle" in her parent's Irmo home, and petitioner's inability to cross-examine Brown about processing the scene for fingerprints, semen, and other items violated petitioner's right to confrontation, and the errors also cannot be deemed harmless for these reasons. As seen above, the physical evidence in this case was very important given Byrd's

claim of a sexual assault by way of forced oral sex, and petitioner's attempt to penetrate her, against petitioner's testimony of consensual oral sex "as they normally had," and quickly terminated vaginal sex. Byrd's and petitioner's versions of what occurred and cross-examination of Brown in this case was critical.

Again, it is important to note that Brown's report contained subjective opinions (a struggle) and conclusions (no fingerprints and presence of semen on the comforter) which petitioner could not cross-examine. This was important because there was testimony Byrd told petitioner that she loved him -- which she claimed was meant to placate him and protect herself -- and varying testimony on *when* things may have gone from being calm to contentious between Byrd and petitioner that afternoon. In short, Brown's observations, and her testing were important to the state's case given the highly unusual facts of this case involving this former live-in girlfriend and boyfriend. Brief of Petitioner at 24-29.

Further, the solicitor exploited this evidence in closing where petitioner could not confront and cross-examine Brown. "*This is forensic evidence. It does not lie. It is incapable.*" The solicitor argued that petitioner only testified the sex that day was consensual because the DNA matched. "[T]he *forensic evidence corroborates that [Byrd's version]*. The exact precise location of where she said she spit up the semen is where it was found." R. 747, l. 7 - 748, l. 18. (emphasis added). The Confrontation Clause violations and the defective chain of custody error were not harmless.

Here, petitioner clearly never had the prior opportunity to cross-examine Investigator Brown, and the state also did not make any showing of a good faith effort to assure her presence at petitioner's trial under the "unavailability" prong. Under Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2532, this was reversible error.

The Melendez-Diaz opinion noted that in Crawford had rejected the Ohio v. Roberts, 448 U.S. 56 (1980) “indicia of reliability” analysis under the Confrontation Clause. Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2533. The Court wrote:

The Sixth Amendment guarantees a defendant the right “to be confronted with the witnesses *against him*.” (Emphasis added.) To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction – that the substance he possessed was cocaine. The contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause confirms this analysis. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses “against him,” the Compulsory Process Clause guarantees a defendant the right to call witnesses “in his favor.” U.S. Const., Amend. VI. The text of the Amendment contemplates two classes of witnesses those against the defendant and those in favor. The prosecution *must* produce the former; the defendant *may* call the latter. *Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.*

Melendez-Diaz v. Massachusetts, 129 S.Ct at 2533-2534. (emphasis added).

Here Brown was not only a chain witness she was a fact witness. Therefore, under the facts of this case, even the dissent in Melendez-Diaz v. Massachusetts would rule in petitioner’s favor. “The dissent first contends that a ‘conventional witness recalls events *observed in the past*, while an analyst’s report contains near-contemporaneous observations of the test.” Melendez-Diaz v. Massachusetts, 129 S.Ct at 2535. (emphasis added). Brown was a conventional witness.

Interestingly, the majority also noted: “A second reason the dissent contends that the analysts are not ‘conventional witnesses’ (and thus not subject to confrontation) is that they ‘observed neither the crime nor any human action related to it. The dissent provides no authority for this particular limitation of the type of witnesses subject to confrontation. Nor is it conceivable that all witnesses who fit this description would be outside the scope of the Confrontation Clause. For

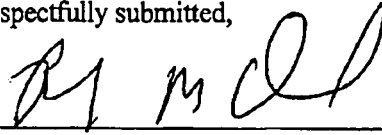
example, is a police officer's investigative report describing the crime scene admissible absent an opportunity to examine the officer? The dissent's novel exception from coverage of the Confrontation Clause would exempt all expert witnesses – a hardly ‘unconventional’ class of witnesses.” Melendez-Diaz v. Massachusetts, 129 S.Ct at 2535. (emphasis added).

As the Court stated: “the dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because the defendant is obviously guilty. This is not what the Sixth Amendment prescribes . . . we do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.” Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2536.

The Court also rejected the argument that it should not find a Confrontation Clause violation because the defendant had the ability to subpoena the witnesses. As in this case, the Court observed, “converting the prosecution’s duty under the Confrontation Clause into the defendant’s privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court.” Melendez-Diaz v. Massachusetts, 129 S.Ct. 2540.

Since petitioner was denied his rights under the Confrontation Clause to confront and cross-examine Investigator Brown as a fact witness and a chain of custody witness, and because the defective chain of custody and Confrontation Clause violations were not harmless, rehearing should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek

Deputy Chief Appellate Defender for Capital Appeal

This 24th day of September, 2009.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

 Appeal from Richland County

 James W. Johnson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

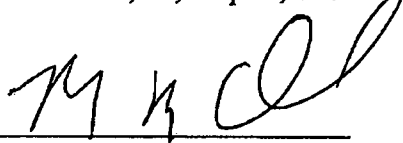
V.

RANDY B. THOMAS,

PETITIONER

 CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blitch, Jr., Esquire, this 24th day of September, 2009.

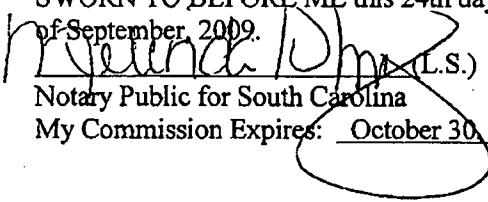


 Robert M. Dudek
 Deputy Chief Appellate Defender for Capital

Appeal

ATTORNEY FOR PETITIONER

 SWORN TO BEFORE ME this 24th day
 of September, 2009.


 (L.S.)
 Notary Public for South Carolina
 My Commission Expires: October 30, 2018.

The South Carolina Court of Appeals

The State,

Respondent,

v.

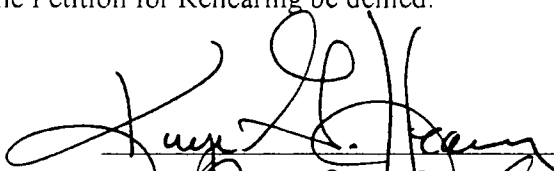
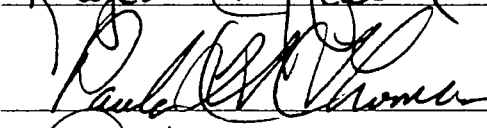
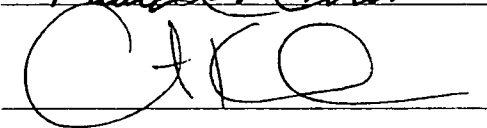
Randy B. Thomas,

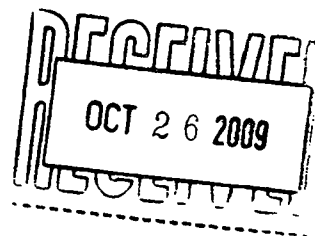
Appellant.

The Honorable James W. Johnson, Jr.
 Richland County
 Trial Court Case No. 2005-GS-40-10296
 2005-GS-40-10297
 2005-GS-40-10298
 2005-GS-40-10299

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

 C. J.
 J.
 J.



Columbia, South Carolina

10/ 26 2009

cc: Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General William M. Blich, Jr.
Warren Blair Giese, Esquire

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

James W. Johnson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RANDY B. THOMAS,

APPELLANT

MEMORANDUM OF LAW

Appellant correctly argued at trial and on appeal before this Court that the use of crime scene Investigator Deidra Brown's crime scene analysis report as evidence in her absence violated appellant's right to confrontation. R. 389, 14 - 437, I. 1. Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (decided June 25, 2009), strongly reinforces appellant's argument that the use of Brown's report, in the absence of appellant being able to cross-examine her, violated his rights under the Confrontation Clause.

Investigator Brown's "standard crime scene analysis" report contained subjective opinions and her allegedly objective conclusions as to her fingerprint and semen analysis inside the home of the parents of the alleged victim, Byrd. The fact the state claimed this was a "standard crime scene report" did not excuse Brown from being subject to cross-examine pursuant to Melendez-Diaz v.

Massachusetts. 129 S.Ct. 2527 (2009), and the use of her report without appellant having an opportunity to cross-examine her violated his rights under the Confrontation Clause.

As the Supreme Court observed in the context of that seemingly simple drug case, “a forensic analyst responding to a request from a law enforcement official may feel pressure -- or have an incentive -- to alter the evidence in a manner favorable to the prosecution. Confrontation is one means of assuring accurate forensic analysis. While it is true, as the dissent notes, that an honest analyst will not alter his testimony when forced to confront the defendant . . . the same cannot be said of the fraudulent analyst. See Brief for National Innocence Network as *Amicus Curie* 15-17 (discussing cases of documented ‘drylabbing’ where forensic analysts report results of tests that were never performed) . . . like the eyewitness who has fabricated his account to the police, the analysts who provides false results may, under oath in open court, reconsider his false testimony.” Melendez-Diaz v. Massachusetts. 129 S.Ct. at 2536-2537. “Confrontation is designed to weed out not only the fraudulent analysis, but the incompetent one as well.” Melendez-Diaz v. Massachusetts. 129 S.Ct. at 2536.

Appellant also correctly argued at trial and on appeal that, citing State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997), the chain of custody was fatally defective because Investigator Brown was not present to establish the chain of custody of the critical items from October 30, 2004 - November 2, 2004. Appellant was denied, as was the defendant in State v. Joseph, the opportunity to confront and cross-examine Brown.

The facts of this case are similar to those in State v. Joseph in that the state essentially argued it was too inconvenient to acquire the presence of a former law enforcement official now living out-of-state, here former Investigator Brown. However, the Court in Melendez-Diaz held that the requirements of the Confrontation Clause may not be relaxed because they make the

prosecution's task burdensome. "Respondent asks us to relax the requirements of the Confrontation Clause to accommodate the 'necessities of trial and the adversary process' . . . It is not whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause -- like those other constitutional provisions -- is binding, and we may not disregard it at our convenience." Melendez-Diaz v. Massachusetts. 129 S.Ct. at 2540. Thus, the DNA evidence here was erroneously admitted due to the fatally defective chain of custody. See Brief of Appellant at 28.

Facts of this case as applicable to *Melendez-Diaz v. Massachusetts* 129 S.Ct. 2527 (2009)

As this Court will recall, a major dispute erupted over what happened with the evidence, including the comforter, pants, shirt, and panties, taken from Byrd's Irmo home between October 30, 2004 and November 2, 2004. Brief of Appellant at 23. The state did not produce Investigator Brown at trial but the state was able to "back door" Brown's testimony before the jury by introducing the contents of her report, without her being subject to cross-examination. The defense strongly objected that this evidence was inadmissible hearsay and that it denied appellant his right to confrontation under the United States Constitution. R. p. 392, l. 4 – 437, l. 1. Appellant's brief at 24.

Lieutenant Padgett testified about how Brown processed the scene in great detail from her "crime scene analysis report." She arrived "at 15:42, which would be 3:42 in the afternoon" . . . and "she observed things out of place, a lamp overturned, an area where a struggle may have took place and some items in disarray. And she also listed items that she collected at the scene and at the hospital. And she also states here that she processed for latent prints . . . There was nothing of value that she could get (fingerprints) . . . which is not unusual. Padgett also said Brown's report

indicated she “detected semen on the bed comforter,” after using a “black light to detect semen.” R. 424, l. 15 – 440, l. Brown was acting as an analyst in this regard, and her conclusions are directly controlled by the Court’s holding in Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, supra. (decided June 25, 2009).

Padgett also sought to deflate speculation about what Brown did with this evidence for these three days. He testified that Brown would not have kept the items “in her car over the weekend . . . That’s against our protocol.” R. 436, l. 25 – 437, l. 18. That obviously is akin to asserting that no law enforcement would intentionally, or out of incompetence, or out of laziness mishandle or incorrectly report findings regarding forensic evidence. See Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2536-2537.

Despite this gap in the chain of custody, and appellant’s inability to cross-examine Investigator Brown, the judge admitted the results of the DNA from the items that could not be accounted for between October 30, 2004 and November 2, 2004, Dr. Amick was able to testify about DNA “matches” to appellant on the items. This was very significant evidence given that Byrd described a sexual assault on her parent’s bed that afternoon, and appellant testified it was “consensual normal oral sex” with the couple in the beginning.

As this Court will recall, Byrd testified appellant took off her clothes and placed her on her parent’s bed. Byrd maintained appellant told her to “perform oral sex on him,” and she said she did perform oral sex. R. 25, l. 9 – 26, l. 5. Byrd said appellant ejaculated, and she “*spit it out.*”

Q. Where did you spit out?

A. On the comforter.

R. 174, ll. 10-11.

Byrd stated appellant was upset by her reaction. Byrd testified appellant then attempted to “penetrate me” vaginally, and she told him to stop. Byrd said she started crying, and “I told him that he was raping me again, *and he stopped in the middle of it. . . he freaked out.*” R. 27, l. 22 – 28, l. 8; R. 171, l. 2 – 174, l. 11. (emphasis added).

Appellant conversely testified that he told Byrd he missed her when he visited her in Irmo, and she told appellant, “she missed me, too.” R. 615, l. 20 – 616, l. 4. Appellant stated that he went upstairs with Byrd just so they could have some privacy. R. 617, ll. 2 – 4.

Appellant testified they had consensual oral sex upstairs *which was normal for them*, and he then started having intercourse with Byrd but she told him to stop. “I don’t want to do this. I said okay, and I was upset.” Appellant said Byrd told him she had cheated on me with one of my supposed good friends . . . so at this point I was very upset and I said, what are you trying to do? Do you want me to kill myself? She said, Randy, you love yourself too much to kill yourself.” R. 617, l. 23 – 619, l. 18. (emphasis added).

Dr. Amick testified that appellant *had two matches of his DNA on the comforter found in the bedroom* of the parent’s home in Irmo. R. 512, l. 4 – 518, l. 22. Dr. Amick further testified that appellant’s DNA was also found on Byrd’s pants. R. 560, ll. 6 – 21. Only Bryd’s DNA was found on her panties. R. 507, ll. 4 – 13. Dr. Amick acknowledged he could not say appellant’s DNA being found on the comforter meant that that DNA came from his semen. R. 537, l. 7 – 539, l. 16. However, as seen, Brown’s report concluded semen was found on the comforter.

The DNA evidence was thus damaging to appellant’s defense of consent because he testified the oral sex was normal. Bryd, on the other hand, maintained that she spit out appellant’s semen after her forced her to perform oral sex. The jury could consider Bryd’s version provided the explanation for why appellant’s DNA was found on the comforter since

both appellant and Bryd testified that oral sex was the only completed sex act that afternoon on her parent's bed. However, the inability of appellant to cross-examine Brown regarding what she did with this evidence from October 30, 2004 until November 2, 2004, given that this evidence may well have been co-mingled, and therefore spoiled, violated appellant's right to confrontation. R. 363, l. 18 – 370, l. 21. Given that appellant and Bryd were the only witnesses to what occurred in the bedroom that afternoon the Confrontation Clause errors as to the chain of custody and the use of Brown's report were not harmless.

Further, as seen, Brown's report was used to "corroborate" Bryd's testimony regarding the alleged "extreme struggle" in her parent's Irmo home, and appellant's inability to cross-examine her about processing the scene for fingerprints, semen, and other items violated appellant's right to confrontation, and the errors also cannot be deemed harmless for these reasons. As seen above, the physical evidence in this case was very important given Bryd's claim of a sexual assault by way of forced oral sex, and appellant's attempt to penetrate her, against appellant's testimony of consensual oral sex "as they normally had," and quickly aborted vaginal sex.

Again, it is important to note that Brown's report contained subjective opinions (a struggle) and conclusions (no fingers and presence of semen on the comforter) which appellant could not cross-examine. This was important because there was testimony Bryd told appellant that she loved him -- which she claimed was meant to placate him and protect herself -- and varying testimony on *when* things may have gone from being calm to contentious between Bryd and appellant that afternoon. In short, Brown's observations, and her testing were important to the state's case given the highly unusual facts of this case involving this former live-in girlfriend and boyfriend. Brief of Appellant at 24-29. Appellant correctly argued the use of Brown's report in her absence violated

his right to be confronted with the witnesses against him and he cited Pointer v. Texas, 380 U.S. 400 (1965) for that proposition. Brief of Appellant at 29.

Further, the solicitor exploited this evidence where appellant could not confront and cross-examine Brown. “This is forensic evidence. It does not lie. It is incapable.” The solicitor argued that appellant only testified the sex that day was consensual because the DNA matched. “[T]he forensic evidence corroborates that [Byrd’s version]. The exact precise location of where she said she spit up the semen is where it was found.” R. 747, l. 7 – 748, l. 18. These Confrontation Clause violations were not harmless.

Application of Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

In Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009) the Supreme Court held, *citing* Crawford v. Washington, 541 U.S. 36 (2004) and Pointer v. Texas, *supra*, that the Confrontation Clause’s historical underpinning guaranteed a defendant his right to confront those “who bear testimony” against him. Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2531.

The Court noted that the drug analysis “certificates” were functionally identical to live-in court testimony, since they did precisely what a witness does on direct examination. Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2532 *citing* Davis v. Washington, 547 U.S. 813, 830 (2006). The Court held that absence of a showing that the analysts were unavailable to testify at trial *and* that the defendant had a prior opportunity to cross-examine them, the defendant was denied his right to confrontation. Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2532.

Here, appellant clearly never had the prior opportunity to cross-examine Investigator Brown, and the state also did not make any showing of a good faith effort to assure her presence at appellant’s trial under the “unavailability prong. Under Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2532, this was reversible error.

The Court noted that in Crawford it had rejected the Ohio v. Roberts, 448 U.S. 56 (1980) “indicia of reliability” analysis under the Confrontation Clause. Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2533. The Court wrote:

The Sixth Amendment guarantees a defendant the right “to be confronted with the witnesses *against him*.” (Emphasis added.) To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction – that the substance he possessed was cocaine. The contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause confirms this analysis. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses “against him,” the Compulsory Process Clause guarantees a defendant the right to call witnesses “in his favor.” U.S. Const., Amend. VI. The text of the Amendment contemplates two classes of witnesses those against the defendant and those in favor. The prosecution *must* produce the former; the defendant *may* call the latter. *Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.*

Melendez-Diaz v. Massachusetts, 129 S.Ct at 2533-2534. (emphasis added).

Here Brown was not only a chain witness she was a fact witness. Therefore, under the facts of this case, even the dissent in Melendez-Diaz v. Massachusetts would rule in appellant’s favor. “The dissent first contends that a ‘conventional witness recalls events *observed in the past*, while an analyst’s report contains near-contemporaneous observations of the test.” Melendez-Diaz v. Massachusetts, 129 S.Ct at 2535. (emphasis added). Brown was a conventional witness.

Interestingly, the majority also noted: “A second reason the dissent contends that the analysts are not ‘conventional witnesses’ (and thus not subject to confrontation) is that they ‘observed neither the crime nor any human action related to it. The dissent provides no authority for this particular limitation of the type of witnesses subject to confrontation. Nor is it conceivable that all witnesses who fit this description would be outside the scope of the Confrontation Clause. *For example, is a police officer’s investigative report describing the crime scene admissible absent an*

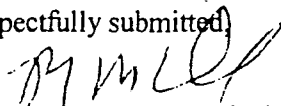
opportunity to examine the officer? The dissent's novel exception from coverage of the Confrontation Clause would exempt all expert witnesses – a hardly 'unconventional' class of witnesses." Melendez-Diaz v. Massachusetts, 129 S.Ct at 2535. (emphasis added).

As the Court stated: "the dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because the defendant is obviously guilty. This is not what the Sixth Amendment prescribes . . . we do not have license to suspend the Confrontation Clause when a preferable trial strategy is available." Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2536.

The Court also rejected the Attorney General's argument that it should not find a Confrontation Clause violation because the defendant had the ability to subpoena the witnesses. As in this case, the Court observed, "converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." Melendez-Diaz v. Massachusetts, 129 S.Ct. 2540.

Since appellant was denied his rights under the Confrontation Clause to confront and cross-examine Investigator Brown as a fact witness and a chain of custody witness, appellant should be granted a new trial.

Respectfully submitted,



Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT

August 13, 2009

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
James W. Johnson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

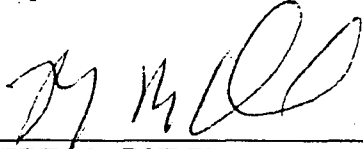
V.

RANDY B. THOMAS,

APPELLANT

CERTIFICATE OF SERVICE

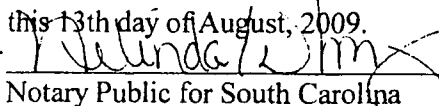
The undersigned attorney hereby certifies that a true copy of the Memorandum of Law in the above referenced case has been served upon William M. Blitch, Jr., Esquire this 13th day of August, 2009.



ROBERT M. DUDEK
Deputy Chief Appellate Defender for Capital Appeals

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 13th day of August, 2009.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
Hon. James W. Johnson, Jr., Circuit Court Judge

The State,

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Randy B. Thomas,

Appellant.

**MEMORANDUM REGARDING APPLICABILITY OF
MELENDEZ-DIAZ v. MASSACHUSETTS, 129 S.Ct. 2527 (2009)**

At the request of this Court, Respondent hereby submits a brief written analysis of the applicability of Melendez-Diaz V. Massachusetts, 129 S.Ct. 2527 (2009), to the facts of this case. First, the State maintains the Court need not address the applicability of Melendez-Diaz to the instant case because the issues raised by Appellant are either not properly preserved for review on appeal or, even if preserved and error, any error was entirely harmless. Finally, the recent decision in Melendez-Diaz is distinguishable from the instant case.

APPLICATION OF MELENDEZ-DIAZ

In Melendez-Diaz, the United States Supreme Court (USSC) found the admission of “certificates of analysis” by a forensic analyst indicating the seized substance was cocaine without the affiant being available for cross-examination violated the Confrontation Clause and the USSC’s recent decision of Crawford v. Washington, 541 U.S.36, 124 S.Ct. 1354 (2004). The USSC found the documents admitted “fall within the ‘core class of testimonial

statements”” described in Crawford. Melendez-Diaz, 129 S.Ct. at 2532. The USSC found the certificates were affidavits and “not only were the affidavits ‘made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ but under Massachusetts law the sole purpose of the affidavits was to provide ‘prima facie evidence of the composition, quality, and net weight’ of the analyzed substance.” Id. The USSC concluded “the analysts’ affidavits were testimonial statements, and the analysts were ‘witnesses’ for purposes of the Sixth Amendment.” Id.

In the instant case, the report completed by Investigator Brown was not an affidavit or a document that met the definition of an affidavit. It was merely a business record required by the Sheriff’s Department to document the activities and progression of the investigation. (R.392-393). The document was not made in anticipation of trial and was not “made for the purpose of establishing or probing some fact.” Id. An objective witness would believe the report was made for tracking the investigation and not to be available for use at a later trial.

Further, the document was created solely to document the crime scene and the officer’s activities and not in anticipation of Appellant’s trial. Appellant had not been arrested at the time Investigator Brown completed the report. The investigation into the alleged incident had just begun, so the document was not reasonably created in consideration of a trial. The report was merely a business record of the Sheriff’s Department for internal documentation. Accordingly, the report should not be considered testimonial, and its admission would not require Investigator Brown’s presence for cross-examination nor violate the Confrontation Clause under the USSC’s decision in Melendez-Diaz.

HARMLESS ERROR AND PRESERVATION

The report in question was admitted for two purposes. One, was to aid in the chain of custody for the DNA analysis which was performed. The second was to further describe the condition of the living room when she arrived. Even if this Court were to find the admission of the report violated the Confrontation Clause as it relates to either issue, the admission was harmless as cumulative to other evidence or due to a lack of prejudice to Appellant. Further, as it relates to the condition of the living room, the issue is not properly preserved for review on appeal. The issues will be discussed separately below.

Chain of Custody

In regards to the chain of custody, any error in the admission of the report as discussed in the State's brief, would be entirely harmless. The chain of custody was solely used to establish Appellant's DNA was present at the scene of the sexual assault. Appellant admitted he was present with the victim and she performed oral sex on him. He further admitted he ejaculated. (R.617-618). It is inconceivable how he was prejudiced by the admission of the finding his DNA was present when he admits to having oral sex with the victim and admits he was seeking to have sexual intercourse. See Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993).

Further, the non-fungible items, as further discussed in the State's brief, were properly admitted without a chain of custody because they were easily identified by the victim. See State v. Rogers, 361 S.C. 178, 187, 603 S.E.2d 910, 914 (Ct. App. 2004) (citing State v. Glenn, 328 S.C. 300, 305, 492 S.E.2d 393, 395 (Ct. App. 1997) ("[W]here the issue is the admissibility of non-fungible evidence-that is, evidence that is unique and identifiable-the establishment of a strict chain of custody is not required....").

Additionally, the State created a sufficient chain of custody for the admission of the DNA analysis. See State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007); State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004)). All persons in the chain of custody have been identified, so there are no missing links in the chain. Further, as detailed in the State's brief, Detective Livingston and Lieutenant Padgett both testified to the handling of the items. As a result, this case is clearly distinguishable from this Court's recent opinion in State v. Hatcher, Op. No. 4604 (filed August 5, 2009). The State in the case *sub judice* produced a complete chain of custody, and as was reiterated in Melendez-Diaz, the testimony of everyone who laid hands on the evidence is not required. Melendez-Diaz, 129 S.Ct. 2532 n.1. Accordingly, even if the report was admitted in violation of the Confrontation Clause, its admission was clearly harmless as regards the chain of custody and the DNA analysis.

Crime Scene Condition

The admission of the report as it relates to the condition of the crime scene and Investigator Brown's subjective notes is also harmless error and is not properly preserved for review on appeal. As discussed in more detail in the State's brief, Appellant maintains subjective comments are included in the report and their admission was improper. This issue was never raised to the trial court and is, therefore, not preserved for review on appeal. To the extent Appellant maintains the report was admitted in violation of the Confrontation Clause, this issue was only raised at trial as it related to the chain of custody the State was required to prove and not as the report related to the condition of the living room. As a result, the issue would not be preserved for review on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court).

Further, the admission of the report as it relates to the condition of the living room, even if preserved and error, would be entirely harmless. The victim testified regarding the condition of the living room. Appellant admitted the lamp was disturbed after the events in the bedroom. (R.620). Further, the State introduced photographs which depicted the living room at the time of the assault and showed the living room in a state of dishevelment. (R.150-153). Accordingly, the information contained in the report would be merely cumulative to other testimony presented at trial. See State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (stating the admission of improper evidence is harmless where the evidence is merely cumulative to other unobjected-to evidence).

As a result, this Court need not address the application of the USSC's recent holding in Melendez-Diaz to the facts of this case because even if the Court finds the admission of the report violates the Confrontation Clause the errors are either harmless or not preserved for review on appeal. On the merits, this Court should find the report was an internal investigative report used by the Sheriff's Department, and not reasonably intended for use at trial. As a result, the report was not testimonial in nature and Investigator Brown was not a necessary witness. Its admission, therefore, would not violate the Confrontation Clause under Melendez-Diaz or Crawford. Accordingly, the State asks the Court to affirm Appellant's conviction and sentence.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

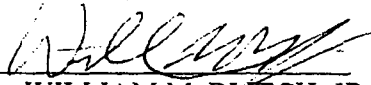
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

W. BARNEY GIESE
Solicitor, Fifth Judicial Circuit

BY:


WILLIAM M. BLITCH, JR.
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

August 14, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
 Hon. James W. Johnson, Jr., Circuit Court Judge

The State,

Respondent,

v.

Randy B. Thomas,

Appellant.

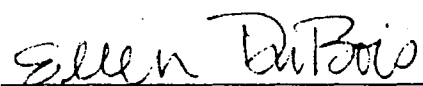
PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Memorandum Regarding Applicability of Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
 SC Commission on Indigent Defense
 Division of Appellate Defense
 Post Office Box 11589
 Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 14th day of August, 2009.


 ELLEN DuBOIS
 Office of Attorney General
 P. O. Box 11549
 Columbia, S. C. 29211
 (803) 734-3727

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Richland County
Hon. James W. Johnson, Jr., Circuit Court Judge

The State,

Respondent,

v.

Randy B. Thomas,

Petitioner.

Opinion No. 2009-UP-437 (S.C. Ct. App. filed Sept. 10, 2009)

**RETURN TO PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS**

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

W. BARNEY GIESE
Solicitor, Fifth Judicial Circuit
Post Office Box 192
Columbia, South Carolina 29202
(803) 748-4785

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

STATEMENT OF QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	3
I. The Court of Appeals correctly found the August 2004 assault in Clemson was part of a common scheme or plan with the charged attack. The Court also correctly determined the evidence did not unduly prejudice Petitioner. As an additional sustaining ground, the testimony regarding the Clemson assault was properly admitted as part of the <i>res gestae</i> of the Irmo assault.	3
II. The Court of Appeals correctly found the admission of the DNA evidence did not prejudice Petitioner and any error in its admission was harmless. Further, the State proved the chain of custody as far as practicable prior to the trial court allowing testimony of DNA results from articles recovered by Investigator Deirdre Brown. (Petitioner's Question III).	13
III. The Court of Appeals correctly found Petitioner was not prejudiced by the admission of Investigator Brown's report and any error in its admission was entirely harmless. Further, portions of Petitioner's argument are not properly preserved for review on appeal. Finally, the admission of the report did not violate the Confrontation Clause. (Petitioner's Question II).	18
CONCLUSION	22

STATEMENT OF QUESTION PRESENTED

- I. The Court of Appeals correctly found the August 2004 assault in Clemson was part of a common scheme or plan with the charged attack. The Court also correctly determined the evidence did not unduly prejudice Petitioner. As an additional sustaining ground, the testimony regarding the Clemson assault was properly admitted as part of the *res gestae* of the Irmo assault.
- II. The Court of Appeals correctly found the admission of the DNA evidence did not prejudice Petitioner and any error in its admission was harmless. Further, the State proved the chain of custody as far as practicable prior to the trial court allowing testimony of DNA results from articles recovered by Investigator Deirdre Brown. (Petitioner's Question III).
- III. The Court of Appeals correctly found Petitioner was not prejudiced by the admission of Investigator Brown's report and any error in its admission was entirely harmless. Further, portions of Petitioner's argument are not properly preserved for review on appeal. Finally, the admission of the report did not violate the Confrontation Clause. (Petitioner's Question II).

STATEMENT OF THE CASE

Petitioner was indicted by the Richland County Grand Jury for criminal sexual conduct in the first degree, assault and battery of a high and aggravated nature, and two counts of kidnaping. The case was tried before the Honorable James W. Johnson and a jury from February 6-10, 2006. Petitioner was convicted on all counts. (T.916-917; R. 820-821). Judge Johnson sentenced Petitioner to concurrent terms of twenty-two years for each count of kidnaping and for criminal sexual conduct in the first degree. Petitioner also was sentenced to ten years, concurrent, on the ABHAN count. (T.936; R. 822).

After hearing oral argument, the Court of Appeals asked Petitioner and the State to file memoranda regarding the application of the case of Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), to the instant case. Petitioner served and filed his memorandum on August 13, 2009, and the State's memorandum was served and filed the next day. The Court of Appeals subsequently affirmed Petitioner's convictions and sentence in State v. Thomas, 2009-UP-437 (S.C. Ct. App. filed September 10, 2009). Petitioner filed a Petition for Rehearing on September 24, 2009, which was denied by the Court on October 26, 2009. The Petition for a Writ of Certiorari followed.

ARGUMENT

- I. The Court of Appeals correctly found the August 2004 assault in Clemson was part of a common scheme or plan with the charged attack. The Court also correctly determined the evidence did not unduly prejudice Petitioner. As an additional sustaining ground, the testimony regarding the Clemson assault was properly admitted as part of the *res gestae* of the Irmo assault.

Petitioner contends the Court of Appeals erred in finding the trial court properly admitted testimony regarding a prior assault of the victim by Petitioner. The Court of Appeals correctly determined the prior assault was part of a common scheme or plan. Further, the testimony was not unduly prejudicial to Petitioner. Finally, as an additional sustaining ground, the testimony was properly admitted as forming part of the *res gestae* of the October assault.

Relevant Facts

After the jury was selected, the court held a hearing pursuant to State v. Lyle¹, to determine whether or not to admit the victim's testimony regarding a prior sexual assault. The victim testified Petitioner frequently stayed in her apartment in Clemson, South Carolina, while they dated from 2003-2004. The victim had a young son that also lived with them. The victim and Petitioner broke up around July 2004, but Petitioner retained a key to the victim's Clemson apartment.

On August 22, 2004, the victim was home on the couch when Petitioner entered the apartment using his key. Her son was staying with her parents in Irmo, South Carolina. The victim testified he began asking her "very direct questions, asking me where I was staying

¹State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

or who I had been seeing.” (T.69; R. 8). He moved to the couch and began touching the victim on her breasts. (T.70; R. 9).

Petitioner then carried the victim upstairs and placed her on her bed. He removed her clothing, held her hands above her head, and began to have sex with the victim. (T.71-72; R. 10-11). She testified she told Petitioner to stop, told him no, told him to leave, and told him that “what he was doing was rape.” (T.72; R. 11). She said he stopped, started crying, and “lost it.” (T.72-73; R. 11-12). She testified that he repeatedly said he was sorry, that he hated himself and that he “freaked out.” (T.73; R. 12).

The victim called several friends after the assault including one that recommended she go to the police. The next day, the victim and her friend went to the police, reported the incident, and she signed a trespass notice against him. (T.74-76; R. 13-15). The victim stated she had the locks changed and stayed with her current boyfriend for about a week. (T.76-77; R. 15-16). She stated she just wanted Petitioner to stay away from her. (T.76; R. 15).

The victim then described the sexual assault that took place in October 2004 for which Petitioner was charged. The victim and her son were staying at her parents’ house in Irmo. She stated she heard a knock on the door and could see through the window it was Petitioner. She said the door was unlocked and he just walked into her parents’ house. (T.78-80; R. 17-19). Petitioner began apologizing for the Clemson assault in August. She testified the discussion became heated so she retreated to the bathroom to call her friend. (T.80-81; R. 19-20). She believed he left, so she exited the bathroom to lock the front door.

Before she could get it locked, however, he reentered the house and would not leave when asked by the victim. (T.81; R. 20).

The victim testified Petitioner moved over to the couch where she was sitting, began hovering over her, and then touched her breasts with one hand while holding her hands above her head with the other. (T.82-83; R. 21-22). Petitioner then picked up the victim, carried her upstairs to her parents room, and placed her on their bed. (T.84-85; R. 23-24). Once upstairs, Petitioner asked the victim to remove her shirt and repeatedly asked "Do you love [her son]?" (T.85; R. 24). After removing the victim's clothes, Petitioner forced her to perform oral sex. He ejaculated into her mouth, but she spit it out. (T.86-87; R. 25-26).

Petitioner then held the victim's hands above her head and penetrated her with his penis about halfway into her vagina. She cried and told Petitioner "he was raping me again, and he stopped in the middle of it." (T.88-89; R. 27-28). The victim stated Petitioner "freaked out," said he was going to kill himself, and said he hated himself. (T.89; R. 28).

They both return downstairs and a struggle ensued in which the victim grabbed a lamp. Petitioner threw the lamp to the side and dragged the victim to the kitchen. (T.92-93; R. 31-32). Petitioner grabbed a steak knife from a kitchen drawer, held the knife to the victim's neck, and told her to "go for a ride." (T.94-95; R.3-34). Petitioner put the knife in his pocket and picked up the victim's son. Once outside, the victim yelled for a neighbor to call 911 and Petitioner took off in the car with the victim's son. (T.96; R. 35). Petitioner eventually left the child in the road and sped away. (T.97; R. 36).

The State sought to admit the testimony regarding the Clemson assault pursuant to the common scheme and plan exception of State v. Lyle. The State maintained the facts of

the Clemson assault were necessary to explain the actions of Petitioner during the Irmo assault only a few months later. The State argued the two assaults are very similar in what took place, including the actual assault and Petitioner's reaction afterwards. The State contended the proof of the first assault tends to prove the second assault and the probative value, to explain Petitioner's actions both before and after the Irmo assault, greatly outweighed the prejudicial impact. (T.137-145; R. 76-84).

Defense counsel maintained the evidence was prejudicial to Petitioner because it only proved propensity to act. She argued there was no evidence of a common scheme or plan. She asserted the crimes were dissimilar and the Clemson assault does not tend to prove the occurrence of the Irmo assault for which Petitioner was charged. Finally, defense counsel maintained there was not clear and convincing evidence of the first assault to allow its admission. (T.147-150; R. 86-89).

The court ruled the testimony regarding the Clemson assault was admissible as evidence of a common scheme or plan as well as under the exception to State v. Lyle, showing motive or intent. (T.159; R. 98). The court also ruled the evidence was not unduly prejudicial to Petitioner under Rule 403, SCRE. (T.163; R. 102).

The victim was the first witness to testify after opening arguments. She testified regarding the Clemson assault in front of the jury consistent with her testimony *in limine*. (T.195-208; R. 134-147). The victim then turned to the events of the Irmo assault. Specifically, she testified the Irmo assault took place after Petitioner entered her parents' house seeking to apologize for the Clemson assault. She stated it "was his way of sort of wanting to show me that he loved me." (T.220; R. 159). She stated Petitioner was trying to

explain the Clemson assault and she kept “cutting him off.” The victim testified Petitioner became angry and the events escalated. (T.225-226; R. 164-165). Her testimony in front of the jury regarding the Irmo assault was consistent with her testimony during the hearing *in limine*. (T.219-261; R. 158-200).

Rule 404(b) or Lyle

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001). This Court is bound by the trial court’s factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000) (citing State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993) (appellate courts are bound by the trial court’s fact findings in response to motions preliminary to trial when the findings are supported by the evidence and not clearly wrong or controlled by error of law)). This same standard of review applies to preliminary factual findings in determining the admissibility of certain evidence in criminal cases. Wilson, 345 S.C. at 6, 545 S.E.2d at 829.

The admission or exclusion of evidence is left to the sound discretion of the trial judge. State v. Gaster, 349 S.C. 545, 564 S.E.2d 87 (2002). A court’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error, which results in prejudice to the defendant. State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (Ct. App. 2004). An abuse of discretion occurs when the trial court’s ruling is based on an error of law. State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

Evidence of prior crimes or misconduct is inadmissible to prove the specific crime charged unless the evidence tends to establish (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the proof of the other; or (5) the identity of the person charged with the present crime. Rule 404(b), SCRE; State v. McClellan, 283 S.C. 389, 323 S.E.2d 772, 773-74 (1984); Lyle, 118 S.E. at 807. To be admissible, a prior bad act must first be established by clear and convincing evidence. State v. Gillian, 373 S.C. 601, 646 S.E.2d 872, 877 (2007); State v. Weaverling, 337 S.C. 460, 468, 523 S.E.2d 787, 791 (Ct. App. 1999).²

Common Scheme or Plan

Evidence of a prior bad act is admissible when it tends to establish “a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others.” State v. Lyle, 125 S.C. 406, 416, 118 S.E. 803, 807 (1923). When there is a close degree of similarity between the crime charged and the prior bad act, both this Court and the South Carolina Supreme Court have held prior bad acts are admissible to demonstrate a common scheme or plan. See e.g., State v. Gaines, 380 S.C. 23, 30, 667 S.E.2d 728, 731 (2008). “When determining whether evidence is admissible as common scheme or plan, the trial court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity.” State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 277-78 (2009).

²Petitioner does not challenge the finding the prior bad act was proven by clear and convincing evidence.

“When the similarities outweigh the dissimilarities, the bad act evidence is admissible under Rule 404(b).” Id.

The South Carolina Supreme Court further explained:

[T]he trial court should consider the following factors when determining whether there is a close degree of similarity between the bad act and the crime charged: (1) the age of the victims when the abuse occurred; (2) the relationship between the victims and the perpetrator; (3) the location where the abuse occurred; (4) the use of coercion or threats; and (5) the manner of the occurrence, for example, the type of sexual battery.

Id. at 433-34; 683 S.E.2d at 278 (citing State v. Hallman, 298 S.C. 172, 379 S.E.2d 115 (1989); State v. McClellan, 283 S.C. 389, 323 S.E.2d 772 (1984)).

In the instant appeal, a clear common scheme or plan can be derived from the evidence of the two assaults. The Clemson assault set the stage for the events of the Irmo assault. The “prior bad act” of the Clemson assault had a very similar progression of events when juxtaposed to the Irmo assault. Both began with the victim and the Petitioner arguing and Petitioner attempting to explain how much he loved the victim. In both instances, when Petitioner’s love and affection was not returned, he became very angry and carried the victim to a bedroom. Once in the bedroom, he assaulted the victim until she told him he was raping her. At that point, he “lost it” or “freaked out” in both assaults. The common scheme or plan shown through the testimony includes Petitioner’s attempts to win the affection of the victim, and then assaulting her when he finds she is not responsive to his attempts.

Furthermore, the Clemson assault has a logical connection or relevance to the Irmo assault for which Petitioner is charged. The Irmo assault occurred after Petitioner became

angry because the victim would not accept his apologies or explanations for the Clemson assault. The Irmo assault ended when the victim reminded the Petitioner he was doing the same thing to her that he did in Clemson. A common thread clearly survives from the Clemson assault through to the Irmo assault, and the Court of Appeals correctly determined the testimony was admissible as a common scheme or plan because the similarities of the major events of each assault greatly outweigh their differences.

Res Gestae

As an additional sustaining ground, the evidence of the Clemson assault was also properly offered as part of the *res gestae* of the charges against Petitioner arising from the Irmo assault and kidnappings. Evidence of prior bad acts is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Fletcher, 363 S.C. 221, 246, 609 S.E.2d 572, 585 (Ct. App. 2005). “The *res gestae* theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred.” Fletcher, 363 S.C. at 246, 609 S.E.2d at 585 (citing State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004).

This evidence of other crimes is admissible:

when such evidence “furnishes part of the context of the crime” or is necessary to a “full presentation” of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its “environment” that its proof is appropriate in order “to complete the story of the crime on trial by proving its immediate context or the ‘*res gestae*’ ” or the “uncharged offense is ‘so linked together in point of time

and circumstances with the crime charged that one cannot be fully shown without proving the other ... '[and is thus] part of the *res gestae* of the crime charged.' And where evidence is admissible to provide this 'full presentation' of the offense," [t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "*res gestae*."

State v. Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)). Under this theory, it is important that the temporal proximity of the prior bad act be closely related to the charged crime. State v. Owens, 346 S.C. 637, 652, 552 S.E.2d 745, 753 (2001).

The Clemson assault, which took place only two months prior, was so "inextricably interwoven" into the fabric of the charges resulting from the Irmo assault as to require admission of the first to explain the context of the events of the latter. See State v. Preslar, 364 S.C. 466, 475, 613 S.E.2d 381, 386 (Ct. App. 2005). Evidence of the Clemson assault was critical to the jury's understanding of the Irmo assault. Testimony regarding the Clemson assault provided the context and a complete picture for why Petitioner was at the victim's parents' home in Irmo, why he became upset when she refused to listen to his apologies or explanations, and why he reacted the way he did after assaulting the victim. The evidence of the prior Clemson assault was necessary to show the complete, whole, unfragmented story related to the charges for CSC, kidnaping, and ABHAN that arose from the Irmo assault.

The trial court correctly allowed the victim to testify and the State to present evidence of the Clemson assault because it was evidence of a common scheme or plan under Rule

404(b), or in the alternative, it formed part of the *res gestae* of the Irmo assault and was necessary to provide the jury with the complete, unfragmented story.

Probative Value

Petitioner also argues the evidence of the Clemson assault was unduly prejudicial. Based on its clear similarity to the charged Irmo assault and common scheme or plan shown by the evidence, the testimony regarding the Clemson assault was clearly relevant and probative. The probative value in allowing the jury to see Petitioner's attempt to win the victim's affection, only to assault her when he cannot convince her of the affection, clearly outweighs the prejudicial impact of the admission of the Clemson assault. Finally, because the evidence of the Clemson assault is necessary for a complete, unfragmented story explaining the environment and context of the Irmo assault, it is certainly more probative than prejudicial in this case. As a result, the Court of Appeals correctly determined the probative value of the victim's testimony substantially outweighed the danger of unfair prejudice. Because the Court of Appeals correctly determined the testimony regarding the August assault was properly admitted by the trial court, this Court should deny the Petition for Writ of Certiorari as to Petitioner's Question I.

II. The Court of Appeals correctly found the admission of the DNA evidence did not prejudice Petitioner and any error in its admission was harmless. Further, the State proved the chain of custody as far as practicable prior to the trial court allowing testimony of DNA results from articles recovered by Investigator Deirdre Brown. (Petitioner's Question III).

Petitioner contends the Court of Appeals erred in affirming the trial court's decision to admit DNA results from items collected at the scene of the October assault. The Court of Appeals correctly determined the admission of the evidence, even if error, did not prejudice Petitioner and was harmless. Further, the State properly proved the chain of custody in this case as far as practicable and Investigator Brown's link in the chain may have been weak, but it was not missing.

Harmless Error

The Court of Appeals correctly found "any violation of the chain of custody requirement in the admission of the DNA evidence to be irrelevant and harmless to the outcome of the verdict." (App.3). For the error to be harmless, the appellate court must determine "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993) (citing Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)).

Petitioner testified at trial that he had consensual sex with the victim on the comforter used to obtain his DNA. He testified that he ejaculated and that he began vaginal intercourse prior to her telling him to stop. (T.704-705; R. 617-618). His testimony supported the DNA analyst's findings that semen was found on the comforter where the sex, whether consensual or forced, occurred. Further, Investigator Godfrey testified that while he and Petitioner went

through the arrest warrants, Petitioner never denied having oral sex with the victim, he only denied actually penetrating her. (T.639-640; R. 563-564). As a result, the admission of the DNA evidence was merely cumulative to Petitioner's own testimony and it is not possible for him to have been prejudiced by its admission. See State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (stating the admission of improper evidence is harmless where the evidence is merely cumulative to other unobjected-to evidence); (State v. Kirby, 325 S.C. 390, 396-97, 481 S.E.2d 150, 153 (Ct. App. 1996) (finding even if officer's testimony regarding information radioed by the police dispatcher constituted hearsay, its admission was harmless given it was cumulative to similar testimony that was admitted without objection); Sligh v. Johnson, 288 S.C. 364, 367, 342 S.E.2d 620, 622 (Ct. App. 1986). Accordingly, the Court of Appeals did not err in affirming the trial court's admission of the DNA evidence.

Chain of Custody

As an additional sustaining ground, the State presented a complete chain of custody as far as practicable and any weakness in the chain went solely to the weight of the evidence and not its admissibility. Investigator Brown was not called as a witness to testify in establishing the chain of custody of the DNA evidence. Sometime after she collected the evidence in this case, she quit the Richland County Sheriff's Department and went to work for a private firm in Kosovo. Testimony indicated she was supposed to keep the Sheriff's Department informed of her contact information, but no one had heard from her. The State asserted no one knew whether she was "alive or dead." As a result, the State had no means to locate her to obtain her testimony in the case.

In order to admit the DNA evidence:

[A] party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable. Where an analyzed substance that has passed through several hands, the identity of individuals who acquired the evidence and what was done with the evidence between the taking and the analysis must not be left to conjecture. Accordingly, if the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive.

State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205-206 (2007) (citing Benton v. Pellum, 232 S.C. 26, 33, 100 S.E.2d 534, 537 (1957); State v. Taylor, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004)).

Testimony from each custodian is not a prerequisite to establishing a chain of custody sufficient for admissibility of the fungible evidence. Taylor, 360 S.C. at 27, 598 S.E.2d at 739. "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." Sweet, 374 S.C. at 7, 647 S.E.2d at 206 (citing State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989) (upholding the admissibility of a blood test even though a nurse who drew the blood from the defendant did not testify at trial; hospital forms completed by the absent nurse and testimony from the other evidence custodians sufficiently established a chain of custody)).

In the instant case, the testimony at trial clearly identified Investigator Deirdre Brown as the person that collected the comforter, shirt, pants, and panties. Detective Livingston testified Investigator Brown removed the comforter from the victim's parent's home.

(T.423-424; R. 355-356). Further, he testified Investigator Brown traveled to the hospital to interview the victim at the same time he went to the hospital. (T.427-428; R. 359-360). The victim described Investigator Brown, with the description nearly matching that given by a co-worker, as the individual that collected her pants, panties, and shirt while she was at the hospital. (T.275-276; 278-279; R. 214-215; 217-218). Finally, Detective Livingston testified he later saw Investigator Brown in her office and she had the comforter and several other items in her possession. (T.425-426; 431-432; 435-436; R. 357-358; 363-364; 367-368).

With the identification of Investigator Brown as the initial link in the chain of custody clearly established, the State needed to “reasonably demonstrate the manner of handling of the evidence.” In addition to Investigator Brown’s report which the trial court properly admitted as a business record, as discussed below, several witnesses testified regarding her handling of the items from which DNA samples were taken.

Lieutenant Padgett, as supervisor of the Richland County Sheriff’s Department Crime Scene Investigators, testified about Brown’s training in the policies and procedures used in handling the items. He described how the items should be wrapped, the proper handling of the items, and identified the paper used to wrap the items. (T.499-500; 501-509; R. 429-430; 431-439). Finally, he identified Investigator Brown’s initials on the packaging which contained the comforter, panties, pants, and shirt. (T.500-501; R. 430-431)

Detective Livingston testified that in addition to seeing Brown collect the comforter from the home, he later saw her in her office. He testified he saw her wrapping the comforter

to be placed into evidence and that she had several other items already wrapped up in brown bags. (T.425-426; 431-432; 435-436; R. 357-358; 363-364; 367-368).

Leonard A. Jones, an evidence clerk with the Richland County Sheriff's Department, testified he retrieved the package. He testified it was wrapped properly according to procedure and completely sealed. (T.445; R. 377). He testified that if it appeared anything was not in proper condition then he would have contacted the investigator to have any error corrected.

Finally, the report by Investigator Brown indicated she collected the comforter, panties, pants, and shirt from the scene or the victim. The report further indicates the investigating officer, in this case Investigator Brown, "placed all collected items into evidence." (T.499; R.429).

The State, therefore, made the requisite showing of a chain of custody as far as was reasonably practicable and the trial court properly admitted the DNA evidence. As a result, the Petition for Writ of Certiorari as to Petitioner's Question III should be denied.

III. The Court of Appeals correctly found Petitioner was not prejudiced by the admission of Investigator Brown's report and any error in its admission was entirely harmless. Further, portions of Petitioner's argument are not properly preserved for review on appeal. Finally, the admission of the report did not violate the Confrontation Clause. (Petitioner's Question II).

Petitioner contends the Court of Appeals erred in finding the admission of Investigator Brown's report harmless error. He asserts the admission of the report violated the Confrontation Clause because it was used to support the chain of custody and because it contained subjective findings of the Investigator. The Court of Appeals, however, correctly determined the admission of the report was harmless because anything it contained was merely cumulative to other evidence in the record. Further, as discussed above, the State presented the required chain of custody without reliance on Investigator Brown's report. Finally, any issue related to the violation of the Confrontation Clause because the admission of the report allowed into evidence the subjective findings of Investigator Brown is not preserved for review on appeal.

Harmless Error

The Court of Appeals correctly determined any error in the admission of the report was harmless because the report's findings were cumulative to other evidence in the record.

As this Court explained:

Violations of the Confrontation Clause are subject to a harmless error analysis. State v. Murphy, 270 S.C. 642, 644, 244 S.E.2d 36, 36-37 (1978) (observing where a wealth of evidence exists against the Petitioner, it eliminates any error in the admission of a codefendant's statement)). "A [C]onfrontation [C]ause error is harmless if the evidence is overwhelming and the violation so insignificant by

comparison that we are persuaded, beyond a reasonable doubt, that the violation did not affect the verdict.” State v. Vincent, 131 Wash. App. 147, 120 P.3d 120, 124 (2005). “Considerations include the importance of the witness’s testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution’s case.” Id.

State v. Holder, 382 S.C. 278, 285, 676 S.E.2d 690, 694 (2009).

Investigator Brown’s report was used by the State to fortify the chain of custody to admit the DNA evidence.³ As discussed above, Petitioner’s own testimony and the testimony by Investigator Godfrey are clearly cumulative to the DNA evidence. The admission of the report was not necessary to establish the fact Petitioner and the victim engaged in sexual activity, whether consensual or forced, because it was admitted by Petitioner. Therefore, any error in admission of the report to establish the chain of custody would be harmless. See State v. Haselden, 353 S.C. 190, 197, 577 S.E.2d 445, 448-49 (2003) (stating the admission of improper evidence is harmless where the evidence is merely cumulative to other unobjected-to evidence).

In addition, the admission of Investigator Brown’s description of the living room would be harmless because it was cumulative to the victim’s and Petitioner’s testimony, as well as the photographic exhibits entered into evidence by the State without objection.

The report stated the living room area was “in disarray. There appeared to be a struggle. One portion of the lamp stand on the sofa and the bottom portion on the floor

³The State submits the report was not necessary to satisfy the requirements of presenting a full chain of custody because it met the requirements of Sweet that all persons be identified and the method of handling the evidence be addressed.

area.” (T.499; R. 429). Petitioner testified the victim picked up a lamp and put it down over on the sofa. (T.707; R. 620). Additionally, the State entered several pictures into evidence showing the “disarray” of the living room including the turned-over lamp and the separated lamp shade. (State’s Exhibits 6-14; photographs). Accordingly, this portion of the report was cumulative to other testimony and evidence in the record.

Preservation

Further, the argument the admission of the report violated the Confrontation Clause because of the admission of Investigator Brown’s subjective findings is not properly preserved for review on appeal. This specific issue was never raised to the trial court for consideration. Petitioner did argue the report should not have been admissible to aid in completing the chain of custody. However, the specific issue that the report should not have been admitted because it contained subjective findings of Investigator Brown was never raised to the court. Accordingly, the issue is not properly preserved for review on appeal. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) (providing that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court).

Additionally, the issue of a violation of the Confrontation Clause as it relates to anything other than the chain of custody is not preserved. To the extent Petitioner now argues the admission of the report indicating a struggle occurred or the living room was in disarray violates the Confrontation Clause, that issue was never raised to the trial court. The only confrontation issue raised to the court related to the ability to question Investigator Brown regarding the report and the chain of custody for the DNA evidence. Accordingly,

this issue, to the extent it is raised in the brief, is also not preserved for review on appeal. See Dunbar, 356 S.C. at 142, 587 S.E.2d at 693.⁴ Accordingly, this Court should deny the Petition for Writ of Certiorari as to Petitioner's Question II.

⁴Further, the State submits Petitioner's argument regarding the Confrontation Clause fails on the merits because the facts of this case are distinguishable from the facts of Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the Court of Appeals should be denied.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

W. BARNEY GIESE
Solicitor, Fifth Judicial Circuit

Post Office Box 192
Columbia, South Carolina 29202
(803) 748-4785

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

February 5, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Richland County
Hon. James W. Johnson, Jr., Circuit Court Judge

The State,

Respondent,

v.

Randy B. Thomas,

Petitioner.

Opinion No. 2009-UP-437 (S.C. Ct. App. filed Sept. 10, 2009)

PROOF OF SERVICE

I, ELLEN DuBOIS, certify that I have served the within Return to Petition for Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 5th day of February, 2010.



ELLEN DuBOIS
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

James W. Johnson, Jr., Circuit Court Judge

Opinion No. 2009-UP-437 (S.C. Ct. App. filed 9/10/2009)

05-GS-40-10296-10299

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JAN 28 2010

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

RANDY B. THOMAS,

PETITIONER

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ROBERT M. DUDEK
Acting Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

INDEX.....	1
CERTIFICATE OF COUNSEL	2
QUESTION PRESENTED	3
STATEMENT OF FACTS	4
ARGUMENT	
I. The Court of Appeals erred by ruling, based on <i>State v. Wallace</i> , 384 S.C. 428, 683 S.E.2d 275 (2009), that an alleged sexual encounter between petitioner and his former live-in girlfriend at their apartment in Clemson in August of 2004 was admissible to show common scheme or plan, motive or intent where petitioner was on trial for an October 30, 2004 incident at her parent's house in Irmo. That incident led to charges of criminal sexual conduct, two counts of kidnapping and ABHAN, since the incidents were not sufficiently similar, and the probative value of the evidence was substantially outweighed by its unduly prejudicial effect.	5
II. The Court of Appeals erred by holding the violation of petitioner's right to confrontation under the United States Constitution was harmless where the state failed to produce Investigator Deidra Brown, a key link in the chain of custody from the time of the seizure of the evidence on October 20, 2004 until November 2, 2004, since Brown's report contained highly prejudicial subjective observations about an apparent struggle taking place and semen being found on the bed that supported the alleged victim's version what occurred where petitioner was left with no way to cross-examine her, and the state also utterly failed to prove it made any reasonable efforts to procure Brown's presence at trial.	18
III. The Court of Appeals erred by holding any violation of the chain of custody requirement was harmless since Investigator Brown was the missing link in the chain, her report stated semen was found on the bed which supported the alleged victim's version of what occurred, and the evidence in this case revealed there might have been corruption of the evidence	21
CONCLUSION	25

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on October 26, 2009.

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by ruling, based on State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), that an alleged sexual encounter between petitioner and his former live-in girlfriend at their apartment in Clemson in August of 2004 was admissible to show a common scheme or plan, motive or intent where petitioner was on trial for an October 30, 2004 incident at her house in Irmo which led to charges of criminal sexual conduct, two counts of kidnapping and ABHAN, since the incidents were not sufficiently similar, the Clemson incident was not proved by clear and convincing evidence, and the probative value of the evidence was substantially outweighed by its unduly prejudicial effect?

2.

Whether the Court of Appeals erred by holding the violation of petitioner's right to confrontation under the United States Constitution was harmless where the state failed to produce Investigator Deidra Brown, a key link in the chain of custody from the time of the seizure of the evidence on October 20, 2004 until November 2, 2004, since Brown's report contained highly prejudicial subjective observations about an apparent struggle taking place and semen being found on the comforter that supported the alleged victim's version what occurred where petitioner was left with no way to cross-examine Brown, and the state also utterly failed to prove it made any reasonable efforts to procure Brown's presence at trial?

3.

Whether the Court of Appeals erred by holding any violation of the chain of custody requirement harmless where Investigator Brown's report stated semen was found on the bed, and this corroborated the alleged victim's version how semen got on the bed, and the state failed to prove it made reasonable efforts to procure Brown's presence at trial?

3

STATEMENT OF THE CASE

Petitioner was indicted at the February 16, 2005 term of the Richland County grand jury for two counts of kidnapping, assault and battery of a high and aggravated nature and criminal sexual conduct in the first degree. Each of the alleged crimes occurred on October 30, 2004 at the home of petitioner's former girlfriend in Irmo, South Carolina. One kidnapping count pertained to petitioner's former girlfriend, and the other to her son Zach. R. 825 - 831. The criminal sexual conduct in the first degree count, and the ABHAN count concerned petitioner's former girlfriend alone. R. 823 - 824.

Petitioner's case came on for trial on February 6, 2006 before the Honorable James W. Johnson, and a jury. Lanelle Durant and Jeanette Vanginhoven represented petitioner. Vanessa O. Cooper and Dolly Justice Garfield represented the state. R. 1. On February 10, 2006 at 5:57 p.m., the jury returned wanting to hear "what is available that contains Lauren's [the former girlfriend's] police statement or actual testimony of what happened in her parent's bedroom." Having been informed that testimony would take two hours and twenty minutes to be replayed if the jury wanted to hear it, the jury sent out a note instead stating that it had reached a verdict instead. At 6:50 p.m. the court announced the jury's verdict of guilty on each count. R. 816, l. 9 - 821, l. 5.

Judge Johnson then sentenced petitioner to concurrent twenty-two year terms of imprisonment for criminal sexual conduct in the first degree, and the two counts of kidnapping. The judge also imposed a concurrent ten year prison term on the ABHAN count. The Court of Appeals affirmed petitioner's convictions in State v. Randy B. Thomas, 2009-UP-437 (filed September 10, 2009) finding, inter alia, the confrontation violation and chain of custody violation harmless. App. 1-3. Petitioner sought rehearing. App. 4-18. Rehearing was denied. App. 19. This petition for a writ of certiorari follows.

I. The Court of Appeals erred by ruling, based on *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009), that an alleged sexual encounter between petitioner and his former live-in girlfriend at their apartment in Clemson in August of 2004 was admissible to show common scheme or plan, motive or intent where petitioner was on trial for an October 30, 2004 incident at her parent's house in Irmo. That incident led to charges of criminal sexual conduct, two counts of kidnapping and ABHAN, since the incidents were not sufficiently similar, and the probative value of the evidence was substantially outweighed by its unduly prejudicial effect.

Relevant Facts

An in camera hearing was held on whether evidence of a past alleged incident between petitioner and his former lived-in girlfriend in Clemson, South Carolina on August 22, 2004 should be admissible under *State v. Lyle*, 125 S.C. 406, 11 S.E.803 (1923). R. 2, ll. 8-11.

Lauren Byrd was a senior at Clemson University. R. 3, ll. 5 – 13. In her sophomore year at Clemson, Byrd lived with petitioner in an apartment there. R.3, ll. 19 – 24. Byrd dated petitioner for approximately one year, and she maintained the relationship ended at “the end of July.” R. 3, l. 16 – 4, l. 19. Byrd had a three-year-old son, Zach, by another man. Zach lived with Byrd and petitioner in her Clemson apartment. Her parents in Irmo, South Carolina also helped to take care of Zach.¹ R. 5, l. 3 – 6, l. 21.

Byrd said the end of her relationship with petitioner was “a long breakup . . . he didn’t want to break up, . . . and I actually had started dating someone else then and we had broken up and I think he moved to Charlotte.” R. 5, l. 20 – 6, l. 4. However, petitioner still had a key to their apartment after he moved. Byrd testified on the night of August 22, 2004 she spent the night with her new boyfriend, Michael Anderson, at his house. R. 6, ll. 16 – 24.

Byrd got home the next morning at sometime before noon and she did not feel that well. She laid down on the couch, and she remembered: “Randy had entered the apartment with a key and

just immediately started asking me questions, very direct questions, asking me where I was staying or who I've been seeing . . ." R. 7, l. 12 – 8, l. 10. "He walked over to the couch and he sat down." R. 8, ll. 11 – 20. Byrd said they got into an argument when petitioner accused her of being with another man. Byrd said petitioner touched her inappropriately "on my breast," and she stated that she told petitioner "to stop." R. 9, ll. 8 – 21.

Byrd testified that petitioner then carried her upstairs and "threw me on the bed and then hovered over me. He removed my clothing . . . and he started to have sex. I told him no, I didn't want to." Byrd said: "I told him this is rape." R. 9, l. 20 – 11, l. 13. Byrd testified: "After I explained it or had said that, he immediately stopped and started crying. He lost it." R. 11, ll. 9 – 17. Byrd claimed petitioner said he was sorry and that he was going to "call the police on himself." Byrd said petitioner repeatedly said "that he hated himself, he's sorry, and [he] just freaked out." R. 11, l. 9 – 12, l. 12. Byrd then went into the bathroom and locked the door. She listened to petitioner tell her how sorry he was through the door. Byrd continued to take a bath until she heard petitioner leave, and then "I ran downstairs and locked the dead bolt." R. 12, ll. 8 – 22. Byrd recalled petitioner stayed outside the bathroom door "probably about five minutes. Not long" before he left. R. 12, ll. 23 – 25.

Byrd testified that after her bath she telephoned her friend "Cat and told her what had happened." Byrd then went over to Cat's house, and Cat "gave me numbers for like a locksmith. He changed the locks, and then I had leave like right after that to go pick up Zach for a soccer game in Greenville." R. 13, ll. 3- 12.

¹ At times his name is listed as "Zack" in the transcript. For ease of reference he is referred to as "Zach."

Byrd said she next spoke with her friend Ashley Mishoe. R. 13, ll. 23 – 25. Byrd recalled that Ashley telephoned the police that day, and the police told her that Byrd should come in that day. Byrd claimed she was too scared, and she stated her bottom line: “I just wanted him to kind of be out of my life, kind of leave, and so I didn’t go to the police that night.” R. 14, ll. 1 – 10. The circumstances under which petitioner went to the Clemson police station with her friend Ashley the next day would be highly disputed by Detective Peppers of the Clemson Police Department. R. 14, ll. 1 – 21. Byrd maintained that when she went to the Clemson Police Station the next day, Detective Peppers told her it would be “pointless to pursue the matter because she had taken a bath,” and waited until the next day. R. 14, l. 22 – 15, l. 6. Byrd said she agreed to sign a “trespass notice” to keep petitioner away from the apartment. R. 15, ll. 1 – 6.

Conversely, Clemson Detective James Peppers testified that Ashley had telephoned the police station and said that a friend of hers had been assaulted. However, Ashley “didn’t give the name or anything at the time of the initial report.” R. 57, ll. 11 – 23. Detective Peppers remembered Ashley came in “a day or so later” in “reference to another report. . . and not involving this incident.” Detective Peppers said he recognized Ashley’s name from the other report and started asking who her friend was who had been assaulted. “That’s when I found out it was Lauren.” R. 57, l. 24 – 58, l. 10.

Detective Peppers remembered he then talked to Byrd, and Byrd told him that petitioner had come into the apartment using his key, and started questioning her about some other man. Byrd said petitioner carried her upstairs, and “I can’t remember if she said he assaulted her, but I think she did.” Peppers said he recalled Byrd telling him she told petitioner “what he was doing was wrong. *He immediately stopped and left.*” Detective Peppers said that Byrd wanted a restraining

order, and he told her that a trespass notice was actually the proper legal document to keep petitioner away from her apartment. R. 58, l. 3 – 60, l. 24. (emphasis added).

Detective Peppers said he was never able locate petitioner to serve the trespass notice. However, Peppers steadfastly maintained that Byrd did not want to file criminal charges against petitioner whom she referred “as an ex-boyfriend.” R. 60, ll. 2 – 25.

Byrd said she returned to her apartment about a week after this incident and she said petitioner “called me from different telephone numbers. Byrd recalled that petitioner also sent her emails listing “everything that we had done together and he basically was trying to get me back.” R. 16, ll. 7 – 25.

Irmo, South Carolina - October 30, 2004

Byrd testified on Saturday, October 30, 2004 that she was at her parent’s home in Irmo. There was a Clemson football game that day, and her father and little brother went to Clemson to see the game. R. 17, l. 4 – 18, l. 7. Byrd’s mother and younger sister went to a soccer tournament in Georgia. R. 18, ll. 8 – 14. Byrd was therefore at the house that day alone with Zach watching the game. As seen, Zach was not present during the incident in Clemson. Byrd said petitioner knocked on the door during the game. R. 18, l. 19 – 19, l. 1. The door was unlocked and petitioner walked into the house. “We started talking. He was talking to Zach.” R. 18, l. 25 – 19, l. 2.

Byrd said petitioner sat in a chair while she sat on the couch. Byrd claimed petitioner “started apologizing for the Clemson incident.” Byrd recalled that she left the living room and went upstairs to the bathroom “because it got heated.” Byrd stated when she got inside the bathroom she text messaged Ashley on her phone -- “saying help me.” R. 19, ll. 2 – 15.

Byrd said she left Zach alone downstairs with petitioner because she did not see him being any danger to Zach. When Byrd heard the door downstairs close she assumed petitioner had left.

Byrd therefore came downstairs to lock the door. However, she testified petitioner was coming back towards the house, and petitioner opened the door "before I got a chance to [lock it] and then it was all down hill from there." R. 19, l. 16 – 20, l. 15.

Byrd said that petitioner came back in and sat on the couch. I picked up Zach and I sat down on the couch. I told him to leave, but he did not leave." R. 19, l. 16 – 20, l. 15. Byrd maintained she felt uneasy because petitioner "wasn't supposed to be there." Byrd said: "[A]nd he was basically just trying in a weird way to console me" about the Clemson incident. "[T]hat was his way of showing me he loved me." R. 20, ll. 13 – 22. Byrd maintained that petitioner touched her knee, and she "jerked away" from him. Byrd said petitioner was offended by her rejection. Byrd testified that "Zach already had left and was on the ground or in the floor and then [petitioner] had hovered over me." R. 21, ll. 1- 14.

Byrd testified that petitioner then "picked me up as a child." She said petitioner also touched her breast. Byrd stated that she told petitioner that her parents would be coming home soon in the hope that petitioner would "leave so he wouldn't do something stupid." R. 21, l. 15 – 22, l. 11. Byrd claimed she struggled with petitioner, and petitioner asked her, "*Do you love Zach?*" Byrd responded, "Yes, I loved Zach." "He was like 'are you going to do or willing to do anything?'" R. 23, ll. 1 – 11. Byrd maintained petitioner told her "*I won't hurt Zach,*" and Byrd testified Zach was downstairs watching cartoons at the time. R. 23, ll. 12 – 20. (emphasis added).

Byrd said that she continued to struggle with petitioner as he carried her upstairs and took her into her parent's bedroom. Petitioner, according to Byrd, told her to "calm down." Petitioner "told me to take off my shirt. He told me and I couldn't do it, so he did . . . he kept asking me in between, *do you love Zach?*" R. 23, l. 18 – 24, l. 23. (emphasis added). Byrd testified petitioner

took off her clothes and placed her on her parent's bed. Byrd maintained petitioner told her to "perform oral sex on him," and she said she did perform oral sex. R. 25, l. 9 – 26, l. 5.

Byrd said petitioner ejaculated, and *she spit "it out."* The significance of this will be apparent infra. Byrd stated petitioner was upset by her reaction. Byrd testified petitioner then attempted to "penetrate me" vaginally, and she told him to stop. Byrd said she started crying, and "I told him that he was raping me again, and he stopped in the middle of it. . . he freaked out." R. 27, l. 22 – 28, l. 8. (emphasis added). Byrd testified that she told petitioner she would not tell anyone what happened. Byrd said she did so because petitioner threatened to kill himself, he told her he hated himself, and that he was real upset with himself "like last time." R. 27, l. 22 – 29, l. 12. Byrd also maintained petitioner pretended to be calling 911 on himself. Byrd stated that petitioner also told her to calm down because she did not want "Zach to see you like this." Byrd said her face was red, and that she did try to compose herself. Byrd "dialed 911 and left an open line." R. 29, l. 11 – 30, l. 16.

Byrd testified that she then sat down on the couch with Zach, and that petitioner followed her. She claimed she struggled once again with petitioner. Byrd maintained that she picked up a lamp, and petitioner asked her if she was going to hit him with it. Byrd said she told petitioner: "No, I just wanted him to leave, and he grabbed it and pulled it." Byrd said she fell over a stool, and the lamp must have been thrown to the side. Byrd maintained petitioner told her before the lamp incident "*that he wanted to take Zach with him.*" R. 31, ll. 1 – 20. (emphasis added).

Byrd further claimed at some point petitioner put *a knife to her neck*, and that she was terrified. She said she calmed down and told petitioner she didn't want her mother "to see me like this." Byrd said petitioner then responded: "Let's go for a ride." Byrd said she was attempting to tell petitioner anything he wanted to hear including "that I loved him, that I understood what he was

doing . . . he was crying. He was upset.” Byrd said she then saw petitioner put the knife in his pocket, he picked Zach up and told her “don’t do anything stupid” as they went outside. R. 33, l. 15 – 34, l. 25.

Byrd testified that once outside she saw her neighbor mowing the lawn, and she attempted to mouth to her neighbor -- “Help me.” Byrd said as she walked towards her neighbor’s house she saw Zach sitting on petitioner’s lap inside the car. She heard the car door slam and she ran after the car as petitioner drove it down the street. R. 35, l. 10 – 36, l. 3. Byrd said petitioner stopped the car and dropped Zach off “in the middle of the road.” This would later be disputed by other evidence that petitioner turned the car around, and brought Zach back in the direction of her parent’s house. R. 35, l. 10 – 36, l. 22.

Ashley Mishoe then testified that she and Byrd were good friends, and that she knew petitioner because petitioner had dated Byrd. Mishoe testified that on August 22, 2004 Byrd telephoned her, and told her that petitioner had come over to her apartment and that they had been “fighting about a guy.” Mishoe said Byrd stated that petitioner “took her upstairs and raped her.” Mishoe maintained that Byrd was scared, and that was why Byrd did not follow her advice to go to the police. R. 43, 17 – 46, l. 6. Mishoe testified she went with petitioner the next day to the police station in Clemson to get a restraining order. “She filled out a report and talked to Detective Peppers.” R. 46, ll. 2 – 22.

Mishoe then testified on October 30, 2004 she was at the football game when she got a text message from Byrd saying “help, call me.” R. 47, l. 9 – 49, l. 2. Mishoe stated she stayed on the phone with Byrd until Byrd told her petitioner had left the house. Mishoe said she next heard from Byrd when she checked her voice messages, and the message said that petitioner “had a knife and he took Zach and she was on her way to the hospital. R. 49, l. 1 – 51, l. 13.

Arguments of counsel

At the conclusion of the in camera testimony on February 6, 2006 the solicitor argued the Clemson incident was admissible under State v. Lyle because it proved a common scheme or plan. R. 76, l. 10 – 86, l. 3. The state *cited* State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) in support of its argument. Defense counsel Durant argued this evidence did not prove a common scheme or plan:

Your Honor, drawing to further differences in this case: First, it happened in a different town; it happened in an apartment where they had lived together; he had a key to the apartment; she gave that address to the officers as the address for Randy. The child was not there. She said that it was vaginal intercourse; in Columbia it happened at her parents' home and oral intercourse was involved.

She also said in the Clemson incident he did not ejaculate. In Columbia there is ejaculation. On the Clemson incident she did not go to the hospital. She did do to the hospital in Columbia.

And I also would like to add, your Honor, to say that he went to Columbia. The connection is he went to Columbia to apologize for the Clemson incident. Well, again, that's only the word of the victim. You can't get inside the mind of Randy Thomas, and I don't know that she could. It's only her word.

R. 88, ll. 7 – 25.

Counsel argued there was “nothing so similar between these two,” and that the evidence did not prove a method of operation. Counsel further told the judge the state had failed to prove the Clemson incident by clear and convincing evidence. Counsel noted that it was Byrd's word alone, and the police witness, Detective Peppers, said Byrd did not want to file criminal charges. No charges were filed, and petitioner was not arrested. There was no hospital evidence of any sexual assault or injuries. There was simply no corroboration of Byrd's claims. R. 86, l. 6 – 89, l. 20. Counsel also argued and that the probative value of this evidence was outweighed its

prejudicial effect. R. 88, l. 7 – 89, l. 14. Defense counsel said this was in reality the type of propensity evidence that Lyle prohibited. R. 89, ll. 17 – 20.

Ruling

The judge noted that the Lyle evidence the state successfully introduced into cases probably led to “more reversals” than anything else. The judge stated there was no question that this evidence was prejudicial, and he stated he would not make his ruling until the next morning. R. 91, l. 22 – 92, l. 12. The following morning on February 7, 2006 the judge ruled he would allow the Clemson evidence as an exception to State v. Lyle --“both as the common scheme or plan as well as motive and/or intent.” R. 98, ll. 3 – 13.

Byrd then testifies before the jury as to both Clemson and Irmo

After the judge ruled, the jury heard his opening charge on the law, the opening statements of counsel and it then immediately heard the testimony of Lauren Byrd on the Lyle issue. R. 106, 10 – 122, l. 9. Byrd said that Zach was born when she was sixteen-years-old, and that she went to Midlands Technical College after high school. She then transferred to Clemson University. R. 124, ll. 10 – 25. She took her son Zach with her to Clemson in 2003 as a sophomore. R. 125, ll. 2 – 13. Byrd testified that petitioner was living with her and Zach, that he had a key to her apartment even after they broke up. R. 128, l. 9 – 130, l. 16.

Byrd then described the August 22, 2004 events to the jury. Byrd testified on that day petitioner let himself into the Clemson apartment with his key while she was resting on the couch. R. 132, l. 24 – 134, l. 21. Byrd then related her in camera version of the Clemson incident to the jury. R. 135, l. 5 – R. 145, ll. 4 – 20.

Byrd’s testimony then turned to the October 30, 2004 event at her parent’s house in Irmo, South Carolina. R. 148, ll. 8 – 13. Byrd again described, in very similar fashion, how she was

watching the football game with Zach when petitioner came to her door. Byrd said she told petitioner to leave, and petitioner told her he wanted to talk to her about the earlier incident. R. 139, ll. 1 – 23. The remainder of Byrd's testimony was the same. R. 158, l. 14 – 238, l. 3.

Petitioner testifies

Petitioner testified that Byrd wanted him to go to Clemson with her, and that he ultimately agreed. R. 601, l. 18 – 603, l. 3. Petitioner said he became very attached to Zach in the process. James Aakhus, a Clemson neighbor, testified: "Randy was very loving to Zach," and petitioner was often alone with him." Zach often called petitioner, "Daddy." R. 589, l. 18 – 590, l. 12. Askhus talked with petitioner about the incident. Petitioner "didn't understand it. He wanted some reasoning behind it. I guess he felt like he was cornered by somebody who was trying to take his life away from him." R. 596, ll. 18 – 23.

Petitioner went out to dinner with Byrd one night in August of 2004 to discuss their breakup. He started sleeping on the couch after they agreed to breakup, and until he actually moved. R. 605, l. 6 – 606, l. 9. Byrd would at times "ask me to come up to go to bed with her." He got a job in the interim, which pleased Byrd, and he then discussed the events of August 22, 2004. R. 605, l. 21 – 607, l. 23.

Zach was not with Byrd that day, and they had consensual sex until Byrd suddenly said: "Stop, stop . . . we're are not suppose to do this. You shouldn't have done that. And I was kind of bewildered." R. 606, l. 24 – 607, l. 21. Petitioner was upset by Byrd's reaction, and he left the apartment. Petitioner recalled that Byrd's new boyfriend, Mike, later confronted him and said that "Lauren's saying that you raped her." Petitioner argued with Mike about that accusation. R. 606, l. 22 – 610, l. 12.

On October 30, 2004 petitioner happened to be in Irmo near Byrd's parent's house. R. 613, l. 9 – 615, l. 14. He was surprised to see her car there. Petitioner stopped at the house, and went inside and took pictures of Zach in his Halloween costume. Petitioner then sat on the couch with Byrd. Petitioner said he told Byrd he missed her, and she told petitioner, "she missed me, too." R. 615, l. 20 – 616, l. 4. He went upstairs with Byrd just so they could have some privacy. R. 617, ll. 2 – 4. They had *consensual oral sex upstairs which was normal for them*, and he then started having intercourse with Byrd but she told him to stop. "I don't want to do this. I said okay, and I was upset." Byrd told him she had cheated on me with one of my supposed good friends . . . so at this point I was very upset and I said, what are you trying to do? Do you want me to kill myself? She said, Randy, you love yourself too much to kill yourself." R. 617, l. 23 – 619, l. 18. (emphasis added). Petitioner recalled it was in this context that he grabbed a knife, and petitioner said Byrd responded, "Randy, you're scaring me and he put the knife down on the TV entertainment center." Petitioner testified that he went outside with Zach and Byrd. He panicked when Byrd ran towards her neighbor's house, and he drove away with Zach in the car. Petitioner said he quickly realized what he was doing, and he made a U-turn and brought Zach back. Petitioner said he had no intention of kidnapping Zach. R. 619, l. 19 – 621, l. 22.

Closing argument

The solicitor told the jury the Clemson incident and the other incident established petitioner's "modus operandi. We call it MO, same MO." The solicitor argued the evidence established petitioner's common scheme or plan, his motive, and his intent. R. 757, l. 6 - 758, l. 22.

Court of Appeals

Petitioner argued in the Court of Appeals that the admission of the alleged Clemson incident violated State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1925) which only allows such evidence if the prior bad act establishes: (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish proof of the other, or (5) the identity of the person charged with the crime. Petitioner noted the differences in the two encounters, and argued that its probative value was substantially outweighed by its unduly prejudicial nature. See Brief of Appellant at 18-22.

The Court of Appeals held, based upon the intervening case of State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009), that the Clemson incident was properly allowed into evidence, that it was proved by clear and convincing evidence, and that the probative value of this evidence substantially outweighed its probative value under Rule 403, SCRE. App. 2-3.

Discussion

In State v. Wallace, 384 S.C. 428, 433, 683 S.E.2d 275, 278 (2009) this Court held that “when the similarities [of the acts] outweigh their dissimilarities, the bad act evidence is admissible under Rule 404(b).” The Court noted the following factors were relevant to considering the similarities in *that child sex case*:

- (1) the age of the victims when the abuse occurred;
- (2) the relationship between the victims and the perpetrator;
- (3) the location where the abuse occurred;
- (4) the use of coercion or threats; and
- (5) the manner of the occurrence, for example, the type of sexual battery.

In Wallace, this Court emphasized that the above factors were merely for guidance. This is not a child sex case and the overwhelming reliance on these factors by the Court of Appeals is therefore misplaced. Here, Randy Thomas and the alleged victim, Byrd, lived together in Clemson, South Carolina. He kept a key to her apartment when he moved out, and that appears to have been with her consent. When the alleged prior bad act occurred in Clemson on August 22, 2004, Zach, Byrd's three-year-old son by another man was *not present*. Petitioner entered the apartment using his key. R. 7, l. 12 – 15, l. 6.

Byrd said petitioner accused her of being with another man. However, there were no threats made against Byrd. After talking, petitioner carried her up the stairs and had sex with her. She told petitioner during the sex – or when the sex was just over -- that this was “rape.” Petitioner began to cry, told Byrd how terrible he felt, and he left. The alleged rape was not immediately reported, the Clemson police detective obviously found Byrd's behavior unusual as seen above, and the “crime” was never prosecuted because Byrd did not want to prosecute. R. 7, l. 12 – 15, l. 6.

In contrast, the incident in Irmo, South Carolina on October 30, 2004 occurred while Zach was present. What Byrd described was that she was forced to perform oral sex on petitioner after he undressed her and she violently resisted. Byrd claimed petitioner continued to ask her if she loved Zach during the struggle just before the oral sex – an obvious threat. Another extreme struggle followed the forced oral sex, where Byrd grabbed a lamp, and petitioner allegedly held a deadly weapon, a knife, to her throat. Petitioner then kidnapped Zach as Byrd ran helplessly after the car. While Byrd claimed petitioner “started apologizing for the Clemson incident in the beginning, she said it quickly “got heated,” and she went into the bathroom to text message her friend Ashley on her phone -- “saying help me.” R. 19, ll. 2 - 36, l. 22. Byrd invoking what she thought petitioner was thinking about the “Clemson incident” did not add to the similarities between these two very

different incidents. Moreover, there was no violence during the Clemson incident, and no kidnapping.

South Carolina law precludes evidence of a defendant prior crimes or bad acts to prove the defendant's guilt for the present crime charged, and that is exactly what the solicitor argued as shown above. State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004); State v. Beck, 342 S.C. 129, 436 S.E.2d 679 (2000). Wallace does not change the fact that the solicitor's use of the Clemson incident to allegedly prove petitioner's "M.O." – where it proved no such thing – was improper. Unlike Wallace the differences in these two encounters were greater than the similarities.

As to Rule 403, SCRE, petitioner's conviction was virtually guaranteed once the jury heard of the non-similar "Clemson incident," and the solicitor argued this was just another incident of petitioner raping his former girlfriend. The Court of Appeals therefore erred by affirming the trial judge's ruling that the probative value of this evidence substantially outweighed its unduly prejudicial effect.

II. The Court of Appeals erred by holding the violation of petitioner's right to confrontation under the United States Constitution was harmless where the state failed to produce Investigator Deidra Brown, a key link in the chain of custody from the time of the seizure of the evidence on October 20, 2004 until November 2, 2004, since Brown's report contained highly prejudicial subjective observations about an apparent struggle taking place and semen being found on the bed that supported the alleged victim's version what occurred where petitioner was left with no way to cross-examine her, and the state also utterly failed to prove it made any reasonable efforts to procure Brown's presence at trial.

A major arose concerning what happened with the evidence, including the comforter, pants, shirt, and panties, taken from Byrd's Irmo home between October 30, 2004 and November 2, 2004. During an in camera hearing it was noted that Investigator Brown was the investigator who retrieved these items on October 30, 2004, and the evidence custodian could only say they were received on November 2, 2004, *three days later*. The state could not establish what

happened with the evidence. Brown was not in court to explain what happened with this evidence. The defense objected to the admission of this evidence because the state was only able to establish what Brown should have done with the evidence after she retrieved it. The state could not establish *what in fact Brown did with the evidence* at that critical time. R. 392, l. 4 – 420, l. 3. The defense argued that with this defective chain of custody the state should not later be allowed to allowed to tie petitioner's DNA to the evidence. The state argued that Investigator Brown was presently in Kosovo, and that the state did not know if "she's alive or dead." The solicitor claimed the state had done everything as far as practicable to have a chain of custody complete. R. 392, l. 4 – 420, l. 3.

The judge then asked how the state could account for the evidence from October 30, 2004 until November 2, 2004. The solicitor responded that the procedures *called for* Brown to turn in the evidence on October 30, 2004, and the fact that it was not taken by the evidence custodian until November 2, 2004 was irrelevant. All of this occurred when the state tried to "back door" Brown's testimony before the jury by introducing the contents of Brown's report, without her testimony. The defense strongly objected that this evidence was inadmissible hearsay and that this procedure denied petitioner his right to confrontation. R. 392, l. 4 – 420, l. 3. Defense counsel said the defense objected "to all the testimony and the fact that we can't confront Ms. Deidra Brown. That would be a violation of Mr. Thomas' state and federal constitutional rights." R. 419, l. 17 – 420, l. 8.

The judge then ruled he would allow the state to use Brown's report over the defense hearsay and confrontation cause objections. R. 420, l. 22 – 421, l. 5. SLED agent Zane Padgett then testified before the jury that Brown photographed the entire Irmo scene, and "she observed things out of place, *a lamp overturned, and area where a struggle may have took place* and some

items in disarray. She also listed items that she collected at the scene and at the hospital.” R. 426, l. 8 – 427, l. 2. (emphasis added). Brown also collected the confronter from the bed, “a multi-colored shirt, one pair of white pants, and one lime colored underwear that was collected at the Richland Memorial Hospital.” R. 427, ll. 5 – 24. All of this became DNA evidence, and its integrity was crucial. The subjective opinion of Brown in this case regarding the struggle and semen being found on the comforter strongly corroborated the alleged victim’s testimony and contradicted petitioner’s testimony of what occurred. The photographs did not make the error harmless because the photographs were not cumulative.

The defense would later object to Dr. Amick’s DNA opinion coming before the jury with the defect in the chain of custody because of Brown’s absence, and the fact that Brown had the evidence in her custody from October 30 – November 2, 2004. The defense argued under these circumstances -- with the handling of the evidence and the absence of Brown -- that Dr. Amick’s DNA opinions should not be allowed. R. 474, l. 8 – 483, l. 4. Over objection, Dr. Amick testified that petitioner’s DNA was found on Byrd’s pants. R. 560, ll. 6 – 21. Importantly, Dr. Amick further said that petitioner had two matches of his DNA on the comforter found in the bedroom of the parent’s home in Irmo. R. 512, l. 4 – 518, l. 22.

The Court of Appeals held the admission of the challenged DNA evidence was irrelevant and harmless because petitioner testified the sex was consensual. App. 3. However, as petitioner argued on rehearing, the alleged victim testified petitioner forced her to have oral sex and that she spit his semen out. Conversely, petitioner testified they had oral consensual sex, and that everything was normal for the couple in that regard. Because the semen found on the comforter and Byrd’s clothes, which were involved in the chain of custody, could be viewed as

“matching” the alleged victim’s version of what occurred, and contradicting petitioner’s testimony, the error was not harmless. App. 7-14.

The Court further held the confrontation clause violation and the defective chain of custody harmless. Prior to deciding this case, and after oral argument the Court asked the parties to brief the application of Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (decided June 25, 2009). Petitioner argued Melendez-Diaz v. Massachusetts strongly reinforced his argument that the use of Brown’s report, in the absence of petitioner being able to cross-examine her, violated his rights under the Confrontation Clause. App. 23-29. The confrontation clause violation in this case cannot be harmless error where Brown was both a *fact witness* because of her subjective findings in her report were read to the jury in her absence, and she was also the only witness who could explain the handling of the clothes and bed linen taken from the Irmo home during the three days it was unaccounted for in this case.

III. The Court of Appeals erred by holding any violation of the chain of custody requirement was harmless since Investigator Brown was the missing link in the chain, her report stated semen was found on the bed which supported the alleged victim’s version of what occurred, and the evidence in this case revealed there might have been corruption of the evidence

Lieutenant Padgett testified about how Brown processed the scene in great detail from her “crime scene analysis report” in her absence. She arrived “at 15:42, which would be 3:42 in the afternoon” . . . and “she observed things out of place, a lamp overturned, *an area where a struggle may have took place and some items in disarray*. And she also listed items that she collected at the scene and at the hospital. And she also states here that she processed for latent prints . . . There was nothing of value that she could get (fingerprints) . . . which is not unusual. Padgett also said Brown’s report indicated she “*detected semen on the bed comforter*,” after using a “black light to detect semen.” R. 424, l. 15 – 440, l. (emphasis added). Brown was acting as an analyst in this

regard, and her conclusions are directly controlled by the United States Supreme Court's holding in Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009). The evidence here goes well beyond the hearsay drug analysis disallowed in Melendez and contains, as discussed, critical evidence bolstering the alleged victim's version.

Padgett also sought to deflate speculation about what Brown did with this evidence for these three days. He speculated that Brown would not have kept the items "in her car over the weekend . . . That's against our protocol." R. 436, l. 25 – 437, l. 18. That obviously is akin to asserting that no law enforcement would intentionally, or out of incompetence, or out of laziness mishandle or incorrectly report findings regarding forensic evidence. See Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2536-2537.

Despite this gap in the chain of custody, and petitioner's inability to cross-examine Investigator Brown, the judge admitted the results of the DNA from the items that could not be accounted for between October 30, 2004 and November 2, 2004, Dr. Amick was able to testify about DNA "matches" to petitioner on the items. This was very significant evidence given that Byrd described a sexual assault on her parents' bed that afternoon, and petitioner testified *it was "consensual normal oral sex"* for the couple. (emphasis added).

As this Court will recall, Byrd testified petitioner took off her clothes and placed her on her parent's bed. Byrd maintained petitioner told her to "perform oral sex on him," and she said she did perform oral sex. R. 25, l. 9 – 26, l. 5. Byrd said petitioner ejaculated, and she "*spit it out.*"

Q. Where did you spit out?

A. *On the comforter.*

R. 174, ll. 10-11. (emphasis added).

The Court of Appeals held any error in the chain of custody was harmless because it was cumulative to other evidence properly admitted. The Court did not explain what other evidence could make the evidence harmless since Brown, the missing witness, was the only one that could explain her extremely sloppy handling of the evidence between Brown's house, the hospital, and how it was stored at the police station. Again, this evidence corroborated Byrd's contention that she spit petitioner's semen out on the comforter and contradicted petitioner's testimony that there oral sex was normal as was part of their relationship. The error was not harmless especially given Padgett's purported explanation that Brown may have kept this evidence in her car for three days. Corruption and co-mingling of this evidence was very possible under these circumstance.

In State v. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997), the Court of Appeals correctly held that the state's failure to produce a chemist who retrieved marijuana and crack cocaine from the drop box, and retained it, made the state's chain of custody fatally deficient, and consequently, the evidence was inadmissible. The fact the witness had moved out of state did not relieve the state of its responsibility of completing the chain of custody. The same is true here. Brown collected the alleged victim's comforter, the pants, the shirts, and the panties and placed them in her Jeep outside the house in Irmo. She apparently then drove to the hospital, and there was evidence Livingston saw her with the evidence at the police station, and while his memory or observations were vague, they are especially troubling given how sloppily and unprofessionally Brown handled this evidence.

Investigator Livingston said he saw Brown collect the comforter from the bed and put it in her Jeep. Livingston stated he later saw Brown with the evidence at the police station. R. 363, l. 18 – 364 l. 22.

The following occurred on cross-examination of Investigator Livingston:

Q. Okay. And let me ask you one more question. You just said that when you were in, just to be clear, Deirdre Brown takes the comforter from the house, puts it in her Jeep?

A. Right.

Q. You all follow the victim, who is driving the car, to the hospital?

A. Yes.

Q. And you leave and Deirdre Brown is left at the hospital; is that right?

A. Yes.

Q. Okay. Then you get - - at some later point you're back at the Sheriff's Department and you peak your head in and you see the comforter?

A. Yes.

Q. And the comforter only?

A. There's some more stuff in the office.

Q. You saw other brown bags but you couldn't tell what was in those bags?

A. No.

Q. Okay. *The only item that you saw that was wrapping or unwrapping was the comforter that's in this box?*

A. *That's correct.*

Q. *Nothing else?*

A. *Nothing else. As I said, I stuck my head in to tell her I was leaving and that was it.*

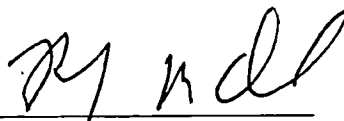
R. 369, l. 21 – 370, l. 21. (emphasis added). See, also, R. 361, l. 18 – 370, l. 21.

Further, the packing and storage of this evidence by Brown does not inspire confidence, and raised serious questions about the reliability of how this evidence was presented to the jury. Given that the intermingling of evidence can make findings regarding DNA and serology incorrect, the failure to establish the chain from October 30 through November 2, 2004 through the testimony of Investigator Brown made the chain of custody fatally defective, and the judge should not allowed the DNA opinions on this evidence. The holding of the Court of Appeals that this error was harmless should be reversed.

CONCLUSION

A writ of certiorari to the Court of Appeals should be granted.

Respectfully submitted,



Robert M. Dudek
Acting Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 28th day of January, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

James W. Johnson, Jr., Circuit Court Judge

Opinion No. 2009-UP-437 (S.C. Ct. App. filed 9/10/2009)
05-GS-40-10296-10299

THE STATE,

RESPONDENT,

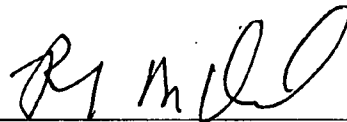
V.

RANDY B. THOMAS,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William M. Blich, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 28th day of January, 2010.



Robert M. Dudek
Acting Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of January, 2010.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 1, 2019.

The South Carolina Court of Appeals

The State,

Respondent,

v.

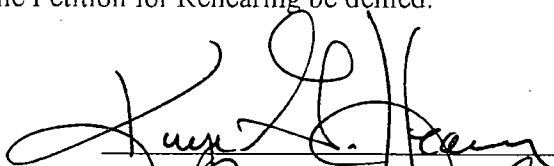
Randy B. Thomas,

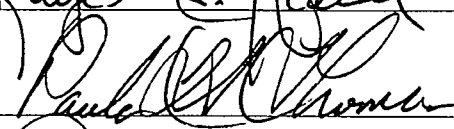
Appellant.

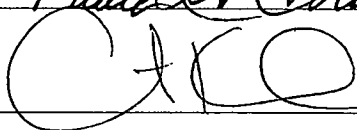
The Honorable James W. Johnson, Jr.
Richland County
Trial Court Case No. 2005-GS-40-10296
2005-GS-40-10297
2005-GS-40-10298
2005-GS-40-10299

ORDER DENYING PETITION FOR REHEARING

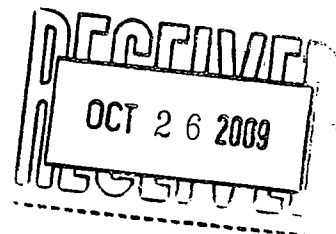
PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.
It is, therefore, ordered that the Petition for Rehearing be denied.



C. J.


J.


J.



Columbia, South Carolina

10/ 26/2009

cc: Deputy Chief Appellate Defender for Capital Appeals Robert M. Dudek
Attorney General Henry Dargan McMaster
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Salley W. Elliott
Assistant Attorney General William M. Blich, Jr.
Warren Blair Giese, Esquire

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

THE STATE,

RESPONDENT,

V.

RANDY B. THOMAS,

PETITIONER.

Appeal from Richland County

James W. Johnson, Jr., Circuit Court Judge

Opinion No. 2009-UP-437

PETITION FOR REHEARING

Pursuant to Rule 221 (a), SCACR, petitioner Randy Thomas seeks rehearing because the Court respectfully has overlooked the fact there was not a close degree of factual similarity between the alleged bad act in Clemson and the crime charged in Irmo in this case. Further, State v. Wallace Op. No. 26703, Shearouse Adv. Sh. No. 37 (field August 17, 2009) was a child sex case, and an adult sex case between two people who lived together in a sexual relationship is -- respectfully -- not correctly comparable to the factors involved in child sex cases: age of the victim; the relationship of the victim and the perpetrator; the location of the abuse; the use of coercion and

threats; and the manner of the occurrence cited in this Court's opinion. For these reasons alone rehearing should be granted.

Randy Thomas and the alleged victim, Byrd, lived together in Clemson, South Carolina. He kept a key to her apartment when he moved out, and that appears to have been with her consent. When the alleged prior bad act occurred in Clemson on August 22, 2004, Zach, Byrd's three-year-old son by another man was *not present*. Petitioner entered the apartment using his key. R. 7, l. 12 – 15, l. 6.

Byrd said petitioner accused her of being with another man. However, there were no threats made against Byrd. After talking, petitioner carried her up the stairs and had sex with her. She told petitioner during the sex – or when the sex was just over -- that this was “rape.” Petitioner began to cry, told Byrd how terrible he felt, and he left. The alleged rape was not immediately reported, the Clemson police detective obviously found her behavior unusual as seen below, and the “crime” was never prosecuted because Byrd did not want to prosecute. R. 7, l. 12 – 15, l. 6.

Clemson Detective Peppers remembered that Byrd told him that petitioner had come into the apartment using his key, and started questioning her about some other man. Byrd said petitioner carried her upstairs, and “I can't remember if she said he assaulted her, but I think she did.” Peppers said he recalled Byrd telling him she told petitioner “what he was doing was wrong. He immediately stopped and left.” Detective Peppers said that Byrd wanted a restraining order, and he told her that a trespass notice was actually the proper legal document to keep petitioner away from her apartment in the future. R. 58, l. 3 – 60, l. 24.

Detective Peppers said he was never able locate petitioner to serve the trespass notice. However, Peppers steadfastly maintained that Byrd did not want to file criminal charges against petitioner whom she referred “as an ex-boyfriend.” R. 60, ll. 2 – 25.

Byrd said she returned to her apartment about a week after this incident and she said petitioner "called me from different telephone numbers. Byrd said petitioner also sent her emails listing "everything that we had done together and he basically was trying to get me back." R. 16, ll. 7 – 25.

Petitioner testified they had consensual sex in her Clemson apartment that day until Byrd suddenly said: " Stop, stop . . . we're are not suppose to do this. You shouldn't have done that. And I was kind of bewildered." R. 606, l. 24 – 607, l. 21. Petitioner said he was upset by Byrd's reaction, and he left the apartment. Petitioner recalled that Byrd's new boyfriend, Mike, later confronted him and said that "Lauren's saying that you raped her." Petitioner said he argued with Mike about that accusation. R. 606, l. 22 – 610, l. 12.

In contrast, the incident in Irmo, South Carolina on October 30, 2004 occurred while Zach was present. Byrd was watching a football game, and petitioner knocked on the door and entered. He talked to Byrd and Zach in the living room.

Byrd said petitioner sat in a chair while she sat on the couch when he first arrived. Byrd claimed petitioner "started apologizing for the Clemson incident. Byrd recalled that she left the living room and went to the bathroom "because it got heated." Byrd stated when she got to the bathroom she text messaged Ashley on her phone -- "saying help me." R. 19, ll. 2 – 15.

Byrd said that petitioner brief left the house, but he came back inside. She claimed: "I told him to leave, but he did not leave." R. 19, l. 16 – 20, l. 15.

Byrd maintained she felt uneasy because petitioner "wasn't supposed to be there." Byrd said: "[A]nd he was basically just trying in a weird way to console me" about the Clemson incident. "[T]hat was his way of showing me he loved me." R. 20, ll. 13 – 22.

Byrd maintained that petitioner touched her knee, and she “jerked away” from him. Byrd said petitioner became offended by her actions. Byrd testified that “Zach already had left and was on the ground or in the floor and then [petitioner] had hovered over me.” R. 21, ll. 1- 14.

Byrd testified that petitioner then “picked me up as a child.” She said petitioner also touched her breast. R. 21, l. 15 – 22, l. 11. When petitioner began to carry her upstairs, the ex-girlfriend described the fight she put up, even grabbing an upstairs beam to stop petitioner from getting her into the bedroom. R. 18, l. 19 – 19, l. 1. Byrd claimed as she struggled with petitioner, that petitioner threatened her, asking her, “Do you love Zach?” Byrd responded, “Yes, I loved Zach.” “He was like ‘are you going to do or willing to do anything?’” R. 23, ll. 1 – 11. Byrd maintained petitioner told her “I won’t hurt Zach,” and Byrd testified Zach was downstairs watching cartoons at the time. R. 23, ll. 12 – 20.

Byrd said that she continued to struggle with petitioner, and that he took her into her parent’s bedroom. Petitioner, according to Byrd, told her to “calm down.” Petitioner “told me to take off my shirt. He told me and I couldn’t do it, so he did . . . he kept asking me in between, do you love Zach?” R. 23, l. 18 – 24, l. 23. Byrd testified petitioner took off her clothes and placed her on her parent’s bed. Byrd maintained petitioner told her to “perform oral sex on him,” and she said she did perform oral sex. R. 25, l. 9 – 26, l. 5.

Byrd said petitioner ejaculated, and she spit “it out.” Byrd stated petitioner was upset by her reaction. Byrd testified petitioner *then attempted* to “penetrate me” vaginally, and she told him to stop. Byrd said she started crying, and “I told him that he was raping me again, and he stopped in the middle of it. . . he freaked out.” R. 27, l. 22 – 28, l. 8.

Byrd also maintained petitioner pretended to be calling 911 on himself. Byrd stated that petitioner also told her to calm down because she did not want “Zach to see you like this.” Byrd

said her face was red, and that she did try to compose herself. Byrd "dialed 911 and left an open line." R. 29, l. 11 – 30, l. 16.

Byrd testified that she then sat down on the couch with Zach, and that petitioner followed her downstairs. She claimed *she struggled once again* with petitioner. Byrd maintained that she picked up a lamp, and that petitioner asked her if she was going to hit him with it. Byrd said she told petitioner: "No, I just wanted him to leave, and he grabbed it and pulled it." Byrd said she fell over a stool, and the lamp must have been thrown to the side. Byrd maintained petitioner told her before the lamp incident *that he wanted to take Zach with him.*" R. 31, ll. 1 – 20. (emphasis added).

Byrd further claimed at some point petitioner *put a knife to her neck*, and that she was terrified. She said she calmed down and told petitioner she didn't want her mother "to see me like this." Byrd said petitioner then responded: "Let's go for a ride." Byrd said she was attempting to tell petitioner anything he wanted to hear including "that I loved him, that I understood what he was doing . . . he was crying. He was upset." Byrd said she then saw petitioner put the knife in his pocket, he picked Zach up and told her "don't do anything stupid" as they went outside. R. 33, l. 15 – 34, l. 25.

Byrd testified that once outside she saw her neighbor mowing the lawn, and she attempted to mouth to her neighbor -- "Help me." Byrd said as she walked towards her neighbor's house she saw Zach sitting on petitioner's lap inside the car. She heard the car door slam and she ran after the car as petitioner drove it down the street. R. 35, l. 10 – 36, l. 3. Byrd said petitioner stopped the car and dropped Zach off "in the middle of the road." R. 35, l. 10 – 36, l. 22.

Petitioner testified they had consensual oral sex upstairs which was normal for them, and he then started having intercourse with Byrd but she told him to stop. "I don't want to do this. I said okay, and I was upset." Petitioner said Byrd told him she had cheated on me with one of my

supposed good friends . . . so at this point I was very upset and I said, what are you trying to do? Do you want me to kill myself? She said, Randy, you love yourself too much to kill yourself.” R. 617, l. 23 – 619, l. 18. Petitioner testified that he went outside with Zach and Byrd. He panicked when Byrd ran towards her neighbor’s house, and he drove away with Zach in the car. Petitioner said he quickly realized what he was doing, and he made a U-turn and brought Zach back. Petitioner said he had no intention of kidnapping Zach. R. 619, l. 19 – 621, l. 22.

Evidence is only admissible under State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1983) if the prior bad act establishes: (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish proof of the other, or (5) the identity of the person charged with the crime. Petitioner strongly maintains the evidence between the Clemson incident and the Irmo event did not establish a close degree of factual similarity necessary to establish a common scheme or plan. That was true before State v. Wallace, and it is true after State v. Wallace

The Clemson and Irmo incidents as described by Byrd were not sufficiently similar. Petitioner and Byrd were alone in Clemson in the apartment they had shared, there were no threats, no fighting, no weapons involved, and no struggle that turned over furniture.

In Irmo, Byrd described her fight with petitioner as he carried her upstairs with her son present, forced her to have oral sex, put a knife to her throat, engaged in a struggle that knocked over furniture and kidnapped her son.

Finally, petitioner respectfully requests that this Court reconsider its finding that the probative value of admitting evidence of the Clemson matter substantially outweighed its unduly prejudicial effect under Rule 403, SCRE. This is the very type of extraordinarily prejudicial

evidence -- the prior Clemson matter -- that can confuse the jury in its mission of determining whether the state proved petitioner's guilt beyond a reasonable doubt in the Irmo case for which he was on trial.

Chain of custody, Confrontation Clause violation, and harmless error

Petitioner requests rehearing because petitioner's testimony that the sex was consensual did not make the error harmless. The alleged victim testified petitioner forced her to have oral sex and that she spit his semen out. Conversely, petitioner testified they had oral consensual sex, and that everything was normal for the couple in that regard. Because the semen found on the comforter and Byrd's clothes, which were involved in the chain of custody, could be viewed as "matching" the alleged victim's version of what occurred, and contradicting petitioner's testimony, the error was not harmless.

Investigator Brown was a key link in the chain of custody. This Court found the any Confrontation Clause violation involving the absent Brown, harmless beyond a reasonable doubt. For the reason above, the reasons contained in petitioner's memorandum of law requested by this Court following oral argument, and the reasons that follow in this petition, this Court should respectfully reconsider that holding. Further, photographs and testimony allegedly indicating a struggle in the Irmo house do not resolve the issue of whether the sex occurred as petitioner described it -- consensually -- or whether petitioner forced the alleged victim to have oral sex and then spit his semen out onto the materials involved in the defective chain of custody.

A brief review of the context of the testimony at trial shows why the Confrontation Clause violation, and the defective chain of custody were not irrelevant and harmless. As this Court will recall, a major dispute erupted over what happened with the evidence, including the comforter, pants, shirt, and panties, taken from Byrd's Irmo home between October 30, 2004 and

November 2, 2004. Brief of Petitioner at 23. The state did not produce Investigator Brown at trial but the state was able to “back door” Brown’s testimony before the jury by introducing the contents of her report, without her being subject to cross-examination. The defense strongly objected that this evidence was inadmissible hearsay and that it denied petitioner his right to confrontation under the United States Constitution. R. p. 392, l. 4 – 437, l. 1. Petitioner’s brief at 24. This Court found this Confrontation Clause violation harmless in its opinion.

Lieutenant Padgett testified about how Brown processed the scene in great detail from her “crime scene analysis report.” She arrived “at 15:42, which would be 3:42 in the afternoon” . . . and “she observed things out of place, a lamp overturned, *an area where a struggle may have took place and some items in disarray*. And she also listed items that she collected at the scene and at the hospital. And she also states here that she processed for latent prints . . . There was nothing of value that she could get (fingerprints) . . . which is not unusual. (emphasis added). Padgett also said Brown’s report indicated she “*detected semen on the bed comforter*,” after using a “black light to detect semen.” R. 424, l. 15 – 440, l. (emphasis added). Brown was acting as an analyst in this regard, and her conclusions are directly controlled by the United States Supreme Court’s holding in Melendez-Diaz v. Massachusetts. 129 S.Ct. 2527 (decided June 25, 2009).

Padgett also sought to deflate speculation about what Brown did with this evidence for these three days. He testified that Brown would not have kept the items “in her car over the weekend . . . That’s against our protocol.” R. 436, l. 25 – 437, l. 18. That obviously is akin to asserting that no law enforcement would intentionally, or out of incompetence, or out of laziness mishandle or incorrectly report findings regarding forensic evidence. See Melendez-Diaz v. Massachusetts. 129 S.Ct. at 2536-2537.

Despite this gap in the chain of custody, and petitioner's inability to cross-examine Investigator Brown, the judge admitted the results of the DNA from the items that could not be accounted for between October 30, 2004 and November 2, 2004, Dr. Amick was able to testify about DNA "matches" to petitioner on the items. This was very significant evidence given that Byrd described a sexual assault on her parent's bed that afternoon, and petitioner testified *it was "consensual normal oral sex"* for the couple. (emphasis added).

As this Court will recall, Byrd testified petitioner took off her clothes and placed her on her parent's bed. Byrd maintained petitioner told her to "perform oral sex on him," and she said she did perform oral sex. R. 25, l. 9 – 26, l. 5. Byrd said petitioner ejaculated, and she "*spit it out.*"

Q. Where did you spit out?

A. *On the comforter.*

R. 174, ll. 10-11. (emphasis added).

Byrd stated petitioner was upset by her reaction. Byrd testified petitioner then *attempted* to "penetrate me" vaginally, and she told him to stop. Byrd said she started crying, and "I told him that he was raping me again, *and he stopped in the middle of it.* . . he freaked out." R. 27, l. 22 – 28, l. 8; R.171, l. 2 – 174, l.11. (emphasis added). Therefore, the jury could have concluded the spit out semen on the comforter "matched" Byrd's corroborated testimony, and contradicted petitioner's testimony.

Petitioner, as seen, testified they had consensual oral sex upstairs *which was normal for them*, and he then started having intercourse with Byrd but she told him to stop. "I don't want to do this. I said okay, and I was upset." R. 617, l. 23 – 619, l. 18. (emphasis added).

Dr. Amick testified that petitioner *had two matches of his DNA on the comforter found in the bedroom* of the parent's home in Irmo. R. 512, l. 4 – 518, l. 22. Dr. Amick further testified

that petitioner's DNA was also found on Bryd's pants. R. 560, ll. 6 – 21. Only Bryd's DNA was found on her panties. R. 507, ll. 4 – 13. Dr. Amick acknowledged he could not say petitioner's DNA being found on the comforter meant that that DNA came from his semen. R. 537, l. 7 – 539, l. 16. However, as seen, *Brown's report concluded semen was found on the comforter.*

The DNA evidence was thus damaging to petitioner's defense of consent because he testified the oral sex was normal. Bryd, on the other hand, maintained that she spit out petitioner's semen after her forced her to perform oral sex. The jury could believe Bryd's version provided the explanation for why petitioner's DNA was found on the comforter since both petitioner and Bryd testified that oral sex was the only completed sex act that afternoon on her parent's bed.

However, the inability of petitioner to cross-examine Brown regarding what she did with this evidence from October 30, 2004 until November 2, 2004, given that this evidence may well have been co-mingled, and therefore spoiled, violated petitioner's right to confrontation. R. 363, l. 18 – 370, l. 21. That error was not harmless merely because petitioner said the evidence was consensual. It was *how the oral sex occurred that was critical in this case.*

Given that petitioner and Bryd were the only witnesses to what occurred in the bedroom that afternoon the Confrontation Clause errors as to the chain of custody and the use of Brown's report were -- respectfully -- not harmless.

Further, as seen, Brown's report was used to "corroborate" Bryd's testimony regarding the alleged "extreme struggle" in her parent's Irmo home, and petitioner's inability to cross-examine Brown about processing the scene for fingerprints, semen, and other items violated petitioner's right to confrontation, and the errors also cannot be deemed harmless for these reasons. As seen above, the physical evidence in this case was very important given Bryd's

claim of a sexual assault by way of forced oral sex, and petitioner's attempt to penetrate her, against petitioner's testimony of consensual oral sex "as they normally had," and quickly terminated vaginal sex. Byrd's and petitioner's versions of what occurred and cross-examination of Brown in this case was critical.

Again, it is important to note that Brown's report contained subjective opinions (a struggle) and conclusions (no fingerprints and presence of semen on the comforter) which petitioner could not cross-examine. This was important because there was testimony Byrd told petitioner that she loved him -- which she claimed was meant to placate him and protect herself -- and varying testimony on *when* things may have gone from being calm to contentious between Byrd and petitioner that afternoon. In short, Brown's observations, and her testing were important to the state's case given the highly unusual facts of this case involving this former live-in girlfriend and boyfriend. Brief of Petitioner at 24-29.

Further, the solicitor exploited this evidence in closing where petitioner could not confront and cross-examine Brown. "*This is forensic evidence. It does not lie. It is incapable.*" The solicitor argued that petitioner only testified the sex that day was consensual because the DNA matched. "[T]he *forensic evidence corroborates that [Byrd's version]*. The exact precise location of where she said she spit up the semen is where it was found." R. 747, l. 7 - 748, l. 18. (emphasis added). The Confrontation Clause violations and the defective chain of custody error were not harmless.

Here, petitioner clearly never had the prior opportunity to cross-examine Investigator Brown, and the state also did not make any showing of a good faith effort to assure her presence at petitioner's trial under the "unavailability" prong. Under Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2532, this was reversible error.

The Melendez-Diaz opinion noted that in Crawford had rejected the Ohio v. Roberts, 448 U.S. 56 (1980) “indicia of reliability” analysis under the Confrontation Clause. Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2533. The Court wrote:

The Sixth Amendment guarantees a defendant the right “to be confronted with the witnesses *against him*.” (Emphasis added.) To the extent the analysts were witnesses (a question resolved above), they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction – that the substance he possessed was cocaine. The contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause confirms this analysis. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses “against him,” the Compulsory Process Clause guarantees a defendant the right to call witnesses “in his favor.” U.S. Const., Amend. VI. The text of the Amendment contemplates two classes of witnesses those against the defendant and those in favor. The prosecution *must* produce the former; the defendant *may* call the latter. *Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.*

Melendez-Diaz v. Massachusetts, 129 S.Ct at 2533-2534. (emphasis added).

Here Brown was not only a chain witness she was a fact witness. Therefore, under the facts of this case, even the dissent in Melendez-Diaz v. Massachusetts would rule in petitioner’s favor. “The dissent first contends that a ‘conventional witness recalls events *observed in the past*, while an analyst’s report contains near-contemporaneous observations of the test.” Melendez-Diaz v. Massachusetts, 129 S.Ct at 2535. (emphasis added). Brown was a conventional witness.

Interestingly, the majority also noted: “A second reason the dissent contends that the analysts are not ‘conventional witnesses’ (and thus not subject to confrontation) is that they ‘observed neither the crime nor any human action related to it. The dissent provides no authority for this particular limitation of the type of witnesses subject to confrontation. Nor is it conceivable that all witnesses who fit this description would be outside the scope of the Confrontation Clause. *For*

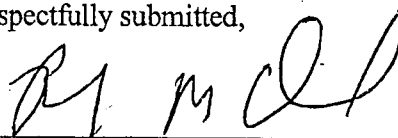
example, is a police officer's investigative report describing the crime scene admissible absent an opportunity to examine the officer? The dissent's novel exception from coverage of the Confrontation Clause would exempt all expert witnesses – a hardly 'unconventional' class of witnesses." Melendez-Diaz v. Massachusetts, 129 S.Ct at 2535. (emphasis added).

As the Court stated: "the dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because the defendant is obviously guilty. This is not what the Sixth Amendment prescribes . . . we do not have license to suspend the Confrontation Clause when a preferable trial strategy is available." Melendez-Diaz v. Massachusetts, 129 S.Ct. at 2536.

The Court also rejected the argument that it should not find a Confrontation Clause violation because the defendant had the ability to subpoena the witnesses. As in this case, the Court observed, "converting the prosecution's duty under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." Melendez-Diaz v. Massachusetts, 129 S.Ct. 2540.

Since petitioner was denied his rights under the Confrontation Clause to confront and cross-examine Investigator Brown as a fact witness and a chain of custody witness, and because the defective chain of custody and Confrontation Clause violations were not harmless, rehearing should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek

Deputy Chief Appellate Defender for Capital Appeal

This 24th day of September, 2009.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County

James W. Johnson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

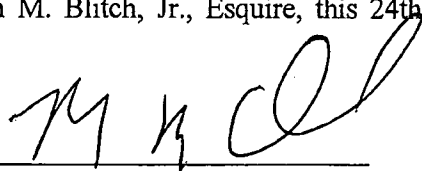
V.

RANDY B. THOMAS,

PETITIONER

CERTIFICATE OF SERVICE

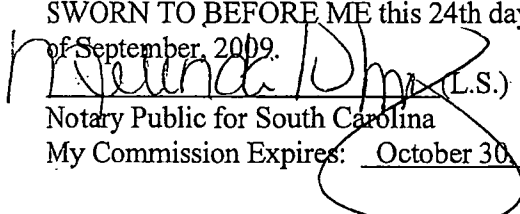
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blich, Jr., Esquire, this 24th day of September, 2009.



Robert M. Dudek
Deputy Chief Appellate Defender for Capital

Appeal

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of September, 2009.
 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018.

VOLUME ONE OF TWO

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

James W. Johnson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RANDY B. THOMAS,

APPELLANT

RECORD ON APPEAL

ROBERT M. DUDEK
Deputy Chief Appellate Defender
for Capital Appeals

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

Attorney for Appellant

HENRY DARGAN MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211

WARREN B. GIESE
Solicitor, Fifth Judicial Circuit
Post Office Box 192
Columbia, SC 29202-0192
(803) 576-1800

Attorneys for Respondent

INDEX

INDEX.....	i
TRIAL TRANSCRIPT.....	1
TESTIMONY	
LAURA BYRD	
<i>In Camera</i> Direct Examination by Ms. Cooper.....	3
<i>In Camera</i> Cross Examination by Ms. Durant.....	37
ASHLEY ELIZABETH MISHOE	
<i>In Camera</i> Direct Examination by Ms. Garfield.....	43
<i>In Camera</i> Cross Examination by Ms. VanGinhoven.....	52
DETECTIVE JAMES PEPPERS	
<i>In Camera</i> Direct Examination by Ms. Durant.....	56
<i>In Camera</i> Cross Examination by Ms. Garfield	61
<i>In Camera</i> Redirect Examination by Ms. Durant.....	75
TRIAL TRANSCRIPT.....	77
COURT REPORTER'S INDEX.....	96
OPENING STATEMENT BY MS. GARFIELD.....	112
OPENING STATEMENT BY MS. VANGINHOVEN.....	119
TESTIMONY	
LAURA BYRD	
Direct Examination by Ms. Cooper.....	122
Cross Examination by Ms. Durant	225
Redirect Examination by Ms. Cooper.....	240
Recross Examination by Ms. Durant.....	247
ASHLEY ELIZABETH MISHOE	
Direct Examination by Ms. Cooper.....	252
Cross Examination by Ms. Vanginhoven	266
Redirect Examination by Ms. Garfield	269
Recross Examination by Ms. Vanginhoven.....	270

SENA LONG

Direct Examination by Ms. Cooper.....	271
Cross Examination by Ms. Vanginhoven	280
Redirect Examination by Ms. Cooper.....	282

RODNEY M. GONZALES

Direct Examination by Ms. Cooper.....	283
Cross Examination by Ms. Vanginhoven	296
Redirect Examination by Ms. Cooper.....	301
Recross Examination by Ms. Vanginhoven.....	301

ZACHARY SCOTT B.

Direct Examination by Ms. Cooper.....	303
Cross Examination by Ms. Vanginhoven	309

KATRINA MICHELLE WEYL

Direct Examination by Ms. Cooper.....	311
Cross Examination by Ms. Durant.....	322

NATHANIEL JOHNSON STEWART, JR.

Direct Examination by Ms. Garfield.....	326
Cross Examination by Ms. Durant.....	341
Redirect Examination by Ms. Garfield	345
Recross Examination by Ms. Durant.....	348

ROY LIVINGSTON

Direct Examination by Ms. Garfield.....	349
Cross Examination by Ms. Vanginhoven	361
Redirect Examination by Ms. Garfield	366
Recross Examination by Ms. Vanginhoven.....	368

LEONARD A. JONES

Direct Examination by Ms. Garfield.....	372
Cross Examination by Ms. Vanginhoven	380
Redirect Examination by Ms. Garfield	384
Recross Examination by Ms. Vanginhoven.....	385

ZANE PADGETT

Direct Examination by Ms. Garfield.....	386
Cross Examination by Ms. Vanginhoven	439

MARIA JHOANA PINEDA-KIM

Direct Examination by Ms. Cooper.....	443
Cross Examination by Ms. Vanginhoven	453

DAVID GOFF	
Direct Examination by Ms. Garfield	455
BEVERLY LEONARD CRANE, JR.	
Direct Examination by Ms. Garfield	458
TENA GOFF	
Direct Examination by Ms. Garfield	463
Cross Examination by Ms. Vanginhoven	471
Redirect Examination by Ms. Garfield	472
GARY D. AMICK	
Direct Examination by Ms. Garfield	483
Cross Examination by Ms. Durant	519
Redirect Examination by Ms. Garfield	534
Recross Examination by Ms. Durant	538
BRIAN GODFREY	
Direct Examination by Ms. Cooper	540
Cross Examination by Ms. Durant	575
Redirect Examination by Ms. Cooper	579
Recross Examination by Ms. Durant	580
JAMES SHELDON AAKHUS	
Direct Examination by Ms. Durant	587
Cross Examination by Ms. Garfield	592
Redirect Examination by Ms. Durant	597
RANDY THOMAS	
Direct Examination by Ms. Durant	599
Cross Examination by Ms. Cooper	623
Redirect Examination by Ms. Durant	647
JAMES PEPPERS	
Direct Examination by Ms. Durant	650
Cross Examination by Ms. Garfield	658
Redirect Examination by Ms. Durant	691
Recross Examination by Ms. Garfield	694
BRIAN GODFREY	
Direct Examination by Ms. Cooper	698
Cross Examination by Ms. Durant	701
Redirect Examination by Ms. Cooper	703
Recross Examination by Ms. Durant	703
CLOSING ARGUMENTS BY MS. COOPER	707
CLOSING ARGUMENTS BY MS. DURANT	723

CLOSING ARGUMENTS BY MS. COOPER.....	733
CHARGE OF THE COURT.....	766
VERDICT.....	820
SENTENCE OF THE COURT.....	822
INDICTMENTS.....	823
SENTENCING SHEETS.....	832
CERTIFICATE OF COUNSEL.....	836

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

October 2nd, 2008

Robert M. Dudek
Deputy Chief Appellate Defender for Capital Appeals

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

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

James W. Johnson, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RANDY B. THOMAS,

APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon William M. Blich, Jr., Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201 this 2nd day of October, 2008.

Warren T. Ferguson
Administrative Assistant

SUBSCRIBED AND SWORN TO before me
this 2nd day of October, 2008.

(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008

STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIONS
COUNTY OF RICHLAND	)	2005-GS-40-10296
		2005-GS-40-10297
		2005-GS-40-10298
		2005-GS-40-10299

STATE OF SOUTH CAROLINA	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	VOLUME 1
RANDY THOMAS	)	
DEFENDANT	)	

February 6, 2006
Columbia, South Carolina

B E F O R E:

THE HONORABLE JAMES W. JOHNSON, JR., JUDGE;
and a jury.

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

VANESSA O. COOPER, ASSISTANT SOLICITOR
DOLLY JUSTICE GARFIELD
Attorneys for the State

LANELLE DURANT, ASSISTANT PUBLIC DEFENDER
JEANETTE VANGINHOVEN, ASSISTANT PUBLIC DEFENDER
Attorneys for the Defendant

CAROL M. THUEME, RPR
Official Court Reporter

1 Everyone else stay seated, please, while the
2 jury is excused.

3 (The jury left open court at approximately 4:14
4 p.m.)

5 THE COURT: We'll go ahead and deal with the
6 Lyle issue at this point in time.

7 MS. COOPER: Thank you, your Honor.

8 At this time the State calls Lauren Byrd to the
9 stand.

10 LAUREN BYRD, after being duly sworn, testified
11 as follows:

12 THE CLERK: Thank you. Please have a seat in
13 the witness stand and state your full name for the record
14 and you'll need to speak up, please.

15 MS. GARFIELD: Your Honor, what did you say
16 regarding the motion to sequester?

17 MS. DURANT: I'm sorry, your Honor. You did ask
18 that.

19 THE COURT: And I think I indicated that unless
20 someone objected to it I would grant that. Of course, the
21 victim is permitted in the courtroom, chief investigating
22 officer.

23 All other witnesses, State and defense witnesses
24 cannot be in the courtroom during the trial. And you
25 cannot discuss your testimony or anybody else's testimony

1 with any other witness.

2 IN CAMERA DIRECT EXAMINATION

3 BY MS. COOPER:

4 Q Good afternoon, Lauren.

5 Lauren, could you please tell Judge Johnson
6 where you live?

7 A Where I live now?

8 Q Yes, ma'am.

9 A

10 Q And you attend that university?

11 A Yes, I do.

12 Q What year are you in?

13 A I'm a senior.

14 Q And what is your major?

15 A Pre-pharmacy.

16 Q And how long have you lived at that apartment?

17 A I've lived there for three years. I went there,
18 moved there my sophomore year.

19 Q And did you ever live in that apartment with anyone?

20 A Not technically.

21 Q Untechnically who did you live with?

22 A Randy.

23 Q The defendant, Randy Thomas?

24 A Uh-huh.

25 Q So it was your apartment but he lived with you?

1 A He stayed over a lot.

2 Q And can you explain or give a little background
3 history about your relationship with Mr. Thomas.

4 A We dated for approximately a year. I met him here in
5 Columbia.

6 Q Who introduced you?

7 A Eric Elsey, I believe.

8 Q And is that one of your friends?

9 A I was dating him at the time, but he's one of Randy's
10 friends.

11 Q And so he introduced you to Randy?

12 A Yes.

13 Q And do you recall approximately when that was?

14 A That was probably May of 2003.

15 Q Okay. And you indicated, though, that you had a
16 relationship with Mr. Thomas for approximately one year?

17 A Yes.

18 Q When was it that you broke up?

19 A The end of July of 2003.

20 THE COURT: Did you say the end of July or 8th
21 of July? I didn't understand.

22 THE WITNESS: The end.

23 THE COURT: The end of July of 2004?

24 THE WITNESS: Yes.

25 THE COURT: All right. Go ahead.

1 MS. COOPER: Thank you, your Honor.

2 BY MS. COOPER:

3 Q And do you have a child?

4 A Yes, I do.

5 Q And is the defendant the father of that child?

6 A No, he is not.

7 Q And how old -- what is your child's name?

8 A Zachariah

9 Q How old is he now?

10 A He's four years old now.

11 Q Back in October of 2004 how old was he?

12 A He was three.

13 Q And did Zachariah live with you at Clemson?

14 A Yes.

15 Q And do you have -- where do your parents live?

16 A They live in Irmo, South Carolina.

17 Q Do your parents help you take care of Zack or at the
18 time when you were starting college?

19 A Yes, they helped.

20 Q Can you describe what it was like? Was it a friendly
21 break-up or a hostile break-up with the defendant?

22 A It was a long break-up. I had tried to get out of
23 the relationship several times, but it just -- he wouldn't
24 let that happen, I guess. He didn't want to break up, but
25 I had tried and I had tried. And I actually had started

1 dating someone else then and we had broken up and I think
2 he moved to Charlotte. It was just ongoing. He was just
3 constantly calling me, he had written me e-mails, things
4 of that nature.

5 Q And so when you broke up with him the end of July of
6 2004, did he move out from your apartment?

7 A He had been -- he had left for awhile a little bit
8 earlier than that, I think, but, yes, he was out of the
9 apartment.

10 Q Did he have a key to that apartment?

11 A Yes.

12 Q And did you ask for him to return that key?

13 A Yes, I did.

14 Q And did he?

15 A No, he did not.

16 Q I'm going to bring your attention to August 22nd of
17 2004. Can you tell Judge Johnson about your new boyfriend
18 and who you were dating at that time?

19 A I was dating Mike Anderson. He's a school teacher at
20 Walhalla High School.

21 Q And on August 22nd of 2004, did you spend the night
22 at your apartment? Did you wake up in your apartment that
23 morning or did you wake up somewhere else?

24 A No, I had spent the night over at Mike's house.

25 Q Where was your son Zack at this time?

1 A He was at my parents' home in Irmo.

2 Q And so they were taking care of him over this
3 weekend?

4 A Yes, they were watching him.

5 Q And incidentally, do you remember what day the
6 22nd of August fell on, what day of the week?

7 A I don't remember. The weekend, maybe right before
8 the weekend. Well, I had taken Zack probably that Friday.
9 That's what I'd normally do.

10 Q When would you have picked up Zack?

11 A Sunday or Saturday. Sunday.

12 Q What time was it that you got home to your apartment
13 on August 22nd, 2004?

14 A I got home that morning or before noon.

15 Q Okay. And what did you do or why did you leave early
16 from Mr. Anderson's residence?

17 A I had left there early because I was not feeling
18 well, I was sick, and I decided to go home.

19 Q What did you do when you got home?

20 A Laid down on the couch, pulled the covers over me and
21 just rested.

22 Q Can you tell Judge Johnson what happened as you were
23 laying on your couch in your apartment?

24 A Could you say that again?

25 Q Could you please tell Judge Johnson what happened

1 when you were laying on your couch in your apartment?

2 A The -- Randy had entered the apartment with a key and
3 just immediately started asking me questions, very direct
4 questions, asking me where I was staying or who I had been
5 seeing, if I was with anybody, and then he went over to
6 the couch where I had been laying and he --

7 Q Take your time.

8 A And he --

9 Q Did you invite him to come over?

10 A No, I had not.

11 Q Had he called to tell you he was coming over?

12 A No, he did not. He just came in.

13 Q And he used the key to get in?

14 A He used the key.

15 Q And when he and you were just -- when he was asking
16 you questions about who you were seeing, where were you,
17 were you still on the couch?

18 A I was still on the couch.

19 Q Where was he?

20 A He walked over to the couch and he sat down.

21 Q He sat down on the same couch or a different couch?

22 A The same one.

23 Q The same couch?

24 A Yes.

25 Q And what happened? Was this a pleasant conversation

1 for the two of you or was it a heated argument?

2 MS. DURANT: Objection, your Honor, leading.

3 MS. COOPER: I was giving her multiple choices.

4 THE COURT: No, I disagree. Go ahead. Overrule
5 the objection.

6 MS. COOPER: Thank you, your Honor.

7 BY MS. COOPER:

8 Q Describe the tone of this conversation.

9 A It was -- we were arguing. He accused me of being
10 with a man, another person. He -- I had told him to
11 leave. We were already broken up at that point, so I knew
12 it wasn't good for him to be over there. But he just
13 didn't leave, he stayed there. And then he eventually
14 just kind of came over to me -- I don't know --

15 Q What did he do when he came to you?

16 A He put my hands over my head. He had been touching
17 me inappropriately and I told him to stop.

18 Q Where did he touch you inappropriately?

19 A He touched me on my breasts.

20 Q And what did you tell him to do?

21 A I told him to stop. It was scaring me. I didn't
22 really know what he was going to do. And then eventually
23 there was a struggle. I didn't really know that he was
24 capable of doing what he eventually did. He had carried
25 me up the stairs after that and --

1 Q Can you describe how he carried you up the stairs?

2 A I don't remember. He had started to drag me up to
3 the bottom of the steps and then he picked me up as a
4 child.

5 Q And what do you mean "as a child"?

6 A Like --

7 Q And you can use your hands to demonstrate for the
8 judge if you need to.

9 A Like laying this way.

10 Q And what was upstairs in your apartment?

11 A My bedroom.

12 Q Did you have any roommates?

13 A I have no roommates.

14 Q And how many bedrooms are upstairs?

15 A There are two bedrooms.

16 Q Are both rooms used as bedrooms?

17 A Yes. One is Zack's room and the other is mine.

18 Q So one is your child's room?

19 A Right.

20 Q And so you were describing him carrying you up the
21 stairs. Can you tell the judge what happened next once he
22 got up you upstairs?

23 A He threw me on the bed and then hovered over me. He
24 removed my clothing and held my hands above my head and he
25 started to just --

1 Q You need to tell us what happened. I know it's
2 embarrassing, but you need to just let us know what
3 happened.

4 A And he had started to have sex. I had told him no, I
5 didn't want to.

6 Q What do you mean by "sex"? What exactly -- what part
7 of his body touched your body?

8 A His penis touched my -- penetrated my vagina.

9 Q Okay. And so what did you say to him when he
10 penetrated your vagina?

11 A I told him to stop. I told him no. I told him to
12 leave. I told him that this was rape. I told him that
13 what he was doing was rape.

14 Then after I explained it or had said that, he
15 immediately stopped and started crying. He lost it. He
16 said, I'm so sorry, and that he was going to call the
17 police on himself. He would rather not -- he would rather
18 not -- he doesn't want people to see him, like out in the
19 street people would know that he had done and that he
20 hated himself, and he was going to call the cops on
21 himself.

22 Q And do you recall when you told him what he was doing
23 to you was rape and he immediately stopped, had he
24 finished or had he ejaculated?

25 A No.

1 Q Okay. And what items of clothing did he take off of
2 himself?

3 A He took off his pants.

4 Q Did he take his shirt off?

5 A No.

6 Q Just his pants?

7 A Yes.

8 Q You described him freaking out. Can you be a little
9 more clear on his demeanor, what he looked like?

10 A He had a blank face. He was very upset. I could
11 remember him crying and just repeatedly saying that he
12 hated himself, he's sorry, and just freaked out.

13 Q And what happened after he stopped and he was
14 apologizing to you?

15 A When he stopped I left the bedroom and went to the
16 bathroom that's right beside it and had locked the door
17 and he just stood outside the bedroom or outside the room
18 and had said or basically repeated himself, I think, that
19 he's sorry, he hated himself, things of that nature. And
20 then I waited for him to leave and -- I had started a bath
21 and I waited for him to leave. As he left, I ran
22 downstairs and locked the dead bolt.

23 Q So how long do you think he was outside of the
24 bathroom door?

25 A Probably about five minutes. Not long.

1 Q And when he left, which door did he leave from?

2 A The front door.

3 Q And what did you do when you heard the front door
4 shut?

5 A I walked outside the bathroom and locked the door.

6 Q And what did you do after you locked the door?

7 A I took a bath and then I called my friend Cat and
8 told her what had happened. She -- I went over to her
9 home and she gave me the numbers for like a locksmith who
10 changed the locks, and then I had to leave like right
11 after that to go pick up Zack from a soccer game in
12 Greenville.

13 Q And your parents had taken Zack to Greenville?

14 A Yes. It was my sister's soccer game.

15 Q What made you want to take a bath so quickly?

16 A I felt dirty. I felt nasty. I had been feeling sick
17 anyway and I just -- that just kind of was the point where
18 it was over the top. I don't know.

19 Q And did you have an occasion to -- when you saw your
20 parents in Greenville, did you tell them what happened to
21 you?

22 A No, I did not.

23 Q And after speaking to Cat, who is the next person you
24 told happened?

25 A Ashley Mishoe.

1 Q And can you describe for Judge Johnson what Ashley
2 did for you, what her role was and what you told her?

3 A Ashley called the police and asked them what I should
4 do in that situation and she said that I would be -- that
5 I should come in that day, but I was too scared. I just
6 wanted him to kind of be out of my life, kind of leave,
7 and so I didn't go to the police that night. But she
8 convinced me to go the next morning, and I went. And then
9 she went with me after class on Monday morning and I told
10 the officer what had happened.

11 Q And do you recall the name of the officer that you
12 spoke to? Which police department was this, by the way?

13 A In Clemson.

14 Q Clemson Police Department. Do you recall the name of
15 that officer?

16 A Yes. It was Detective Peppers.

17 Q And did you provide -- what was it that you signed
18 after you talked to Detective Peppers?

19 A I had signed a written statement and it was on a
20 carbon copy and I believe I signed a trespass notice as
21 well.

22 Q And did you indicate to Detective Peppers that you
23 did not wish to press charges against the defendant at
24 that time?

25 A He said that it would be pointless because I had

1 taken a bath and that it was the next day. I didn't
2 really know what to do in the situation. I was confused.
3 I might have pursued it if I didn't think it was kind of a
4 lost cause. I just wanted him to not -- I just wanted to
5 get the trespass notice, restraining order or whatever I
6 picked so he could not be anywhere near me ever again.

7 Q Do you recall signing a trespass notice against
8 Mr. Thomas?

9 A Yes, I believe I did.

10 Q Did you have any encounters with the defendant after
11 this incident after you had gone to the police or later
12 that day, the same day of the assault?

13 A The same day of the assault I had locked -- when I
14 got back I brought Zack back, too, with me and I still had
15 my door locked and Mike was -- the guy I was seeing had
16 come over and Randy had walked -- he was outside my door
17 banging on the door. He had not come in. I did not let
18 him in. But he went and talked to Mike Anderson and he
19 was like, she's a liar, she's crazy, and he didn't even
20 know what happened and so he was really confused because I
21 hadn't told him anything and then he came upstairs.

22 Q Who's "he"?

23 A Mike.

24 Q Mike came upstairs?

25 A I let Mike in, but Randy did not come in at all

1 afterwards.

2 Q And did you --

3 A He came in so I could pack my things and I went over
4 to Mike's house. I didn't want to stay at my house.

5 Q So you and Zack went to Mike's?

6 A Right.

7 Q And how long was it before you were able to return to
8 your apartment?

9 A It was about a week before I returned.

10 Q Why was it that you stayed away for a week?

11 A I was too scared to go back if he had a key.

12 Q Did you eventually have the locks changed?

13 A I did have the locks changed.

14 Q Now, since that incident, which was on

15 August 22nd of 2004, did you see the defendant anywhere
16 or talk to him before the incident at your parent's house
17 in October?

18 A He had called me from different phone numbers. I
19 didn't really answer because -- I mean I wasn't sure -- I
20 didn't have one number from him. I did not talk to him.
21 He had written me e-mails.

22 Q What was the gist of the e-mails?

23 A The e-mails, there was one e-mail in particular where
24 he listed everything that we had done together and he
25 basically was trying to get me back.

1 Q And did you ever speak to him on the phone or in
2 person?

3 A No, not after that incident.

4 Q Okay. I'm going to bring your attention to October
5 30, 2004, okay?

6 A Okay.

7 Q Where were you that weekend?

8 A I was at my parents' home in Irmo.

9 Q And is that here in Richland County?

10 A Yes.

11 Q Is that where you grew up?

12 A I -- not -- I moved there my junior year.

13 Q Of high school?

14 A Yes.

15 Q Is that where you -- what high school did you attend?

16 A Dutch Fork High School.

17 Q Can you please tell Judge Johnson why you went to
18 your parents' house that weekend?

19 A There was a Clemson football game going on and I'd
20 given my daddy and my little brother tickets to go see the
21 game or my tickets to go see the game and I just -- Zack
22 and I stayed there until they came back.

23 Q What day did you go home?

24 A Friday.

25 Q And on Saturday, the next day, can you describe how

1 many members of your family you have? Who all is in your
2 family?

3 A I have my parents, my mother, my father, and a
4 younger sister, a younger brother.

5 Q So on Saturday your father and brother, where did
(b) they do?

7 A They went to the Clemson game.

8 Q Where did your mom and younger sister go?

9 A They were with my sister's soccer tournament.

10 Q Do you remember where that was?

11 A I don't remember.

12 Q Was it in Columbia?

13 A I think it was in Georgia. It wasn't close by; they
14 had to travel.

15 Q They had to travel?

16 A Uh-huh.

17 Q And was Zack with you at your parents' house?

18 A Yes, he was.

19 Q Describe what happened October of 2004 at home with
20 your son.

21 A It was afternoon and Zack and I watched the football
22 game on TV and I heard a knock on the door. It was Randy.
23 I saw him through the window. And I didn't leave the
24 living room but I kind of moved over to make sure that he
25 didn't -- I didn't think he had saw me. And the door was

1 unlocked. He just walked in.

2 We started talking. He was talking to Zack.
3 Everything was -- it was uneasy, but I was just hearing
4 what he had said because it sounded -- he started
5 apologizing for the Clemson incident. And he was on the
6 chair, on the opposite chair. I was sitting on the couch
7 when we were talking about it, or when he was talking
8 about it, and he -- I left the living room and went to the
9 bathroom because it kind of got heated and led to an
10 argument and I went to the bathroom and I text messaged
11 Ashley on my phone saying help me. And then she
12 immediately called back and I told her -- I was whispering
13 and I told her that he was here, Randy was here and
14 that -- she just advised me to stay on the phone until he
15 left. Zack stayed in the living room.

16 Q At this point did you feel that he was -- why did you
17 leave Zack in the living room in the meantime if you were
18 scared of him?

19 A I didn't see any danger of leaving Zack there. I
20 really wasn't thinking. I just kind of -- my gut -- I
21 just immediately went to the bathroom. I wasn't thinking
22 that Zack was in any danger. I was just waiting for him
23 to leave. I just thought that he was wanting to talk to
24 me.

25 Q Okay. And what happened while you were on the phone

1 with Ashley?

2 A I heard the door shut.

3 Q Which door?

4 A The front door open and shut, so I assumed that he
5 had left. And I told Ashley, I said, okay, he's gone, and
6 I hung up the phone with her.

7 I left the bathroom and I started walking to the
8 living room but then I turned around because Ashley had
9 told me to lock the door, and so I went over and
10 immediately locked the door and then I saw him coming
11 back, and so he had opened the door before I got a chance
12 to and then it was all downhill from there.

13 He came back in. I sat on the couch. I picked
14 up Zack and I sat down on the couch. I told him to leave,
15 but he did not leave. I felt real uneasy because I knew
16 that he wasn't supposed to be there. And then he knelt
17 down beside me or down in front of me on the couch in
18 front of me and he put his hand on my knee and I jerked it
19 away. And he was basically just trying in a weird way to
20 console me, telling me that he's sorry for what happened
21 in Clemson and that that was his way of showing me he
22 loved me. And then he had put Zack down.

23 Q When he touched you on your knees, what did you do?

24 A I jerked away.

25 Q How did he react to that?

1 A He didn't like it. I think it sort of offended him.

2 Also, whenever he was talking about the whole
3 thing about Clemson, I kept cutting him off, like it
4 doesn't matter, leave. I was kind of being rude and told
5 him to leave, and then --

6 Q How did he react to your interruptions?

7 A He didn't like it at all.

8 Q What happened after he touches your knees and you
9 jerk away, what did he do?

10 A He hovered over me. He just kind of -- Zack already
11 had left and was on the ground or in the floor and then he
12 had hovered over me and I started -- I scrunched back into
13 the corner of the couch. I really wasn't sure what he was
14 going to do, but I know it wasn't good.

15 Q And when you say he was hovering over you, was he
16 seated on the sofa or the couch or was he standing or what
17 was he doing?

18 A He was standing and then he picked me up as a child
19 again and then he was going to go sit down, I believe, and
20 I straightened out in his arms so that like he couldn't
21 hold me, and then he sat down. I sat -- I was in the
22 corner at that time. I told him to leave, and any time
23 there was a moment of silence I was like, please leave,
24 and then he put his hand on -- or his hand on my breast
25 and --

1 Q Do you remember which hand and which breast he
2 touched?

3 A I don't remember.

4 Q Okay. What did he do with your hands when he touched
5 you there?

6 A He had put my hands over my head.

7 Q Do you recall telling him whether or not you were
8 expecting anybody to come home soon?

9 A Yes. I had told him that my parents or that my momma
10 was coming home soon just to get him to leave so he
11 wouldn't do something stupid.

12 Q And did he leave at that point?

13 A No, he did not.

14 Q What did you say to him when he grabbed you
15 inappropriately on your breast?

16 A I had jerked back again. I pushed his hands off me
17 and I was like -- in the back of my mind I got that creepy
18 feeling like I did back in Clemson and I told him no,
19 don't do that.

20 Q And could you describe his demeanor at this point?

21 A He was very -- he was calm at first. I mean, I could
22 see that he was angry but he just didn't really say much.
23 He just did stuff.

24 Q Okay. And when you told him not to touch you that
25 way, what happened next?

1 A Then he -- I had gotten up and I guess, you know, I
2 tried to console Zack. Zack was a little upset and then
3 he had -- there was a struggle. I don't remember the
4 result of the struggle, but I remember that he ended up
5 like bear hugging me from behind. He told me that -- he
6 was like, Do you love Zack? And I was like, Yes, I love
7 Zack. He was like, Are you going to do or willing to do
8 anything? Something. I'm not quoting exactly. And I was
9 like -- I said -- no, I didn't say anything, and then he
10 picked me up from behind, kind of bear hugging me with my
11 arms down and then --

12 Q Did he ever threaten Zack at that point?

13 A At that point he said that he wouldn't hurt Zack. He
14 said, I won't hurt Zack.

15 Q And what was on the television at this time?

16 A He had turned it to cartoons and told Zack to stay
17 downstairs and watch cartoons.

18 Q And where did he take you?

19 A He took me upstairs. There was a struggle in the
20 middle of the stairs. I'd kind of gotten free. He
21 started to drag me. He picked me up and carried me like a
22 child again up the stairs and I was squirming. And
23 there's a beam at the top of the stairs right next to the
24 bedroom and I grabbed onto it with my hands and he pulled
25 my feet off, like pulled my feet until I had to let go.

1 And then the bedroom's right adjacent to that beam and he
2 drug me in there, kind of kneeled down and sat me in the
3 floor where I was at.

4 Q So that was your parents' bedroom?

5 A It was not my bedroom.

6 Q While you're being taken up the stairs, were you
7 going up there voluntarily?

8 A No, I was not.

9 Q And did you have any opportunity to talk to Zack
10 while you were being taken upstairs?

11 A I believe I told him, you know, that it's okay. He
12 was a little upset. He didn't know what to think. He
13 knew he didn't want to go upstairs because he's kind of
14 apprehensive when it came to Randy. He's just real uneasy
15 around him, and he did stay downstairs.

16 Q What happens while you're in the bedroom on the
17 floor?

18 A He had told me to calm down. He told me to take off
19 my shirt. He told me and I couldn't do it, so he did it.
20 And then he told me to take off my pants and I couldn't do
21 that. He kept asking me in between, Do you love Zack?
22 Kind of sort of saying if I didn't do this then something
23 bad was going to happen to Zack or me.

24 Q And what else? He took your shirt off. What else
25 did he take off?

1 A He took off my pajama pants and my panties.

2 Q And what were you wearing during this time?

3 A I was wearing my pajamas.

4 Q Okay. And what kind of top were you wearing?

5 A It was a tie-dyed shirt.

6 Q And what item of clothing did he remove from his own
7 body?

8 A His pants.

9 Q During this time did you try to leave the room in any
10 way?

11 A I tried to leave the room several times. I was kind
12 of -- I was scared to do it because I was afraid that he
13 might do something, but then again I couldn't sit there
14 and let him do it, so I had tried to leave. He got up
15 constantly. He told me that I'm going to mess up, you're
16 going to mess up, Lauren, and he had forced me to the bed.
17 He had put me on the bed.

18 Q And what did he do with you once you got on the bed?

19 A Well, my clothes were taken off and he grabbed my
20 back of my hair on my neck and kind of forced my head so
21 that it was laying on the side of the bed and he stood up.
22 He never got on the bed.

23 Q All right. And so while you're lying on the bed are
24 you facing him or facing away from him?

25 A Facing him.

- 1 Q What does he do with your head?
- 2 A He told me to perform oral sex on him, and he told me
- 3 to do it right, do it well.
- 4 Q And so did you perform oral sex on him?
- 5 A Yes, I did.
- 6 Q Did you do that voluntarily?
- 7 A No, I did not. He was complaining the whole time
- 8 while I was doing it. He told me to stop crying. I was
- 9 hysterical, I was crying the entire time.
- 10 Q And did he ejaculate at any point?
- 11 A Yes, he did.
- 12 Q And where did he do that?
- 13 A In my mouth.
- 14 Q What did you do once that happened?
- 15 A I spit it out.
- 16 Q And do you recall where you spit it out onto?
- 17 A On the edge of the comforter on the bed.
- 18 Q In your parents' bedroom?
- 19 A On my parents' bed.
- 20 Q And how did he react when you spit it out?
- 21 A He was upset. He didn't -- he told me to -- I guess
- 22 before he was going to do that he told me to take all of
- 23 it and he was upset because I didn't. I felt like I was
- 24 going to throw up. It was horrible.
- 25 Q And after you spit on the bed comforter, what did he

1 do next to you?

2 A He swung me back so that I was laying on the bed on
3 the edge. He stood up in front of the bed on the side.

4 Q And are you on your stomach or on your back?

5 A I'm on my back.

6 Q Okay. And is he standing -- where is he standing?

7 A He's standing in front of me. I had my legs
8 intertwined like several times. He -- I was pushing him
9 away with my hands. He put my hands over my head again,
10 and then I figured I could just be strong enough not to --
11 so that he couldn't unravel my legs, but he did. I put my
12 hands back down and he put my hands back up. It's a
13 back-and-forth struggle.

14 Q And where did he put your hands down to?

15 A I was down just trying to push him off of me.

16 Q And what happened after -- while you were struggling
17 to put your hands up and down, what happened next?

18 A He started to penetrate me with his penis. It went
19 like halfway in.

20 Q To your vagina?

21 A Yes.

22 Q Okay. And what did you start telling him during this
23 point?

24 A I told him to stop. I started crying. I mean, I was
25 always crying, I never stopped crying. I told him to

1 stop, and he did. And he started freaking out again just
2 like it was last time.

3 Q And did you have more in-depth conversation on why he
4 should stop?

5 A I told him that he was raping me again, and he
6 stopped in the middle of it. He just stopped. He freaked
7 out. He had like this blank crazy look on his face and he
8 just stopped.

9 Q And what -- did you threaten to tell anybody on him?

10 A I told him I wouldn't because he had said that he was
11 going to kill himself, that he hated himself, and that he
12 was just real upset with himself like last time. And I
13 told him that I wouldn't tell anybody just so that he'd
14 calm down. I just wanted him to leave. And he --

15 Q What did he say to you when you told him you wouldn't
16 tell on him?

17 A He said I had a good heart and that -- then he picked
18 up the phone. He's like, I'm so upset with myself I'm
19 going to call the cops on me.

20 He had picked up the phone and kind of waited
21 for my reaction to see what I was going to say to that.
22 And then he dialed three numbers and I had realized that
23 it was not 911 because it was a different -- it was the
24 same tone and he did not move his fingers. And so when I
25 realized that I thought he was kind of testing me and I

1 told him, I was like, No, don't call the cops. He just
2 threw the phone down and went, Let's go downstairs.

3 Q Before you went downstairs, did you have an
4 opportunity to get dressed?

5 A Yes. While he was upset with himself, I -- before
6 the phone call I put back on my clothes.

7 Q When did he put his clothes back on, his pants back
8 on? Was it before the 911 call that he pretended to make
9 or after?

10 A I'm not sure.

11 Q Now, before you go downstairs with the defendant,
12 what was your demeanor like?

13 A Very upset. I'm shaking, I'm scared, I don't know
14 what he's going to do next.

15 He told me to calm myself down. He said, Do you
16 want Zack to see you like this? I didn't, so I tried to
17 compose myself. I remember glimpsing myself in the mirror
18 that was right by the door and my face was red. It was
19 just like a different person.

20 Q And did you go downstairs voluntarily or did he touch
21 you in any way?

22 A He grabbed my arm. It wasn't really a struggle
23 because I wanted to go downstairs.

24 Q And where on your arm did he grab you?

25 A On the bicep.

1 Q When you get downstairs, can you tell Judge Johnson
2 what happens?

3 A When we got downstairs, Zack was kind of looking at
4 me like he didn't know what to think. I had picked him up
5 immediately and sat down on the couch. My phone was in
6 the couch. I dialed 911 and just left an open line. I
7 hoped somebody -- that I didn't ever pick up and answer
8 and talk to anyone on the other line. Randy had asked
9 where's my purse. My purse was in the kitchen, and then
10 he asked where my phone was. I pretended like I couldn't
11 find it, and then I just kind of picked up the phone, oh,
12 here it is, and then by that time it was off. There was
13 nobody on the other line.

14 Q So the call was no longer through to 911? Did you
15 hear anybody on the other end when you called 911?

16 A Yes, I did.

17 Q But you did not respond or answer that person?

18 A (Witness shaking head.)

19 Q What does he do with your cell phone and your purse?

20 A He put it in the kitchen. He just put it together.

21 Q Where in the kitchen?

22 A On the counter.

23 Q And at what point -- in the meantime you're in the
24 den; is that correct?

25 A I'm in the den with Zack.

1 Q Okay. Is there another den in your house?

2 A Yes. There's a den close to the front door. I was
3 trying to think of a way to leave, so I got Zack and we
4 started to walk into the other room.

5 I sat on that couch with Zack and he had
6 followed us. There was a struggle. I tried to put --
7 there's a corner near the computer and I put Zack kind of
8 in between there, in between me and Randy. I didn't know
9 what he was going to do. I picked up a lamp that was
10 right there and tried to put it between us so that we
11 could leave. I told him I just wanted to leave, you know,
12 that he was scaring me, and he was like, Are you going hit
13 me with that? I said, No, I just want to leave, and he
14 grabbed it and pulled it.

15 I fell over a stool and then I guess the lamp
16 was just kind of thrown to the side. He was wanting to go
17 to the kitchen and -- I'm trying to remember the details.

18 He was wanting to go to the kitchen, and so that
19 was my chance to kind of leave. And he said he wanted to
20 take Zack with him. This was before I got the lamp.

21 Q Well, before you get to the other living room, did
22 you -- you grabbed the lamp and you fell over the stool;
23 is that correct?

24 A Yes.

25 Q This is in the living room by the front door?

- 1 A Yes.
- 2 Q Okay. Where there's a computer?
- 3 A Yes.
- 4 Q Did he take you back to the kitchen?
- 5 A Yes. He was taking me back to the kitchen. He was
6 dragging me on the floor. I had been able to grab --
7 there's a beam passing through the living room and then
8 I -- we were passing the beam and I had wrapped my legs
9 around the beam and he proceeded to pull like with all his
10 might. I could feel my muscles ache from the corner of
11 the beam pressing into my calves and eventually he
12 overpowered me and pulled me off.
- 13 Q Where was Zack during this time?
- 14 A He was still in the other living room.
- 15 Q And where did he drag you to?
- 16 A To the kitchen. He had dragged me and then I started
17 to kind of stand up on my own and he went to the kitchen
18 and started opening drawers. I kind of figured out what I
19 thought he was going to get, something to hurt us with it,
20 so I pushed the drawer back.
- 21 Q Which drawer was this in your parents' kitchen?
- 22 A It was in the island.
- 23 Q Okay. And what is in that drawer?
- 24 A There are steak knives in that drawer.
- 25 Q Why is it that you tried to shut that drawer?

1 A I was afraid he was going to grab a knife. He had
2 threatened to kill us, so I thought that was what he was
3 going to do.

4 Q And were you able to at any point keep him from going
5 into the drawer?

6 A Yes. I pushed the drawer back. Then he pushed me
7 aside, grabbed the knife, and then I was turned around
8 because I was pushing the drawer this angle, trying to, I
9 guess, put me in between it, and then he had put the knife
10 to the back of my neck.

11 Q What kind of knife was it?

12 A Just a regular steak knife, wooden handle.

13 Q Wooden handle?

14 A Uh-huh.

15 Q Where did he put the knife?

16 A He put the knife at my neck.

17 Q And what was going through your mind when this
18 happened?

19 A I was terrified. I knew -- I knew that I was going
20 to die. I really genuinely thought I was going to die at
21 that point.

22 I told him that I didn't want my momma to see me
23 like this, and then I just -- I got really calm. I
24 stopped crying. I just had to think. I was trying to get
25 out of the situation and I told him that I did not want my

1 parents to see me like this. He said, Let's go for a
2 ride.

3 At that point I was scared. I thought he was
4 going to -- he had threatened to kill himself earlier and
5 me and Zack, so I thought that that was his plan whenever
6 he told us to go for a ride.

7 Q Did you talk to him at all about your feelings for
8 him?

9 A Yes, I did. I told him -- I was trying to tell him
10 anything he wanted to hear. I told him that I loved him,
11 that I understand what he's doing, just anything possible.

12 Q Did he react in any way?

13 A He was crying. He was upset again.

14 Q And after you -- did he ever let loose of the knife?

15 A Yes, he did.

16 Q When did that happen?

17 A That happened in the kitchen, and then he put the
18 knife in his -- I saw him put the knife in his back pocket
19 and then we went outside. He had picked Zack up.

20 Q Where did he pick Zack up?

21 A In the living room. He had just picked him up and
22 put him on his hip. I saw the knife in his back pocket
23 and of course I'm going to follow.

24 We went outside. He said, Don't say anything.
25 He was like, Don't do anything stupid. And so I walked

1 outside. I looked to my left and I saw Katria mowing the
2 lawn.

3 Q Who did you see?

4 A Katria.

5 Q Okay.

6 A I saw her mowing the lawn.

7 Q And is she -- who is she?

8 A She's my neighbor.

9 Q Okay.

10 A And when I saw her I mouthed to her, I said, Help me.
11 And she obviously didn't see, it was loud. And then I
12 heard Randy's voice say, Lauren, like trying to get my
13 attention again because I started wandering towards
14 Katria, and then when I heard my name I just freaked out.
15 I told her, I said, Call 911. Then I heard the car door
16 slam. He had Zack in the seat.

17 Q Which seat?

18 A In the driver's seat in his lap.

19 And he -- once I heard the car door slam I
20 turned my head and I ran after -- I was running after his
21 car to the passenger's side and I had -- at this time he's
22 on the road of West Ashford Way.

23 Q How did he get out of your driveway? Which direction
24 was his car facing?

25 A His car was facing the garage. He had backed out.

1 Then it's really quick, reckless. And then I just ran as
2 fast as I could after the car. I had opened the passenger
3 door while it was moving.

4 Q Is this the front passenger door?

5 A The front.

6 Q The front passenger door. Okay.

7 A And I opened it. The car would accelerate. He told
8 me to get in the car. I went, I need Zack, and I tried to
9 reach for Zack. Zack was turning to me. I saw tears in
10 his eyes. I saw that he was very, very upset. I was
11 scared. I thought he was going to take him away and so I
12 just ran as fast as I could after the car.

13 Q What were you wearing on your feet?

14 A I was barefoot.

15 Q And were you able to get Zack out of the car?

16 A No, I was not. He ended up driving off and I just
17 ran as fast as I could. I saw a white truck and I was
18 screaming the whole time. I told the truck to turn around
19 and I'm guessing it did. I was so focused on that, and
20 then I seen Zack in the road.

21 Q How did he get in the road?

22 A Randy had dropped him off in the middle of the road.

23 Q Did you see him stop the car and drop Zack off?

24 A Yes.

25 Q What did you do when you saw Zack?

1 A I ran up to Zack and he was crying and I picked him
2 up and just started running back to Katria's house. When
3 I got close to her house she had grabbed Zack and I was so
4 fatigued I had fallen on the pavement and then she
5 consoled me and she took me back into their home.

6 MS. COOPER: Beg the Court's indulgence, your
7 Honor.

8 THE COURT: All right.

9 BY MS. COOPER:

10 Q Lauren, can you please point out the individual we're
11 speaking of, Randy Thomas, for the judge, please.

12 A Yes. (Witness pointing.)

13 Q And what's he wearing?

14 A A blue shirt.

15 MS. COOPER: Your Honor, let the record reflect
16 she's identified the defendant, Randy Thomas.

17 THE COURT: All right.

18 MS. COOPER: I have no further questions of this
19 witness.

20 THE COURT: Cross-examine.

21 MS. DURANT: Thank you, your Honor.

22 IN CAMERA CROSS-EXAMINATION

23 BY MS. DURANT:

24 Q Lauren, hi. My name is Lanelle Durant. I'm one of
25 the attorneys representing Randy Thomas. I have a few

1 questions for you.

2 You -- in Clemson, Randy actually lived at the
3 apartment with you, didn't he?

4 A Not technically. He did, but he went back and forth.
5 He stayed at friends' houses and he stayed at my house.
6 He really didn't have a home.

7 Q But didn't he use that as his address?

8 A He did use that as his address.

9 Q And you said you broke up the end of July but he
10 still had a key, I think, on August 22nd?

11 A Uh-huh.

12 Q So you had not changed your locks during that time?

13 A No.

14 Q I think you said that you went to Ashley's that day?

15 A To Ashley's in Clemson?

16 Q I'm talking about the Clemson incident.

17 A No, I went to Cat's that day. I had called Ashley.
18 I didn't go to Ashley's that day. I went the next day
19 when we went to the police.

20 Q So you went to the police the next day?

21 A The next day.

22 Q Ashley went with you?

23 A Yes, she did.

24 Q When you talked with Investigator Peppers, he told
25 you not to prosecute the case?

1 A He told me that it would be very -- this isn't his
2 exact words, but it would be kind of pointless because I
3 had taken a bath, it was the next day, plus they didn't
4 know where to find Randy because he wasn't living at my
5 home at that time.

6 Q During the incident in Clemson, you had vaginal
7 intercourse, correct?

8 A Yes.

9 Q I think you said he did not ejaculate?

10 A I don't believe so.

11 Q You didn't go the hospital, did you?

12 A No, I did not.

13 Q So a sexual assault kit was not done?

14 A No, it was not. He, Investigator Peppers told me it
15 would be hard to find anything.

16 Q So the paper was the trespassing notice, correct?

17 A I believe it was.

18 Q And I have a couple of questions about the incident
19 in October. I think you said you didn't talk to Randy any
20 more from the incident in Clemson until October, that
21 incident?

22 A Right.

23 Q You said you grabbed ahold of a beam outside your
24 parents' bedroom. That was with your hands?

25 A That was with my hands.

1 Q Now, I'm going back again to the incident at Clemson.
2 Zack was not there that time?

3 A Zack was not there.

4 MS. DURANT: I beg the Court's indulgence.

5 THE COURT: All right.

6 BY MS. DURANT:

7 Q Lauren, the Clemson incident was August 22nd?

8 A Uh-huh.

9 Q Isn't it true that the weekend after that Randy was
10 at your parents' home in Columbia?

11 A With me there?

12 Q Uh-huh.

13 A I know that he had driven by several times going by
14 my house. My daddy -- I know of one incident where my
15 daddy was outside in the garage and he had seen him drive
16 by and then Randy had occasion to talk to me.

17 Q So did Randy actually talk to your parents?

18 A He didn't say anything to my parents. My daddy
19 didn't know what was going on. When he saw my face, that
20 I was upset, because he had told me at that time that he
21 had -- that he wanted to kill himself and then I felt bad
22 like I'd done something wrong.

23 Q I'm sorry. You're saying Randy did drive by your
24 house?

25 A Yes, he had been driving by my house and then he had

1 stopped. I think James was in the car.

2 Q James Aakhus?

3 A I believe he was. I think that's what James told me.
4 Because James had told me that he had -- that he didn't
5 know that they were stopping -- that he -- he didn't tell
6 me that day but he told in Clemson because he's my
7 neighbor that he didn't know that they were stopping by my
8 house, that Randy had told him that they were going
9 somewhere else.

10 THE COURT: Can you explain again what
11 happened -- and this is the weekend after the Clemson
12 incident; is that right?

13 THE WITNESS: I'm not sure.

14 THE COURT: Were you there?

15 THE WITNESS: I was there.

16 THE COURT: You were at your parents' home?

17 THE WITNESS: Yes.

18 THE COURT: And I had a hard time understanding
19 some of what you were telling Ms. Durant. You said that
20 your understanding is he came by, your father was in the
21 garage and saw him. Did you say that he asked to speak to
22 you?

23 THE WITNESS: My father, did he ask my daddy?

24 THE COURT: I didn't understand what you said
25 occurred. Or did you just say your father saw him drive

1 by?

2 THE WITNESS: My daddy had seen him drive by a
3 couple of times and he didn't know what was going on. He
4 had no awareness of the situation. And then he did stop
5 by the house.

6 THE COURT: You're saying that the defendant
7 stopped at your house?

8 THE WITNESS: Yes, he did.

9 THE COURT: But you didn't see him or talk to
10 him?

11 THE WITNESS: No, I did talk to him.

12 THE COURT: You did talk to him?

13 THE WITNESS: Yes.

14 THE COURT: Go ahead, Ms. Durant.

15 BY MS. DURANT:

16 Q So you did talk to him that weekend after the Clemson
17 incident?

18 A Yes. I'm not sure if that's the right day, but I
19 know there was a time when I had been home.

20 MS. DURANT: I beg the Court's indulgence.

21 THE COURT: Yes, ma'am.

22 MS. DURANT: No further questions, your Honor.

23 THE COURT: Redirect.

24 MS. COOPER: Not for this witness. We do have
25 another witness, your Honor.

1 THE COURT: You may step down.

2 Go ahead and call your next witness.

3 MS. GARFIELD: State calls Ashley Mishoe.

4 ASHLEY MISHOE, after being duly sworn, testified
5 as follows:

6 THE CLERK: Please have a seat and state your
7 full name for the record.

8 THE WITNESS: Ashley Elizabeth Mishoe.

9 THE COURT: You're going to need to speak up so
10 I can hear you, okay?

11 THE WITNESS: Ashley Elizabeth Mishoe.

12 THE COURT: Thank you.

13 Go ahead, please.

14 MS. GARFIELD: Thank you.

15 IN CAMERA DIRECT EXAMINATION

16 BY MS. GARFIELD:

17 Q Ashley, where are you originally from?

18 A Conway, South Carolina.

19 Q And where do you go to school?

20 A Clemson University.

21 Q How old are you?

22 A I'm 21.

23 Q And what are you studying at Clemson?

24 A Pharmacy.

25 Q And what year are you?

1 A I'm a senior.

2 Q Have you had the occasion to become friends with the
3 victim in this case, Lauren Byrd?

4 A Yes.

5 Q Can you just tell the Judge how you got to know
6 Lauren?

7 A Lauren and I took a summer biology class together and
8 we became very good friends.

9 Q About when was this?

10 A This was the summer of 2004.

11 Q So you all have known each other about a year and a
12 half?

13 A Yes.

14 Q You also know Randy Thomas?

15 A Yes.

16 Q And how do you know Randy?

17 A Through Lauren. They dated.

18 Q And did you know Randy before they dated or did you
19 get to know Randy through Lauren?

20 A I knew him through Lauren.

21 Q Would you say in August of 2004 you established a
22 friendship with Lauren?

23 A Yes.

24 Q Now, specifically I'll take you to August 22nd, 2004.
25 Did you get a phone call from Lauren Byrd?

1 A Yes.

2 Q And did it have anything to do with Randy Thomas?

3 A Yes.

4 Q And can you just please explain to the Judge what
5 that phone call was in regard to.

6 A She called me and said that he had come over and they
7 had started fighting about a guy because they had been
8 broken up and he wanted to know what guy she had been
9 seeing and that they had gotten in a fight and he took her
10 upstairs and he raped her.

11 Q And what did you do at that time upon learning this,
12 Ashley?

13 A I immediately said that she should go to the cops
14 and -- you know, go to the cops.

15 Q And do you remember what day of the week this would
16 be?

17 A That was on a Sunday.

18 Q And do you know what time it was that Lauren called
19 you?

20 A She called me in the early evening.

21 Q And you told her to go to the cops?

22 A Yes.

23 Q Did she follow your advice?

24 A She didn't. She was really scared. She just wanted
25 him to go away and she said she would go to the cops the

1 next day to get a restraining order.

2 Q And you don't have any background in preserving
3 evidence for rapes or anything of that nature, do you?

4 A No, ma'am, I didn't know that. I told her that she
5 should probably go to the cops immediately because any
6 evidence would be gone.

7 Q And did she go to the cops, Ashley?

8 A She did not.

9 Q Did she ever go to the cops?

10 A She went the next day to get a restraining order.

11 Q And when you refer to "cops," what exact police
12 agency are you referring to?

13 A Clemson University. No, Clemson City Police
14 Department.

15 Q City of Clemson Police Department, not just the
16 normal university?

17 A Right.

18 Q Did you accompany Lauren to the police department?

19 A Yes.

20 Q What did she do while she was there?

21 A She filled out a report and talked to Detective
22 Peppers.

23 Q Were you there when she filled out the report?

24 A Yes.

25 Q Now, when you say "fill out a report," did she

1 actually make a statement?

2 A Yes. She filled out things that are like carbon
3 copies.

4 Q You saw her writing?

5 A Yes.

6 Q And then after that, was there any action taken by
7 the police, the Clemson Police Department?

8 A Not that I'm aware of.

9 Q Okay. I want to also bring you to October 30th,
10 2004. Do you remember what you were doing that day?

11 A Yes. I was watching a football game at Clemson and
12 then later that afternoon I went to work.

13 Q Did you actually go to the game or were you watching
14 it on television?

15 A I was watching it at the game.

16 Q And then you went to work. Where do you work?

17 A I work at the Galley restaurant.

18 Q Where is the Galley restaurant?

19 A It was in Anderson, South Carolina.

20 Q And while you were at work, Ashley, did you get a
21 phone call from -- did you get any type communication from
22 Lauren Byrd?

23 A Yes, I did. I got a text message from her earlier in
24 the afternoon that said help, call me.

25 Q And when you say earlier afternoon, do you know about

1. what time this was?

2. A About one-ish.

3. Q Were you at the football game?

4. A Yes.

5. Q What did you do when you saw this help message?

6. A Well, I immediately left the football game so I could
7. hear her and I called her and she was whispering. I could
8. tell she was scared and she said, he's here, and I knew
9. exactly who she meant.

10. Q And who was the "he" that she was referring to?

11. A Randy Thomas.

12. Q And how did you know that that was the person that
13. she was referring to?

14. A Because she was scared and because she told me. She
15. affirmed that it was him.

16. Q And how did she appear when she was talking to you on
17. the phone? What was her demeanor like?

18. A She was in the bathroom. She had gone into the
19. bathroom. She was very quiet, she was very scared. She
20. said he came over and he came inside and she just wanted
21. me to stay on the phone until he left.

22. Q Was she whispering or --

23. A She was whispering. She seemed very scared. She was
24. whispering like she didn't want him to hear anything.

25. Q Ashley, what did you tell her to do?

1 A I told her to stay on the phone with me until he left
2 and then to go and lock the door.

3 Q And did she do that?

4 A I got off the phone with her and then I did not talk
5 to her until after the incident occurred, and she said
6 that she had gone to lock the door but that he was coming
7 back in.

8 Q Now, let's go back to the phone conversation. You
9 told her to stay on the phone with you?

10 A Yes.

11 Q Why did she get off the phone?

12 A Because she said she had heard him walk out and shut
13 the door.

14 Q And that's why you all got off the phone?

15 A Yes.

16 Q She was under the impression according to you that he
17 had left?

18 A Yes.

19 Q And when was your next communication from Lauren
20 Byrd?

21 A Later at work I saw that I had a missed call from
22 Lauren. I checked my voice mail and she was screaming,
23 she was crying, very upset. She said he came back and he
24 had raped her and that he had a knife and he took Zack and
25 she was on her way to the hospital.

- 1 Q This was a message on your voice mail?
- 2 A Yes.
- 3 Q In fact, you saved that message, didn't you?
- 4 A Yes.
- 5 Q Did you share that message with Lauren?
- 6 A Yes.
- 7 Q And a copy of that message was made?
- 8 A Yes.
- 9 Q Have you heard that message?
- 10 A Yes.
- 11 Q What did you do after getting this message from your
- 12 friend?
- 13 A I immediately left. I went to my manager and told
- 14 her I needed to leave and I went home and changed clothes
- 15 and came straight to Columbia.
- 16 Q Ashley, why did you have to change clothes?
- 17 A We were dressing up for Halloween at the Galley and I
- 18 didn't want to drive down the interstate in an I Dream of
- 19 Jeannie costume.
- 20 Q So you changed clothes and got some extra clothes and
- 21 where did you go?
- 22 A I immediately went to the hospital.
- 23 Q From Anderson?
- 24 A Yes.
- 25 Q To Richland Memorial Hospital?

1 A Yes.

2 Q When you got to the hospital what did you do?

3 A I waited in the lobby because I wasn't allowed back
4 there because I wasn't a family member, but then they
5 talked to Lauren and I got to go back.

6 She seemed very upset. She was very afraid.
7 She was still crying. She just said she hurt.

8 She was telling me about what happened. She
9 said that he grabbed her and had a knife and took Zack and
10 she had to chase him down and she fell. She was just very
11 afraid.

12 Q Where did you stay that night?

13 A I stayed with Lauren at her house.

14 Q And was she released from the hospital later that
15 evening?

16 A She was.

17 Q And you all went back to her home in Irmo?

18 A Yes.

19 Q How did Lauren appear when she got back to her home?

20 A As soon as we got back to her home she started
21 shaking, almost like uncontrollably shaking and she
22 started crying. She was very scared. She didn't want to
23 go back in and face anything that she had seen earlier
24 that day.

25 Q How many days did you stay with Lauren?

1 A Two or three.

2 Q Did you ever appear or did you ever see or observe at
3 any time any bruises on Lauren?

4 A Yes. Actually I guess about two days later I -- she
5 started getting bruises on both her wrists and on the
6 right thigh.

7 Q Those bruises, were they consistent with what your
8 friend Lauren told you where she had been grabbed?

9 A Yes.

10 Q Ashley, do you see Randy Thomas in the courtroom?

11 A Yes.

12 Q Can you describe for the Judge what he's wearing?

13 A A blue shirt.

14 MS. GARFIELD: Your Honor, may the record
15 reflect that Ms. Mishoe has identified the defendant.

16 THE COURT: All right.

17 MS. GARFIELD: I beg the Court's indulgence.

18 I have no further questions. Please answer
19 anything the defense has for you.

20 THE COURT: Cross-examine, Ms. VanGinhoven.

21 IN CAMERA CROSS-EXAMINATION

22 BY MS. VANGINHOVEN:

23 Q Hi, Ashley.

24 A Hey.

25 Q You stated that the first time you met Lauren was

1 July of 2004; is that correct?

2 A Yes.

3 Q Okay. And you met Randy through Lauren?

4 A Uh-huh.

5 Q So they were dating in July?

6 A Yes.

7 Q And he stayed at her house, basically lived there?

8 A Yes.

9 Q He had a key to the house?

10 A Yes.

11 Q Okay. Now, this incident that happened on
12 August 22nd was about a month later; is that right?

13 A Yes.

14 Q Okay. And actually you're the one who called the
15 police on that day, right?

16 A Yes.

17 Q Now, you weren't at the house on the day of the
18 incident?

19 A No.

20 Q In August or in October?

21 A Correct.

22 Q So you're going only on what Lauren told you?

23 A Yes.

24 Q Okay. And you, like you said, you met Randy through
25 Lauren and you considered him to be living at that house,

1 at her house, right?

2 A He stayed there sometimes, but I don't -- I guess --
3 he didn't really live there.

4 Q He was there a lot?

5 A He was there and had a key to the house.

6 Q They were boyfriend and girlfriend?

7 A Yes..

8 Q You did go to the police department with Lauren in
9 August in Clemson?

10 A Yes.

11 Q Were you with her when she was talking to the
12 detective?

13 A Yes.

14 Q She was making this statement?

15 A Yes.

16 Q And again in October you were talking to her on the
17 phone but you don't know what happened after that except
18 for what she tells you; is that right?

19 A That's correct.

20 Q Now, you came down that night. Did you stay with her
21 at her parents' house for the next two days or you stayed
22 there with her?

23 A Yes.

24 MS. VANGINHOVEN: I have no further questions.

25 THE COURT: Any redirect?

1 MS. GARFIELD: Nothing further.

2 THE COURT: You may step down.

3 Let me ask you this: Do you know when they
4 broke up?

5 THE WITNESS: They were off and on. From the
6 time I met her they were off and on.

7 THE COURT: Do you know how long they had been
8 broken up at the time of the August incident?

9 THE WITNESS: A few weeks maybe.

10 THE COURT: Any questions based on what the
11 Court has now asked the witness from the State?

12 MS. GARFIELD: No, sir.

13 THE COURT: From defense?

14 MS. VANGINHOVEN: No, sir.

15 THE COURT: All right. You may step down.

16 MS. COOPER: That's all the State has, your
17 Honor.

18 THE COURT: All right. I assume defense doesn't
19 have any evidence or testimony at this point?

20 MS. DURANT: We had subpoenaed Investigator
21 Peppers who was supposed to be here.

22 THE COURT: All right.

23 MS. COOPER: He's outside.

24 THE COURT: All right. Yes, ma'am.

25 MS. DURANT: We want to call him, your Honor.

1 THE COURT: You may call him.

2 Come down and be sworn, please.

3 JAMES PEPPERS, after being duly sworn, testified
4 as follows:

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

7 THE WITNESS: Detective James Peppers.

8 IN CAMERA DIRECT EXAMINATION

9 BY MS. DURANT:

10 Q Investigator Peppers, my name is Lanelle Durant. I'm
11 one of the attorneys representing Randy Thomas.

12 A Hello.

13 Q Would you please tell the Court where you work?

14 A Clemson City Police Department.

15 Q And how long have you been there?

16 A Four years.

17 Q And what are some of your duties, please, sir?

18 A I'm actually a detective. We investigate -- I do
19 investigate all types of crimes I guess you'd say.

20 Q And how do you get cases to investigate?

21 A They're assigned by my captain.

22 Q And how does he get them?

23 A The road officer takes the initial report and then
24 it's referred up to investigation. The captain is
25 actually the one that actually gives it to one of the

1 detectives.

2 Q Do you get copies of those reports?

3 A Yes, ma'am.

4 Q As part of your investigation?

5 A Yes, ma'am.

6 Q Investigator Peppers, may I take you back to
7 August 22nd, 2004. Where were you working at that time?

8 A Clemson City Police Department.

9 Q The same job?

10 A In investigations, yes, ma'am.

11 Q You received an investigation report concerning
12 Lauren Byrd. Could you tell the Court about that?

13 A It came to me from -- actually Officer Byron Byers is
14 the one that took the initial report and it was assigned
15 to me by my captain. It was a reference that they had
16 just got a phone call from a lady by the name of Ashley
17 Mishoe. She had called and stated that her friend had
18 been assaulted but didn't give the name or anything at the
19 time of the initial report. He referred it to his
20 sergeant, which is Sergeant Nate Herd. I think he made
21 contact with Ashley and tried to get information but
22 didn't get any more than the details that night on the
23 initial report.

24 Q So let me make sure I understand. Ashley Mishoe
25 called but did not give the name of the person that she

1 was calling about?

2 A That's correct.

3 Q So could you tell the Court what happened after that?

4 A Ashley just -- for some reason I think maybe a day or
5 so later Ashley came in in reference to another report
6 that I had that was in reference to her and not involving
7 this incident, and whenever I was talking to her I
8 recognized the name from this report and started
9 questioning her about who her friend was and that's when I
10 found out it was Lauren.

11 Q And how did you meet Lauren?

12 A She was actually -- she was at the police department
13 that day after she came in on the 23rd.

14 Q So she had come to the police department with Ashley
15 concerning an incident Ashley was -- about Ashley?

16 A Correct.

17 Q So it was your understanding that Lauren had not come
18 concerning the report about her?

19 A Correct. It was never mentioned until actually I
20 left them in the interview room and went and picked this
21 report up and brought it back.

22 Q Did you have an opportunity to talk with Lauren Byrd?

23 A Yes, ma'am, I did.

24 Q Could you tell the Court about that?

25 A She stated that her, at the time she referred to him

1 as an ex-boyfriend, Randy Thomas had came to her apartment
2 and she was inside the apartment and he used a key that he
3 had and came in and started questioning her about who was
4 she -- some guy or the name of the guy that she was seeing
5 or something, and she wouldn't tell him, so at that point
6 he carried her upstairs. I don't remember, I can't
7 remember if she said he assaulted her, but I think she
8 did.

9 She somehow got away, I think went and locked
10 herself in the bathroom. She told him what he was doing
11 was wrong. He immediately stopped and left.

12 She wasn't sure, said she didn't want to pursue
13 any criminal charges at the time, she just wanted him to
14 stay away from her. She referred to a restraining order.
15 And what we do, we normally don't issue a restraining
16 order just based on that. I did get her to sign what we
17 call a trespass notice, which would in turn be served on
18 Randy, and it's actually supposed to keep him away from
19 that address.

20 Q After talking with Ms. Byrd, what was your belief for
21 the reason Randy Thomas had a key?

22 A That he had actually been staying there from time to
23 time, and he stayed there part of the time and my
24 understanding is he was staying some other places, but
25 it's my belief that he was staying there at that

1 apartment.

2 Q A trespass notice would do what?

3 A Keep him actually away from that property at that
4 address.

5 Q Just that particular property?

6 A Yes, ma'am.

7 Q Was the trespass notice ever served on Randy Thomas?

8 A No, ma'am, it was not. I was never able to locate
9 him to serve him with it.

10 Q So if you had not served it on him he had no
11 knowledge of it as far as you knew?

12 A That's correct.

13 Q Did you -- what did you tell -- you testified that
14 she did not want to file criminal charges?

15 A That's correct.

16 Q What else did she say to you as far as a relationship
17 with Randy?

18 A She referred to him as an ex-boyfriend.

19 Q Was there any talk at all about her prosecuting the
20 case at all?

21 A No, ma'am.

22 Q You never said anything to her about that?

23 A No, ma'am. We talked, but she clearly stated that
24 she had no intentions on pursuing any criminal charges
25 against him.

1 Q So was it your belief that that's what she wanted?

2 A That's correct. She said she just wanted mainly for
3 him just to stay away from her.

4 Q She just wanted him to stay away from her?

5 A That's correct.

6 MS. DURANT: I beg the Court's indulgence, your
7 Honor.

8 BY MS. DURANT:

9 Q Investigator Peppers, after talking with Ms. Byrd, at
10 any point did you try to tell her not to prosecute?

11 A No, ma'am.

12 Q You wouldn't do that?

13 THE COURT: I didn't hear what you said.

14 MS. DURANT: I was asking him if at any point
15 did he tell her not to prosecute the case.

16 THE COURT: All right.

17 THE WITNESS: No, ma'am, I did not.

18 MS. DURANT: No further questions, your Honor.
19 Please answer any questions the State may have.

20 THE COURT: All right. Cross-examine.

21 MS. GARFIELD: Thank you, your Honor.

22 IN CAMERA CROSS-EXAMINATION

23

24 BY MS. GARFIELD:

25 Q You're actually Detective Peppers, correct?

- 1 A That's correct.
- 2 Q And where are you employed again?
- 3 A Clemson City Police Department.
- 4 Q And you said you've been there for four years?
- 5 A That's correct.
- 6 Q Where were you employed before that?
- 7 A South Carolina Highway Patrol.
- 8 Q How many years were you with the Highway Patrol?
- 9 A Sixteen.
- 10 Q And I assume that you've been to the academy?
- 11 A That's correct.
- 12 Q And what kind of training have you received at the
- 13 academy?
- 14 A Just as far as traffic and investigation.
- 15 Q Did you go there when you were with the Highway
- 16 Patrol?
- 17 A I did.
- 18 Q Have you been there also with the City of Clemson?
- 19 A I have.
- 20 Q And did you ever have any particular sex assault
- 21 training at the academy?
- 22 A No, I have not.
- 23 Q Have you ever attended any sort of state-wide
- 24 conference on sex assaults?
- 25 A I have not.

1 Q Have you ever attended any national conferences on
2 sex assaults?

3 A No.

4 Q Have you received any sexual assault training in your
5 career in law enforcement?

6 A No.

7 Q You said that you are a detective so you get reports
8 from the road deputies, I guess, calls that are made to
9 the city of Clemson; is that correct?

10 A That's correct.

11 Q So you would have gotten this call the next day
12 regarding Lauren Byrd?

13 A I don't remember what day of the week the
14 22nd would have been on. If it was during the week it
15 would have been the next day. If it's on like a Friday it
16 would have been Monday.

17 Q Okay. Do you have the incident report of this case
18 in front of you?

19 A I do.

20 Q And who is the complainant in this case?

21 A The complainant in this case is Ashley.

22 Q And Ashley what? What's her last name?

23 A Mishoe.

24 Q So not just Ashley called in a report, Ashley Mishoe
25 called in a report?

1 A That's correct.

2 Q And did she give the victim's name?

3 A To my knowledge when she talked to Officer Byers she
4 did not give the victim's name. Sergeant Herd also
5 attempted to get the name from her.

6 Q Okay. Do you see where it says victim's name on that
7 report?

8 A I do.

9 Q And can you please report to the Court what it says?

10 A I can tell you that it says Lauren Byrd, but what
11 happens is once I identify my victim, once I get the case,
12 I'll go back and put it in as the victim's name and that's
13 why it's in there.

14 Q Do you see the date at the bottom of this incident
15 report?

16 A I do.

17 Q And can you please report what that date was?

18 A 8-22.

19 Q And that would be the date of the incident that we're
20 talking about today; is that correct?

21 A That's correct.

22 THE COURT: What was that date on there?

23 MS. GARFIELD: August 22nd.

24 THE WITNESS: August 22nd.

25 THE COURT: I thought you said the 26th. I'm

1 sorry. 8-22-04; is that right?

2 THE WITNESS: That's correct.

3 THE COURT: All right. Go ahead.

4 MS. GARFIELD: Thank you, your Honor.

5 BY MS. GARFIELD:

6 Q So you're telling the judge that you went back to a
7 report that's dated August 22nd and added information?

8 A We will always go back and add -- if we don't have a
9 victim or if we don't have a suspect, once you learn the
10 suspect, we always go back and add them in --

11 Q Isn't it --

12 A -- in this report.

13 Q I'm sorry. I didn't mean to cut you off.

14 Isn't it proper procedure that you would just
15 put "victim unknown"?

16 A If the -- the initial officer would put "victims
17 unknown," but once that me as an investigator identified
18 the victim, I would go back and put them in as the victim
19 on the report.

20 Q Isn't it proper procedure to do a supplemental report
21 with the victim's information?

22 A Technically we would only put in an original incident
23 report.

24 Q Okay. So you're telling the Court, when was the
25 first time that you knew Lauren Byrd was the victim in

1 this case?

2 A The 23rd.

3 Q And how did you come to know that it was Lauren Byrd?

4 A Whenever they came by police department.

5 Q And about what time of day was that?

6 A I can't tell you that for sure.

7 Q Was it morning?

8 A I can't tell you for sure. I'm not going to guess at
9 a time.

10 Q Okay. Do you see a supplemental report in this case?

11 A I do.

12 Q And who was that provided by?

13 A That was me.

14 Q And what date is that?

15 A That is on the 23rd.

16 Q And when you just report -- I'm sorry. Hold on one
17 second.

18 So you didn't make a notation of what time she
19 came in to talk to you?

20 A Actually here in my incident report it says 23:30.

21 Q Okay. But what is the date of that?

22 A That was on the 22nd is when I called her.

23 Q Why don't you just read that sentence.

24 A It says, On August the 23rd, I, Detective Peppers,
25 spoke to Lauren Byrd at the police department about her

1 assault. I called her on August 22nd at approximately
2 23:30 about the assault.

3 Q So you --

4 MS. DURANT: Objection, your Honor. I don't
5 believe we have a copy of that.

6 MS. GARFIELD: Okay.

7 MS. DURANT: The supplemental report.

8 THE WITNESS: And Ashley, who is --

9 THE COURT: Wait just a minute.

10 MS. GARFIELD: Beg the Court's indulgence so I
11 can go get a copy of this.

12 THE COURT: All right. Let's go ahead.

13 BY MS. GARFIELD:

14 Q Did you -- so you first became aware of this incident
15 on August, according to your report, on August 22nd?

16 A It says that Ashley who I called was not Lauren.
17 When I made the phone call it was on the 22nd and I
18 actually talked to Ashley.

19 Q You spoke with Ashley?

20 A That's correct.

21 Q And that's all you have information was a girl named
22 Ashley?

23 A Yes, ma'am.

24 Q And did you have a name of a victim at that time?

25 A Only a first name.

1 Q And when did you actually come in contact with Lauren
2 Byrd?

3 A The 23rd.

4 Q And that's when she came to the police department; is
5 that correct?

6 A That's correct.

7 Q And she gave a statement to you?

8 A She just told me about what happened. She never did
9 a written statement.

10 Q Are you sure she didn't do a written statement?

11 A I do not have a written copy of a written statement.

12 Q Would it shock you that she has a copy of a written
13 statement?

14 A No, but it wasn't in the case file in records.

15 Q And after she had reported the sexual assault to you,
16 at what time did the investigation department, City of
17 Clemson Police Department go to her house to collect any
18 evidence?

19 A At no time because actually when I spoke with her she
20 was saying that she didn't want to pursue any criminal
21 charges.

22 Q So this was the case of Lauren Byrd versus Randy
23 Thomas?

24 A When she said she didn't want to pursue any criminal
25 charges, that's -- you know, that's pretty much it.

1 Q Isn't the proper procedure for the State of South
2 Carolina versus Randy Thomas?

3 A Proper procedure. By her she said she didn't want to
4 pursue any charges.

5 Q So if the victim doesn't want to pursue charges the
6 City of Clemson Police Department ends all investigation
7 at that point?

8 A Yes, ma'am.

9 Q That's your protocol?

10 A Yes, ma'am.

11 Q So you do not instruct your victim in this case to go
12 to the hospital to get any rape protocol?

13 A If she says she's not going to pursue any criminal
14 charges, chances are that's where it stops.

15 Q That's just where it ends.

16 Did you ever -- and no one ever went to her
17 home?

18 A No, ma'am.

19 Q Did anyone ever attempt to take any photographs of
20 Ms. Byrd?

21 A No, ma'am.

22 Q Did anyone ever attempt to interview Ashley Mishoe?

23 A I did. She was in -- Ashley was in there actually
24 when I talked to them.

25 Q So you did talk with her?

1 A I did.

2 Q Had she not been with Lauren Byrd would you have gone
3 and talked to her?

4 A Would I talk -- if I knew a victim's name.

5 Q If you had known that Ashley Mishoe -- had Ashley
6 Mishoe not been with Lauren Byrd, would you have gone to
7 talk with Ashley Mishoe?

8 A Talk to Ashley? Yes.

9 Q Oh, you would?

10 A Yes.

11 Q Did you go and talk with Lauren's friend Cat that she
12 called right after this incident?

13 A That's the first time I've heard that name.

14 Q Did you ever go attempt to interview her friend Mike
15 about this incident?

16 A First time I've heard that name.

17 Q Did you ever put any kind of BOLO out for Randy
18 Thomas?

19 A A BOLO for?

20 Q Randy Thomas.

21 A For what region?

22 Q Okay. Let's talk about this trespass notice. Did
23 she sign for a trespass notice for anyone?

24 A She did.

25 Q Do you have a copy of that with you?

1 A I do.

2 Q May I please have it?

3 A (Witness handing document to Ms. Garfield.)

4 MS. GARFIELD: May I please have this marked for
5 identification.

6 (WHEREUPON, State's Exhibit No. 59 was marked
7 for identification only.)

8 THE COURT: State's 59 marked for
9 identification.

10 MS. GARFIELD: Your Honor, we hand State's
11 Exhibit No. 59 to defense.

12 BY MS. GARFIELD:

13 Q Detective, I'm going to hand you what's been marked
14 as State's Exhibit No. 59 which you handed me. What
15 exactly is this document of?

16 A A trespass notice.

17 Q And what exactly does that mean?

18 A That means that if Randy is initially found and he's
19 served he would actually sign it himself saying that he's
20 received a copy of it and he would no longer be allowed to
21 go to the address of 250 Elm Street, Apartment 726.

22 Q Who filled out this request?

23 A I actually filled it out and Lauren actually signed
24 it.

25 Q Was Lauren Byrd with you?

- 1 A Who?
- 2 Q Was Lauren Byrd with you when you filled it out?
- 3 A Yes.
- 4 Q And you witnessed her sign it?
- 5 A I did.
- 6 Q And she's the one that requested this?
- 7 A That's correct.
- 8 Q What is the address that Randy Thomas gives you -- I
- 9 mean that Lauren Byrd gives you for Randy Thomas?
- 10 A He was -- 250 Elm Street, Apartment 7.
- 11 Q And that was your understanding of the address that
- 12 he had at the time?
- 13 A That's correct.
- 14 Q Were you aware that he was not living there all the
- 15 time?
- 16 A I was aware that that was the address where he was
- 17 most recently staying.
- 18 Q You're aware, though, that he was sort of a
- 19 transient, he stayed a lot of places?
- 20 A Sure. Exactly. That's one reason why there wasn't
- 21 any service on him.
- 22 Q What all did you do in an attempt to find Randy
- 23 Thomas?
- 24 A I basically just tried to locate him wherever I
- 25 could. She told me that he had no real fixed address.

1 Everybody I talked to or she said that, you know, he just
2 stayed wherever.

3 Q Did you obtain a picture of him?

4 A No, I did not.

5 Q Did you try to see if he had any pending charges
6 anywhere else in the state?

7 A No.

8 Q Did you try to see if he had a rap sheet?

9 A No, we typically don't for trespass notices.

10 Q You have had a girl come to you who is a student at
11 Clemson University who is alleging a sexual assault
12 occurred and you make no effort to find Randy Thomas to
13 serve a trespass notice on him; is that what you're
14 saying?

15 A I make an effort, but if we have no fixed address
16 other than the one where he was at last, you can't serve
17 something that you can't locate the person.

18 Q You were actually aware about this rape, I think we
19 already cleared this, on August 22, 2004, correct?

20 A Right.

21 Q And isn't it true that on August 22nd you knew that
22 you had a meeting with Lauren Byrd at noon the next day?

23 A At noon? Not for sure. There was nothing definite
24 about what time she was coming in.

25 Q Will you please refer to the original incident

1 report.

2 A Okay.

3 Q And please read the next to last sentence.

4 A It says that Sergeant Herd contact Mishoe back. At
5 the time she advised her and Lauren would come in
6 around -- on 8-23 at around 12 p.m. to speak to an
7 officer.

8 Q So there had been a time, there had been a meeting
9 set up with Lauren Byrd?

10 A There was a time given. That's not necessarily that
11 she's going to show up at 12, and I can't tell you that
12 she did show up at 12.

13 Q You can't tell us if she did show up?

14 A I can't tell you that she showed up at exactly
15 12 o'clock.

16 Q Because you didn't make any note as to when she
17 showed up, did you?

18 A Ma'am?

19 Q You didn't make any notes as to when she showed up,
20 did you?

21 A No, I did not. I don't have it with me, but I don't
22 know what time she showed up.

23 Q Do you have any other notes besides the two
24 supplement reports?

25 A No, just the supplemental.

1 THE COURT: Anything further from the State?

2 MS. COOPER: None from the State, your Honor.

3 THE COURT: I'll be glad to hear your argument.

4 MS. COOPER: Thank you, your Honor.

5 May I approach, your Honor?

6 THE COURT: All right.

7 MS. COOPER: Your Honor, I've handed up a
8 diagram I brought up here for the Court's convenience.

9 THE COURT: Is this the same thing?

10 MS. COOPER: Same exact thing, your Honor.

11 Your Honor, the State seeks to introduce the
12 prior incident at Clemson University in Clemson, South
13 Carolina, under State versus Lyle under the common scheme
14 or plan exception to the Rules of Evidence.

15 Your Honor, just to refresh the memory of the
16 Court and everyone in the courtroom, on August 22nd, 2004,
17 it was approximately 8 a.m. or in the morning before noon
18 at the victim's apartment where she resided alone with her
19 two-year-old son. Her son was not there at that time.

20 On this occasion, your Honor, the defendant and
21 the victim had been broken up for several weeks. He
22 entered without consent. He used a key to get into the
23 apartment. That key, she had requested that key from him
24 on several occasions prior to that and he did not return
25 it.

1 MS. GARFIELD: I have no further questions.

2 THE COURT: Any redirect?

3 MS. DURANT: Yes, your Honor.

4 IN CAMERA REDIRECT EXAMINATION

5 BY MS. DURANT:

6 Q Detective Peppers, the information that you got was
7 from Lauren Byrd?

8 A That's correct.

9 Q You never talked with Randy Thomas?

10 A No, ma'am.

11 Q So the address on the trespass notice is what Lauren
12 Byrd gave you for Randy Thomas?

13 A That's correct.

14 Q And no criminal charges were ever filed?

15 A That's correct.

16 Q And I just want to verify that you said it was
17 routine procedure apparently for your department to go
18 back and add a victim's name?

19 A That's correct.

20 Q That was just done routinely?

21 A Yes, ma'am.

22 MS. DURANT: No further questions, your Honor.

23 THE COURT: All right. You may step down.

24 Any further questions?

25 MS. DURANT: No, your Honor.

1 He entered without consent. She was at the
2 apartment alone.

3 The conduct that began at the apartment in
4 Clemson then is that they argued. He started asking her
5 direct questions about who she was with and who she's
6 seeing.

7 He then acted in a threatening manner; if she
8 didn't tell him who she was seeing he would kill her.

9 At that point he held her arms over her head.
10 He grabbed the victim's right breast or gripped the
11 victim's breast and then he grabbed her arms.

12 At that point he carried her like a child up the
13 stairs to her bedroom where he then threw her onto the
14 bed.

15 At that point he takes his pants off only. He
16 holds her hands over her head while he begins to force
17 himself upon her. She screams for him to get off of her.
18 He then forces his penis inside of her vagina.

19 While he's raping her, your Honor, the victim
20 tells him, What you're doing to me is rape, and finally it
21 clicks in his mind that he is raping her and he stops
22 right away. She doesn't believe he ejaculated. He was
23 not done because he stopped after she made him realize
24 that he was raping her.

25 The demeanor of the defendant as soon as the

1 assault is over is as follows: He starts crying, he
2 starts apologizing, threatening to kill himself, that he
3 didn't deserve to live, that he wouldn't want anybody to
4 know what he had just done to the victim.

5 During that time, your Honor, there was an
6 incident in September of 2004 where the victim was home
7 with her father and the defendant drove by. Apparently he
8 drove by on several occasions. But on October 30th,
9 2004, the defendant knew she was home alone. He saw her
10 car outside of the house. He claims to be in the
11 neighborhood looking for a friend who apparently lives on
12 a totally different street.

13 Your Honor, he arrives at her house
14 approximately around noon or 1 o'clock in the afternoon.
15 This is the residence of her parents' house which is
16 located here in Richland County at 300 West Ashford Way.
17 Again the same victim is Lauren Byrd.

18 He again enters the residence without consent.
19 He did not have access to this residence, the door was
20 unlocked, but he does gain entry and just walks in without
21 consent. Again, the victim is alone without any other
22 adult. She is with her two-year-old or actually her
23 three-year-old child at that time.

24 The purpose of him coming into that residence on
25 October 30th of 2004 is to discuss the Clemson matter.

1 He's there to apologize for what happened at Clemson, and
2 you heard the testimony of Lauren Byrd that she was
3 cutting him off, telling him it doesn't matter to me, just
4 leave, leave, and that he got offended and angry about the
5 interruptions.

6 Apparently at one point he then tries to talk
7 sense into her and kneels in front of her as she's seated
8 on the sofa, and she jerks her knees away when he touches
9 her knees and that angers him again.

10 He then grabbed her by the arms over the head
11 and he then also grabbed her right breast.

12 When she resisted that and backed off from that,
13 he then also grabs her and carries her up the stairs like
14 a child to her parents' bedroom. He put her first on the
15 floor where he was kneeling down to her trying to calm her
16 down, but then he puts her on the bed. He takes her shirt
17 off and then panties and her pants. At this point the
18 defendant only takes his pants off, just like he did in
19 Clemson.

20 He told her basically that her son would be okay
21 if she complied, using again her son as a threat. He said
22 that he won't kill her if she does what he says, and again
23 he's threatening her, threatening to kill her.

24 He then forces her to perform oral sex and he
25 ejaculates in her mouth, where she then spits it out onto

1 the bed comforter and this angers him.

2 He then holds her hands over her head and throws
3 her on the bed on her back and forces his penis inside of
4 her vagina.

5 While he's raping her, your Honor, she gets him
6 to stop because she promises not to tell if he stops, and
7 he tells her, Of course, you wouldn't tell anyone, you've
8 got a good heart. And at that point he said it was too
9 late, that he had already done what he had done, but then
10 he stops.

11 Up on the right of that column, your Honor, his
12 demeanor is identical to the previous incident. He
13 immediately starts crying and he immediately starts
14 apologizing and threatens suicide, just as he had
15 threatened suicide at the Clemson incident just a few
16 months prior, two and a half months prior, two months and
17 one week prior.

18 Your Honor, I provided you with some case law
19 that I would like to discuss briefly.

20 I've handed up to the Court and I've shared with
21 defense State versus Aaron Mathis. And in criminal sexual
22 conduct cases, your Honor, prior bad acts, whether they
23 are charged or uncharged, are generally admitted because
24 typically we have the same victim under the same
25 circumstances and the rape is done in the same manner or

1 the same modus operandi. And in State versus Mathis, your
2 Honor, that court allowed the State to introduce evidence
3 of three prior incidents involving the same victim over a
4 nine-month period.

5 Your Honor, we would argue that this is even
6 closer in time and more relevant to show the state of mind
7 of the defendant as well as the fact of his intent as well
8 as the common scheme or plan because this is a continued
9 illicit sexual act with the same victim.

10 The Court in State versus Mathis, which is by
11 the way cited at 597 SE2nd 872, holds that there has to be
12 a logical relevance between the two incidents; that there
13 has to be a close degree of similarity or connection
14 between the prior bad act and the crime for which the
15 defendant is on trial.

16 Here, your Honor, the whole purpose of him
17 coming to Lauren's parents' house in October is to
18 apologize for the Clemson incident, telling her that the
19 Clemson incident was his way of showing her that he loved
20 her.

21 Without that information the jury would hear the
22 facts of this case in a vacuum. They wouldn't understand
23 why he was there and why she was scared of him.

24 Also, your Honor, the two crimes need to be
25 similar or some connection to the crime is necessary. And

1 again, your Honor, without explaining what had happened to
2 Lauren just a month or two months and a week prior to this
3 incident and explaining what he's doing at her parents'
4 house unannounced and they haven't spoken except for that
5 one September incident, without that information the
6 jurors would not understand what it was he was there to do
7 and why she was scared of him and why she flinched away
8 from him when he touched her.

9 Your Honor, the Court also held that proof of
10 one tends to establish the other. And in this incident,
11 your Honor, the Clemson incident is so interrelated with
12 what happened to her at her parents' house in October, the
13 facts are so similar, that he takes the same item of
14 clothing off of himself, takes her up the stairs to a
15 bedroom rather than just raping her on the sofa, takes her
16 clothes off. She does not take her clothes off, he takes
17 her clothes off, carries her like a child up the stairs to
18 the bedroom and his demeanor in which she talks him out of
19 raping her while it's going on is exactly the same. They
20 mirror one another.

21 The next case of the probative value of the
22 Clemson incident as pertains to the October 2004 incident
23 for which he stands for trial, the probative value helps
24 explain to the jury why the defendant returns to see the
25 victim in order to discuss the Clemson incident, and the

1 probative value clearly outweighs any prejudicial effect
2 so that the jurors would not hear the facts in a vacuum.

3 Your Honor, the next case that I've handed up to
4 the Court is State versus McClellan, and in that case the
5 Court allowed -- the defendant sexually assaulted his
6 youngest daughter. And the Court in that case allowed the
7 daughter, the victim, her two sisters were permitted to
8 testify about prior sexual conduct by the same defendant.
9 Again, it's a different victim.

10 Well, in this case, your Honor, it's the same
11 victim discussing the case, discussing what happened to
12 her, and her testimony is corroborated by Ashley Mishoe,
13 who at the Clemson incident hears about it the very same
14 day and persuaded her to tell the police, and in the Irmo,
15 South Carolina incident in October is actually on the
16 phone for portions of this incident and testified that the
17 victim was clearly terrified and whispering so that she
18 wouldn't be heard by the defendant.

19 Also, your Honor, the victim was allowed to
20 testify in State versus McClellan about prior incidents of
21 sexual conduct between her and the defendant. The
22 experiences parallel each other, and in this situation it
23 also they parallel one another.

24 State versus Weaverling, and I failed to mention
25 the cite for State versus McClellan. That would be 323

1 SE2nd 772.

2 State versus Weaverling, in that case, your
3 Honor, the defendant molests his nephew by performing oral
4 sex on him over 100 times. The Court found that there was
5 a common scheme or plan when, and this is their definition
6 of common scheme or plan, your Honor, two or more crimes
7 so related to each other that proof of one tends to
8 establish the other.

9 And I just wanted to be clear about that that
10 the courts do not require a repeated amount hundreds of
11 times of sexual illicit conduct between the parties. Two
12 incidences are enough in order to define or establish
13 common scheme or plan.

14 Also the court in State versus Weaverling found
15 that there is a close similarity, close degree of
16 similarity or connection between the incidents. And in
17 this case it's clearly connected. The facts are clearly
18 intertwined to explain the defendant's motive to be there
19 and the victim's reasoning for fearing him.

20 The fact that the prior incident at Clemson is
21 uncharged is also not a factor, your Honor.

22 THE COURT: Well, it's a factor in that it
23 raises the level of clear and convincing evidence.

24 MS. COOPER: Yes, sir, your Honor. And other
25 courts have found that whether it's charged or uncharged,

1 the standard is clear and convincing evidence.

2 And you heard testimony in this case that the
3 victim did report to the officer the very next day what
4 had happened to her and what he testified to exactly
5 corroborates what she testified to, your Honor.

6 The fact that he was derelict in his duties to
7 basically let her decide whether or not the State of South
8 Carolina is going to prosecute a rapist is not her fault.

9 But in that, I believe, she is corroborated by
10 her friend, Ashley Mishoe, as well in that instance, and I
11 believe that the clear and convincing level has been
12 satisfied or that standard has been met.

13 Lastly, your Honor, I did submit State versus
14 Whitner. That is also cited as State versus Aaron Mathis.
15 I just wanted to reiterate that in State versus Mathis
16 they find that in criminal sexual conduct cases the prior
17 act is usually or generally admitted due to the intimacy
18 between the victim and the defendant, if the victim is
19 alone or if the same victim is involved, and if the same
20 circumstances are involved, and that the sexual act is
21 carried out in the same manner.

22 And based on the similarities of both of the
23 sexual act, your Honor, and their close connection to one
24 another, the State would respectfully request that the
25 Court allow us to go into the incident on August 22nd of

1 2004.

2 And if I could just beg the Court's indulgence.

3 Your Honor, that is all the State has.

4 THE COURT: All right. Ms. Durant.

5 MS. DURANT: Thank you, your Honor.

6 Your Honor, first we will address the standard
7 of clear and convincing evidence.

8 We think it does not reach that level of that
9 standard, your Honor.

10 First, all you have is the word of Ms. Byrd and
11 a friend she told. The friend was not there. There were
12 no criminal charges filed. There's testimony from the
13 officer that she said she did not want to file criminal
14 charges.

15 She did not take out a restraining order. She
16 signed a trespass notice which only kept him away from
17 that apartment, and she provided the officer Randy's
18 address for it as being the same as hers and indicating
19 that they had lived together.

20 No arrests were made, there's no hospital
21 reports of injuries or sexual assaults. There's just no
22 corroborating evidence that it happened, your Honor. All
23 we have is the word of the victim.

24 So we would argue that it does not meet that
25 standard, your Honor.

1 The second issue we would like to address is the
2 similarity.

3 First of all, we believe that common scheme or
4 plan requires that there be one sort of ongoing purpose to
5 meet a common purpose. I would like to cite, and I
6 apologize to the Court that I did not get copies but I can
7 get those, your Honor, in People versus Mollonoll, which I
8 think is one of the two main cases that Lyle is based on,
9 says, The court held some connection between the crimes
10 must be shown to have existed in fact and in the mind of
11 the actor uniting them from the accomplishment of a common
12 purpose. That's cited at 306 61NE 299.

13 In this case each one of these tend to stand
14 alone, your Honor. They don't need each other to prove
15 one another.

16 And I would also like to cite State versus
17 Touffour, T-O-U-F-F-O-U-R -- I'm sorry, T-U-F-F-O-U-R.
18 It's 613 SC2nd 814, South Carolina Court of Appeals, a
19 2005 case, your Honor. In that case it's a drug case but
20 it's talking about purchasing drugs from the defendant on
21 several prior occasions and similar circumstances.

22 In that case, the Court said, The State here was
23 not trying to prove a common scheme but to convince the
24 jury that because Tuffour had sold crack cocaine in his
25 past, he was selling crack cocaine on this occasion. This

1 is precisely the type of evidence that Lyle prohibits.

2 In that case they cite State v Campbell where
3 the State was not trying to develop their drug case -- the
4 State was not trying to prove a common scheme but to
5 convince the jury that because Campbell had sold crack in
6 his past, he was selling crack cocaine on this occasion.

7 Your Honor, drawing to further differences in
8 this case: First, it happened in a different town; it
9 happened in an apartment where they had lived together; he
10 had a key to the apartment; she gave that address to the
11 officers as the address for Randy. The child was not
12 there.

13 She said that it was vaginal intercourse; in
14 Columbia it happened at her parents' home and oral
15 intercourse was involved.

16 She also said in the Clemson incident he did not
17 ejaculate. In Columbia there is ejaculation.

18 On the Clemson incident she did not go to the
19 hospital. She did go to the hospital in Columbia.

20 And I also would like to add, your Honor, to say
21 that he went to Columbia. The connection is he went to
22 Columbia to apologize for the Clemson incident. Well,
23 again, that's only the word of the victim. You can't get
24 inside the mind of Randy Thomas, and I don't know that she
25 could. It's only her word.

1 And I'd also like to indicate that she testified
2 that she did talk with him again between the incident in
3 Clemson and the incident in Columbia. So I think that
4 breaks any purpose that he was there just to apologize for
5 what had happened in Clemson.

6 And there's nothing so similar between these
7 two, your Honor. I mean what happened in the Clemson
8 incident could happen in any rape case. It's not a
9 particular method of operation; I mean, anyone who is
10 restrained for the purpose of sexual intercourse.

11 And I would also like to add, your Honor, we
12 definitely feel that it is certainly more prejudicial to
13 Mr. Thomas than probative because the Columbia incident
14 has far more emotional details than the Clemson incident.

15 And I beg the Court's indulgence, your Honor.

16 THE COURT: Sure.

17 MS. DURANT: Your Honor, we would argue that we
18 feel the State is trying to introduce the Clemson evidence
19 only for propensity and that is exactly what Lyle
20 prohibits, your Honor.

21 THE COURT: All right. Anything in response?

22 MS. COOPER: Yes, your Honor.

23 State versus Mathis, the three prior incidents
24 that the Court allowed the victim to testify to in that
25 case where her uncle had molested her and assaulted her.

1 and got her pregnant, she was permitted to go to the three
2 prior incidents that were never charges filed in this
3 case, and I think one or two of those prior incidents she
4 had filed a police report with the local police
5 department. It happened in different towns throughout the
6 state. However, charges were not filed or pursued in
7 those other counties. The only county that had charges
8 pending against Mr. Mathis was Richland County.

9 And so for that reason, your Honor, the fact
10 that a charge was not brought forward in the Clemson
11 incident doesn't make it not meet the standard of clear
12 and convincing evidence.

13 Clear and convincing evidence, your Honor, I
14 think it has been satisfied here because you heard from
15 the victim's testimony and then you heard corroborating
16 witnesses to that fact, including the officer, Detective
17 Peppers, that she did report the next day what happened to
18 her. You also heard about her demeanor by the
19 corroborating witness, Ashley Mishoe.

20 As far as the rape and the fact that they had
21 spoken in the presence of her father again shows that he
22 doesn't do things to her when other adults are around, but
23 this break that Ms. Durant was alluding to, in State
24 versus Weaverling, there are cases or occasions where the
25 victim was around the defendant in the interim between

1 those 100 times that oral sex was performed on them by the
2 defendant and the judge in that case or the Court allowed
3 him to still to go into the prior incidents, prior acts
4 between the defendant and himself despite the fact that
5 there had been times when nothing happened between the two
6 of them, where the defendant didn't do anything to him.
7 So the fact that they had an opportunity to speak at the
8 victim's residence with her father present I don't think
9 would do away for the standard that, well, basically
10 doesn't have any meaning to not allowing it in.

11 Also, the case that she cited, Tuffour, that's
12 involving a crack case, and I do believe that the courts
13 held that when you're trying to introduce prior bad acts
14 in drug cases with prior drug convictions, that is
15 prejudicial, but in this case, State versus Mathis, the
16 Court there found that the victim met the clear and
17 convincing standard by testifying alone without
18 corroborating witnesses whatsoever. They felt it was
19 enough to meet that standard and that the probative value
20 clearly outweighed the prejudicial effects.

21 Thank you, your Honor.

22 THE COURT: I'm not going to rule this
23 afternoon. I need to take a look at the cases.

24 I do know this: That Lyle evidence is one of
25 those little landmines or red flags that go up every time

1 the State tries to put it in and it has led to probably
2 more reversals than anything else. At the same time if
3 the evidence meets the criteria that's set forth in all of
4 those cases it is proper evidence, and that will be my
5 starting point. It's just that red flags are waved any
6 time Lyle comes up and I'll have to analyze these cases
7 and see if the State meets it.

8 There's no question but that it's prejudicial.
9 I mean, evidence against any defendant is prejudicial in
10 that it's a matter of whether its probative value
11 outweighs whether it's unfairly prejudicial. I will be
12 making that analysis and rule first thing in the morning.

13 MS. COOPER: And, your Honor, can I make the
14 diagram that I've made for the Court as part of the court
15 record?

16 THE COURT: I've got a copy of it here. I don't
17 know -- we'll make it -- you've got a copy just like I've
18 got?

19 MS. COOPER: Yes, sir.

20 THE COURT: We'll mark that as a Court's exhibit
21 so it will be made part of the record.

22 MS. COOPER: Thank you, sir.

23 THE COURT: Anything else?

24 MS. COOPER: Nothing further from the State.

25 MS. DURANT: Nothing further, your Honor.

1 THE COURT: I've got recommitments at 9 o'clock
2 in the morning, so we'll try to start at 10.

3 MS. COOPER: Okay. Thank you, your Honor.

4 MS. DURANT: Thank you.

5 (The proceedings were concluded for the day to
6 be reconvened on February 7, 2006.)

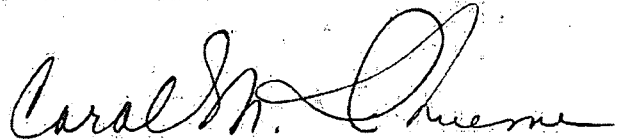
7 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

8 VOLUME 1 OF 5
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1 CERTIFICATE OF REPORTER
2
34 STATE OF SOUTH CAROLINA)
5)
6)7 COUNTY OF RICHLAND)
8)
9)

10 I, CAROL M. THUEME, RPR, Official Court Reporter for
11 the 11th Judicial Circuit of the State of South Carolina,
12 do hereby certify that the foregoing is a true, accurate
13 and complete Transcript of Record of the proceedings had
14 and evidence introduced in the trial of the captioned
15 case, relative to appeal, in the Court of General Sessions
16 for Richland County, South Carolina, on the 6th day of
17 February, 2006.

18 I do further certify that I am neither of kin,
19 counsel nor interest to any party hereto.
20

21 August 1, 2006
2223 
2425 CAROL M. THUEME, RPR, Court Reporter
My Commission Expires: 06-04-2007

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

COURT OF GENERAL SESSIONS

2005-GS-40-10296

2005-GS-40-10297

2005-GS-40-10298

2005-GS-40-10299

STATE OF SOUTH CAROLINA)

vs.)

TRANSCRIPT OF RECORD

VOLUME 2

RANDY THOMAS)

DEFENDANT)

February 7, 2006

Columbia, South Carolina

B E F O R E:

THE HONORABLE JAMES W. JOHNSON, JR., JUDGE;
and a jury.

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

VANESSA O. COOPER, ASSISTANT SOLICITOR
DOLLY JUSTICE GARFIELD
Attorneys for the State

LANELLE DURANT, ASSISTANT PUBLIC DEFENDER
JEANETTE VANGINHOVEN, ASSISTANT PUBLIC DEFENDER
Attorneys for the Defendant

CAROL M. THUEME, RPR
Official Court Reporter

INDEX OF WITNESSES

OPENING STATEMENTS:	PAGE
MS. GARFIELD	173
MS. VANGINHOVEN	180
WITNESSES:	
LAUREN BYRD	
Direct By Ms. Cooper	183
Cross By Ms. Durant	285
Redirect By Ms. Cooper	301
Recross By Ms. Durant	308
ASHLEY MISHOE	
Direct By Ms. Garfield	313
Cross By Ms. Vanginoven	327
Redirect By Ms. Garfield	330
Recross By Ms. Vanginoven	331
SENA LONG	
Direct By Ms. Cooper	332
Cross By Ms. Vanginoven	341
Redirect By Ms. Cooper	343
RODNEY GONZALES	
Direct By Ms. Cooper	344
Cross By Ms. Vanginoven	357
Redirect By Ms. Cooper	362
Recross By Ms. Vanginoven	362

STATE EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
2	Aerial photo		256
4-45	Photographs		210
46	Photograph		277
47	Photograph		277
48	Photograph		
49	Photograph		277
50-58	Photographs		277
59	Trespass notice		203
60	Audiotape	162	282
61	Statement	205	
62, 63, 64	(62) Shirt (63) Pants (64) Panties	218	241
65	Photo	222	254
66	Rape protocol kit	222	
67	Comforter	235	236
68	Audiotape	340	340

COURT EXHIBITS

<u>NO</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
1	Chart	159	

1 (WHEREUPON, The Court's Exhibit No. 1 was marked
2 for purposes of the record.)

3 THE COURT: All right. I have taken the
4 opportunity last night and again this morning to go over
5 the cases that were cited concerning the Lyle issue and
6 the arguments that were made by Counsel. I have
7 concluded, applying the law as I understand it, that there
8 is sufficient similarity and connection between the
9 alleged Clemson event and the incident for which the
10 defendant is being tried at this time to fall within the
11 Lyle exception, both as common scheme or plan as well as
12 motive and/or intent. For that reason that evidence will
13 be admissible.

14 The chart that the State made pointing out what
15 the similarities are is in evidence as a Court exhibit and
16 that is a part of my ruling, the similarities that are
17 indicated on the chart as testified to by the witnesses
18 who testified yesterday, so that will be permitted as it
19 was presented to the Court yesterday.

20 Are there any other matters for me to take up
21 before the jury is brought back and sworn and we get
22 started? Anything from the State?

23 I know we still have the matter of settling the
24 defendant's record. I will take care of that before the
25 State rests. I will make a final ruling on that.

1 MS. COOPER: Your Honor, I have explained to the
2 defense that Ms. Lauren Byrd has no prior convictions and
3 Ms. Ashley Mishoe has an arrest pending but no
4 disposition, so that would not be permitted as an issue.

5 THE COURT: Anything else from defense/

6 MS. DURANT: Yes, your Honor, just a couple of
7 things, please.

8 I don't think I raised yesterday the objection
9 to -- we objected to the 911 tape as being inflammatory.
10 There's also a phone call that she made to Ashley Mishoe
11 that we would raise an objection to and ask that it be
12 suppressed for the same reason, that it is inflammatory
13 for the jury and that she is here to testify. We would
14 ask that that would be suppressed as well, your Honor.

15 We also may have another witness, the father,
16 who I think is not on our witness list, Randy Thomas, Sr.
17 He's here today, but we would add him to our witness list.

18 And we also would request, your Honor, if you
19 could explain to the witnesses just what sequestration
20 means. We had some outside and we can bring them in, that
21 they're not supposed to talk to each other about their
22 testimony. If your Honor feels that way, but we're not --
23 we just want to make sure they're all clear on that.

24 THE COURT: All right. I will be glad to do
25 that in just a minute.

1 Any response from the State on any of those
2 matters?

3 MS. COOPER: Yes, sir. Beginning with the tape,
4 again, we have the witness, Ms. Lauren Byrd, present to
5 lay the foundation, proper foundation to admit the
6 cassette tape of a phone call she makes to Ashley Mishoe
7 on her way to the hospital where she reports the rape and
8 the assault and the kidnapping of herself and the child.

9 Your Honor, this is not inflammatory and
10 prejudicial. Obviously it's prejudicial, any evidence
11 against the defendant typically is, and this also is
12 admissible under excited utterance. She's still clearly
13 under stress and the excitement of the assault when she
14 makes this phone call to her friend.

15 THE COURT: Well, I don't know that you even get
16 to excited utterance, which is an exception to hearsay, if
17 they are both present to testify, one to what was said and
18 one to what was heard, and subject to cross-examination
19 it's not hearsay, so I don't believe that we even need to
20 get to that point.

21 I don't know what order you're going to call
22 your witnesses. I don't know when these conversations are
23 going to come in, but if they come in, I'm a little bit
24 hesitant to rule on the inflammatory effect of a telephone
25 conversation until I've actually heard it. It's kind of

1 hard for me to do that then.

2 MS. COOPER: Your Honor, it's very short. I can
3 play it for the Court right now.

4 THE COURT: That's fine. Let's go ahead and do
5 that so I can make that determination.

6 MS. COOPER: And, your Honor, for purposes of
7 the record --

8 THE COURT: This is a phone call from the
9 Ms. Byrd to --

10 MS. COOPER: Mishoe, Ashley Mishoe.

11 And, your Honor, for the record, it's State's
12 Exhibit No. 60 for identification purposes.

13 (WHEREUPON, State's Exhibit No. 60 was marked
14 for identification only.)

15 MS. DURANT: Your Honor, I think that this
16 happened at what, 6 o'clock? I think it's about five
17 hours after the incident occurred.

18 THE COURT: All right.

19 MS. DURANT: Your Honor, should she be in here?

20 THE COURT: I don't think there's a problem with
21 this, not if she was a party to this conversation.

22 MS. DURANT: Yes, sir.

23 THE COURT: All right.

24 MS. COOPER: This was left on her cell phone and
25 it was a recorded message. She missed the phone call and

1 this is the message she retrieves from her voice mail.

2 (Tape being played.)

3 MS. COOPER: And that's her saying that she's on
4 her way to the hospital. He came back, I'm on my way to
5 the hospital, he tried to take Zack, he had a knife, and
6 then she cuts off.

7 THE COURT: The objection to that or the motion
8 to suppress on the grounds that it would be inflammatory
9 and unduly prejudicial is denied. I don't find that that
10 presents -- if they present that recording if it's
11 properly identified from coming in.

12 Let me also state on the record that in addition
13 to the analysis I made under Lyle, that I have also
14 weighed the probative value against the prejudicial effect
15 of the Lyle testimony, and I have determined that it is
16 not unduly prejudicial and the prejudicial effect is not
17 outweighed by the probative value of that evidence. And I
18 did make that analysis under, what is it, 404, I believe?
19 It's 403.

20 MS. COOPER: 403, your Honor.

21 THE COURT: 403.

22 MS. DURANT: Your Honor, if I may, I don't think
23 you heard the 911 tape yesterday.

24 THE COURT: That is true, and I will be glad to
25 listen to it. Also again, I do not know at what point the

1 State intends to introduce that.

2 MS. COOPER: Well, we'll introduce one of the
3 911 calls after lunch with Sena Long.

4 THE COURT: That's fine. I will do that during
5 the lunch break.

6 MS. COOPER: Okay. The next phone call, there's
7 two 911 calls made by eye witnesses, your Honor. The
8 next, the second phone call, the 911 call will be -- we
9 would intend to introduce that Wednesday morning, tomorrow
10 morning through Katria Weyl, and she'll be here tomorrow.

11 THE COURT: I'll listen -- I'll listen to them
12 at the same time.

13 MS. COOPER: Thank you, your Honor.

14 THE COURT: Either during the lunch break or
15 when we break for the day.

16 MS. DURANT: Thank you, your Honor.

17 THE COURT: All right. Any other matters before
18 the jury's brought in, Ms. Durant?

19 MS. DURANT: No, your Honor.

20 THE COURT: Solicitor?

21 MS. COOPER: No, your Honor.

22 May Ms. Ashley Mishoe stay in the courtroom?

23 THE COURT: Yes. I would like for all the
24 witnesses that y'all have, to bring them in. Let me talk
25 to them for just a minute. All State and Defense

1 witnesses are to come in so I can explain to them what
2 sequestration is all about.

3 MS. COOPER: Your Honor, we're retrieving Mr.
4 Thomas's mother and father. They are here today.

5 THE COURT: Okay. Any other witnesses for me to
6 talk with, or just the two of them right now?

7 MS. VANGINHOVEN: Just the two of them and
8 Ashley Mishoe.

9 THE COURT: All right. While they're coming in,
10 let me remind Counsel that I don't know who any of your
11 witnesses are and I have to rely on you folks to keep up
12 with them and sometimes people sort of wander in and take
13 a seat. You need to keep up with who's coming and going.

14 And as far as the State is concerned, if there's
15 any possibility that you want to recall a witness in
16 reply, they need to stay out of the courtroom after they
17 testify on the record. If they stay in the courtroom I'll
18 not permit them to be recalled.

19 MS. COOPER: Yes, sir, your Honor. And just to
20 clarify, the victim has the right to stay in the
21 courtroom?

22 THE COURT: Oh, yes, the victim has the right to
23 be here for all proceedings.

24 MS. COOPER: And in case we do need to recall
25 her, is it okay for her to be in here?

1 THE COURT: That's fine.

2 MS. COOPER: Okay.

3 THE COURT: All right. For the two witnesses in
4 here right now, all witnesses in this case are
5 sequestered. That simply means that you will be outside
6 the courtroom and you'll not be hearing the testimony of
7 any other witness. That is to ensure that your testimony
8 is based on what you know about the case and not based on
9 what somebody else may know or testify to.

10 When a witness is sequestered they are not
11 permitted to discuss their testimony or anybody else's
12 testimony with anyone else, including any other witness
13 who has found out what someone may or may not have said in
14 the courtroom.

15 If you violate the provisions of this
16 sequestration order you are subject to being held in
17 contempt of court.

18 I will be glad to make that announcement over
19 and over to whatever witnesses you all would like me to
20 make that to.

21 MS. DURANT: Thank you, your Honor.

22 THE COURT: All right. State ready?

23 MS. COOPER: Your Honor, should Ms. Mishoe leave
24 the courtroom?

25 THE COURT: She should, yes.

1 MS. COOPER: Okay.

2 THE COURT: Defense ready, Ms. Durant?

3 MS. DURANT: Yes, sir.

4 THE COURT: All right. Let's get the jury in,
5 please.

6 (The jury came into open court at approximately
7 10:28 a.m.)

8 THE BAILIFF: The jury is all present, your
9 Honor.

10 THE COURT: All right. Ladies and gentlemen,
11 let me thank you first. We had a couple other matters to
12 deal with and we're now in a position to proceed with the
13 trial of this case.

14 The first order of business is I will appoint
15 Mr. Byrnes as the foreman of the jury. Again, that's who
16 you have selected.

17 Mr. Byrnes, your vote is no more important and
18 does not count any more than any other member of the jury,
19 but you will preside in the jury room and you will be the
20 spokesman for the jury here in the courtroom.

21 Now, you've gotten in and you've gotten
22 comfortable and now let me ask you to stand up and raise
23 your right hands and the Clerk will administer your oath
24 as the jury in this case.

25 (WHEREUPON, the jury was sworn at 10:29 a.m.)

1 THE COURT: Mr. Foreman, ladies and gentlemen,
2 at the outset of any trial, I make just a few brief
3 comments to you to sort of explain to you procedurally
4 what will be happening during the course of this trial.

5 Now, what I'm about to tell you is certainly
6 not intended to be a substitute for the detailed
7 instructions of law that I'll be giving you at the end of
8 the case.

9 Again, this is a criminal case that has been
10 commenced by the State. I may have refer to the State as
11 the prosecution or the solicitor. It is a case against
12 Randy Thomas that was introduced to you yesterday.

13 The case is based on the indictments that I
14 briefly went over with you yesterday. They will be
15 explained to you in just a few minutes.

16 You should understand that the indictments in
17 this case are charges or allegations only and they are not
18 evidence of the charges that they contain.

19 In this case, as I indicated earlier, there are
20 four separate indictments, each of which contains a
21 separate offense, offenses for criminal sexual conduct
22 first degree, assault and battery of a high and aggravated
23 nature, and two counts of kidnapping. Those are the
24 charges that are made in this case.

25 The defendant has pled not guilty to the charges

1 in these indictments and State does, therefore, have the
2 burden of proving each of the essential elements of the
3 these offenses beyond a reasonable doubt, and the purpose
4 of this trial is to determine whether the State has met
5 that burden.

6 Your duty and your purpose as jurors is to
7 determine what the facts of this case are. You have just
8 become judges just as much as I'm a judge except are you
9 the judges of the facts, you have to decide what the facts
10 are based on the evidence as presented here in this
11 courtroom.

12 I'm the judge of the law. And under the law of
13 this state, I do not have the right, as a matter of fact
14 the law clearly states that the trial judge cannot state
15 or intimate or comment upon or make any comment to the
16 trial jury about the facts of the case. That is something
17 that you have to determine and the Court does not and will
18 not have an opinion as to what the facts of this case are.

19 The same law that makes you the judge of the
20 facts does make me the judge of the law, and under the
21 oath that you have just taken, you've agreed to accept the
22 law and apply the law as I will explain it to you at the
23 end of the case.

24 Again, you must not consider anything that you
25 may have read or heard about the case outside the

1 courtroom, whether during or before the case. And again,
2 until the case is submitted to you, you cannot discuss it
3 with anyone inside or outside the courthouse and not even
4 among yourselves. So that when we take breaks and you
5 come back and you're waiting for the other jurors to get
6 back or if you go to lunch or have to go to lunch with
7 other jurors, you cannot discuss the case among yourselves
8 at any time. That's a serious violation of the criminal
9 procedure if you violate those instructions.

10 From time to time during the trial there may be
11 objections that are made by the lawyers. If one of the
12 lawyers makes an objection, you do not hold that against
13 the lawyer or the lawyer's client.

14 If the lawyer makes an objection, that is simply
15 his or her way of letting this Court know that a rule of
16 evidence has come into play and at that time I'm going to
17 have to make a ruling.

18 If I sustain the objection, you cannot try to
19 guess at what the answer to that question might have been.
20 Or if it's an exhibit that is offered into evidence, if it
21 is objected to and I sustain that objection, you cannot
22 try to guess what that exhibit might have been. You can
23 only rely on the testimony and the other evidence that is
24 admitted into the record.

25 Also, from time to time, when exhibits are

1 admitted into evidence, the attorneys may ask that those
2 exhibits be published to the jury. That simply means to
3 take that exhibit and pass it among you folks while the
4 trial's going on. There's nothing wrong with that, but I
5 would caution you to remember that the testimony will
6 continue while that is occurring and you need to continue
7 to listen to the testimony that is being presented while
8 you're passing those objects around.

9 I have had jurors express concern to me in the
10 past that they didn't have enough time to look at
11 something as long as they wanted to while it was being
12 passed around in the jury box, and I would point out to
13 you that all of the exhibits that are admitted into
14 evidence will be with you in the jury room when you are
15 deliberating. So you can give those exhibits as long and
16 hard an examination as you choose back when you're
17 deliberating at the end of the case.

18 Now, procedurally, when I conclude my remarks in
19 just a minute, we're going to have brief opening
20 statements from the attorneys, first from the Solicitor's
21 office because the Solicitor does have the burden of
22 proof, and then the defense is given the same opportunity
23 to make an opening statement.

24 The attorneys when they make these opening
25 statements, they are not testifying. The purpose of the

1 opening statement is for the attorneys to outline to you
2 their position in the case.

3 And once you've heard from both sides, we will
4 proceed with the presentation of testimony and other
5 evidence. And when all of that has been submitted to you,
6 the attorneys will come back and make what we call closing
7 arguments. And then you'll hear the instructions of law
8 from me, and then you'll be sent back to deliberate and to
9 reach a verdict.

10 The only other thing I'd ask you to do is this:
11 Please give all of the attorneys and all of the witnesses
12 who testify in this case your full attention.

13 One of the things I do during the course of the
14 trial is I sort of keep an eye on you folks, because it's
15 what you do, you sit, you listen, and you watch. It's
16 hard to do that for more than about an hour, hour and 15
17 minutes. I have a hard time sometimes doing it for longer
18 than that and I know jurors do, too, so we'll be taking a
19 break about every hour, hour and ten or fifteen minutes to
20 give you an opportunity to stretch your legs, use the
21 restroom, and to stay fresh.

22 We from time to time have jurors who have a hard
23 time keeping their eyes open. And that's a problem. And
24 if I see that I have to do something about it. I know
25 either last week or the week before we had a juror right

1 on the front row who about half the trial had his eyes
2 shut. We ended up having to dismiss him. You need to
3 understand it's important that you stay alert and you stay
4 awake and aware of what's going on in the courtroom.

5 If you get to the point where you have to take a
6 break and it doesn't look like I'm about to that point,
7 just raise your hand, get my attention, we'll take a
8 break. And if you unable to hear or understand what
9 someone is saying from the witness stand, do the same
10 thing, just get my attention and I'll be sure that they
11 speak loudly and clearly enough for you to hear what the
12 testimony is.

13 Again, please give all the attorneys and
14 witnesses your full attention and we will proceed with the
15 trial at this time.

16 All right, Solicitor.

17 MS. GARFIELD: Thank you, your Honor. May it
18 please the Court.

19 THE COURT: All right.

20 MS. GARFIELD: Home. Home is where everyone
21 should have a feeling of safety and security. But on
22 October 30th, 2004, that feeling of safety and security
23 for Lauren Byrd -- stand up Lauren -- ended forever by the
24 criminal acts committed to her by the defendant, Randy
25 Thomas.

1 Ladies and gentlemen, Lauren and Randy had been
2 dating for about a year. In the summer of 2004 their
3 relationship became rocky, breaking up on and off. Early
4 August the breakup became official.

5 At this particular time Lauren was 19 years old.
6 She was a student at Clemson University. She was studying
7 biology. She lived at Clemson in her apartment with her
8 three-year-old son, Zachary. He goes by Zach.

9 On the weekend of October 30th, October 30th was
10 a Saturday, Lauren came to her family's home in Irmo,
11 which she did often on the weekends with her
12 three-year-old son.

13 On this particular day, her father and her
14 younger brother had actually gone to Clemson to a Clemson
15 football game. Lauren had gotten them tickets. Her
16 mother, her little sister were out of town at a soccer
17 match as her sister was very involved in soccer.

18 Lauren was at home in the family's living room
19 with her three-year-old son eating a late breakfast and
20 watching the Clemson football game on television. At some
21 point she heard a knock at the door. She wasn't expecting
22 any visitors. She looked into the window and could see
23 the defendant, her ex-boyfriend, Randy Thomas, who had
24 come to her house uninvited. She actually kind of tried
25 to move out of the way hoping Randy didn't see her and

1 hoping he would think that she wasn't home. But,
2 unfortunately, the door was unlocked and Randy came on in.

3 Lauren was not happy about this. She sat down,
4 she talked to Randy, she was very nervous with him being
5 in her home uninvited. She went to the bathroom with her
6 cell phone and text messaged a friend of hers for help.
7 Her friend Ashley called her back and said, stay on the
8 phone until he leaves. About that time she hears the door
9 close. Assuming Randy is gone, she walks out of the
10 bathroom and she's on her way to lock the door when Randy
11 comes back inside.

12 Lauren will never feel safe in her home again
13 due to the actions of Randy Thomas from here on out. They
14 got into an argument in the living room. He then drags
15 her upstairs to the first available bedroom, which is her
16 parents' bedroom. They continue arguing into the bedroom
17 when he forces her to perform oral sex on him. He
18 ejaculates into her mouth. She spits it out into the bed
19 comforter.

20 He then attempts vaginal penetration, making
21 entry into her vagina but not proceeding. She begins to
22 cry. The fight continues, and you will hear more about
23 this from Lauren. He then drags her back downstairs.

24 Lauren is terrified as her son sits downstairs
25 alone in the living room. She grabs three-year old Zach

1 and takes him into another living room which is closer to
2 the door. She's preparing to try to get out. The fight
3 continues between her and Randy Thomas in this living
4 room, at which point he finally drags her into the
5 family's kitchen and takes a steak knife out of the drawer
6 and holds it up to her neck. Lauren is terrified for her
7 life and she is terrified for her son's life.

8 Eventually, Randy Thomas says he wants to go for
9 a drive. He puts the knife into his back pocket and he
10 grabs Zach into his arms and he leaves out the front door.
11 Lauren chases after him and fortunately in her
12 neighborhood there were neighbors out in the yard. She's
13 trying to get one of her neighbor's attention when Randy
14 takes Zach, puts him into the car, puts him on his lap and
15 drives off. A mother is terrified; her son has just been
16 kidnapped.

17 Lauren chases the car. And finally a little
18 ways down Randy realizes what he's done. He stops and
19 puts three-year-old Zach in the middle of the road and
20 drives off.

21 Randy Thomas is charged with criminal sexual
22 conduct in the first degree, kidnapping Lauren Byrd,
23 kidnapping Zach Byrd, and assault and battery of a high
24 and aggravated nature.

25 Ladies and gentlemen, my name is Dolly

1 Justice-Garfield and my co-counsel seated at the table is
2 Vanessa Cooper. We are assistant solicitors for the 5th
3 Judicial Circuit. It is our job this week to prove to you
4 that Randy Thomas committed these criminal exacts. It is
5 a job in this courtroom and in this particular case that
6 we welcome.

7 Ladies and gentlemen, often people ask me, what
8 is an assistant solicitor. I run into friends from home
9 and college and they don't quite understand the term. And
10 I explain to them that the assistant solicitor is just a
11 term that South Carolina uses to call assistant
12 prosecutors or assistant district attorneys. And when
13 they hear that, they say, oh, you mean like on Law and
14 Order? And I say, yes, just like on Law and Order except
15 there's a really big difference between what I do on a
16 daily basis and what you all see on Law and Order shows,
17 and that is, this is real.

18 Law and Order is composed of actors reading
19 scripts. While some of the issues may be the same things
20 that we deal with on a daily basis, that is all fake.

21 What you will see in this courtroom this week is
22 real. You will see a real criminal trial. And I will be
23 the first to tell you, this is not CSI. You will not see
24 all the fancy things that are done on CSI. Ladies and
25 Gentlemen, you won't see it because those kind of tests

1 they use on that show just don't exist. They're for
2 entertainment purposes only.

3 What you will see from this witness stand are
4 real witnesses who take the stand and tell you what they
5 saw concerning these acts.

6 Now, how will we do this? Lauren Byrd's going
7 to take the stand. She's going to tell you, as difficult
8 as it may be, what she endured on October 30th, 2004.
9 And, ladies and gentlemen, you will hear from Lauren that
10 this wasn't the first time something like this happened.

11 You will also hear from her friend Ashley that
12 she text messaged for help. You will hear from people at
13 the Richland County Sheriff's Department who arrived at
14 the scene and investigated this crime. You will also hear
15 from the doctor who had to examine Lauren after this
16 horrific event.

17 Now, ladies and gentlemen, everybody in this
18 courtroom has a job to do. I have shared with you that
19 Ms. Cooper and my job is to prove to you that Randy Thomas
20 committed these acts.

21 Seated at the defense counsel or the defense
22 table with Randy Thomas are his lawyers, Ms. Lanelle
23 Durant and Ms. Jeanette VanGinhoven, very seasoned
24 lawyers, and it is their job to prove you the best they
25 can to represent their client, that Mr. Thomas did not do

1 these acts.

2 And you will see at the table are Judge Johnson

3 --

4 MS. VANGINHOVEN: Your Honor, I object to that
5 last comment.

6 THE COURT: Come up.

7 (A bench conference was held with the judge and
8 attorneys in the presence of the jury but out of the
9 hearing of the jury.)

10 THE COURT: Ladies and gentlemen, before Counsel
11 continues with her opening statement, let me just point
12 out to you any misconception that might have been-- there
13 is no burden of proof on a defendant, on this defendant to
14 prove anything, to prove his innocence. A defendant has
15 absolutely no burden of proof. The burden of proof in
16 this case, as in all criminal cases, is with the State to
17 prove guilt beyond a reasonable doubt. If anything has
18 been said to give you the impression that the defendant
19 has any kind of burden of proof, that is incorrect. The
20 defendant does not have any burden of proof whatsoever.

21 Solicitor, you may continue.

22 MS. GARFIELD: Thank you, your Honor. And I
23 apologize for misspeaking.

24 It's the defense counsel's job to represent
25 their client to the best of their ability.

1 And Judge Johnson has a job. Just as you saw,
2 he makes the rulings of the law throughout this trial.
3 And that may happen several times, and that is his job.

4 And, ladies and gentlemen, I watched all of you
5 as you stood up and raised your right hand and you took an
6 oath. You now have a job: You have a job to listen to
7 all these facts very carefully. And at end of this case,
8 the State will submit to you after you hear all the
9 evidence, you will be able based on all the facts
10 presented to find that Randy Thomas is guilty of these
11 criminal acts.

12 I know that you will listen carefully, that this
13 is wrong, a crime that occurred in the county that you
14 live in. Send a message to Randy Thomas, send a message
15 that we will not tolerate people doing these things to
16 people that live in our county. Send a message to Randy
17 Thomas that people deserve to feel secure and safe in
18 their own homes, people like Lauren and Zach.

19 Thank you.

20 THE COURT: All right. Ms. VanGinhoven.

21 MS. VANGINHOVEN: May it please the Court.

22 Randy Thomas, who sits here today in between his
23 counsel, who we are privileged to represent, Ms. Durant
24 and me, Ms. VanGinhoven, feel the same way, is not guilty.

25 What does this case involve? This case involves

1 two young adults who were in a relationship for over a
2 year. There will be testimony that they lived in the same
3 place, even with the three-year-old child.

4 Now, I'm going to apologize for offending anyone
5 because we all know that in a relationship with someone
6 for over a year there's going to be sex involved. In this
7 case you're going to hear about vaginal sex, vaginal
8 intercourse, and oral sex. And I do apologize, Ms. Durant
9 and I apologize if anyone is offended by what we're
10 talking about, but that's what the facts of the case are.

11 You just heard Ms. Justice-Garfield go over to
12 you what everybody's role is. Well, I want one thing
13 clear and I think the judge will reiterate this:
14 Mr. Thomas does not have to prove anything to anybody. It
15 is the State's burden, it's the government's burden to
16 prove him guilty beyond a reasonable doubt. And how do
17 they do that? Through evidence, through testimony up
18 here, through physical evidence that they put in.

19 Ladies and gentlemen, what we want you to do in
20 this case is we want you to pay close attention to the
21 testimony that you hear from up here and from the evidence
22 that is introduced at trial. We want you to listen to
23 what they say and also listen to what they don't say. We
24 want you to look at what you see and also what you don't
25 see. That is how they're going to try to prove their

1 case.

2 Now, reasonable doubt is the highest standard in
3 the court system and it applies in criminal cases. Why
4 does it apply in criminal cases? Because so much is at
5 stake.

6 But what does reasonable doubt mean? Reasonable
7 doubt means if you think someone probably did something,
8 that is not enough. And I'll repeat that. If you think
9 someone probably did something, that is not enough. The
10 government must prove beyond a reasonable doubt that
11 Mr. Thomas did what they say he did. And there's going to
12 be a lot of just someone saying something in this case.

13 Now, Ms. Justice, I mean Ms. Garfield got up
14 here and said she wants you to send a message. Well, we
15 also want you to send a message. Reasonable doubt is what
16 makes the burden the government has and what makes this
17 country different from all the other countries, and we
18 want you to hold them to that burden and send a message
19 that you just can't call someone into the courtroom and
20 say something happened and that's enough.

21 Now, each and every one of you on this jury pool
22 come from different backgrounds, you have different
23 experiences, you have different educations. No one is
24 more important or has a different say than anybody else
25 sitting here. We want everyone to remember that.

1 Again, all we ask is that you pay very close
2 attention to the evidence in this case, and at the
3 conclusion of the evidence we believe that you will find
4 our client, Randy Thomas, who is sitting right there and
5 is going to be sitting there through the rest of the
6 trial, that gentleman in the blue shirt, not guilty.

7 Thank you.

8 THE COURT: All right. Call your first witness,
9 please, Solicitor.

10 MS. COOPER: Thank you, your Honor.

11 The State calls Lauren Byrd.

12 LAUREN BYRD, after being duly sworn, testified
13 as follows:

14 THE CLERK: Please have a seat and state your
15 full name for the record.

16 THE WITNESS: Lauren Byrd.

17 DIRECT EXAMINATION

18 BY MS. COOPER:

19 Q Good morning, Lauren.

20 A Good morning.

21 Q Lauren, can you tell the jury a little bit about
22 yourself? Where are you from originally?

23 A I'm from Columbia, South Carolina. I go to Clemson
24 University. I'm a senior there studying pharmacy, and I
25 will be graduating this August.

1 Q So are you a senior at Clemson?

2 A Yes.

3 Q Where did you go to high school?

4 A I went to high school at Dutch Fork High School here
5 in Irmo.

6 Q And where did you live when you were attending Dutch
7 Fork High School?

8 A I lived with my parents in Irmo.

9 Q What address is that?

10 A

11 Q Is that part of Richland County?

12 A Yes.

13 Q And tell the jury a little bit about your family.

14 A I have -- I live with my mother and my father, and my
15 mother's a teacher and my daddy works for SCE-TV. My
16 little sister plays soccer and my little brother plays
17 football.

18 Q How old is your little sister?

19 A She is 16.

20 Q And your little brother?

21 A He is 13.

22 Q And your little sister, what school does she go to?

23 A She goes to Dutch Fork.

24 Q And your little brother?

25 A He also goes to Dutch Fork.

- 1 Q And do you have any family with you here today?
- 2 A I have my mother who is outside.
- 3 Q Why is she outside?
- 4 A I don't want her to hear the details. It would make
- 5 her --
- 6 Q When did you start attending Clemson University?
- 7 A I transferred there my sophomore year.
- 8 Q And where did you transfer from?
- 9 A Midlands Tech.
- 10 Q Why did you go to Midlands Tech?
- 11 A I wanted to stay close to my family for awhile. My
- 12 son was still very young and I just wanted to spend my
- 13 first year close to home.
- 14 Q And so how old were you when you had Zach?
- 15 A I was 16.
- 16 Q And you managed to finish high school?
- 17 A Yes, I did.
- 18 Q And which Midlands Tech did you go to?
- 19 A The one, Airport campus.
- 20 Q Did your parents help you with your son at this time?
- 21 A Yes, they did.
- 22 Q And once you finished at Midlands Tech, did you have
- 23 enough of the prerequisite classes to go to Clemson
- 24 University?
- 25 A Yes, I did.

1 Q When you went to Clemson University, again what year
2 was that?

3 A 2003.

4 Q 2003. So that was your sophomore year; is that
5 correct?

6 A Yes.

7 Q Did you take your son with you?

8 A Yes, I did.

9 Q And explain your living arrangements at Clemson.

10 A He lives with me. I live by myself. I have no
11 roommates, just me and my son. He goes to day care up
12 there. And I pretty much just take him to day care in the
13 morning and go to school, come back, pick him up.

14 Q Do you have a job?

15 A I did. I no longer have a job.

16 Q Where did you work?

17 A I worked as a receptionist at the Magnum Center.

18 Q What is that?

19 A It's a conference center in Clemson.

20 Q Okay. And you indicated you're a pharmacy major now?

21 A Yes.

22 Q And did you have a different major before?

23 A Yes, I was a biology major.

24 Q While you have been attending Clemson have you made
25 any friends?

1 A Yes.

2 Q Who is your best friend?

3 A Ms. Ashley Mishoe.

4 Q And how did you meet Ashley?

5 A We had a biology class one summer. We had to meet
6 every day; we had labs. We spent all day together.

7 Q Now, Lauren, I'm going to ask you a little bit about
8 your relationship with the defendant, Randy Thomas.

9 When was it that you met Randy?

10 A I met Randy here in Columbia in May I believe of
11 2003.

12 Q 2003?

13 A Uh-huh.

14 Q And who introduced you?

15 A I was dating one of his friends, Eric Elsey.

16 Q And he introduced you to Randy?

17 A He introduced him to me. They were living together.
18 He was living in Eric's house.

19 Q And so how long after you met Randy did you start
20 dating him?

21 A It had been about a month, month and a half.

22 Q So you started dating, exclusively dating Randy
23 Thomas in what month of 2003?

24 A June.

25 Q June of 2003?

1 A Uh-huh.

2 Q And at that time where were you living when you first
3 started dating him?

4 A I was living in Irmo.

5 Q And what month in 2003 did you move to Clemson?

6 A I moved there in August right before the fall
7 semester began.

8 Q And during this time was Randy at school?

9 A No.

10 Q Did he have a job?

11 A No.

12 Q Where did he live at this time?

13 A He -- when I was at Clemson?

14 Q No, when you first started dating him.

15 A He lived with Eric.

16 Q Okay. And what happened when you moved to Clemson?
17 Did he follow you or did he stay in Columbia?

18 A He had followed me to Clemson.

19 Q And you wanted him to come and join you, correct?

20 A Yes.

21 Q And describe your living arrangements. Did he live
22 with you in Clemson?

23 A He stayed at my house often. It wasn't a technical
24 living arrangement. He kind of just leaped from house to
25 house, just stayed wherever he could.

1 Q Did he have other friends besides you or other
2 acquaintances in Clemson besides you?

3 A Yes, he did. He had met people in Clemson, a couple
4 of my neighbors, and he had stayed with them a couple of
5 times, and also he knew friends there before I moved to
6 Clemson.

7 Q Okay. So he knew people before that?

8 A Yes.

9 Q When you say he wasn't living with you technically,
10 can you elaborate for the jury, please?

11 A He did not have a job and I sort of felt sorry for
12 him and he stayed with me often. I tried to convince him
13 to get a job and help me out. He knew my bank card number
14 and I didn't even know it. He had taken money out. It
15 was beginning to get excessive. He was just sort of
16 sponging off of me and my parents, and so I told him to
17 leave several times. He didn't.

18 MS. DURANT: Objection, your Honor. Relevance.

19 THE COURT: Overruled. I will permit. Go
20 ahead.

21 MS. COOPER: Thank you.

22 BY MS. COOPER:

23 Q Please proceed.

24 A And he did not leave. It was very difficult. He
25 didn't have a place to stay. He was very good with words.

1 He was able to convince me that things were going to work
2 out, that he would get a job, he was going to be good.

3 Nothing ever --

4 Q Did he help pay bills?

5 A He did not help pay bills.

6 Q Did he pay any rent?

7 A He did not pay anything.

8 Q But you did give him a key to your apartment; isn't
9 that correct?

10 A Yes, he did have a key.

11 Q And how long after you moved to Clemson did things
12 begin to deteriorate between the two of you?

13 A Well, we had been fighting the first week he moved in
14 there. I kind of felt bad because I knew my parents
15 wouldn't approve of him staying there and so I told him to
16 leave I know the first week that we were there and then
17 that's whenever he started convincing me that he was going
18 to get a job and his friends said he was serious and going
19 to get one.

20 THE COURT: Can you speak up? I'm having
21 trouble understanding you. Speak into the microphone,
22 please.

23 BY MS. COOPER:

24 Q Okay.

25 A And -- and --

1 Q I believe I had asked you when things began to
2 deteriorate between the two of you.

3 A Things really started to get bad that summer. We
4 were no longer intimate. He just came and went as he
5 pleased. It just -- we were off and on trying to break up
6 or I tried to break up and then he convinced me to get
7 back together and it was just off and on.

8 Q Okay. When was it that you finally were able to
9 break up with him more permanently?

10 A August 9th. I believe it's the beginning of August
11 of 2004.

12 Q So this is about a year after you initially moved to
13 Clemson?

14 A Yes.

15 Q So for about a year it was off and on?

16 A Yes.

17 Q I'm going to bring your attention to August 22nd of
18 2004. I believe you indicated you had broken up with the
19 defendant earlier in August; is that correct?

20 A Yes.

21 Q Had you begun to see another gentleman?

22 A Yes, I did.

23 Q What's his name?

24 A His name is Mike Anderson.

25 Q All right. And what does Mike do for a living?

1 A He's a school teacher at Walhalla.

2 Q And on August 22nd of 2004, where were you when you
3 woke up that morning? Where did you wake up that morning?

4 A I woke up at Mike's home in Walhalla.

5 Q How far is that from Clemson?

6 A It's about a 20-minute drive.

7 Q And what time did you get home that morning?

8 A I got home around 9, 9:30.

9 Q And before we continue, what was your address or your
10 address in Clemson, what your apartment is?

11 A

12 Q Describe your apartment for the jury.

13 A It's upstairs. You have to climb upstairs to get to
14 it. My apartment also has two floors.

15 Q So if I'm correct you walk -- from the outside you
16 have to walk up stairs to get to your front door?

17 A Yes.

18 Q Okay. And how many stories is your apartment?

19 A It's two.

20 Q Okay. What's on the first floor of your apartment?

21 A My living room, bathroom, and a kitchen.

22 Q And on the second floor?

23 A Two bedrooms and a bathroom.

24 Q Whose bedroom is the second bedroom?

25 A It's my son Zach's.

1 Q Describe for the jury why it is you left early from
2 Mike's to go home?

3 A I was not feeling well that morning. I felt really
4 sick and so I decided to leave earlier than normal.

5 Q And where was Zach during this time?

6 A He was at my parents' house. And they were going to
7 a -- that was a Sunday and they were going to a soccer
8 tournament. They were at a soccer tournament and Zach
9 came along. It's in Greenville.

10 Q So he was not home when you spent the night with
11 Mike?

12 A No.

13 Q Would you have done that with Zach around?

14 A No.

15 Q Now, when you got home, describe your symptoms? How
16 were you feeling? You said you were feeling ill. What
17 were your symptoms?

18 A I felt a little nauseous. I felt like I had a UTI.

19 Q What is a UTI?

20 A It's urinary tract infection.

21 Q And so did you have any medicine at your house, your
22 apartment?

23 A Yes.

24 Q Okay. And describe for the jury what it is you did
25 when you got to your apartment alone on the morning of

1 August 22nd 2004.

2 A I had come home. I took some cranberry supplements.

3 Q I'm sorry, some cranberry?

4 A It's like cranberry vitamin supplement things, and
5 then was on the couch. I was resting there on the couch
6 in the living room.

7 Q And describe for the jury if you -- who came to your
8 home?

9 A Randy had walked in to my home.

10 Q And, again, was he living with you at this time?

11 A No, he was in Charlotte, I believe.

12 Q Had you seen him since you had broken up, you know,
13 the beginning of the month?

14 A I'm not sure. I don't recall.

15 Q How did he get into your apartment that morning?

16 A With a key.

17 Q And is that the key you had given him before the
18 breakup?

19 A Yes.

20 Q When he came in, please describe for the jury what
21 his demeanor was like.

22 A He was very upset. He was wondering where I had
23 been.

24 MS. DURANT: Objection, your Honor. That is
25 commenting on the defendant's state of mind.

1 THE COURT: She can describe what she saw but
2 not what he may have been thinking. She can describe his
3 demeanor or what she saw.

4 Rephrase the question, Counsel.

5 MS. COOPER: Okay.

6 BY MS. COOPER:

7 Q Just what you saw about him, his behavior, how he was
8 acting. Just describe your observations to the jury.

9 A He was asking questions. He was asking very direct
10 questions, where were you, who are you seeing, and --

11 Q What was his demeanor like, was he happy, sad?

12 A No.

13 Q What was his behavior?

14 A He was angry.

15 Q And what did you say when he was asking you these
16 questions?

17 A I wouldn't give him -- I wouldn't give him a name. I
18 didn't really want to participate in him asking me these
19 questions. I wouldn't answer him at first. I wanted him
20 to leave. I told him to leave. He was not welcome in our
21 home. We had been broken up.

22 Q And did he leave when you asked him to leave?

23 A No, he did not.

24 Q What happened next?

25 A We were fighting and he had sat down on the couch.

1 He sat down on the couch and he --

2 Q And where were you? Were you on the couch also?

3 A Yes, I was also on the couch.

4 Q Okay.

5 A And he had put my arms over my head. He had put his
6 hand on my left breast, and I felt very uncomfortable. I
7 pushed his hand off and I also told him no, to stop and
8 not touch me. He still did and then I used more force and
9 it just turned into a struggle back and forth. I tried to
10 get up to go to the door and at that point he followed me.
11 He picked me up and carried me upstairs.

12 Q Describe how it is he carried you up the stairs.

13 A He had picked me up as a child, laying like a baby,
14 as you would hold a baby.

15 Q And what were you doing while he was carrying you up
16 the stairs?

17 A I was squirming, wiggling. I was flailing. I tried
18 to kind of -- he eventually overpowered me and I couldn't
19 get out of his arms. And then he -- at that point he took
20 me to my bedroom, which is right across from the stairs,
21 and threw me on the bed and --

22 Q What did he do to you when he got you on the bed?

23 A He started touching me.

24 Q How was he touching you, where?

25 A On my whole body, just groping me. I was pushing him

1 off constantly. He took off my pants. My shirt wasn't
2 even -- he didn't take off my shirt all the way. It was
3 just up. He had removed my pants. He was able to grab my
4 arms with one hand and push them up against the railing or
5 the headboard and he removed his pants. And then he began
6 to -- to have -- to penetrate my -- with his penis he
7 tried to --

8 Q Are you nervous?

9 A Yes.

10 Q I know it's difficult. Can you just use the terms?

11 A Yes.

12 Q Where did he insert his penis?

13 A In my vaginal area.

14 Q How long did he -- did he penetrate you fully or just
15 partially? Describe it.

16 MS. DURANT: Objection, your Honor. Leading.

17 THE COURT: I sustain to the form of the
18 question.

19 BY MS. COOPER:

20 Q Describe how he penetrated you.

21 A He fully -- he had -- it was fully in and he was
22 beginning to have sex.

23 Q At this point did you say anything to him while he's
24 penetrating you?

25 A Yes. Yes. As soon as he started doing it, I was

1 crying the whole time. I told him, I told him, I said,
2 this is rape. I said, what you're doing is rape. And at
3 that point he stopped and sort of realized what he was
4 doing. He kind of backed away. He was freaking out. He
5 was -- he just started crying, he was apologizing. He's,
6 oh, my God, I can't --

7 MS. DURANT: Objection, your Honor.

8 THE COURT: Wait. Pardon me?

9 MS. DURANT: I'm objecting to what she's saying
10 the defendant said, your Honor.

11 THE COURT: Overruled.

12 BY MS. COOPER:

13 Q Please continue.

14 A And he was threatening to call the police on his
15 self. He said he didn't want to live like this. He was
16 very upset. And while he was explaining this I just got
17 up and locked myself into the bathroom.

18 Q Did he ever threaten harm to you at this point?

19 A At this point I believe he was just threatening
20 himself.

21 Q Threatening to kill himself only?

22 A Yes.

23 Q Now, you got up and went to the bathroom. Where is
24 the bathroom in relation to the bathroom?

25 A It's right beside it, right adjacent to it.

1 Q Did he try to follow you when you went to the
2 bathroom?

3 A Yes. He was trying to explain himself. He just was
4 real upset with what he did. At that point I just started
5 running the bath water. I really wasn't responding. I
6 had -- I remember having a towel on in the bathroom. The
7 door was locked. I was just waiting for him to leave, and
8 I just stayed there until he did.

9 Q So when you left the bedroom and went to the bathroom
10 you locked the door to the bathroom?

11 A Yes.

12 Q And what was he doing?

13 A He was outside of the door basically pleading, just
14 apologizing over and over with what he had done. He was
15 so sorry. He couldn't believe that that's what he had
16 done.

17 Q And do you recall at a previous hearing you testified
18 that you heard him leave and then you left the bathroom to
19 go lock the door behind him?

20 A Yes.

21 Q Did you have an opportunity to refresh your memory
22 with a statement you provided about this incident?

23 A Yes.

24 Q Please clarify what happened next.

25 A I had been -- it wasn't immediately after he had left

1 that I had left the bathroom and locked the door. I just
2 kind of stayed there for awhile. And eventually I had to
3 go pick up Zach from Greenville and I -- then I left.

4 Q So you stayed in the bathroom until it was time for
5 you to go pick up your son?

6 A Uh-huh.

7 Q How many baths do you think you took or how long were
8 you in the bathtub?

9 A I was in the bathtub for awhile. I was just sort of
10 trying to analyze the situation, trying to figure out what
11 had just happened. I was just sitting there after I had
12 washed myself and just kind of staring off into space.

13 Q What made you want to take a bath so badly?

14 A I felt dirty. I felt -- I had not been feeling well
15 anyway and I just felt abused.

16 Q Who is the first person that you contacted and told
17 about this incident?

18 A My friend Cat, Cat Bazzell.

19 Q And what did you tell her?

20 A I had told her what happened. She had told me to
21 come over to her house. I came over to her house. She
22 was giving me locksmith numbers, advised me to change my
23 locks. She was just consoling me for the moment until I
24 had to go, like last minute to go get Zach.

25 Q And when you went to pick up Zach, who all did you

1 see in Greenville?

2 A I saw my whole -- my family, my whole family was
3 there watching my sister play.

4 Q And did you tell them what had just happened to you?

5 A No. They could tell something was wrong. I wasn't
6 really talkative. I actually stayed in the car while they
7 played. I just was sitting in the van until it was over.

8 Q And why didn't you tell your mom or your dad what had
9 happened to you?

10 A I knew they would be upset. I didn't want them to
11 worry about it. I figured it would all be over.

12 Q After you picked Zach up from Greenville, where did
13 you go?

14 A I went back home.

15 Q To Clemson?

16 A To Clemson.

17 Q And did you talk to your friend Ashley Mishoe?

18 A Yes. I called Ashley. I told her what happened and
19 she told me I needed to go and --

20 MS. DURANT: Objection, your Honor.

21 THE COURT: Sustained.

22 BY MS. COOPER:

23 Q Don't worry about what she had to say to you.

24 A Okay.

25 Q As a result of talking to Ashley, did you make

1 contact with the police?

2 A I did the next day.

3 Q What time do you recall the next day did you go to
4 the Clemson Police Department?

5 A It was around noon after my classes on Monday.

6 Q Do you recall who you met with at the Clemson Police
7 Department?

8 A I met Ashley there.

9 Q What about law enforcementwise? Do you remember the
10 name of any officers you met with?

11 A Yes. Detective Peppers.

12 Q And what did you tell Detective Peppers?

13 A I told him what happened. We had arranged an
14 appointment to meet with him. I told him what happened.
15 I filled out a statement, a written statement, and he
16 advised me that -- to get a trespass notice because I
17 couldn't get a restraining order.

18 Q I'm going to show you what has been marked as State's
19 Exhibit No. 59 for identification purposes. Do you
20 recognize that document?

21 A Yes, I do.

22 Q And can you describe what it is for this jury,
23 please?

24 A It is a trespass notice.

25 Q Okay. And who is it requesting to be put on notice?

1 A Randy B. Thomas.

2 Q And who is requesting that he be put on notice?

3 A Lauren Byrd, me.

4 Q Do you see your signature anywhere on that document?

5 A Yes, I do.

6 Q And is that your signature?

7 A Yes, it is.

8 Q Do you see any other signatures on that document?

9 A No.

10 MS. COOPER: Your Honor, at this time the State
11 would seek to introduce No. 59 into evidence.

12 THE COURT: Any objections?

13 MS. DURANT: No objection, your Honor.

14 THE COURT: State's 59 is admitted into
15 evidence.

16 (WHEREUPON, State's Exhibit No. 59 was admitted
17 into evidence.)

18 BY MS. COOPER:

19 Q Now, Lauren, if you look at that document, what did
20 you put down as your address?

21 A 242 1st St. my apartment in Clemson.

22 Q And what was the address provided for Randy Thomas or
23 put for Randy Thomas?

24 A but it's a different apartment. It
25 says Apartment 7. I'm guessing that's supposed to be my

1 apartment number.

2 Q Did you tell the officer that that was his address?

3 A He asked me where I could -- where he could get in
4 contact with him. I told him that I knew that -- I told
5 him that he had been living with his daddy and that they
6 had the same name in Charlotte, and I also told him that
7 he might be staying at my neighbor's apartment.

8 MS. DURANT: Objection, your Honor. Lack of
9 personal knowledge about where he was if she's saying he's
10 living in Charlotte.

11 MS. COOPER: Your Honor, she's testifying what
12 she told the officer.

13 THE COURT: She can testify what she told the
14 officer. I overrule the objection.

15 MS. COOPER: Thank you.

16 BY MS. COOPER:

17 Q Please proceed.

18 A And I just told him several places where he could be.

19 Q Did you tell the officer to put that address, your
20 address as the defendant's address?

21 A Yes.

22 Q Why is that?

23 A He thought that -- well, no. It says -- the address
24 that's on here is the address from my neighbor's because
25 it says bottom far left and Apartment

1 Q So that is not your address?

2 A That is not my address.

3 Q When you met with Detective Peppers you indicated he
4 wrote out a statement; is that correct?

5 A Yes.

6 (WHEREUPON, State's Exhibit No. 61 was marked
7 for identification only.)

8 BY MS. COOPER:

9 Q Let me show you a document that's been marked State's
10 Exhibit 61 for identification purposes only. Do you
11 recognize this document?

12 A Yes, I do.

13 Q Can you describe what the title of that document is?

14 A It says, Voluntary Statement. It's a statement of
15 what happened on the 22nd.

16 Q Of August?

17 A Of August.

18 Q And how many pages long is it?

19 A It is three pages.

20 Q And whose handwriting is in it?

21 A It is my handwriting.

22 Q After you wrote this statement, were you asked to
23 sign that statement?

24 A Yes, I did.

25 Q And you signed it?

1 A Yes, I signed every page.

2 Q Who else signed it?

3 A Detective Peppers signed it as a witness.

4 Q Okay. And so in this statement you told the officer
5 what happened to you on August 22nd; is that correct?

6 A Uh-huh.

7 Q Did you ever tell Detective Peppers that you did not
8 wish to pursue criminal charges against Randy Thomas?

9 A No. I had told -- I didn't know what to do. I knew
10 that I didn't want him around me anymore. He told me that
11 because I had taken a bath, I remember specifically he
12 said that because I had taken a bath and because it was
13 the next day, it would be hard to find evidence to pursue
14 criminal charges against him.

15 Q And what was your main goal in going to the police?

16 A I wanted him -- I wanted to never -- Randy never to
17 be around me again. I wanted to get a restraining order,
18 but they said that couldn't happen.

19 Q And so you instead got the trespass notice?

20 A I just settled for this.

21 Q Do you know if this was ever served on the defendant?

22 A No.

23 Q What happened on August 22nd of 2004 when you
24 returned to your apartment at Clemson with Zach?

25 A I returned to my apartment. I locked the dead bolt.

1 Q Why did you lock the dead bolt?

2 A It's a different key.

3 Q Did Randy have a key to that lock?

4 A No.

5 Q And who's in the apartment with you at this time?

6 A Just Zach and I. I didn't want to stay there
7 because -- I just didn't want to stay there. I felt
8 uncomfortable. I called Mike again and he was coming to
9 come pick up Zach and I.

10 MS. DURANT: Objection, your Honor.

11 THE COURT: Wait just a minute.

12 What is the objection?

13 MS. DURANT: She's just saying what Mike was
14 saying to her.

15 MS. COOPER: No, she wasn't. She said what Mike
16 was doing to her.

17 MS. DURANT: I thought she said Mike was telling
18 me.

19 THE COURT: You can't go into that conversation
20 except to what her part of the conversation may have been.
21 I would sustain it to that extent. But if you talk about
22 what she told him what she was doing, then she may do
23 that.

24 Go ahead, Counsel.

25 MS. COOPER: Thank you, your Honor.

1 BY MS. COOPER:

2 Q Lauren, what did you tell Mike to do?

3 A To come over.

4 Q Did he come over?

5 A He did.

6 Q Who else came back to your apartment?

7 A My friend Cat and my friend Carrie.

8 Q Did you tell them what had happened to you earlier
9 that day?

10 A Yes, I told Cat and Cat told Carrie.

11 Q Did you tell Mike what had happened to you?

12 A I had not told Mike.

13 Q And are you aware of whether or not the defendant
14 returned to your apartment?

15 A Yes, he did. He was knocking on my door. Mike
16 showed up and Randy went downstairs and just said, she's
17 lying, she's not telling the truth, she -- I didn't do
18 that, and I had not revealed --

19 MS. DURANT: Objection, your Honor.

20 THE COURT: Wait just a minute.

21 MS. DURANT: She's saying what the defendant had
22 said, your Honor.

23 THE COURT: Overruled.

24 BY MS. COOPER:

25 Q Please proceed.

1 A I had not -- I didn't tell Mike anything about the
2 incident at that point, so Mike was very confused. He
3 didn't know what Randy was talking about.

4 Q Did you ever see Randy or did you remain inside of
5 the apartment?

6 A I remained inside the apartment. I did not unlock
7 that door until Mike showed up.

8 Q Okay. Now I'm going to bring your attention to
9 August -- I'm sorry, October 30th, 2004. Okay? Where
10 were you that weekend?

11 A I was in Irmo.

12 Q And whose house were you at?

13 A At my parents.

14 Q And I'm going to show you some photographs. These
15 are State's Exhibit No. 4 through 45 and ask you to -- if
16 you recognize these photographs.

17 THE COURT: What were those numbers?

18 MS. COOPER: Four through 45 for identification
19 purposes.

20 THE WITNESS: These are pictures of my home, the
21 outside and the interior.

22 BY MS. COOPER:

23 Q Okay. And just so we can orient the jury, beginning
24 with State's Exhibit No. 4, what's that a picture of?

25 A It's the outside of my home. That's my mailbox.

1 Q Okay. And the next photograph, what's that a picture
2 of?

3 A This is my front door. And this is the entryway to
4 the front door.

5 Q Okay. State's No. 6.

6 A Yes.

7 MS. COOPER: Your Honor, at this time I believe
8 she's identified the photographs as being of her parents'
9 residence in Irmo. I would seek to introduce them into
10 evidence at this time.

11 THE COURT: Four through 45?

12 MS. COOPER: Yes, sir.

13 THE COURT: Is there an objection? Have you
14 seen these?

15 MS. DURANT: I have seen those, your Honor.
16 There's no objection.

17 THE COURT: State's 4 through 45 are admitted
18 without objection.

19 (WHEREUPON, State's Exhibits Nos. 4-45 were
20 admitted into evidence.)

21 MS. COOPER: Your Honor, may I start publishing
22 these photographs to the jury?

23 THE COURT: You may.

24 MS. COOPER: Thank you.

25 BY MS. COOPER:

- 1 Q Again, No. 4, what picture is that of?
- 2 A That's my mailbox. That's the driveway.
- 3 Q And then 5 is what?
- 4 A The front door to my home.
- 5 Q And then 6 is a picture of what?
- 6 A The entryway with the front door open.
- 7 Q And while we pass these photographs out, if you
- 8 could, explain what the next picture depicts.
- 9 A This is part of the entryway and part of the second
- 10 living room or the computer room.
- 11 Q And so you have two living rooms in your home?
- 12 A Yes.
- 13 Q Let's pretend this is your street and this is your
- 14 front door right here. Is there a foyer?
- 15 A Yes, there is.
- 16 Q And what's the room over here?
- 17 A That's the living room with the computer.
- 18 Q Okay. And what is next?
- 19 A A bathroom, a half bath.
- 20 Q It's a half?
- 21 A Uh-huh.
- 22 Q Okay. What's next?
- 23 A And then the main living room.
- 24 Q This is the main living room?
- 25 A Uh-huh.

- 1 Q Where are the stairs?
- 2 A The stairs are right across from the half bath.
- 3 Q Right over here?
- 4 A Yes.
- 5 Q And they go?
- 6 A Yes.
- 7 Q And what's over here?
- 8 A Upstairs or --
- 9 Q Down. We're still on the first floor.
- 10 A Okay. That's the formal dining room.
- 11 Q Dining room. Okay. And what's next? What's over
- 12 here?
- 13 A The kitchen.
- 14 Q And is there a wall between the kitchen and the
- 15 dining room?
- 16 A It's open. There's like an opening.
- 17 Q It's open?
- 18 A Yes.
- 19 Q So there's no wall?
- 20 A Yes.
- 21 Q And this goes upstairs?
- 22 A Yes.
- 23 Q And is there any bannisters or poles or anything in
- 24 this area?
- 25 A Yes. There is a bannister right -- yes, right there.

1 Q And so this picture, State's No. 7, which living room
2 is this?

3 A The one right by the entryway.

4 Q State's No. 8 is a picture of what?

5 A That same living room.

6 Q And just go ahead and go through these.

7 A These are all of that living room area, the couch,
8 the computer, the lampshade, the couch, office area.

9 That's a picture of the living room. You can see the
10 steps sort of back looking this way.

11 Q Okay. Now, do these pictures reflect how your
12 apartment looked on October 30th or your parent's house
13 looked on October 30th, 2004?

14 A Yes.

15 Q And so your parents' home doesn't typically look like
16 that?

17 A No.

18 Q And, again, those photographs, 9 through 15 are of
19 this living room with the computer?

20 A Yes.

21 Q Okay. All right. If you could just go through the
22 next.

23 A Okay. This is the hall. You can kind of see the
24 main living room. Here's the --

25 Q Okay. You said there's a hallway right here?

- 1 A Yes.
- 2 Q So there's a hallway down this way?
- 3 A Uh-huh.
- 4 Q All right.
- 5 A And here's the bathroom, the half bath.
- 6 Q Okay. What's in the hallway? What's shown in that
- 7 hallway right there?
- 8 A That's the linen and a baseball hat.
- 9 Q Whose baseball hat is that, do you know?
- 10 A It's my brother's.
- 11 Q Okay.
- 12 A And that's the steps.
- 13 Q Can you see the front door by the steps?
- 14 A Yes, to the right.
- 15 Q The next photo?
- 16 A This is a picture of part of the main living room.
- 17 Q Okay.
- 18 A Here's the steps.
- 19 Q All these show the staircase going upstairs?
- 20 A Uh-huh.
- 21 Q When you get upstairs, where is your parents'
- 22 bedroom?
- 23 A Immediately to the left.
- 24 Q Okay. So if you were on the second floor, we'll use
- 25 this as the second floor, to the left like right there?

1 A Yes.

2 Q But upstairs?

3 A Upstairs.

4 Q So their room is kind of over the kitchen?

5 A Yes.

6 Q Okay. And what pictures are these?

7 A These are the kitchen, all these are the kitchen.

8 Q Okay. And so you have a counter in the kitchen; is
9 that correct?

10 A Yes.

11 Q And these are State's No. 23 through 27 depicting the
12 kitchen?

13 A This is the living room and to your right you can see
14 the entry to the kitchen.

15 Q Okay.

16 A And these are all of the living room, the main one,
17 the couch.

18 Q Okay. So State's No. 28 through 37 all are of this
19 main living room down here?

20 A Yes.

21 Q Okay. What are State's No. 38 through 45 a picture
22 of?

23 A That is a picture of my parents' bedroom.

24 Q And did you have a bedroom at this house during this
25 time since you were now at Clemson?

1 A No.

2 Q Where would you typically stay with Zach when you'd
3 come see your parents on weekends?

4 A If you go up the stairs, you take a right and you go
5 all the way back towards this area, to one of the back
6 bedrooms.

7 Q So you would say in a room sort of above the living
8 room with the computer; is that correct?

9 A Yes.

10 Q And what happened to your room?

11 A It turned into a music room.

12 Q A music room?

13 A Uh-huh.

14 Q Where did all the furniture from your room go?

15 A It's in my apartment in Clemson.

16 Q So you took all your stuff with you?

17 A Yes.

18 Q That morning on October 30th of 2004, you indicated
19 you were home visiting your family?

20 A Right.

21 Q What day did you get there?

22 A I got there that Friday.

23 Q The day before?

24 A Uh-huh.

25 Q And where did your father and your brother go?

- 1 A They went to the Clemson football game. I got them
2 tickets to go see it.
- 3 Q Do you recall what time that game started?
- 4 A Noon.
- 5 Q And where was your mother and your little sister?
- 6 A They were at a soccer match out of town.
- 7 Q Do you recall where they had gone?
- 8 A Not specifically.
- 9 Q And so when you woke up, do you recall what time it
10 might have been when you got up that morning?
- 11 A It would probably have been around 10 or 11. I was
12 in my pajamas basically the whole day.
- 13 Q Now, I'm going to show you some items and ask if you
14 recognize them. Do you recognize what those are?
- 15 A Yes. They are the pants I was wearing, the pajama
16 pants I was wearing that day.
- 17 Q Do you recognize this item? What is that?
- 18 A Yes, that is the shirt I was wearing that day.
- 19 Q How would you describe that shirt?
- 20 A As tie dyed, just something I was sitting in.
- 21 Q And lastly, do you recognize this item?
- 22 A Yes.
- 23 Q What is it?
- 24 A Those are my panties.
- 25 Q And were you wearing that that day?

1 A Yes.

2 MS. COOPER: Beg the Court's indulgence, your
3 Honor.

4 THE COURT: All right.

5 (WHEREUPON, State's Exhibits Nos. 62, 63, 64
6 were marked for identification only.)

7 BY MS. COOPER:

8 Q So when you got up and you're still in your pajamas,
9 what was Zach wearing?

10 A He was wearing a Spider-Man outfit. It was before
11 Halloween and he had just gotten up.

12 Q Do you recall who gave that to him?

13 A I got it in the mail. I believe Randy's mother sent
14 it to me.

15 Q And were you friends? Was anything -- was there any
16 bad blood between you and Randy's mother?

17 A No.

18 Q What's her name?

19 A Margaret, Margaret Mitchell.

20 Q And was it common for her to do nice things for Zach?

21 A Yes.

22 Q So Halloween is the next day; is that correct?

23 A Right.

24 Q What did you do when you woke up, the first thing you
25 did when you got up?

1 A I turned on the channel where the game was going to
2 be on. I had gotten some cereal. Just regular, just kind
3 of lounging.

4 Q Relaxing?

5 A Relaxing.

6 Q Do you recall what you gave Zach for breakfast?

7 A Pop Tarts.

8 Q And can you describe for the jury as you're relaxing
9 at your parents' house, were you expecting any company
10 that morning?

11 A No.

12 Q Or that day at all?

13 A No, not at all.

14 Q Tell the jury what happened while you were watching
15 TV in the main living room.

16 A The game had just started and I was sitting on the
17 couch. I heard a knock on the door. I saw that it was
18 Randy through the windows, and I hid myself sort of hoping
19 that he didn't see me through the window.

20 He walked in and he -- we started to talk. He
21 was talking. He was talking to Zach. It was really
22 uncomfortable. I didn't know what was going to happen.

23 I didn't want him there. I did not let him in.
24 He -- I told him to leave, it would probably be best to
25 leave.

1 It wasn't really a fight at first, even though
2 I'd told him to leave, and he said he wanted to talk to
3 me, he wanted to talk to me, and I said no.

4 Q What did he want to talk to you about?

5 A He had wanted to talk to me about the Clemson
6 incident.

7 Q And what did he start saying to you about that?

8 A He was apologizing for it, and he had said that that
9 was his way of sort of wanting to show me that he loved
10 me. He was apologizing, he didn't want to hurt me, things
11 like that. It made me very uncomfortable, and at that
12 point I went to the -- I told him to leave. He did not
13 leave and I went to the bathroom.

14 Q When you had this conversation where he's apologizing
15 to you for what he did in Clemson, what are you? What
16 room are you in?

17 A The main living room.

18 Q Is that where Zach is?

19 A Yes.

20 Q And so what, if anything, did you take with you to
21 the bathroom?

22 A I had already had the phone. I always had the phone
23 in my hand. It was just my cell.

24 Q And what is it that you did once you got to the
25 bathroom?

1 A I text messaged Ashley Mishoe and told her, I said,
2 help, call me.

3 Q And did she respond to your text message?

4 A Yes, she called back and I told her what -- I told
5 her that Randy was there, and she advised me to stay on
6 the phone with her until he had left.

7 Q Did you -- were you trying to hear what was going on
8 outside the bathroom?

9 A Yes, I was whispering to Ashley. I was very quiet.
10 I was trying to listen to see what was going on. I heard
11 the door shut and I told Ashley that it's okay, he's gone,
12 and I was going to go lock the door.

13 Q When you got off the phone, did you hang up with her
14 in the bathroom?

15 A I hung up with her in the bathroom.

16 Q Where did you go when you left the bathroom?

17 A I went to go lock the front door.

18 Q And describe to the jury what happened while you're
19 on your way to lock the front door.

20 A I seen him coming back in.

21 Q And approximately where were you when you saw him
22 walk back in?

23 A Probably in the hallway.

24 Q In this general area?

25 A Yes.

1
2 THE COURT: Ms. Cooper, let me interrupt you.
3 We need to take a break.

4 MS. COOPER: Yes, sir.

5 THE COURT: We've been going about an hour and
6 ten or fifteen minutes.

7 Mr. Foreman, ladies and gentlemen, we'll take
8 about 10 minutes.

9 Please don't discuss the case. Stretch your
10 legs, use the restroom, and then we'll continue.

11 You're excused to your jury room.

12 Everyone else stay seated, please, while the
13 jury's excused.

14 (The jury left open court at approximately 11:46
15 a.m.)

16 THE COURT: We'll take about ten minutes.

17 Ms. Byrd, you can step down. Don't discuss your
18 testimony during the break.

19 Counsel, step up here, please.

20 (A bench conference was held with the judge and
21 attorneys in the presence of the jury but out of the
22 hearing of the jury.)

23 (WHEREUPON, State's Exhibits Nos. 65, 66 were
24 marked for identification only.)

25 (A recess was taken.)

1 THE COURT: All right.

2 MS. DURANT: Your Honor, for the record, to
3 preserve the record, I'd renew my objections to any
4 reference to the Clemson incident coming in.

5 THE COURT: All right. That objection is noted.
6 The ruling would remain the same.

7 MS. VANGINHOVEN: And, your Honor, I just wanted
8 to place on the record that in the State's opening
9 statement, that I objected to portions of the statement by
10 Ms. Garfield as being burden shifting and that there be a
11 curative instruction to cure that.

12 THE COURT: All right. There was an objection
13 made. I've heard it at the bench. There was -- Counsel
14 for the State indicated and I know I heard the word
15 "prove" and I perked up and then she sort of changed and
16 that's when the objection was made and a curative
17 instruction was placed on the record and I tried to make
18 it as strong as I possibly could, and I think it cured any
19 possible improper argument that may have been made.

20 MS. VANGINHOVEN: Thank you, your Honor.

21 THE COURT: Anything further before we resume?

22 All right. Let's get the jury back in, please.

23 (The jury came into open court at approximately
24 12:08 p.m.)

25 THE BAILIFF: The jury's all present, your

1 Honor.

2 THE COURT: We will continue with the testimony,
3 Solicitor.

4 MS. COOPER: Thank you, your Honor.

5 BY MS. COOPER:

6 Q Lauren, I believe we were talking about a
7 conversation you had with the defendant, Randy Thomas, in
8 the main living room prior to the break.

9 Can you explain for the jury where you were
10 seated in the living room and where was the defendant
11 seated when you were having discussions about what had
12 happened in Clemson?

13 A After he'd come in the second time?

14 Q Yes, ma'am.

15 A I was sitting on the couch.

16 Q And the couch, can you kind of describe where it is?

17 A It's right along -- right there.

18 Q And where's the TV?

19 A The TV is --

20 Q Along this wall?

21 A Yeah, along that wall.

22 Q And what other furniture?

23 A There's a chair right there.

24 Q Any other chairs?

25 A A chair right here.

1 Q Where were you seated and where was the defendant
2 seated when you were initially having the discussion about
3 what happened at Clemson?

4 A I was sitting on the couch closest to the TV, on that
5 kind of corner, and he was sitting on the chair across.

6 Q Which chair, this one?

7 A That one.

8 Q Okay. And you're in this area?

9 A Yes.

10 Q Where was Zach seated?

11 A Zach was on my lap.

12 Q I'm sorry, Zachariah. Zach was on your lap, okay.

13 Can you describe the defendant's demeanor, how
14 he was acting when he was talking to you about what
15 happened at Clemson?

16 A He was trying to explain the situation. He was
17 genuinely -- he was -- I think he was really trying to say
18 that he was sorry and I just kept cutting him off. I told
19 him to leave, I didn't really want to hear it.

20 Q How did he react to your interruptions?

21 A He was very upset. He got real angry and his voice
22 was raised. He wasn't really getting through to me. I
23 just wanted him to leave. And at that point he got up and
24 kneeled in front of me by the couch.

25 Q So he got up from the chair where he was seated?

1 A Yes.

2 Q And came and kneeled in front of you?

3 A Yes.

4 Q What happened when he kneeled in front of you?

5 A Zach got up. He went to another area across the
6 room. And he put his hand on my knee. I jerked back. I
7 didn't want him that close. I felt very uncomfortable.

8 Q How did he react when you jerked away from him?

9 A He was angry. He was mad. Because I think his main
10 mission really was to just apologize for what happened and
11 I was just -- kept cutting him off. I jerked back
12 whenever he was kind of invading my space and it just made
13 him more upset.

14 Q Now, when he's -- when you jerked back, did he remain
15 kneeled in front of you or did he do something different?

16 A No. He had went down to pick me up again as a child
17 and then he was turning around like he was going to sit
18 down and I straightened myself out so that it would be
19 difficult so I could get out of his arms. And when that
20 happened, I ended up getting on this side of the couch.

21 Q The side of the couch. Which side, over here?

22 A Yes.

23 Q Okay.

24 A And he was just sat down on the couch. And --

25 Q Was any part of your body touching his body when you

1 got loose from his --

2 A It was really quick. My legs were right on top of
3 his lap. It's just that that's where I had landed. And
4 then he touched -- then he started to touch me again. He
5 touched my breasts again like at Clemson.

6 Q And when he touched your breasts, did he touch any
7 other part of your body while he was doing that?

8 A He was hovering over me. It really was mainly that
9 area. And then I pushed him away, and it was just more.
10 So every time I'd push him away it was like more intense,
11 like he touched more of my body.

12 Q And when he touched you on your breasts, what did
13 that make you think?

14 A I immediately flashed back to Clemson. I got scared.
15 I felt sick in my stomach. I knew he had to leave. I
16 knew that he just had to go. I didn't want things to go
17 like they went before.

18 Q Up until this time were you scared of the defendant?

19 A Yes. Yes.

20 Q What did he do when you kept pushing him away from
21 you as he's trying to touch your body?

22 A He just hovered over me, overpowered me. He put my
23 hands over my head like before and he was just touching
24 me. It was a struggle. I was pushing him off.

25 I stood up. Zach was getting upset because he

1 saw me upset, and I was crying.

2 I told him to leave and he told me, he asked me
3 if I loved Zach. And I felt real uneasy and I said, yes,
4 I love Zach. He said, well, will you do, you know --
5 well, I can't remember the words exactly, but basically
6 will you do anything? And I said -- I didn't answer. I
7 got up really shaky, I felt sick. Just I knew something
8 was not right.

9 Q And when he asked you about whether or not you loved
10 Zach --

11 A Uh-huh.

12 Q -- what did that make you think he meant?

13 A I got the impression that he was going to use that to
14 make me do something bad. I thought he was going to rape
15 me again.

16 Q Did his demeanor change from being upset, apologetic,
17 did it change?

18 A Yes. He got really calm. His face was just blank.
19 It was just strange. He was asking questions. He didn't
20 raise his voice. He was like, Do you love Zach? He was
21 very calm.

22 Q Did his eyes appear differently?

23 A His eyes were blank. It didn't even look like he was
24 looking me in the eye. It was frightening.

25 Q And at this point what happened? Where was Zach?

1 A Zach was on the floor in the living room. He had
2 told Zach to watch cartoons.

3 Q And so what -- who changed the channel?

4 A He did.

5 Q What happened next?

6 A He -- I was standing up and he had bearhugged me from
7 behind and was tucking my arms by my side. He tried to
8 get me to come up and I wasn't going to come up, and then
9 that's whenever he did that and then he started to carry
10 me up the stairs. I got loose. He --

11 Q How did he carry you up the stairs?

12 A Like a -- after I'd gotten loose he carried me again
13 like a child.

14 Q Draped you over --

15 A He picked me up like this and draped me.

16 Q Okay. Describe what you were doing while he was
17 trying to carry you up the stairs.

18 A Screaming and crying.

19 I remember looking at Zach's face. Zach didn't
20 know what to think. He was just looking at me like -- he
21 had told -- Randy had instructed him to stay downstairs
22 and watch cartoons, and I was kind of like, yes, stay down
23 here. So he didn't know what to think. He didn't want to
24 go upstairs but he knew mommy was upset so he was upset.

25 Q Did you try to fight him off while he's taking you up

1 the stairs?

2 A Yes, I did. I did try to fight him off.

3 Q How did you try to fight him off?

4 A I was kicking, just everything, every body part was
5 just all over the place.

6 Q Did you try to hold on to anything on the way up the
7 stairs?

8 A Yes. At the very top of the stairs there's a beam
9 and I had grabbed ahold of it with my arms and then he was
10 trying to pull me off, and it ended up him holding on to
11 my feet like with all his might and pulling me off.

12 Q And on the second floor where is that beam?

13 A It's right across from my parents' room.

14 Q So about here?

15 A Right there.

16 Q Is it square or round?

17 A It is square.

18 Q And what happened when he drug you into your parents'
19 room?

20 A He drug me into the floor. The bed would be right
21 here. I was kind of at the foot of the bed on the floor.
22 He had knelt down, told me to stay calm, just do what he
23 said, he wasn't going to hurt us, just do what he said.

24 Q Just so everyone gets an idea of what the layout of
25 your parents' bedroom is, could you describe how its

- 1 layout is? Is this the door entering to your parents'
2 room? Where is the bed?
- 3 A The bed would be to the left against that wall.
- 4 Q The headboard?
- 5 A Right. And then it's -- right.
- 6 Q Okay.
- 7 A There's a dresser right against that wall and another
8 dresser right here.
- 9 Q Are there any tables next to the bed?
- 10 A Yes, there's a nightstand on both sides of the bed.
- 11 Q Is there a bathroom in this room?
- 12 A Yes, right across.
- 13 Q That's the door?
- 14 A Yes.
- 15 Q Approximately where were you in the bedroom when he
16 drug you into the -- on the floor and knelt down to talk
17 to you?
- 18 A Right at the entranceway at the foot of the bed.
- 19 Q In this general area?
- 20 A Yes.
- 21 Q And, again, what did he say to you when he's kneeling
22 down talking to you?
- 23 A He told me to calm down because I was very
24 distraught. I was shaking, I was very upset, I was scared
25 what was going to happen. He was unemotional. He just

1 told me to stay calm.

2 Q Did he ask you to remove any clothes?

3 A Yes.

4 Q Which items?

5 A He told me to take off my shirt. I started crying
6 again and he had threatened -- he then threatened to hurt
7 me, to kill me, and I said, no, I still couldn't do it.
8 Then he said once again, Do you love Zach? And kind of
9 making the impression that he was going to hurt Zach. I
10 said yes. I still couldn't take off my shirt. He ended
11 up he had to do it.

12 Q Were you still on the floor when he took your shirt
13 off?

14 A No, we had moved to the bed.

15 Q How did you get from the floor to the bed?

16 A He had told me -- he had picked me up. He was just
17 right in my face all the time. He said to stand up, try
18 to be calm, and we just kind of walked over there. And
19 then he took off my shirt. It ended up -- I guess he
20 threw it over here.

21 Q Threw it onto the floor?

22 A Yes. And then he told me, he said that he could make
23 things worse. He just basically told me to cooperate.
24 And even though I'd wanted I couldn't for some reason, and
25 then he told me to take off my pants. And I couldn't do

1 that either. So he ended up doing that to me.

2 Q Did he take off your panties, too?

3 A Yes, he did. And I was struggling the whole time.

4 Q What item of clothing did he remove off of his own
5 body?

6 A His pants.

7 Q While he was removing his pants, what, if anything,
8 did you try to do?

9 A I got up. I tried to leave. I tried to leave
10 several times. Any time that he wasn't on me I got up to
11 try to leave and he just ran back over to me preventing me
12 from leaving.

13 Q And what did he do when you tried to leave the room
14 while he was taking his pants off, what did he do with
15 you?

16 A He grabbed my neck. He had pushed it down onto the
17 bed so that my head was near the nightstand right there.

18 Q So approximately in this area?

19 A My head was right there.

20 Q Okay.

21 A And he basically forced my head towards his crotch
22 area.

23 Q Were you on your side or on your back? Describe your
24 position..

25 A I was on my side. I think my face was hanging off.

1 Q So you're facing this way?

2 A Yes.

3 Q And where was he when he forced your head --

4 A He was standing right there.

5 Q Okay. Where did he force your head to?

6 A His crotch. He told me to perform oral sex on him.

7 Q And what did you say to him when he told you to do
8 that?

9 A I never stopped crying. I said, no, please, begging
10 him, please, don't do this, and he still told me to do it.

11 Q At this point could you hear Zach?

12 A Yes.

13 Q What was going on with Zach?

14 A He was like, Momma, can you hear me downstairs? Can
15 you hear me? Randy had yelled and told him, You watch
16 cartoons. And then, I mean, of course that just made me
17 more upset to hear that. And then --

18 Q Did you end up performing oral sex on him?

19 A Yes.

20 Q Did you want to do that?

21 A No.

22 Q Describe to the jury what he would say to you while
23 you were forced to perform oral sex on him.

24 A He told me to stop crying and that to do it right and
25 to do it good. And I would try, but I was just so upset,

1 I felt so sick to my stomach. It was the worst.

2 Q Did he finish his act while you performing oral sex?

3 A Yes. He told me to take it all.

4 Q Did he ejaculate?

5 A Yes, he did.

6 Q Where did he ejaculate?

7 A In my mouth.

8 Q What did you do when he ejaculated?

9 A I spit it out.

10 Q Where did you spit it out?

11 A On the comforter.

12 Q I'm going to show you State's Exhibit No. 40. Is
13 that the comforter?

14 A Yes.

15 Q Can you see where the tag is on that comforter?

16 A Yes, the bottom left.

17 Q And the tag is on the bottom side of the comforter?

18 A Yes.

19 (WHEREUPON, State's Exhibit No. 67 was marked
20 for identification only.)

21 BY MS. COOPER:

22 Q I'll show you what's been marked as State's No. 67
23 and ask if you can identify the contents of this box.

24 A That's the comforter from my parents' bed.
25

1 MS. COOPER: Your Honor, at this time I would
2 like to introduce No. 67 into evidence.

3 THE COURT: Any objection?

4 MS. DURANT: May we approach?

5 THE COURT: Sure.

6 (A bench conference was held with the judge and
7 attorneys in the presence of the jury but out of the
8 hearing of the jury.)

9 THE COURT: All right. State's 67 is admitted.

10 MS. COOPER: Thank you, your Honor.

11 (WHEREUPON, State's Exhibit No. 67 was admitted
12 into evidence.)

13 BY MS. COOPER:

14 Q Is this the comforter that was on your parents'
15 bedspread?

16 A Yes, it is.

17 Q Okay. Looking at State's No. 40, if I were to lay
18 this mattress down on a bed with the tag hanging out as
19 the photograph depicts, is that approximately the location
20 of the tag?

21 A Yes.

22 Q Like so, with this tag on the bottom left?

23 A Yes.

24 Q And that would be the headboard right there?

25 A Yes.

1 Q And, again, approximately where was it that you spit?
2 Where did you spit when the defendant ejaculated?

3 A Right there where that's cut out.

4 Q In this area?

5 A Uh-huh.

6 Q This general vicinity I am pointing to, correct?

7 A Yes.

8 Q How did the defendant react when you spit him up on
9 the bed comforter?

10 A He was mad.

11 Q What did he do?

12 A He threw me on my back and had -- he threw me on my
13 back. I had my hands over my head and he was trying to --
14 I had my legs intertwined and he had tried to spread them
15 apart.

16 Q When he threw you on your back on the bed, where
17 approximately was your head and your body on this?

18 A My legs were draping off. My head was back there.

19 Q So in the middle of the bed?

20 A In the middle of the bed.

21 Q Okay. So your legs are there and your head's in the
22 middle?

23 A Uh-huh.

24 Q And you're on your back?

25 A Right.

1 Q And your knees are at the edge of the bed folded
2 down, or how are your legs?

3 A My legs are hanging off.

4 Q And your arms, where are they?

5 A He had held them above my head.

6 Q And approximately where was your crotch area?

7 A It was towards the edge.

8 Q Closer to the edge?

9 A Yes.

10 Q Okay. Where did he stand when he was holding your
11 arms over your head?

12 A He stood right on the edge of the bed.

13 Q And what did he proceed to do at that point?

14 A He had tried to spread my legs open. I had pushed
15 him off with my hand. I thought that just my legs alone
16 would -- if I held it like that would be enough, but it
17 wasn't. He managed to spread my legs. I was crying and
18 he started to penetrate with his penis.

19 Q And where? What part of your body?

20 A In my vagina.

21 Q Before he penetrated you with his penis, did you in
22 any way use your hands to do something?

23 A I pushed him off me. I tried to just push his body
24 away. It was a struggle.

25 Q Did you ever try to block your crotch area?

- 1 A Yes, I did.
- 2 Q And what would he do with your hands?
- 3 A He put them back.
- 4 Q When he penetrated you with his penis in your vagina,
5 how -- describe how far he came into you?
- 6 A About halfway. He immediately stopped after I told
7 him that -- I told him, I said, I understand, I'm not
8 going to tell anybody, don't do this, it's okay, just try
9 to calm him down, told him that I understood.
- 10 Q Why were you saying these things to him?
- 11 A I tried to just basically get on his level. He
12 obviously, I don't know, wasn't thinking logically and I
13 just tried to comfort him and tell him, you know, it
14 wasn't like the point of no return, he could kind of stop.
- 15 Q And did he stop?
- 16 A He did stop.
- 17 Q Describe for the jury what he did once he stopped.
- 18 A He asked me why I wouldn't tell anyone. And he said
19 I have a good heart. And then he got very upset again
20 with himself. He started crying. He said, oh, my God,
21 and it's like he came to. He just was -- he's like, I
22 hate myself, I'm going to kill myself, I don't want to
23 live, I'm going to call the cops on myself, I'm going to
24 call the police, I don't want to be seen in public, people
25 will know what I've done. At that point I left and put my

1 clothes on. I just threw them on just as fast as I could.

2 Q Where were your clothes? Where did you have to go to
3 put your clothes on?

4 A To the floor.

5 Q Okay. On which side of the bed?

6 A It was this side.

7 Q This side. And I believe I already asked you to
8 identify your clothes.

9 MS. COOPER: Your Honor, Ms. Byrd has already
10 identified her clothes. At this time I would seek to
11 introduce them into evidence.

12 MS. DURANT: Your Honor, we would have the same
13 objection.

14 THE COURT: Same objection as the other.

15 As far as the items themselves, they will be
16 admitted.

17 Are they marked separately?

18 MS. COOPER: Yes, your Honor, they are marked as
19 follows: 62 is the shirt, 63 are the pants, and 64 are
20 her panties.

21 MS. DURANT: There's no objection to the shirt,
22 but those items that pertain to the testing --

23 THE COURT: All right. At this point in time
24 they're not being offered for any testing. I'm going to
25 let the others come in, but where we go with anything else

1 is yet to be seen. But those items will be admitted.
2 That's State's 62, 63, and 64.

3 MS. COOPER: Thank you, your Honor.

4 (WHEREUPON, State's Exhibits Nos. 62, 63, 64
5 were admitted into evidence.)

6 BY MS. COOPER:

7 Q Now, is this your shirt that you were wearing that
8 day?

9 A Yes.

10 Q What are these?

11 A Those are the pajama pants.

12 Q These holes that are in them right now with black
13 marker, did you do that?

14 A No.

15 Q Were they in good condition?

16 A They were in good condition.

17 Q And State's No. 64, what are these?

18 A Those are my panties that I was wearing that day.

19 Q And, again, the hole and marker, are those -- did you
20 do that?

21 A No.

22 Q I'm going to show you a series of photographs.

23 Actually just one for now. State's No. 48, do you
24 recognize that?

25 A Yes.

1 Q What is that?

2 A It's a picture of my arms. I'm wearing that shirt
3 and those pants. The shirt is on inside out.

4 Q The shirt is on inside out?

5 A Yes.

6 MS. DURANT: No objection, your Honor.

7 THE COURT: Without objection State's 48; is
8 that right?

9 MS. COOPER: Yes, sir.

10 THE COURT: State's 48 is admitted.

11 (WHEREUPON, State's Exhibit No. 48 was admitted
12 into evidence.)

13 BY MS. COOPER:

14 Q Was your shirt on the correct way that morning you
15 got up?

16 A Yes.

17 Q When did it become inside out?

18 A When I put it back on after the incident.

19 Q While you were getting dressed describe what the
20 defendant was doing.

21 A He put his pants back on. He was apologizing. He
22 was very upset with himself. He was saying he didn't want
23 to live, things of that nature.

24 Q Did you see him pick up the phone at any time?

25 A Yes.

1 Q What did he do?

2 A He had talked about calling the police on himself.

3 He had picked up the phone.

4 Q Where was the phone located in this room?

5 A Right by the nightstand.

6 Q Which nightstand?

7 A This one.

8 Q So the phone is right there?

9 A Yes.

10 Q Describe for the jury what you saw him do with that
11 phone.

12 A He had picked up the phone and I got the impression
13 he was going to call the police, and he had dialed three
14 numbers. However, the numbers had the same sound and he
15 never moved his finger. So I thought he was testing me,
16 because I'd earlier said no, I wouldn't tell anybody
17 nothing, I understand what you're doing. And so whenever
18 I realized that he didn't dial 911, I said no, don't call
19 the police, it's okay. I'm just trying to appease him.
20 And he threw the phone down and was like, let's go
21 downstairs. I could tell he was upset again. He wasn't
22 sad anymore, he just got mad again.

23 MS. DURANT: Objection, your Honor. She's
24 talking about his state of mind.

25 THE COURT: She cannot talk about his state.

1 She can testify what she observed. Go ahead.

2 BY MS. COOPER:

3 Q Did he appear upset?

4 A Yes.

5 Q Did he appear apologetic and sorry?

6 A Not at that point anymore.

7 Q When he tells you to come downstairs, does he touch
8 you in any way?

9 A He grabbed my arm, my bicep, and told me to be calm.
10 He said, You don't want Zach to see you like this. And I
11 didn't, so I tried to be calm and I went downstairs. It
12 wasn't that big of a fight. I wanted to go downstairs. I
13 wanted to leave.

14 Zach was downstairs. He was watching cartoons.
15 He saw me again and could tell obviously something was
16 wrong. He was crying.

17 Q And what did you do when you saw Zach downstairs?

18 A I picked him up and I sat on the couch.

19 Q Is this still in the main living room where he's
20 watching TV?

21 A Yes.

22 Q And what did you do with Zach?

23 A I was holding him and telling him it was okay and
24 I -- the phone was still -- my cell phone was there.

25 Q On the couch?

1 A On the couch, and I had dialed 911.

2 Q Can you describe for the jury what your cell phone
3 looked like?

4 A It's just a -- it's not a flip phone. It's just a
5 regular Nokia phone. And I dialed 911 quietly and I just
6 stuck it behind the pillow and then Randy had asked where
7 my purse is and I told him on the counter. He'd looked
8 through it and said --

9 Q On the counter where?

10 A In the kitchen. He looked through it and then asked
11 where my phone was. I pretended like I couldn't find it
12 and then I was like, oh, here it is, and --

13 Q Could you tell whether the line was still with 911?

14 A No, it wasn't at that point.

15 Q And, by the way, when you called 911, could you hear
16 anybody on the other end?

17 A Yes. Yes, someone did answer, but I kind of stuffed
18 it down in the pillow.

19 Q And you did not respond?

20 A No.

21 Q Where was Randy during this time?

22 A He was searching. He was looking through my
23 pocketbook in the kitchen.

24 Q There are no walls between the living room and
25 kitchen?

1 A No.

2 Q So when you found the cell phone, pretended to find
3 the cell phone, was the line still on?

4 A No, it was off. It was not on anymore.

5 Q So what did you do with the phone?

6 A I handed it to him. He took it and put it down on
7 the counter in the kitchen.

8 Q I'm going to show you State's 23. Do you see your
9 purse?

10 A Yes, it's black. It's right on the counter there.

11 Q Is that where the defendant put your purse?

12 A Yes.

13 Q And what color is your purse?

14 A It's black.

15 Q When he puts your purse on the kitchen counter, did
16 you leave the main living room at any point?

17 A Yes. I had tried the -- I was going towards the
18 front door. I was trying to leave. Randy had followed
19 us. We were in the living room, sat back down on the
20 couch, and I was trying to think of what to do.

21 Q Where is the couch located in that living room?

22 A It's on that wall right there.

23 Q And describe for the jury what happens when you're on
24 the couch in that living room.

25 A He followed us in there to make sure that we weren't

1 going to leave. Then he left to go back to the kitchen.
2 And when he had left to go back to the kitchen, Zach and I
3 got up again to go out the door. We came back and he said
4 he wanted to take Zach with him because he knew I wasn't
5 going to leave without Zach. And, I don't know, I didn't
6 know at that point why he wanted to go to the kitchen.
7 Then I got up and I wouldn't let him take Zach. I put
8 Zach in the corner.

9 Q Which corner did you put Zach in?

10 A It's kind of on that 90-degree angle where the
11 bathroom is.

12 Q This corner?

13 A There's a corner near the computer.

14 Q And what, if anything, is normally in that corner?

15 A There is a lamp.

16 Q What did you do when you got Zach to that corner?

17 A I put Zach behind me and I put the lamp in front of
18 us. I just wanted something in between us and Randy. I
19 was trying to get to the door.

20 Q What did the defendant say to you when you grabbed
21 the lamp?

22 A He asked me if I was going to hit him with that. I
23 said no, I just want to leave. At that point he grabbed
24 the lamp from me and jerked it and I fell over the stool
25 right there and he, I guess, threw the lamp so that it was

1 laying right by the couch.

2 Q I'm going to show you State's No. 14, 10 and 11. In
3 photo 11, do you see the stool that you say you tripped
4 on?

5 A Yes.

6 Q Could you just point it out for the jury?

7 A Right here.

8 Q And it's behind a chair on the floor?

9 A Uh-huh, it's right by that corner.

10 Q And State's No. 10, do you see the lamp that you had
11 grabbed?

12 A Yes, that is the lamp.

13 Q Where is it in the room?

14 A It's draped over -- you see my brother and my
15 sister's book bag and the couch.

16 Q And then State's No. 14, do you see an item that
17 should be on the lamp?

18 A It's the lamp shade.

19 Q What color is that lamp shade?

20 A It's red.

21 Q When you tripped over the stool and he took the lamp
22 from you and threw it onto the couch, what happened next?

23 A He grabbed my arms and he started to drag me to the
24 kitchen. I was terrified at this point. I was very
25 scared and so my feet wrapped around that bannister, that

1 square bannister.

2 Q And just so we should make everyone on the same page,
3 let me show you a photograph. Do you see that bannister
4 in State's 16 and 18?

5 A Yes.

6 Q Can you please describe it?

7 A It's a white square column with a bannister.

8 Q How did you hold onto that bannister?

9 A I wrapped my legs around it. I used all the power
10 that was in me to just hang on there. I did not want to
11 go to the kitchen. But he just used all the strength he
12 had to pull me off.

13 Q And what part of his body was he holding onto to pull
14 you off?

15 A My arms. He was holding onto my arms. I was leaning
16 back like this.

17 Q Where is Zachary or Zachariah at this time?

18 A He's still in that living area. He's terrified. He
19 doesn't know what's going on.

20 Q And was the defendant able to get you off of the
21 bannister?

22 A Yes.

23 Q Where did he take you after he got you released from
24 the bannister?

25 A He began to drag me out. I was able to get myself

1 back up while he was pulling me into the kitchen. He
2 started rustling through some drawers and I pushed the
3 drawers back.

4 Q Why did you push the drawers back?

5 A I was afraid he was going to get some sort of weapon,
6 a knife, something that I couldn't ever protect myself
7 against, and so I just pushed it back. I stood in front
8 of the drawer and him and he had pushed me back into the
9 drawer and then spun me away, got open the drawer, got the
10 knife, and he had put it at my neck.

11 Q So describe for the jury, are you facing one another
12 when he puts it to your neck or how are your bodies
13 positioned?

14 A At first we were facing each other and then I got
15 turned around and he got -- I got turned around and
16 that's -- before I got turned around I got really calm. I
17 just knew I had to figure out a way to get out of this
18 situation. So I just started -- like survival mode just
19 clicked and I just stopped crying and I was trying to
20 figure out what to say. I was like, Randy, I love you,
21 you know I don't want my parents to see me this way, just
22 stay very calm and nice, and then he had turned me around
23 and then the knife was still -- it wasn't as forceful but
24 it was there.

25 Q So did he relax the knife when you told him the

1 things he wanted to hear?

2 A Yes. Then he started to cry again. I could feel the
3 tears on the back of his neck, on the back of my neck.

4 Q His tears?

5 A His tears. He was very upset.

6 Q And you indicated you didn't want your parents to see
7 you this way. What was going on through your mind at this
8 point?

9 A I thought I was going to die at that moment. I
10 literally -- I was so overwhelmed, I was so scared, I was
11 scared for Zach more than anything. I was like a hundred
12 percent sure that, like, I was going to die. Because he
13 had threatened earlier to kill him, to kill me, I was
14 terrified. Terrified. I was trying anything in my power
15 to convince him to lay off. And then whenever he started
16 getting upset again, he said, Let's go for a ride.

17 Q What did he do with the knife?

18 A He put it in his back pocket.

19 Q And how did he -- did he force you to come with him?

20 A He picked up Zach and I followed him outside. He had
21 Zach on his arm on the right side and his -- the knife was
22 in his back pocket..

23 Q On which side?

24 A I don't remember.

25 Q But it was on the back side?

1 A It was in his back pocket.

2 Q When he picked Zach up, where did he go?

3 A To the front door.

4 Q Had he told you whether or not you were supposed to
5 follow, too?

6 A No, I just did.

7 Q Did he have permission to take Zach at this point?

8 A No. No.

9 Q Tell the jury what happens when you get outside.

10 A We got outside. I knew it was kind of like a
11 now-or-never thing. I saw my neighbor.

12 Q And what's her name?

13 A Katria.

14 Q What was Katria doing?

15 A She was mowing the lawn. And, I mean, my face was --
16 I was crying but I was composed. And I saw her and I just
17 looked at her and without thinking I just was, like, I
18 mouthed to her like that, help me, and just really quiet.
19 I didn't say it. And then I started walking in that
20 direction.

21 I was like -- I don't -- I was just doing
22 things. I wasn't thinking at all. I just started
23 walking. And I heard Randy say, Lauren, and then I knew
24 that he was like, Lauren, like, I felt like he kind of
25 knew what I was about to do. And then I just went all

1 out. I ran up to Katria. I was a wreck. I just was
2 like, Please call 911.

3 Then I heard the door slam and I looked and Zach
4 was in the seat, in his lap, and I was so scared.

5 Q When you heard the door slam, did that grab your
6 attention from Katria?

7 A It immediately grabbed my attention. I turned
8 around. I saw Zach's face and he was crying and I just
9 ran after the car. It backed out of the driveway and it
10 started going. I got on -- I was running beside the
11 passenger side. I had opened the door while it was going.

12 Q Would this be the front passenger door?

13 A The front passenger door.

14 Q On the other side?

15 A On the other side. I had opened the door and I saw
16 Zach's face and I reached for him and he said, Momma, and
17 I reached for him. Randy was like, Get in the car, and I
18 was like, No, and every time I opened the door he
19 accelerated and I just ran like I've never ran before. I
20 ran so fast.

21 I saw a white truck coming. I was screaming,
22 trying to get anybody's attention to go after him. I
23 didn't know if I was going to see Zach again. I was
24 terrified.

25 And I saw him, his face. It's like imprinted in

1 my mind, you know? And I just kept running.

2 Then he dropped Zach off, I guess he had
3 realized what he had done, in the middle of the road.

4 Q Were you still at the car at this time?

5 A No. He had gone so fast.

6 Q Did you lose grip?

7 A I lost grip.

8 Q Did you fall?

9 A Yes.

10 Q Were you wearing any shoes at this time?

11 A I was barefoot.

12 Q I'm going to show you a picture, State's No. 65. Do
13 you recognize that?

14 A Yes, I do.

15 Q Do you see your house, your parents' house in that
16 picture?

17 A Yes.

18 Q Okay.

19 A There's a --

20 MS. COOPER: Your Honor, at this time I would
21 like to introduce State's 65 into evidence. I've shown it
22 to defense already.

23 MS. DURANT: No objection.

24 THE COURT: If there's no objection, State's 65
25 is admitted.

1 (WHEREUPON, State's Exhibit No. 65 was admitted
2 into evidence.)

3 BY MS. COOPER:

4 Q Just to orient the jury, where exactly is your house
5 on that picture, your parents' house?

6 A It's right here. There's a van and a truck in the
7 driveway in this picture. That's our mailbox. That's the
8 driveway. This is kind of a hill, and right there Randy
9 had taken off this way.

10 Q And am I pointing at the correct house?

11 A Yes.

12 Q I'm also going to show you a diagram so the jury is
13 oriented. State's No. 2, do you recognize this diagram?

14 A Yes.

15 Q Do you see your house, your parents' house on that?

16 A Yes, that's my house, the back porch in the back.

17 Q Does this accurately depict your neighborhood?

18 A Yes.

19 MS. COOPER: Your Honor, at this time State
20 seeks to introduce No. 2 into evidence.

21 MS. DURANT: No objection, your Honor.

22 THE COURT: Without objection, State's 2. I
23 think you described it as a diagram. That's actually an
24 aerial photograph, is it not?

25 MS. COOPER: Yes, sir, I apologize, aerial

1 photograph.

2 THE COURT: I want to make sure the record is
3 clear.

4 MS. COOPER: Okay, aerial photograph.

5 (WHEREUPON, State's Exhibit No. 2 was admitted
6 into evidence.)

7 BY MS. COOPER:

8 Q And, again, using this marker, please mark which
9 house is yours?

10 A Right here.

11 Q All right. Just put an X on the house.

12 And this is your house, correct, with the X?

13 A Right.

14 Q Which house is Katria's?

15 A It's right here.

16 Q Okay. When Randy backed out of the driveway, what
17 kind of car was he driving?

18 A I believe it was a Toyota Corolla, beige.

19 Q And approximately how old is the car?

20 A Early '90s.

21 Q And describe for the jury pointing with this diagram,
22 and feel free to stand up but just speak up, how did he
23 back out of the driveway?

24 A He had backed out and he backed out this way and just
25 started going down this road right here.

1 Q Where were you when you lost grip of the vehicle and
2 fell?

3 A It was on this road somewhere.

4 Q Okay.

5 A I don't remember exactly where it was. It was past
6 Katria's house.

7 Q And when was it that -- what kind of vehicle did you
8 notice coming?

9 A It was a white truck coming this way.

10 Q The opposite direction?

11 A The opposite direction.

12 Q Approximately how far up the road was Randy? Did you
13 see him actually stop and let the baby out?

14 A Yes.

15 Q How far do you think you made it?

16 A Past this. Probably -- I don't have a sense of it.

17 Q Was it more than a block or two blocks?

18 A Yes.

19 Q Yes, which one?

20 A It was just -- it was like maybe -- I would say six
21 houses down.

22 Q Okay. What did you do when you lost grip of the car?
23 Did you go up to the truck, the white truck, at any point?

24 A Yes.

25 Q What did you do when you got to that truck?

1 A I remember trying to stop the truck. I was just
2 running in the middle of the road. I remember trying to
3 stop the truck. I remember telling somebody to turn
4 around. It's so blurry. I was focused dead set on Zach.
5 I couldn't even tell you who was driving the car or the
6 truck. We did find out who it was, but at that point I
7 couldn't even tell you. I was just in the zone.

8 Q You couldn't tell if it was a man or a woman?

9 A No, I couldn't. I wasn't looking. I just wanted
10 anybody to stop and turn around.

11 Q Did that truck stop and turn around?

12 A I believe it did.

13 Q What happened when you saw the defendant let Zach out
14 of the car?

15 A I fell. I kept running. I felt like some sort of
16 relief. I was still worried that he was in the middle of
17 the road. I kept running towards him. I didn't stop. I
18 picked him up. It just felt so good to have him in my
19 arms and I started to walk back. There was just so much
20 adrenaline had built up for so long that I just
21 immediately drained. I got really light-headed. Katria
22 ended up taking Zach and I just had fallen again on the
23 side of the road, just so overwhelmed, just hysterical.

24 Q And do you recall whether or not Katria had called
25 the police?

- 1 A Yes.
- 2 Q Did you see a phone in her hand?
- 3 A Yes.
- 4 Q And do you recall them asking you, her and her
- 5 husband asking you questions?
- 6 A Yes.
- 7 Q And what did you tell them?
- 8 A I told them that it was Randy, it was Randy Thomas.
- 9 They were on the phone with 911 and I told them that it
- 10 was a beige-ish car, that he was wearing a baseball cap.
- 11 I just was -- I said he was six-two. I was just trying to
- 12 get somebody out there after him.
- 13 Q Did you tell Katria what he had done to you in the
- 14 house?
- 15 A Yes, I did.
- 16 Q How long did it take for the police to get to
- 17 Katria's house?
- 18 A It seemed like a while. I couldn't tell you exactly.
- 19 I was so distraught at that point.
- 20 Q And do you recall talking to the police officers when
- 21 they arrived?
- 22 A Yes.
- 23 Q Do you recall speaking to a Deputy Gonzales?
- 24 A Yes.
- 25 Q A Hispanic officer?

1 A Yes.

2 Q A male officer. Did you tell him what had happened
3 to you at the house?

4 A I did tell him.

5 Q When he first questioned you, were you alone with him
6 or were you with other people?

7 A I was with other people.

8 Q Who?

9 A Katria. We were in her house. We were all just
10 sitting down.

11 Q Do you recall her husband being there?

12 A Yes. I know she got me water. She got -- she was
13 just taking care of Zach at that point.

14 Q And did you feel comfortable talking to Deputy
15 Gonzales about what had happened to you inside of the
16 house in front of those people?

17 A No, I was - I didn't --

18 MS. DURANT: Objection, your Honor. Leading.

19 THE COURT: It was a leading question. I
20 sustain the objection.

21 Go ahead. Rephrase your question.

22 MS. COOPER: Thank you, your Honor.

23 BY MS. COOPER:

24 Q How did you feel when he questioned you in front of
25 those other people?

1 A I felt -- I didn't know these people. I rarely -- I
2 barely knew Katria really. I felt uneasy. I had just --
3 I'm still trying to calm down. I didn't -- I didn't
4 really want to reveal any information, but they assured me
5 that it was safe, it was okay to tell, and I did say what
6 had happened.

7 Q And when had your family moved to this neighborhood?

8 A We moved there in December of 2001.

9 Q And did you know Katria as a neighbor the whole time
10 you lived there?

11 A Not really. I think a lot of people moved in and out
12 of that house. She probably moved there -- I never really
13 officially met her, but she probably moved there whenever
14 I was in Clemson. I didn't even know her name.

15 Q Okay. So you didn't grow up next to this woman your
16 whole life?

17 A No.

18 Q Do you recall whether or not Deputy Gonzales advised
19 you concerning water?

20 A Yes.

21 Q What did he do?

22 A I quit drinking. He had told me not to drink it
23 because at the hospital they were saying they needed to
24 take tests.

25 Q So you did drink some water, though?