

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Union County

John C. Hayes, III, Circuit Court Judge

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S.C. Supreme Court

DONNIE M. MALPASS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001460

APPENDIX

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STATE OF SOUTH CAROLINA
COURT OF GENERAL SESSIONS
COUNTY OF UNION
03-GS-44-772

STATE OF SOUTH CAROLINA
VS.
DONNIE M. MALPASS

UNION, SOUTH CAROLINA
MARCH 9-10, 2004
BEFORE THE HONORABLE LEE S. ALFORD

APPEARANCES
FOR THE STATE: LISA COLLINS, DAN KINKARD
FOR THE DEFENDANT: BILL AUL
REPORTED BY: MICHAEL C. WATKINS
OFFICIAL COURT REPORTER

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NO EXHIBITS

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VOIR DIRE

1 THE COURT: Ladies and gentlemen of the jury, if you
2 would give me your attention, please. We are going about
3 to go into the trial in the matter of State of South
4 Carolina vs. Donnie Mack Malpass. The State is charging
5 Donnie Mack Malpass with two counts of lewd of act upon a
6 minor under the age of 16. The indictments allege as
7 follows, that the defendant, Donnie Mack Malpass, did on or
8 about July 19, 2003 commit the crime of lewd act upon a
9 child under the age of 16 years, and that the defendant was
10 over the age of 14 years at the time of the incident, did
11 willfully and lewdly commit or attempt to commit a lewd or
12 lascivious act upon or with the body or any part or member
13 thereof of the victim, ^{Minor 2} a child under the
14 age of 16 years at the time of the incident. The other
15 indictment charges that -- or alleges that on or about the
16 same date the defendant, Donnie Mack Malpass, did willfully
17 or lewdly commit or attempt to commit a lewd or lascivious
18 act upon or with the body or any part or member thereof of
19 the victim, ^{Minor 1} spelled ^{Minor 1} L, a child
20 under the age of 16 years at the time of the incident.
21 Ladies and gentlemen of the jury, I have read to you
22 allegations contained in these two indictments and I will
23 tell you that these indictments are not proof of anything,
24 not evidence and not proof of anything and cannot be
25 considered proof of anything. An indictment is merely a

1 formal document upon which any person charged with any
2 criminal offense is put on notice as to what the
3 allegations against him or her are so they can come into
4 court and appropriately defend themselves. The only reason
5 I read some of these allegations to you, factual
6 allegations, is that from those factual allegations they
7 would cause you to know that you had any prior knowledge
8 about this case before coming to court here today which may
9 affect your ability to serve in this case, that's the only
10 reason that I read those allegations to you. Again, it's
11 not proof of anything and not evidence of anything in this
12 case and cannot be considered as evidence or proof of
13 anything. Now, the State of South Carolina is represented
14 in this case by Assistant Solicitors Lisa J. Collins and
15 Daniel Kinkard. Counsel, if you would stand and face the
16 jury panel. Thank you, you may be seated. Is anyone on
17 the jury panel related by blood or marriage, friends with
18 or have any other type social, business or professional
19 relationship with either Lisa J. Collins or Daniel D.
20 Kinkard? If so, please stand. Is anyone on the jury panel
21 related by blood or marriage, friends with or have any
22 other type social, business or professional relationship
23 with anyone who works in the 16th Circuit Solicitor's
24 Office? If so, please stand. The defendant in this case,
25 Donnie Mack Malpass, is represented by Mr. William D. Aul,

VOIR DIRE

1 II, known as Bill here in Union. Mr. Aul, would you please
2 stand and also ask Mr. Malpass, if he would stand. Thank
3 you, you may be seated. Is one anyone on the jury panel
4 related by blood or marriage, friends with or have any
5 other type social, business or professional relationship
6 with Donnie Mack Malpass? If so, please stand. Now, what
7 I'm going to ask you to do is if you would all just come to
8 the center aisle I would like to get your responses down
9 front next to the court reporter. Give us your name and
10 number, if you remember your number.

11 THE DEFENDANT: Stella Manus, 133.

12 THE COURT: How do you know the defendant?

13 MR. AUL: Well, his granddaddy and my granddaddy were
14 close, but his mother is my neighbor.

15 MR. KINKARD: Okay. Now, let me ask you, ma'am,
16 whether your relationship with his mother and other family
17 members would interfere with your ability to be fair to
18 both the State and the defendant and fair and impartial as
19 to both the State and the defendant in this case? Be as
20 honest as you can.

21 THE JUROR: I wouldn't use that as anything, no.

22 THE COURT: Pardon me?

23 THE JUROR: I wouldn't use that against him or for
24 him.

25 THE COURT: Could be fair to both the State of South

VOIR DIRE

1 Carolina and the defendant?

2 THE JUROR: I could try.

3 THE COURT: I need a better answer than that. I need
4 a yes or no.

5 THE JUROR: Yeah, I could be fair.

6 THE COURT: You could be fair?

7 THE JUROR: Yeah.

8 THE COURT: All right. Thank you, ma'am, you may
9 return to your seat.

10 THE CLERK: This is number 60.

11 THE COURT: How do you know the defendant?

12 THE JUROR: I've known him all of his life, his
13 parents are real good friends of mine.

14 THE COURT: Let me ask you then, sir, and be as honest
15 as you can, is there anything about your relationship with
16 him and his parents that would interfere in any way with
17 your ability to give both the State of South Carolina and
18 the defendant a fair and impartial trial in this case?

19 THE JUROR: Well, I just wouldn't feel, you know,
20 being able to face his family if I passed judgment on him
21 in any manner.

22 THE COURT: So you don't think you could be fair to
23 both sides?

24 THE JUROR: No, sir. I think it's a honor you let me
25 come in to be a juror but not on this trial in this case.

VOIR DIRE

1 I will be glad to do it on any other.

2 THE COURT: But you don't want to serve on this one.

3 THE JUROR: No, sir.

4 THE COURT: I'm going to excuse you on this one, but,
5 of course, you just stay with the jury panel on any other
6 case we may try.

7 THE JUROR: That will be fine.

8 THE COURT: Yes, sir. Do you remember your number?

9 THE JUROR: 131.

10 THE COURT: How do you know the defendant?

11 THE DEFENDANT: My wife was here before, the same
12 question, he grew with up in my neighborhood and I have
13 known him all of his life.

14 THE COURT: Let me ask you, sir, and be as honest as
15 you can, would your prior relationship with him interfere
16 with your ability to be fair to both the State and to the
17 defendant in this case?

18 THE JUROR: I believe it would.

19 THE COURT: You think it would?

20 THE JUROR: Yes, sir.

21 THE COURT: I'm going to excuse you from this case,
22 sir, but you just stay with the jury panel for any other
23 case we try this week. Thank you.

24 THE CLERK: This is 114.

25 THE COURT: Yes, ma'am, how do you know the defendant?

VOIR DIRE

1 THE JUROR: I live in Buffalo, he lives just a few --
2 well, I would say about a quarter mile above me.

3 THE COURT: Okay. Let me ask you whether the fact
4 that y'all live that close together in the same
5 neighborhood, would that relationship interfere in any way
6 with your ability to give both the State and the defendant
7 a fair and impartial trial?

8 THE JUROR: No, sir.

9 THE COURT: Thank you, ma'am. You may return to your
10 seat. Thank you.

11 THE CLERK: Number 25.

12 THE COURT: How do you know the defendant?

13 THE JUROR: I've worked with him before, him and some
14 of his family.

15 THE COURT: Let me ask you, sir, whether that
16 relationship with him and his family would interfere in any
17 way with your ability to be fair impartial to the State of
18 South Carolina and the defendant?

19 THE JUROR: No, sir, I don't think so.

20 THE COURT: You think you could be fair to both sides?

21 THE JUROR: Yes, sir.

22 THE COURT: You may return to your seat.

23 THE CLERK: This is number 163.

24 THE COURT: How do you know the defendant?

25 THE JUROR: When I was a teenager he used to go with

VOIR DIRE

1 my best girlfriend. And then as an adult he lived in the
2 same trailer park I did and was married to one of my other
3 girlfriends.

4 THE COURT: Let me ask you whether your prior
5 relationships with him, if that would interfere in any way
6 with your ability to be fair and impartial as to both the
7 State of South Carolina and the defendant?

8 THE JUROR: I wouldn't think so.

9 THE COURT: I've got to have a more definitive answer,
10 either yes or no.

11 THE JUROR: No.

12 THE COURT: It would not?

13 THE JUROR: No.

14 THE COURT: Thank you, ma'am, you may return to your
15 seat. Anyone on the jury panel related by blood or
16 marriage, friends with or have any other type social,
17 business, or professional relationship with William B. Aul,
18 II, Bill Aul? If so, please stand. Yes, ma'am, please
19 give us your name and number.

20 THE JUROR: 145, Kim Morris.

21 THE COURT: And how do you know Mr. Aul?

22 THE JUROR: He closed my home for me.

23 THE COURT: All right. Ma'am, is there anything about
24 that relationship that would interfere in any way with your
25 ability to be fair and impartial as to both the State of

VOIR DIRE

1 South Carolina and the defendant in this case?

2 THE JUROR: No, sir.

3 THE COURT: Thank you, ma'am, you may be seated.

4 Anyone else? Yes, ma'am, please give us your name and
5 number.

6 THE JUROR: My name is Jenny Knox, Mr. Aul has done
7 some legal business for me. I asked him to give me some
8 legal advice with the closing of my mother's estate and on
9 my sister's death.

10 THE COURT: Let me ask you whether that relationship
11 would interfere in any way with your ability to give both
12 the State and the defendant a fair and impartial trial in
13 this case?

14 THE JUROR: No, sir.

15 THE COURT: Thank you, ma'am, you may be seated.
16 Anyone else?

17 THE JUROR: Mr. Aul has done some personal business
18 for me, closing out some loans and things.

19 THE COURT: Ma'am, is there anything about that
20 relationship that would interfere in any way with your
21 ability to give both the State and the defendant a fair and
22 impartial trial in this case?

23 THE JUROR: No.

24 THE COURT: Thank you, ma'am, you may be seated. Yes,
25 sir?

VOIR DIRE

1 THE JUROR: Charles Cavender. Mr. Aul closed a house
2 for us, sir.

3 THE COURT: Is there anything about that relationship
4 that would interfere in any way with your ability to give
5 both the State and the defendant a fair and impartial trial
6 in this case?

7 THE JUROR: No, sir.

8 THE COURT: Thank you, sir, you may be seated. Anyone
9 else? Yes, ma'am?

10 THE JUROR: Number 45, Tammy Eaves. Mr. Aul closed
11 our house.

12 THE COURT: Ma'am, is there anything about that
13 relationship that would interfere in any way with your
14 ability to give both the State and the defendant a fair and
15 impartial trial in this case?

16 THE JUROR: No, sir.

17 THE COURT: Thank you, ma'am, you may be seated.
18 Anyone else?

19 THE JUROR: 212. Mr. Aul closed on my house and also
20 we attend church together.

21 THE COURT: Ma'am, is there anything about Mr. Aul
22 that would interfere in any way with your ability to give
23 both the State and the defendant a fair and impartial trial
24 in this case?

25 THE JUROR: No, sir.

VOIR DIRE

1 THE COURT: Thank you, ma'am, you may be seated.

2 Anyone else? Yes, sir?

3 THE JUROR: Mr. Aul done a closing on our new house.

4 THE COURT: Give us your name and number, please, sir.

5 THE JUROR: 206, Harry Williams.

6 THE COURT: Sir, is there anything about that
7 relationship that would interfere in any way with your
8 ability to give both sides a fair and impartial trial in
9 this case?

10 THE JUROR: No.

11 THE COURT: Thank you, sir, you may be seated.

12 THE JUROR: 84, Teresa Henderson.

13 THE COURT: What's your number, ma'am?

14 THE JUROR: 84. Mr. Aul has closed on a house for me,
15 too.

16 THE COURT: Ma'am, is there anything about that
17 relationship that would interfere in any way with your
18 ability to give both sides a fair and impartial trial in
19 this case?

20 THE JUROR: No, sir.

21 THE COURT: Thank you. Anyone else?

22 THE JUROR: Number 127, Eleanor Hand. Mr. Aul closed
23 on my house.

24 THE COURT: Okay. Ma'am, is there anything about that
25 relationship that would interfere in any way with your

VOIR DIRE

1 ability to give both the State and the defendant a fair and
2 impartial trial in this case?

3 THE JUROR: No, sir.

4 THE COURT: Thank you, ma'am, you may be seated.

5 Anyone else? Is any member of the jury panel or any family
6 member of a juror on the juror panel a past or present
7 member of law enforcement? Let me go back over that. Is
8 any member of the jury panel or member of your family a
9 past or present member of a law enforcement agency? If so,
10 please stand. Yes, ma'am, please give us your name and
11 number.

12 THE JUROR: Patsy Vickery, 158. My son is on the
13 Union Public Safety.

14 THE COURT: Ma'am, have you discussed this particular
15 case with him?

16 THE JUROR: No, sir.

17 THE COURT: Ma'am, is there anything about that
18 relationship that would interfere in any way with your
19 ability to give both the State and the defendant a fair and
20 impartial trial in this case?

21 THE JUROR: No, sir.

22 THE COURT: Thank you, ma'am, you may be seated.

23 Anyone else? Yes, ma'am?

24 THE JUROR: Number 56. My daughter works for the
25 magistrate downstairs, does that have anything to do with

1 it?

2 THE COURT: Well, I appreciate you telling us. Is
3 there anything about that relationship -- did you get any
4 knowledge about this case from her, ma'am?

5 THE JUROR: No, sir.

6 THE COURT: Is there anything about that relationship
7 that would interfere in any way with your ability to give
8 both the State and the defendant a fair and impartial trial
9 in this case?

10 THE JUROR: No, sir.

11 THE COURT: Thank you, you may be seated. Anyone
12 else? Has any member of the jury panel or member of your
13 immediate family been a victim of sexual molestation? If
14 so, please stand. If you need to respond we can take your
15 responses down front or we can do it with a little more
16 privacy. The question was has any member of the jury panel
17 or member of your immediate family ever been the victim of
18 a sexual molestation? If so, if you would stand. Okay.
19 What I'm going to ask you to do, please, is just come on to
20 the center aisle and we will take your responses down
21 front. Please give your name.

22 THE JUROR: Melody Knox, 113.

23 THE COURT: Yes, ma'am. Can you tell us what
24 happened?

25 THE JUROR: I was sexually molested by my father when

VOIR DIRE

1 I was four.

2 THE COURT: Okay. All right, ma'am. Given the nature
3 of nature of the allegations in this case, is there
4 anything about that experience that would interfere in any
5 way with your ability to give the State and the defendant a
6 fair and impartial trial?

7 THE JUROR: No, sir.

8 THE COURT: Thank you, ma'am, you may return to your
9 seat. Thank you. Please give us your name and number,
10 please.

11 THE JUROR: 88 I think is my number. Liz Morgan. My
12 husband was molested when he was young.

13 THE COURT: Is that right? Is there anything about
14 that experience that would interfere in any way with your
15 ability to give both sides a fair and impartial trial in
16 this case?

17 THE JUROR: I would have to say I would be impartial.

18 THE COURT: You would be impartial or -- so you don't
19 think you could be fair?

20 THE JUROR: I don't think so, no, sir.

21 THE COURT: We will excuse you from this case but be
22 sure to stay with us, we may have another case to try this
23 week. Has any member of the jury panel or member of your
24 immediate family ever been accused, whether falsely or
25 accurately, of sexual molestation? If so if you would

1 please stand at this time. You or a member of your
2 immediate family were accused falsely or accurately of
3 sexual molestation? Ladies and gentlemen of the jury, we
4 asked you earlier if you had ever been represented by Mr.
5 Aul, let me ask you that same question as to the law firm
6 of Aul and Frost. Other the ones that have already stood
7 with regard to Mr. Aul's representation, is there any other
8 member of the jury panel who did not stand before who was
9 represented by the law firm of Aul and Frost, that would be
10 Gary Frost who practices with Mr. Aul? If so, please
11 stand.

12 THE JUROR: Mr. Frost has represented my grandson in
13 some cases.

14 THE COURT: All right. Ma'am, is there anything about
15 your experience in that regard that would interfere in any
16 way with your ability to give both the State and the
17 defendant a fair and impartial trial in this case?

18 THE JUROR: No.

19 THE COURT: Thank you, ma'am, you may be seated. Yes,
20 ma'am, please give your name and number.

21 THE JUROR: 123, Aul and Frost closed on my house.

22 THE COURT: They represented you before, ma'am?

23 THE JUROR: They closed on my house.

24 THE COURT: Closed on your house? Okay. And ma'am,
25 is there anything about that relationship that would

VOIR DIRE

1 interfere in any way with your ability to give both sides a
2 fair and impartial trial in this case?

3 THE JUROR: No.

4 THE COURT: Thank you. You may be seated. Anyone
5 else?

6 THE JUROR: Brenda Frost, number 60. Mr. Frost is the
7 one I worked with when my dad passed away and also
8 Mr. Frost is a nephew of mine.

9 THE COURT: He's a nephew of yours?

10 THE JUROR: Yes, sir.

11 THE COURT: Ma'am, is there anything about that
12 relationship that would interfere in any way with your
13 ability to give both the State and the defendant a fair and
14 impartial trial?

15 THE JUROR: No, sir.

16 THE COURT: Thank you, ma'am, you may be seated.
17 Anyone else? Has any member of the jury panel or any
18 immediate member of your immediate family ever been
19 prosecuted for a sex crime or any crime by the 16th
20 Judicial Circuit Solicitor's Office anyone in that office?
21 If so, please stand. Ladies and gentlemen of the jury
22 panel, I'm going to go through a list of potential
23 witnesses in this case. All of these witnesses may not be
24 called but they may be called. What I'm going to ask you
25 to do is when I call their names if you are related by

VOIR DIRE

1 blood or marriage, friends with or have any other type
2 social, business or professional relationship with any of
3 these named persons, I will ask you to stand when I call
4 their names. Here are the names of potential witnesses:

5 Minor 2 Minor 1 What I'm going to ask you
6 to do is come to the center aisle and I will take your
7 responses down front.

8 THE JUROR: I'm ^{Minor 1} teacher.

9 THE COURT: If you would give us your name and number?

10 THE JUROR: My name is Judy Ledbetter.

11 THE COURT: Ma'am, let me ask you whether you have
12 discussed this case with her any?

13 THE JUROR: I knew she was coming to court but I
14 didn't know why because she just transferred. I could not
15 be a juror in this case.

16 THE COURT: You could not be a juror?

17 THE JUROR: I could not, no, not and be her teacher
18 next week, no.

19 THE COURT: We're going to excuse you from this case
20 but if you will stay with the jury for any other case we
21 might hear this week.

22 THE JUROR: 127, Eleanor Lynn.

23 THE COURT: Yes, ma'am?

24 THE JUROR: ^{Minor 2} is a student at my school. I have
25 seen her in the halls, I know who she is and my fellow

VOIR DIRE

1 teacher, Jody Ledbetter, has been talking to me since she
2 heard the name earlier.

3 THE COURT: Have you all talked about this case or
4 anything about the allegations in this case?

5 THE JUROR: Just that she has been -- she told Jody
6 yesterday that she was going to be in court this week and
7 Jody has been talking to me about her transferring from
8 Buffalo and how she's very mature for her age, some things
9 like that.

10 THE COURT: Okay. But not about this case
11 specifically?

12 THE JUROR: Not specifically about this case.

13 THE COURT: Let me ask you whether that relationship
14 with her being at the same school and anything else you
15 have had discussions with her about would interfere in any
16 way with your ability to give both the State and the
17 defendant a fair be impartial trial in this case?

18 THE JUROR: I'm afraid it would.

19 THE COURT: I appreciate your honesty. I will go
20 ahead and excuse you from this case, you just stay with the
21 jury.

22 THE CLERK: This is number 96.

23 THE JUROR: I used to babysit ^{Minor 1} and she's
24 friends with my son, was at one time.

25 THE COURT: Okay. Let me ask you then, given that

1 relationship, if that would interfere in any way with your
2 ability to give both the State and the defendant a fair and
3 impartial trial in this case?

4 THE JUROR: No.

5 THE COURT: It would not interfere? You think you
6 could be fair?

7 THE JUROR: Uh-huh.

8 THE COURT: Thank you, ma'am. I will go over the list
9 of potential witnesses. Again, if you are related by blood
10 or marriage, friends with or have any other type social,
11 business or professional relationship with any of these
12 potential witnesses, when I call their names please stand.

13 J.L. Lynn Fox. Investigator Marty Shugart with the
14 Union County Sheriff's Office. Sergeant Troy Bruington
15 with the Union County Sheriff's Office. Lieutenant Robert
16 Malone with the Union County Sheriff's Office. Deputy
17 Travis Shugart with the Union County Sheriff's Office.
18 Corporal Skeet Jeter who is with the Union County Jail.

19 A.F. Dale Guerton, it is spelled G-u-e-r-t-o-n.

20 I'm not sure if I'm pronouncing it correctly. Harold

21 Lawson. S.D. . Yes, ma'am, please give us your
22 name and number.

23 THE JUROR: Gwendolyn Fisher, 56.

24 THE COURT: Yes, ma'am? How do you know S.D.

25 ?

VOIR DIRE

1 THE JUROR: He's friends with my grandson, plus his
2 sister stays down at my house a good bit, spends the night
3 with my granddaughter.

4 THE COURT: Ma'am, let me ask you whether that
5 relationship -- if he were to be called as a witness by
6 either side in this case, if your relationship with him
7 would interfere in any way with your ability to give both
8 the State and the defendant a fair and impartial trial in
9 this case?

10 THE JUROR: No.

11 THE COURT: Thank you, ma'am, you may be seated.
12 Anyone else? Yes, sir, your name?

13 THE JUROR: I've had dealings with four officers with
14 the investigation for arson through my fire department that
15 I am chief in the Monarch Fire Department.

16 THE COURT: Give us your name and number, please?

17 THE JUROR: James F. Barfield.

18 THE COURT: Do you remember your number?

19 THE JUROR: Number 8.

20 THE COURT: Is there anything about that relationship
21 that would interfere in any way with your ability to give
22 both sides a fair and impartial trial in this case?

23 THE JUROR: No, sir.

24 THE COURT: Anyone else? Mark Coker. Leonard H.
25 Benfield. Tommy Dow. Rickey Malpass. Ma'am, please give

VOIR DIRE

1 us -- I'm sorry, yes, ma'am, give us your name and number.

2 THE JUROR: 133, Stella Manus.

3 THE COURT: Okay.

4 THE JUROR: I just know his family.

5 THE COURT: Okay. Ma'am, is there anything about that
6 relationship that would interfere in any way with your
7 ability to give both sides a fair and impartial trial in
8 this case?

9 THE JUROR: No.

10 THE COURT: You may be seated.

11 THE JUROR: Knox, 114, I know Ricky Malpass and
12 family.

13 THE COURT: Ma'am, is there anything about that
14 relationship that would interfere in any way with your
15 ability to give both sides a fair and impartial trial in
16 this case if he were to be called as a witness in this
17 case?

18 THE JUROR: No, sir.

19 THE COURT: Thank you, ma'am, you may be seated.

20 THE JUROR: Charles Cavendar, 25. I know Ricky
21 Malpass and part of the family.

22 THE COURT: All right, sir. Is there anything about
23 those relationships that would interfere in any way with
24 your ability to give both sides a fair and impartial trial
25 if he were to be called as a witness in this case?

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1 THE JUROR: No, sir.

2 THE COURT: Thank you, sir, you may be seated. Anyone
3 else? Ashley Malpass.

4 THE JUROR: William Hall, 92. My son and her lived
5 together for about two years.

6 THE COURT: They no longer live together?

7 THE JUROR: No.

8 THE COURT: Is there anything about that relationship,
9 sir, if she were to be called as a witness by either side
10 in this case that would interfere in any way with your
11 ability to give both sides a fair and impartial trial?

12 THE JUROR: No.

13 THE COURT: Thank you, sir, you may be seated. Yes,
14 ma'am, please give us your name and number again, please.

15 THE JUROR: Knox. I know Ashley, friends of the
16 family.

17 THE COURT: Again, ma'am, would that relationship
18 interfere in any way with your ability to be fair to both
19 sides in the case if she were to be called as a witness by
20 either side?

21 THE JUROR: No, sir.

22 THE COURT: Thank you, ma'am, you may be seated.

23 Anyone else? James Belue. Sharon Black. Dewayne
24 Covington. Mary Moore. Yes, ma'am, please give us your
25 name and number again.

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1 THE JUROR: Knox, 114. Mary was married to my cousin.

2 THE COURT: Ma'am, is there anything about that
3 relationship that would interfere in any way with your
4 ability to give both sides a fair and impartial trial?

5 THE JUROR: No.

6 THE COURT: Anyone else? Luke Rose, R-o-s-e.

7 THE JUROR: Gwendolyn Fisher, 56. Luke is my nephew.

8 THE COURT: Okay. Ma'am, have you discussed this case
9 at all with him?

10 THE JUROR: No, sir.

11 THE COURT: If he were to be called as a witness by
12 either side in this case, would that interfere in any way
13 with your ability to give both sides a fair and impartial
14 trial?

15 THE JUROR: No.

16 THE COURT: Thank you, ma'am, you may be seated.

17 Anyone else? I appreciate your patience, just a few more
18 questions, ladies and gentlemen. Has any member of the
19 jury panel had any prior knowledge about this case or any
20 knowledge about anybody who you have heard is going to be
21 involved in this case from any source before coming here to
22 court today? If so, please stand. Yes, ma'am, please give
23 us your name and number.

24 THE JUROR: Gwendolyn Fisher, 56.

25 THE COURT: I'm going to get you to come down front to

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1 respond, please. Tell us what knowledge you had.

2 THE JUROR: Well, all I got is what my sister had told
3 me that she had heard about what he did.

4 THE COURT: What did you hear from her?

5 THE JUROR: That he molested that little girl.

6 THE COURT: Okay. Let me then ask you, would that
7 knowledge, would that interfere with your ability to give
8 both the State and the defendant in this case a fair and
9 impartial trial?

10 THE JUROR: I believe it would, yeah, to be honest.

11 THE COURT: Okay. That's what we want you to be,
12 honest, we just need fair, impartial jurors. I'm going to
13 excuse you from this case but you will stay with the jury.
14 Give us your name and number again.

15 THE JUROR: Charles Cabler, 25. I just heard it
16 through the grapevine that he was arrested for that.

17 THE COURT: Have you discussed it with anyone?

18 THE JUROR: No, sir.

19 THE COURT: With that -- would you be able to put back
20 whatever information you had about that, put it aside and
21 still render a judgment which would be fair to both sides,
22 the State and the defendant in this case?

23 THE JUROR: Yes, sir.

24 THE COURT: Thank you, sir, you may return to your
25 seat. Give us your name and number again, please.

1 THE JUROR: Shannon Knox, 114. Just what I've heard
2 and what I seen in the paper.

3 THE COURT: Have you talked with anybody specifically
4 about this case, ma'am?

5 THE JUROR: No.

6 THE COURT: What you've heard through the newspaper as
7 you were talking to people?

8 THE JUROR: Talking to different people.

9 THE COURT: What have you heard, ma'am?

10 THE JUROR: Nothing in particular, just different
11 tales, he did, he didn't, don't know if he did or not, you
12 know.

13 THE COURT: Again, let me ask you then, were there
14 any -- would you be able to put aside anything you've heard
15 about this case before coming to court today and listening
16 to the testimony and evidence in the case and reach a
17 verdict which would be fair to both the State and the
18 defendant?

19 THE JUROR: Yes, sir.

20 THE COURT: Thank you, ma'am, you may return to your
21 seat. Has any member of the juror panel expressed an
22 opinion as to the guilt or innocence of the defendant in
23 this case, Donnie Mack Malpass? If so, please stand. Is
24 any member of the jury panel conscious of any interest,
25 bias or prejudice for or against the defendant, Donnie Mack

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1 Malpass? If so, please stand. Can each member of the jury
2 panel give both the State and the defendant, Donnie Mack
3 Malpass, a fair and impartial trial in this case? If not,
4 please stand. Does any member of the jury panel know of
5 any reason whatsoever why he or she should not serve as a
6 juror in this particular case? If so, please stand. Any
7 additional questions requested of the jury panel from the
8 State?

9 MR. KINKARD: Not from the State, Your Honor.

10 THE COURT: From the defense?

11 MR. AUL: No, sir, Your Honor.

12 THE COURT: Madam Clerk, if you would please give us a
13 jury. We will draw two alternates in this case.

14 (At this time the jury was selected.)

15 THE COURT: Any motions with regard to the jury from
16 the State?

17 MR. KINKARD: Not from the State, Your Honor.

18 THE COURT: From the defense?

19 MR. AUL: No, sir, Your Honor.

20 THE COURT: Ladies and gentlemen of the jury, give me
21 your attention please. We are going to go ahead and recess
22 for lunch at this time. We will take a little longer than
23 normal lunch our, there's some matters I need to take up
24 with counsel before we get started with the actual trial,
25 so I am going to ask you to be back in the jury room at

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1 2:30, that should give everybody plenty of time to get
2 lunch and be able to get back then. I'm going to give this
3 instruction to you and I will give you this instruction
4 every time you leave the courtroom really, and that is to
5 not begin discussing this case because you don't really
6 know anything about the case at this point. But I do not
7 want you to discuss the case among yourselves or with
8 anyone else during a break from court and to discuss it at
9 anytime until I tell you to and that will not occur until
10 you have heard all of the testimony and evidence in the
11 case and I have instructed you upon the law. Again, you
12 should not discuss the case among yourselves nor with
13 anyone else you might see on a break from court, including
14 family or friends. If you should see family or friends and
15 they find out you're on a jury they're going to want to
16 know about the case you're on, what kind of case it is,
17 something about it. The problem with discussing the case
18 is once you start discussing the case you start forming
19 opinions. Okay. And you wouldn't be fair to both sides in
20 this case if you didn't wait until you heard all of the
21 testimony and evidence and I have instructed you upon the
22 law that applies to the issues in this case before you
23 start forming opinions. Until then you should keep an open
24 mind and wait until you've heard all of the testimony and
25 evidence and the law that applies before you start forming

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1 opinions. So I'm going to tell you over and over please do
2 not discuss this case amongst yourselves or with anyone
3 else you might see on the lunch break. And I will go ahead
4 and give you this instruction, I don't know of any media
5 coverage of this trial but I would instruct you now not to
6 read, listen to or watch any media account of this trial.
7 And, of course, we are in an electronic age too, so I'm
8 going to instruct you the balance of the time you are on
9 this jury also not to get on the computer, stay off the
10 computer until after this case is over, and that's just a
11 precautionary matter, this day a lot of information is also
12 on the computer. So please do not get on the computer
13 during the time this case is going on. That might sound
14 like a long time but this is a short case so it's not much
15 of an imposition so I would ask that you do that. It's
16 extremely important that you make your decision in this
17 case based solely on the sworn testimony and evidence that
18 comes in during the course of this trial and not from any
19 other source. We can't guarantee the accuracy of any other
20 account you might get about this case from outside of the
21 courtroom. So please do not read, listen to or watch any
22 account of this trial or discuss it with anyone or receive
23 any information from anyone. If you see anyone discussing
24 the case outside of the courtroom, please move away from
25 them, don't discuss it with them. Now, if anybody

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1 deliberately tries to discuss this case with you do not
2 discuss it with them but make note of that person, give the
3 bailiffs or clerk of court's office a description -- best
4 description you can of that person when you return so that
5 I can deal appropriately with that person. No one should
6 try to discuss the case with you. If they do, I want to be
7 made aware of it so I can deal with that person. I'm going
8 to ask you to please enjoy your lunch. I will tell you the
9 alternates, when you come back sit in the same seat each
10 time and so the rest of the seats are changeable except for
11 the foreperson. I'm going to ask juror number 30, Richard
12 S. Cobb, raise your hand. I will ask you to serve as the
13 foreperson of this jury, and I will explain the role of the
14 foreperson. The foreperson is asked to serve as the
15 spokesperson for the jury back to the Court. If there's a
16 matter that needs to come to the attention to the Court
17 from the jury we would ask you to write it down on a
18 tablet, which that will be provided to you back in the jury
19 room. Please give it to the bailiff, the bailiff will
20 bring it to me, I will either correspond in a like manner
21 or I will bring you back in the courtroom and respond, but
22 if you would serve as spokesperson. We also ask that the
23 foreperson serve as the moderator once we've reached
24 deliberative stage and discussions, maintain some order in
25 those deliberations to make sure everyone is allowed to

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1 participate and be heard in the deliberations. And then
2 finally once a unanimous verdict is reached by the jury you
3 will be asked to record the verdicts on the verdict forms,
4 which will be provided to you and explained to you at the
5 appropriate time at the conclusion of the trial. But the
6 primary role of the foreperson is the same as the first 12
7 or the other jurors chosen and that is to listen carefully
8 to the testimony and evidence so you will be in a position
9 to deliberate and reach a verdict in this case just like
10 all of the other jurors. Now, we do ask that the
11 foreperson sit in the first seat beside the alternate on
12 the front row and we would like to know where the
13 foreperson and the alternate are, all of the other seats as
14 I say are interchangeable, sit wherever you comfortable, it
15 really doesn't matter. Ladies and gentlemen, I'm going to
16 excuse you at this time, please enjoy your lunch and be
17 back in the jury room at 2:30, the bailiff will show you
18 how to get back to the jury room. Thank you.

19 (The jury left the courtroom.)

20 MS. COLLINS: Your Honor, at this time the State would
21 move to sequester the witnesses in this case both for
22 defense and the State. For the State we would ask that
23 Lieutenant Marty Shugart would stay in as the case agent.
24 And we do have one issue as to one of the victim's parents,
25 that is Lynn Fox who is the mother of the victim ^{Minor 2}

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1 , and under the Victim's Right Act we would ask that
2 she be allowed to remain in. She is the first parent to
3 whom these children reported and she will be a witness to
4 that, but we would ask that she stay in under the Victim's
5 Rights Act. But other than that we are prepared to
6 sequester the remainder of our witnesses and we would ask
7 that all of the defendant's witnesses be sequestered as to
8 the defense witnesses.

9 THE COURT: Counsel?

10 MR. AUL: Your Honor, we would prefer the witnesses
11 not be sequestered, however if the Court would sequester
12 the witnesses we would ask that Ms. Fox also be
13 sequestered, Your Honor.

14 THE COURT: Why would you need her in, she's not a
15 victim, she's a parent of the victim. How old is the
16 victim?

17 MS. COLLINS: ^{Minor 2} I believe, is now 14,
18 Your Honor, or 13.

19 THE COURT: Well, I will sequester the witnesses, I
20 will let her stay in since the victim is 14 or younger
21 under the Victim's Rights Act, I believe she would be
22 allowed to stay.

23 MS. COLLINS: Your Honor, the State's next motion, the
24 State has filed -- has responded to the defense motion
25 under Brady Rule 5 to provide discovery and we have done

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1 so. We have filed a motion for reciprocal discovery. It's
2 our understanding that the defense has complied with that
3 motion but we just want to put that forth on the record.
4 We also served requests for notice of alibi defense which
5 we have received no notice of that so it's our
6 understanding they'll not be presenting any alibi defense.
7 And we also served a request for a written notice of a
8 mental health defense and we have not received written
9 notice of that so it is our understanding that those two
10 types of defense, alibi or mental health, will not be
11 presented. And again, that the defense has complied with
12 the reciprocal discovery requirements.

13 THE COURT: Mr. Aul?

14 MR. AUL: That is correct, Your Honor.

15 THE COURT: You agree that you're not going to
16 introduce any of those two defenses, which would be alibi
17 or anything of that nature?

18 MR. AUL: Yes, sir, we agree.

19 THE COURT: And you agree that you've complied with
20 the discovery -- reciprocal discovery requests?

21 MR. AUL: Yes, sir. We may do something this evening
22 that will require making some pictures but we will supply
23 copies of that as soon as we can.

24 MS. COLLINS: Your Honor, the State's next motion is
25 during the process of discovery it came to our attention

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1 that the defense may present or attempt to present
2 testimony and evidence as to alleged prior false
3 accusations of one or both victims against either this
4 defendant or a third party. It's our understanding of the
5 case law in this area that that would require not only the
6 burden of proof would be on the defendant to show that,
7 number one, the allegation was made, and number two, that
8 it was actually false, but also that that should be taken
9 care of outside the presence of the jury in a pretrial
10 hearing. So at this time we would move that -- just to
11 have the defense indicate to the Court if they do intend to
12 present such testimony, and if so, have a hearing on that
13 matter.

14 MR. AUL: Your Honor, as part of my Rule 5 request I
15 specifically asked if there were any allegations made by
16 any of the three individual young women that are involved
17 in this case, Your Honor. And I was told by the
18 solicitor's office they had checked with law enforcement
19 and that there was no such allegations having been made in
20 the past. I have done some independent investigation in
21 about three or four different manners, Your Honor, and have
22 not been able to find anything to indicate that that was
23 the case, Your Honor. Your Honor, we as late as this
24 morning had subpoenas to the sheriff's office on incident
25 reports involving named individuals that I had been relayed

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1 information may have had on allegations made against them
2 by these individuals and found nothing in those incident
3 reports I've got to review so far in indicating that, Your
4 Honor. Your Honor, I don't believe there's going to be
5 time between now and when the girls testify for me to find
6 anything else, Your Honor. Your Honor, if I did find
7 anything I would disclose it immediately to the solicitor's
8 office and want to have a hearing on that because that was
9 information that was supplied to me but I have not been
10 able to verify any of that information. So at this time
11 there's no attempt to do anything in regards to that, Your
12 Honor. I'm not going to ask the witnesses irrelevant
13 questions because I have nothing to back up any information
14 like that, Your Honor. However, if the sheriff's office --
15 and as the Court knows, has been very busy with an
16 investigation this morning, if they do come up with
17 something in regards to that I will obviously supply it to
18 the solicitor's office, and law enforcement is actually
19 working under them and so I would assume they would have
20 provided it to them already. We have worked with
21 Ms. Collins in the solicitor's office yesterday running
22 some names of individuals that I had been told to see if
23 they ever had related charges like this and have not been
24 able to find anything. We do not intend to introduce
25 anything in that regard, Your Honor.

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1 THE COURT: If anything like that came up at a later
2 time we would have to conduct a hearing outside of the
3 presence of the jury and we would do that in-camera at that
4 time. Anything else?

5 MS. COLLINS: Just for the record Mr. Aul is
6 absolutely correct, we did inquire of the victims and
7 victims' families with law enforcement that's working on
8 this case. The victims and their families deny any prior
9 allegations of this type being made by the victims and law
10 enforcement was not aware of any as well. The last motion
11 by the State, Your Honor -- and actually I'm sure this is a
12 motion that the defense will be making, but we do have some
13 prior oral statements prior to trial of the defendant, two
14 oral statements that the State's position is were
15 spontaneously made and were not pursuant to questioning,
16 however he was in custody at the time so we would probably
17 need to fashion that through a Jackson v. Denno hearing.
18 Then one written statement after waiving his Miranda rights
19 in a written waiver with Lieutenant Marty Shugart after he
20 was arrested when he was in custody, so we probably need to
21 have a hearing on those matters.

22 THE COURT: Let's see what else the defense may have
23 and we would have to have a Jackson v. Denno hearing, let's
24 see what else we can dispose of before we get to that.

25 MR. AUL: Your Honor, just for the record, I have made

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1 a motion to have sequestration of the jurors, Your Honor.
2 I filed a written motion in the clerk of courts file, Your
3 Honor. When we were back in chambers the Court denied that
4 motion, indicated that the Court would give instructions to
5 the jury to avoid being on computers and internet, which
6 the Court did do and my understanding is the Court is going
7 to do when we break for the day and when we come back in
8 the morning and during the breaks. Your Honor, I just want
9 for the record, we made that motion and that motion was
10 denied, Your Honor. And, Your Honor, the only other thing
11 that I now need to put on the record is when I was talking
12 to Mr. Kinkard last week in regards to the witnesses that
13 the State had intended to call, there is a young man that
14 the State is going to call who is a witness who my partner
15 is representing his soon to be adopted mother in an
16 adoption proceeding, Your Honor. And I talked to
17 Mr. Malpass about this last night to indicate whether he
18 had any concern with there being a conflict regards to this
19 case. I was not even aware of it until I was made aware by
20 the solicitor's office and Mr. Frost verified that was the
21 case, Your Honor. I don't have any concerns of it being a
22 conflict, however it may appear to be a conflict in some
23 sort and I talked to Mr. Malpass about that when we were at
24 the jail yesterday around 4:00 in the afternoon, he
25 indicated he did not see a problem with that, Your Honor.

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1 But I would like the Court to inquire of him and put it on
2 the record, Your Honor, because if it does present a
3 conflict I would feel it necessary obviously for me to
4 withdraw and for the Court to appoint another counsel and
5 give other counsel some time to prepare for trial whether
6 it will be next month or the month after that, how much
7 ever time. It could be the appearance of impropriety, Your
8 Honor, and I realize that's the old rule that I was taught
9 under and I realize that. If the Court would inquire of
10 Mr. Malpass in regards to that.

11 THE COURT: I don't see an issue on that, but
12 nevertheless, let me ask Mr. Malpass and get his position
13 on it one way or another. Mr. Malpass, if you would stand
14 up and address the Court. You heard what Mr. Aul said, his
15 law partner, Mr. Frost, represents -- now, tell me that
16 again?

17 MR. AUL: My law partner represents J.L. --
18 there is an adoption proceeding brought where J.L. is
19 the defendant being the child to be adopted, that action is
20 brought by his soon to be hopefully adoptive mother. My
21 client -- my partner, Mr. Frost, representing J.L.
22 soon to be adoptive mother, assuming that the adoption is
23 granted, Your Honor.

24 THE COURT: And Mr. Malpass, you've heard that
25 recitation by your attorney, do you see any conflict of

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1 interest on behalf Mr. Aul as far as representing you in
2 this case as per that adoption, do you see any problem?

3 THE DEFENDANT: No, sir.

4 THE COURT: Do you have any concern about it?

5 THE DEFENDANT: No.

6 THE COURT: And you are waiving any conflict there
7 might be if there is any. I don't know that there is but
8 if there should be you waive that at this time?

9 THE DEFENDANT: Yeah.

10 MS. COLLINS: Your Honor, I will state for the record
11 that Jill Lewis, the adoptive mother, is not going to be a
12 witness in this case. She indicated to us that she was
13 fine with the matter proceeding from her end and that she
14 had not even discussed the matter in any detail whatsoever
15 in terms of her son being a witness in this case with
16 Mr. Frost. The person that would be testifying would be
17 the child, J.L. he was a witness at the incident or
18 the surrounding scene of the incident. And if I could on
19 behalf of the State too just memorialize the record, our
20 meeting in chambers about the defense's motion to sequester
21 the jury, it was the State's position that while
22 acknowledging that in these times that access is available
23 to members of the public, including juror members, be it
24 the computer to certain information, that instruction from
25 Your Honor to stay off of the computer once they're

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1 selected through the course of the trial until the trial is
2 over would be sufficient. And we even indicated that
3 should a juror come forward during voir dire and indicate
4 that they have already obtained certain information about
5 the defendant or about this case from the computer, that we
6 would not object to them being struck for cause at that
7 point rather than the defense or the State having to use a
8 strike. And for the record, to my memory no jurors came
9 forward during the questioning with that particular point.
10 So again, it's our position that the instructions to the
11 jury is sufficient, and thank you. We did ask that this
12 motion to sequester of the jury be denied.

13 MR. AUL: Your Honor, Ms. Jefferson reminded me that I
14 probably need to just introduce as a Court's Exhibit if the
15 Court would not mind marking the motion as a Court's
16 Exhibit.

17 THE COURT: I don't have a problem with that. Let me
18 say I did ask the panel if they had heard anything about
19 this case and a few did come up during that time and said
20 they had discussed it with somebody or heard something.
21 None of them mentioned anything about the computer or
22 having anything with regard to this on the computer. I
23 think we have adequately addressed. Now we are ready to
24 move to the Jackson v. Denno hearing. Let me instruct all
25 of the witnesses who are here, when we say sequester that

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1 means you would not be in the courtroom prior to giving
2 your testimony -- testifying -- not testimony -- in court
3 until after you've testified you would not be in the
4 courtroom, you would be sequestered outside of the
5 courtroom until after you've testified. The sequestration
6 also means even after you've testified not discussing your
7 testimony or what you testified to with any of the other
8 witnesses. So sequestration means not being present in the
9 courtroom until after you testified, and also not
10 discussing your testimony with anybody else, any other
11 potential witnesses in the case after you've testified.

12 MS. COLLINS: Thank you, Your Honor. The State's
13 first witness is Deputy Travis Shugart.

14 The witness, TRAVIS SHUGART, was first duly sworn and
15 Testified as follows, on:

16 DIRECT EXAMINATION

17 BY MS. COLLINS:

18 Q. Would you please state your name?

19 A. Travis Shugart.

20 Q. What is your occupation?

21 A. I'm a sheriff's deputy with the Union County
22 Sheriff's Department.

23 Q. Were you on duty with the sheriff's department as a
24 deputy on July 22, 2003?

25 A. Yes, ma'am, I was.

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1 Q. In your capacity as a deputy with the sheriff's
2 department on that day, did you see the defendant, Donnie
3 Malpass?

4 A. Yes, ma'am.

5 Q. Deputy Shugart, did you have occasion to serve an
6 arrest warrant on Donnie Malpass?

7 A. Yes, ma'am.

8 Q. And were those two counts lewd act upon a child?

9 A. Yes, ma'am.

10 Q. Do you recall? Okay. Deputy, I would like to show
11 you arrest warrants H439588 and 425589. Are those the two
12 warrants for lewd act upon a child that you served upon
13 the defendant or you were part of a team serving upon
14 defendant on July 22, 2003?

15 A. Yes, ma'am.

16 Q. Who was with you at the time those warrants were
17 served on the defendant?

18 A. Lieutenant Malone, my supervisor.

19 Q. All right. And were y'all in uniform that day?

20 A. Yes, ma'am.

21 Q. All right. And did you, in fact, sign one of the
22 warrants indicating that you had served it?

23 A. Yes, ma'am. I signed the one and he signed it.

24 Q. So you signed 588?

25 A. Yes, ma'am.

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1 Q. And he signed 589?

2 A. Yes, ma'am.

3 Q. When y'all served these on the defendant, was he
4 placed in custody at that time?

5 A. Yes, ma'am.

6 Q. Was he confined in handcuffs or anything of that
7 matter?

8 A. Yes, ma'am. We had handcuffed him and took him out
9 to the patrol car.

10 Q. All right. And where were y'all when y'all served
11 him with the warrants?

12 A. At his residence on Haywood Street.

13 Q. In Union County?

14 A. Yes, ma'am.

15 Q Now, officer, at that time when he was served with
16 these warrants and placed in custody, what, if any,
17 questioning did you or Lieutenant Malone engage in with
18 the defendant?

19 A. We didn't ask any questions, we just read him the
20 warrants which is the process you go through when you
21 serve a warrant, read the warrants, tell him who signed
22 the warrants on him and what date that criminal act took
23 place.

24 Q But you and Lieutenant Malone neither one asked the
25 defendant any questions at that time?

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1 A. No, ma'am.

2 Q. What, if any, spontaneous statements did the
3 defendant make to you or to Lieutenant Malone in your
4 presence at that time?

5 A. While in the back of the car he stated that -- that
6 that day there was some girls over there riding his go
7 cart and somebody came over to his house, I don't remember
8 what the name of the person was, that had some liquor. He
9 started drinking some liquor, and the next thing he
10 remembered he woke up the next morning I think he said on
11 the couch and he said, "I don't remember what happened, so
12 I can't say I didn't do it. I don't remember what
13 happened."

14 Q. All right. Now, at the time prior to the defendant
15 making those statements to you and Lieutenant Malone, had
16 you threatened him in any way?

17 A. No, ma'am.

18 Q. Had you or Lieutenant Malone made any promises to him
19 of any reward or any leniency for making statements?

20 A. No, ma'am.

21 Q. And again, those statements were not made in response
22 to any police questioning?

23 A. No, ma'am.

24 MS. COLLINS: Thank you. Please answer any questions
25 the defendant's counsel might have.

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CROSS EXAMINATION

1

2 BY MR. AUL:

3 Q. Corporal is it?

4 A Deputy.

5 Q. Deputy? Okay. Deputy Shugart, you were in uniform
6 when you came to arrest Mr. Malpass?

7 A. Yes, sir.

8 Q. You had your gun on you?

9 A. Yes, sir.

10 Q. Lieutenant Malone, he was in uniform?

11 A. Yes, sir.

12 Q. He had his gun on him?

13 A. Yes, sir.

14 Q. Did either one of you advise Mr. Malpass of his
15 constitutional rights at all?

16 A. No, sir.

17 Q. How long had Mr. Malpass been in the car before y'all
18 started talking?19 A. I don't remember where we were at when he made the
20 statement, but somewhere between his -- the road he lives
21 on and the jail.22 Q. So you had already started the car up and were
23 moving?

24 A. Yes, sir.

25 Q. Were you driving?

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1 A. Yes, sir.

2 Q. Was Lieutenant Malone in the vehicle with you at the
3 time?

4 A. Yes, sir.

5 Q. When he started talking, did you advise him of his
6 rights then?

7 A. No, sir.

8 Q. Did you write any of this down?

9 A. No, sir, I didn't.

10 Q. Have you told anyone about anything about these
11 statements?

12 A. I told Lieutenant Marty Shugart about the statements
13 and he went directly to the jail and took a sworn
14 statement from him and I looked at the statement and it
15 was pretty much exactly the same thing he told us, that's
16 the reason I didn't write anything down because he already
17 had the statement.

18 Q. So he wrote you are saying the same statement he
19 took?

20 A. Yeah, that was. It was the same as what he had told
21 us.

22 Q. And he gave Detective Shugart that statement after
23 giving you a statement but before he was advised of his
24 rights?

25 A. We didn't advise him of his rights, now that's all I

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1 can answer.

2 Q. Okay. And no question he was in custody, he was not
3 free to go.

4 A. No, he wasn't free to go. He was under arrest.

5 Q. Did you say anything at all to Mr. Malpass?

6 A. Nothing other than reading him the warrant and
7 telling him who signed the warrants and what day it
8 happened on.

9 Q. Did you tell him to get in the car?

10 A. We told him he was under arrest for a lewd act on a
11 minor, we had two warrants on him. And, of course, we
12 read him the warrants.

13 Q. You didn't speak another word to him?

14 A. We probably spoke another word to him but it wasn't
15 any questions involved. To tell you truth we didn't
16 really want to know, it wasn't our case.

17 Q. So you don't recall if you told him to get in the car
18 or anything like that?

19 A. Yeah, we told him to get in the car.

20 MR. AUL: I don't have any other questions of this
21 witness, Your Honor.

22 REDIRECT EXAMINATION

23 BY MS. COLLINS:

24 Q. Deputy, you indicated that the defendant made the
25 statement from the time he was placed in the patrol car to

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1 the jail sometime during that transport period; is that
2 right?

3 A. Yes, ma'am, that's right.

4 Q. To the best of your memory, about how long does it
5 take for y'all to drive from his residence at Haywood
6 Street to the jail, just approximately?

7 A. Probably five to eight minutes.

8 Q. All right. And you indicated in response to
9 questioning by defense counsel that you might have said
10 another word or two to him, but you didn't ask him any
11 questions; is that right?

12 A. That's right.

13 Q. And did that word or two to him in any way, was that
14 in any way an effort on your part or Lieutenant Malone's
15 part to illicit a statement from the defendant?

16 A. No, ma'am.

17 Q. Okay.

18 MS. COLLINS: Thank you.

19 THE COURT: Do you have anything else?

20 MR. AUL: No, sir.

21 THE COURT: Let me ask you this, did he at anytime
22 tell you that he wanted an attorney?

23 THE WITNESS: No, sir.

24 THE COURT: All right. Thank you, sir.

25 MS. COLLINS: Thank you, Your Honor, that will be all

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1 from this witness. Our next witness is Lieutenant Robert
2 Malone.

3 The witness, ROBERT MALONE, was first duly sworn and
4 Testified as follows, on:

5 DIRECT EXAMINATION

6 BY MS. COLLINS:

7 Q. Would you please state your name for the record?

8 A. Robert Malone.

9 Q. What's your occupation, please?

10 A. I'm a lieutenant with the Union County Sheriff's
11 Office.

12 Q Were you on duty in your capacity as lieutenant with
13 the Union County Sheriff's Department on July 22, 2003?

14 A Yes, ma'am.

15 Q. In your capacity as such, did you have occasion to
16 see the defendant, Donnie Malpass?

17 A. Yes, ma'am.

18 Q. And what was your business with him that day,
19 lieutenant?

20 A. Myself and Deputy Shugart had been given a warrant
21 for him and we went to his house and arrested him there.

22 Q. All right. And the defendant's home where you went
23 to, is it within Union County; is that right?

24 A. Yes, ma'am.

25 Q And the -- were you and Deputy Shugart in law

1 enforcement clothing and uniforms as you are today and he
2 is today?

3 A. Yes, ma'am.

4 Q All right. Were you, in fact, given two warrants to
5 serve on the defendant, do you recall?

6 A. I recall one specifically, I'm not sure if it was
7 two.

8 Q Okay. Let me show you two warrants, H429588 and
9 H429589 and let you look at those. Did those warrants
10 look familiar?

11 A. Yes, ma'am.

12 Q. In fact, were those the two warrants that were served
13 on the defendant by yourself and Deputy Shugart on July
14 22, 2003?

15 A That's correct.

16 Q And did you sign one of those warrants as having been
17 signed on him?

18 A. Yes, ma'am.

19 Q. And did Deputy Shugart sign the other warrant?

20 A. Yes, ma'am, that's correct.

21 Q And at the time that y'all served him with the
22 warrants, was he placed in custody at that time?

23 A. Yes, ma'am, he was placed in custody.

24 Q. Was he, in fact, handcuffed?

25 A. Yes, ma'am.

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1 Q. And placed in the patrol car?

2 A. Yes, ma'am.

3 Q. From the point that y'all served the warrants on him,
4 lieutenant, and placed the defendant in custody, did you
5 or Deputy Shugart in your presence ask the defendant any
6 questions?

7 A. No, ma'am.

8 Q. Did the defendant at anytime in your presence ask for
9 an attorney?

10 A. No, ma'am.

11 Q. Did you or Deputy Shugart in your presence make any
12 threats to the defendant to try to get him to make a
13 statement?

14 A. No, ma'am.

15 Q. Did you or Deputy Shugart in your presence make any
16 offers or promises of leniency or rewards if he were to
17 give a statement?

18 A. No, ma'am.

19 Q. What, if any, statements did the defendant
20 spontaneously make to you and Deputy Shugart at that time?

21 A. While we were in route to the jail he just began
22 spontaneously talking about the incident in general as it
23 related to the warrants, and that he began talking about
24 on the day in question that he had -- somebody had came
25 over and brought alcohol and he was drinking and that he

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1 had been drinking heavily, and at a point in making that
2 statement he said, "Well, I was very drunk. I ain't
3 saying it did happen but if it did I don't remember it."
4 And that was basically it.

5 Q. To the best of your recollection how long does it
6 take -- or how long did it take that day to drive from the
7 defendant's residence on Haywood Street to the jail where
8 he ultimately was placed in custody and detention?

9 A. Probably about eight to 10 minutes depending on
10 traffic.

11 Q. And the defendant spontaneously made these statements
12 during the course of that eight minute trip?

13 A. That's right. We asked him no questions at all, it
14 was just things that he was talking about on the way.

15 Q All right.

16 MS. COLLINS: Thank you. Please answer any questions
17 that Mr. Aul may have.

18 CROSS EXAMINATION

19 BY MR. AUL:

20 Q. Lieutenant, did you advise him of his rights at
21 anytime when he was arrested?

22 A. No, sir.

23 Q. At anytime did you see Travis Shugart advise him of
24 his rights?

25 A. No, sir.

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1 Q. What did you say to the defendant once you came upon
2 the house?

3 A. We came in the residence and asked where he was at,
4 and he came out from another room into the main living
5 room. We told him we had two warrants for him and that he
6 was under arrest. He got his stuff together, his clothes
7 zipped up and a T-shirt on and we handcuffed him and
8 proceeded to go on to the vehicle and transport him to the
9 jail. We didn't ask him any questions specifically or
10 anything of that nature.

11 Q. Did you talk to him at all?

12 A. No, not really. Other than he asked what's this all
13 about and we said all we know is what's on the warrants,
14 because we wasn't involved in the investigation of the
15 case and we didn't know any of the details.

16 Q. And you were dressed in uniform, you had your police
17 revolver?

18 A. Everything except it was summer, we were wearing
19 short sleeved shirts and no ties, so everything is the
20 same.

21 Q. And as part of what Mr. Malpass said, did he also
22 say, "I don't think I did nothing?"

23 A. He said that he was drunk and if it occurred he
24 didn't remember it. He wasn't saying that it happened,
25 but if he did he didn't remember it because he was very

1 drunk.

2 Q. Did you happen it write this down?

3 A. No, sir.

4 Q. Did you happen to discuss this statement with
5 anybody?

6 A. After we placed him in the jail facility Deputy
7 Shugart and I came back to the sheriff's office and came
8 in and notified Lieutenant Shugart that we had placed the
9 subject in custody and he was at the jail. We advised him
10 of the statements that he had made on the way to the jail
11 and that he was up there if he wanted to go talk to him
12 and get any further statements from him because he was the
13 one doing the investigation.

14 Q. I may have misunderstood you, lieutenant. In
15 answering Ms. Collins' questions I think you said he said
16 other things -- among other things or you said something
17 like that. What else did he say, do you recall?

18 A. He was like was asking questions about what this was
19 all about and things that we couldn't answer because we
20 didn't know the details. And we said, "This is just
21 what's on the warrants," as we read the warrants to him,
22 that's all of the information that we had. And that was
23 his response, "Well, I had been drinking," and so forth.

24 Q Did he talk about -- did he say else anything else
25 while he was in the car?

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1 A. He mentioned that there was two girls had come over
2 and something about riding a go cart, they had been at his
3 house riding a go cart, and then the other thing was about
4 the drinking.

5 MR. AUL: I don't have anything else.

6 REDIRECT EXAMINATION

7 BY MS. COLLINS:

8 Q. Just briefly. In response to Mr. Aul's questioning
9 about your police weapon, was that kept in your holster
10 during the entire process of arresting the defendant and
11 transporting him to jail, do you recall?

12 A. Yes, ma'am. The subject is -- he never put up any
13 kind of resistance or anything so there was no force
14 involved in the arrest. We simply told him he was under
15 arrest and we handcuffed him at that point and --

16 Q. So your pistol remained in the holster the whole
17 time?

18 A Yes, ma'am.

19 Q. And Deputy Shugart's pistol remained in its holster
20 the whole time?

21 A. Yes, ma'am.

22 Q. In answering questions to Mr. Aul you stated at one
23 point, "We didn't ask them any questions specifically."
24 Let me ask you, lieutenant, did you or Deputy Shugart in
25 your presence ask any questions, whether generally or

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1 specifically, to the defendant at the time you served him
2 with warrants and transported him to the jail?

3 A. Other than the basic question of do you have any
4 weapons on you before we -- is there anything on you
5 before we start to handcuff you. But, no, nothing related
6 to anything.

7 Q Nothing related to the incident or the case or --

8 A. Nothing about the case, no.

9 MS. COLLINS: Thank you, that's all.

10 THE COURT: Thank you, sir, you may stand down, sir.

11 The witness, MARTY SHUGART, was duly sworn and

12 Testified as follows, on:

13 DIRECT EXAMINATION

14 BY MS. COLLINS:

15 Q. Would you please state your name for the record?

16 A. Lieutenant Marty Shugart.

17 Q What is your occupation?

18 A. I'm detective lieutenant with the Union County
19 Sheriff's Office.

20 Q How long have you served law enforcement?

21 A. A little over 17 years.

22 Q. Lieutenant Shugart, were you the case agent on the
23 case?

24 A. Yes, ma'am.

25 Q. Were you on duty July 22, 2003, the date the

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1 defendant was placed under arrest on these two warrants?

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

3 Q. Were you present when he was actually physically

4 arrested by Lieutenant Malone and Deputy Shugart?

5 A. No, ma'am.

6 Q. Did you subsequently have a conversation with those

7 two officers?

8 A. That's correct.

9 Q Pursuant to that conversation, did you then go to see
10 the defendant in the jail?

11 A. I did.

12 Q. When you went to see the defendant, Donnie Malpass,

13 in the jail, do you know what time that was?

14 A. Yes, ma'am.

15 Q It was around 2:50, close to that?

16 A Yes, ma'am.

17 Q. July 22, 2003?

18 A. Yes, ma'am.

19 Q. And the defendant, in fact, was in custody at the

20 jail at that time, correct?

21 A. Yes, he was.

22 Q. Where did you talk to him?

23 A. There's a little office in the back that's used by

24 the magistrate at that time and we used that office to do

25 interviews.

1 Q Other than the defendant and you, was anyone else
2 present?

3 A. No, ma'am.

4 Q. Were you dressed as you are today in a blazer and
5 khakis or a suit rather than a law enforcement uniform?

6 A. Well, yes, ma'am, it would have been dress
7 clothes and a tie, maybe not a coat.

8 Q. Did you carry a weapon on that day pursuant to your
9 duties with the sheriff's department?

10 A. Not on that interview, no, ma'am, we're not allowed
11 to carry our weapon into the jail facility.

12 Q Was the defendant cuffed during that interview?

13 A. I don't remember, very possibly. They usually bring
14 them in cuffed, I believe.

15 Q All right. Did he during the course of that
16 interview ever express that he was uncomfortable
17 physically or needed some assistance with his physical
18 well-being?

19 A. No, ma'am.

20 Q. Did he appear to be under the influence of any
21 alcohol or drugs substances or any type of substances at
22 the time that you interviewed him?

23 A. No, ma'am, he did not.

24 Q. Did you advise him of his Miranda rights at that
25 time?

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- 1 A. Yes, ma'am, I did.
- 2 Q. Did you, in fact, go over a written Miranda waiver
3 form with him?
- 4 A. That's correct.
- 5 Q Did you bring that with you today?
- 6 A. Yes, ma'am.
- 7 MS. COLLINS: If I could have that marked.
- 8 Q. All right. I will hand you now what's been marked
9 now for identification purposes as State's Exhibit 1. Do
10 you recognize that document?
- 11 A. Yes, ma'am.
- 12 Q. What is it?
- 13 A. It's an advice of rights form with a waiver of rights
14 we use at the sheriff's office that I actually used that
15 on July 22, 2003 in regards to an interview with Donnie
16 Malpass.
- 17 Q. And did the defendant sign that document in your
18 presence under the waiver of rights statements?
- 19 A. Yes, ma'am, he did.
- 20 Q Did you also witness his signature by you signing
21 your name?
- 22 A. Yes, ma'am, I did.
- 23 Q. And that time was 2:53 p.m. at the time of the
24 signatures?
- 25 A. That's correct.

1 Q Has that document been altered, lieutenant, in any
2 way since it was executed on that day?

3 A. The only thing would be two punch holes where I kept
4 it in my file at the top.

5 Q. But no alterations of writing, et cetera?

6 A. No, ma'am.

7 MS. COLLINS: At this time I would move State's
8 Exhibit 1 into evidence for the purpose of this hearing?

9 MR. AUL: For the purpose of this hearing no
10 objection, Your Honor.

11 THE COURT: Without objection, admitted for the
12 purposes of this hearing.

13 (The Miranda form was received as State's 1.)

14 Q. Lieutenant, I note that to the right of each of the
15 sentences there is a check mark. Who entered at that
16 check mark?

17 A. I did that.

18 Q What was the purpose of those check marks?

19 A That's my check marks making sure that I read each
20 line to the defendant.

21 Q. Would you go ahead and please read for the Court --
22 did you -- did you just hand him this document and have
23 him read it or did you read it out loud to him?

24 A. I read it out loud to him.

25 Q Would you please read then for the Court as you did

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1 that day the rights that you advised the defendant of
2 prior to him giving you a statement on July 22, 2003?

3 A Yes, ma'am. I advised him that I had to advise him
4 of his rights before we could talk or I could ask him any
5 questions. I said, "Before we ask you any questions you
6 must understand your rights. You have the right to remain
7 silent. Anything you say can be used against you in
8 court. You have the right to talk to a lawyer for advice
9 before we ask you any questions and to have him with you
10 during questioning. If you cannot afford a lawyer one
11 will be appointed for you before any questioning if you
12 wish. If you decide to answer questions now without a
13 lawyer present you still have the right to stop answering
14 at anytime. You also have the right to stop answering
15 anytime until you talk to a lawyer." At that point I
16 asked him did he understand each one of those rights and
17 did have any questions, he indicated he did not have any
18 questions.

19 Q. Let me stop and ask you, you said you asked him two
20 things, did he understand his rights. Did he indicate to
21 you that he understood those rights?

22 A. Yes, ma'am.

23 Q. And then you stated did he have any questions. Did
24 he indicate he had any questions?

25 A. He did not have any questions.

1 Q. Did he ask for an attorney at that time?

2 A. No, ma'am, he didn't.

3 Q. Did you then go forward with the waiver of rights
4 statement?

5 A. I advised him that if he wanted to talk to me about
6 the case that he would have to sign the waiver of rights
7 and I showed him the paper. "I have read this statement
8 of my rights and I understand what my rights are. I'm
9 willing to make a statement and answer questions. I do
10 not want a lawyer at this time. I understand and know
11 what I'm doing. No promise or threats have been made to
12 me and no pressure or coercion of any kind has been used
13 against me." I checked that off as having read it to him.
14 I slid the paper over to him and told him if he wanted to
15 talk to me he needed to sign there, which he did. I
16 witnessed it with my signature and that was at 2:53 p.m.

17 Q. All right. Now, at any time during this process or
18 the subsequent statement, did the defendant ask for an
19 attorney?

20 A. He did not.

21 Q. At anytime during this process or the subsequent
22 statement, did you or anyone in your presence make any
23 threats of any kind to the defendant?

24 A. No, ma'am.

25 Q. At anytime during this process or the giving of a

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1 subsequent statement by the defendant, did you or anyone
2 in your presence make any promises of any reward or
3 promises of leniency in exchange for him giving a
4 statement?

5 A. No, ma'am.

6 Q. Did you determine the educational level of the
7 defendant and his age?

8 A. His age I did. On his statement form I had his date
9 of birth. Educational I don't remember what that was.

10 Q. At anytime during this process did you have any
11 concerns regarding the defendant's again ability to
12 understand or educational background or intellectual
13 abilities in order to understand the waiver of his rights?

14 A. No, ma'am.

15 Q. All right. Again, how long have you been a law
16 enforcement officer?

17 A. 17 years, nine months.

18 Q. Did you bring with you the original written statement
19 that the defendant gave you that day?

20 A. I did.

21 Q. All right. Could I have that, please? All right.
22 Lieutenant, I'm handing you now what's been marked as
23 State's Exhibit 2, a two page document entitled voluntary
24 statement. Do you recognize that document?

25 A. Yes, ma'am.

- 1 Q. What is that?
- 2 A. A statement given to me by Donnie Malpass.
- 3 Q. When did he give you that statement?
- 4 A. On July 22, 2003.
- 5 Q. When did he give you that statement, what time?
- 6 A. It started at 3:06 p.m.
- 7 Q. When did it end?
- 8 A. 3:36 p.m.
- 9 Q. And that was at the Union County jail here in Union
- 10 County?
- 11 A. Yes, ma'am.
- 12 Q. Was that statement basically then immediately
- 13 following the written waiver of Miranda rights, State's
- 14 Exhibit that's in evidence?
- 15 A. Yes, ma'am.
- 16 Q. Now, there's some preliminary information before the
- 17 statement itself at the top. Did you go through that with
- 18 the defendant?
- 19 A. Yes, ma'am. I put the date and the place where the
- 20 interview was taking place at the time. I put his name,
- 21 date of birth next line where he was born, I had to ask
- 22 him where he was born, which was in Union County, South
- 23 Carolina. I asked him you now live at [REDACTED]
- 24 Buffalo, I ascertained that information from him.
- 25 Q. Below that is again a review of the Miranda rights.

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1 Did you read through that with him out loud again?

2 A. Yes, ma'am.

3 Q. All right. And again, would you read that for the
4 Court as you read it to the defendant that day?

5 A. It says, "Before I ask you any questions or make any
6 statements, Lieutenant James M. Shugart, a person who
7 identified himself as a detective with the Union County
8 Sheriff's, duly warned and advised me and I know and
9 understand that I have the following rights: I have the
10 right to remain silent and I do not have to answer any
11 questions or makes any statements at all. And any
12 statement I make can and will be used against me in a
13 court of law for the offense or offenses concerning which
14 the following statement is hereinafter made. That I have
15 the right to consult with a lawyer of my own choice before
16 or at anytime during any questioning or statements I make.
17 That if I cannot afford to hire a lawyer I may request or
18 have a lawyer appointed for me by the proper authority
19 before or at anytime during any questions or statements
20 that I make without cost or expense to me. That I can
21 stop answering any questions or make any statements at
22 anytime that I choose and call for the presence of a
23 lawyer to advise me before continuing anymore questioning
24 or make anymore statements whether or not I have already
25 answered some questions or made some statements. I do not

1 want to talk to a lawyer and I hereby knowingly and
2 purposefully waive my right to remain silent and my right
3 to have a lawyer present while I make the following
4 statements to the aforesaid person knowing that I have the
5 right and privilege to terminate any interview at anytime
6 hereafter and have a lawyer present with me before
7 answering anymore questions or making anymore statements
8 if I choose to do so. I declare that the following
9 voluntary statement is made of my own free will without
10 promise of hope or reward or without fear or threat of
11 physical harm without coercion, favor or offer of favor
12 without leniency or offer of leniency without any person
13 or persons whatsoever."

14 Q. Thank you. At anytime during you reading the
15 defendant those rights, did he request an attorney?

16 A. No, ma'am.

17 Q. At anytime did he indicate he did not wish to speak
18 to you?

19 A. No, ma'am, he did not.

20 Q. Lieutenant, on the next line begins the written
21 portion of the statement, whose handwriting is that in?

22 A. That's my handwriting.

23 Q. Who was the person making the statement that you then
24 memorialized in handwriting?

25 A. Donnie Malpass.

1 Q. Did he ask you to write this for him or is that your
2 usual procedure?

3 A. Yes, ma'am, he did ask me to right it. It reflects
4 on the last page that at his request after being advised
5 of his rights and signing a waiver he asked me to write
6 the statement.

7 Q. And after having written the statement did you give
8 him an opportunity to read over and make any changes,
9 additions or deletions thereto?

10 A. Yes, ma'am. There was a couple of places where I had
11 to scratch a word out and we went over all of that, he
12 initialed beside each place throughout the statement.

13 Q. At the bottom of page one after the words come in
14 there's an arrow to the right. Does that indicate that
15 the statement continues on the back of the page or does
16 that indicate there's a page two to follow?

17 A. It shows there's a page two, there's nowhere to write
18 on the back of the pages.

19 Q. In fact, on page two at the conclusion of that
20 statement there is an X, what does that delineate?

21 A. That shows us the end of the statement his initials
22 is at the very last word showing the end of the statement
23 so we cannot go back and add anything further.

24 Q. Did the defendant read over and sign this statement
25 after he made any desired changes, did he sign it in your

1 presence?

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

3 Q. Did he sign page one and page two in your presence?

4 A. Yes, ma'am.

5 Q. Did you sign both pages as witnessing his signatures?

6 A. I did.

7 Q. Prior to him signing it, did he sign a statement

8 regarding having read these two pages and approved them at

9 the bottom?

10 A. Yes, ma'am.

11 Q. Can you read that for the Court, please?

12 A. It says, "I have read each page of this statement

13 consisting of the two pages, each page bears my signature

14 and corrections, if any, bears my initials, and I certify

15 that the facts contained herein are true and correct. I

16 further certify that I make no requests for the advice and

17 presence of a lawyer before or during any part of this

18 statement nor at anytime before it was finished did I

19 request that the statement be stopped. I also declare

20 that I was not told or proffered what to say in this

21 statement. I have received a copy of that statement this

22 day." The statement was completed at 3:36 p.m. on the

23 22nd day of July, 2003.

24 Q. All right. Lieutenant, at this time I would ask that

25 you read to the Court the statement as memorialized in

1 your handwriting that Donnie Malpass gave to you that day,
2 July 22nd of 2003 after waiving his Miranda rights.

3 A. It says, "On 7/19/03 I was at my friend's trailer,
4 his name is Blue, I believe his first name is James. I
5 was at the trailer for about 45 minutes to an hour. James
6 had a bottle of Vodka and asked me if I wanted some. He
7 poured me a cup full, I believe it was 16 ounce cup. Some
8 kids came by and they were taking turns riding a bicycle.
9 One of them rode the bicycle down the hill through my
10 neighbor's yard and I made a statement about her being a
11 daredevil. The kids asked me if they could ride my go
12 cart, I told him I didn't have any methanol, I would look
13 to see if I had any gas. I found some gas on the front
14 porch and I put it in the go cart. They started riding
15 and I stood there and made sure they rode safe and shared
16 riding time. I remember going into the residence and
17 getting them two glasses of water, they didn't come in."

18 Page two. "Sometime after this I blacked out, I don't
19 remember anything that happened after this. During this
20 time as far as I know my Uncle Harold Lawson was in the
21 house. My friend, Blue, was outside with me. The next
22 thing I remember I woke up lying beside the couch in the
23 floor. This was the next morning. My go cart was outside
24 beside the porch. I don't know if it happened. If it did
25 I'm sorry but I hope it didn't. I wish I would have told

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1 them to wait until another day when I wasn't drinking.
2 This statement was written by Lieutenant Shugart at my
3 request after being advised of my rights and signing a
4 waiver." It's initialed at the end and signed at the
5 bottom.

6 MS. COLLINS: Your Honor, at this time I move State's
7 2 into evidence for the purpose of this hearing.

8 MR. AUL: Without objection for purposes of this
9 hearing.

10 THE COURT: For purposes of this hearing it's
11 admitted.

12 (The statement was received as State's 2.)

13 MS. COLLINS: Lieutenant, please answer any questions
14 of Mr. Aul.

15 CROSS EXAMINATION

16 BY MR. AUL:

17 Q. Lieutenant, did you tape the statement that was
18 given?

19 A. Yes, sir.

20 Q. There's a tape of it.

21 A. Did I tape it? No, sir. I thought you said did I
22 take it.

23 Q. No tape?

24 A. No, sir.

25 Q. No audio or videotaped?

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- 1 A. No, sir.
- 2 Q. Did anybody come in the room at any time while you
- 3 were giving the statement?
- 4 A. No, sir.
- 5 Q. Did Mr. Malpass cooperate fully the whole time that
- 6 you were taking the statement?
- 7 A. Yes, sir.
- 8 Q. Did he appear that he had been drinking that day?
- 9 A. No, sir. I don't recall smelling anything on him.
- 10 Q. Did you have his signature notarized?
- 11 A. No, sir.
- 12 Q. Did you supply him a copy of his statement?
- 13 A. Yes, sir, I did.
- 14 Q. Which copy does he get?
- 15 A. The pink copy.
- 16 Q. The pink copy? Whose copy is the yellow copy?
- 17 A. It's just for the record.
- 18 Q. Okay. Did he sign for his copy?
- 19 A. Not that I'm aware of besides what it says at the
- 20 bottom. I think it may have said he was getting a copy.
- 21 MR. AUL: I don't have any further questions, Your
- 22 Honor.

23 REDIRECT EXAMINATION

24 BY MS. COLLINS:

- 25 Q. State's Exhibit 2, the two page statement is written

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1 and on carbon paper; is that correct?

2 A. That's correct. It's a white sheet, a yellow sheet
3 and then there is a pink sheet.

4 Q So any signatures or words or authorization thereto
5 on the top original one through the service of the carbon
6 should also leave a reflecting coordinating mark below; is
7 that correct?

8 A. That's correct.

9 MS. COLLINS: All right. Thank you. Nothing further.

10 THE COURT: Let me ask you a couple of questions. How
11 long was he with you during this process?

12 THE WITNESS: We started at 2:50, I think that
13 statement ended at 3:36, almost 40 minutes.

14 THE COURT: Any promises made to him?

15 THE WITNESS: No, sir.

16 THE COURT: Any threats made to him?

17 THE WITNESS: No, sir.

18 THE COURT: Did he request an attorney at anytime
19 during this --

20 THE WITNESS: No, sir, he didn't.

21 THE COURT: -- interview at anytime the statement was
22 taken?

23 THE WITNESS: No, sir.

24 THE COURT: Did he tell you he wanted to stop at
25 anytime?

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1 THE WITNESS: No, sir, he did not.

2 THE COURT: Any questions relating to the questions I
3 just asked?

4 MS. COLLINS: No, Your Honor.

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

6 MS. COLLINS: Your Honor, that's the State's witnesses
7 on the Jackson vs. Denno issue.

8 MR. AUL: Your Honor, my client's position would be
9 that the two oral statements given to the police officers
10 in the vehicle after he was driving, after he had been
11 arrested by officers in uniform with weapons, Your Honor,
12 he was in the vehicle, Your Honor, he should have been
13 advised as to his rights sometime in that time. I realize,
14 Your Honor, that the case law provides that unless there is
15 an interrogation in form and he gives a voluntary
16 statement, Your Honor, that that's not required, Your
17 Honor. So I guess we are still arguing against case law.
18 I'm pointing that out to Your Honor. Your Honor, I think
19 under current case law we do not have a good grounds. Our
20 position would be that the law should require that he be
21 Mirandized before any such statements be admissible against
22 him, Your Honor.

23 MS. COLLINS: Your Honor, just in response thereto, as
24 to this oral statement, again, I understand Mr. Aul at this
25 point at least has not argued as to the written statement.

1 But again, that the case law is clear and has been followed
2 for years, decades even by our nation's supreme court as
3 well as our appellate courts here in South Carolina that
4 the issue for the Jackson v. Denno and waiver of Miranda a
5 is in custody in police interrogation. And again, here
6 both officers were very clear that there was no
7 interrogation whatsoever. These were spontaneous
8 statements by the defendant and the defense is not -- the
9 only evidence before this Court is that it was spontaneous
10 statements not pursuant to interrogation. Thank you.

11 THE COURT: Well, the Court finds that the oral
12 statements that were given were not the subject of
13 interrogation and no questions were asked, according to the
14 only testimony I've got here, is that no questions were
15 asked of him whatsoever. There's no question that he was
16 in custody, no question what he was arrested and taken into
17 custody by two police officers whose sole job was to arrest
18 him and take him to the police station. They did that.
19 They didn't ask him any questions, they didn't know
20 anything, couldn't answer his questions about the case.
21 They didn't know anything about it, they didn't ask him any
22 questions. He volunteered that information, which he has a
23 right to do. But there is no requirement that Miranda
24 warning be given before somebody makes a voluntary
25 statement. Only if they begin interrogation or even if

1 they don't -- it's not a specific interrogation but they
2 ask questions and make statements to him, which is designed
3 to illicit involuntary and incriminating statements, but
4 there's no evidence of that here, so I find none of that.
5 So pursuant to Rhode Island vs. Innis, 446US291 under
6 Supreme Court 1682, that case has not been changed to my
7 knowledge, it's a 1980 case. Also State vs. Franklin, 299
8 South Carolina 133, 382 Southeastern Second 911, State vs.
9 Easler, State vs. Primus, State vs. Howard, all for the
10 statute of proposition that statements made which are not
11 subject to interrogation even if he's in custody are still
12 admissible like prior Miranda warnings be given. I find
13 they would be admissible as statements made by -- allegedly
14 made by the defendant without any type of custodial
15 interrogation. Are you making any questions concerning
16 statements after being advised of his rights?

17 MR. AUL: No, sir.

18 THE COURT: All right, sir. Of course, the Court
19 finds by a preponderance of the evidence, which is the
20 standard, that the defendant waived his rights after being
21 further advised of his constitutional rights under Miranda
22 and gave a statement and signed off and was given a copy of
23 it and so the Court finds under the totality of the
24 circumstances around which that statement was taken by a
25 preponderance of the evidence that the defendant waived his

1 rights and voluntarily gave that statement after being
2 advised of his constitutional rights, the Court finds them
3 likewise admissible. Anything else?

4 MS. COLLINS: Nothing from the State.

5 MR. AUL: Nothing from the defense, Your Honor.

6 THE COURT: I will point out one other thing. As far
7 as the oral statements is concerned, they essentially were
8 reiterated in the written statement and so I don't see any
9 prejudice to the defendant anyway, but I don't think
10 they're required to give the rights there. But I would
11 just point out that what he made in the oral statements
12 essentially were repeated in the written statement after
13 having being advised of his rights.

14 (A recess was taken.)

15 THE COURT: All right. Please bring the jury in, sir.

16 (The jury returned to the courtroom.)

17 THE COURT: Good afternoon, Mr. Foreman, ladies and
18 gentlemen of the jury, I hope you enjoyed your lunch. I'm
19 sorry we ran a little bit late with matters we needed to
20 take up so we kept you back a little longer than we
21 intended to, but we are ready now to begin with the trial
22 and at this time I would will ask the clerk to please swear
23 the jury panel.

24 (The jury panel was sworn.)

25 THE COURT: Mr. Foreman, ladies and gentlemen of the

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1 jury, I'm going to give you what I call a preliminary
2 instruction with regard to what to expect as we go through
3 this trial. I suspect that most of you have not been on a
4 circuit court general sessions jury before and hopefully
5 this information will be helpful to you in understanding
6 what the process and format that we go through and what to
7 expect as we go through the trial. The first thing that
8 will happen after I have completed this instruction to you
9 is that the State will address you in an opening statement,
10 the State's assistant solicitor will make an opening
11 statement to you. And then the attorney for the defendant
12 will have the same opportunity to address you in opening
13 statement. These opening statements by the attorneys are
14 not evidence but you should pay close attention because
15 they're in essence going to identify to you what they
16 perceive or say that the issues in the case are. After
17 they've made their opening statements to you, then the
18 State will proceed by presenting the testimony and evidence
19 that they want you to consider. The reason the State goes
20 first is that the State has the burden of proof in this
21 case. There's no burden upon the defendant to prove his
22 innocence, the burden of proof is upon the State of South
23 Carolina to prove the charges against this defendant by
24 evidence that satisfies you, the jury, beyond a reasonable
25 doubt before you can return a verdict of guilty. If the

1 State fails to meet that burden of proof then your verdict
2 must be not guilty. After the assistant solicitor has
3 presented to you the evidence that they want you to
4 consider on behalf of the State then the same opportunity
5 would be afforded to the defense. The defendant may but is
6 not required to present any testimony or evidence because
7 the State has the burden of proving the defendant guilty
8 beyond a reasonable doubt. The defendant does not have to
9 prove he is innocent. He is presumed innocent and that
10 presumption stays with him throughout the trial and may
11 only be removed as the State meets its burden of proving
12 the guilt of the defendant beyond a reasonable doubt. Now,
13 what is evidence in the case? Evidence is sworn testimony
14 you will hear from the witness stand here to my left,
15 exhibits admitted into the record for your consideration by
16 me, the presiding judge, and any stipulation of counsel.
17 Exhibits may take many forms such as documents, pictures,
18 videotapes, maps, diagrams and so forth. Stipulations are
19 agreements of facts by the attorneys. If the attorneys
20 enter into a stipulation, that stipulation will be made
21 known to you and you may consider it along with all of the
22 other facts and evidence in the case and give such weight
23 to it as you deem appropriate when you begin your
24 deliberations. Sworn testimony, exhibits and stipulations
25 are the only evidence you may consider in your

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1 deliberations of innocence or guilt of the defendant. You
2 may not consider anything you've heard from any other
3 source about this case in making your decision because that
4 is not evidence. After you have heard all of the evidence
5 the attorneys for the State and the defendant will once
6 again appear before you and make what we call closing
7 arguments, and we call them arguments because the attorneys
8 are allowed at that time to argue their positions and
9 attempt to persuade you as to their view or position as to
10 the facts. When you have heard final arguments from
11 counsel I will then charge you, which simply means to
12 instruct you as to the law that applies to the issues in
13 this case. You will then retire to the jury room to
14 deliberate and reach your verdict. Now, that's how a case
15 is tried in general sessions court whether it be this case
16 or any other case. Some cases take a half day or a day,
17 some cases take weeks, but the same format applies in every
18 case. As the trial judge I have three functions to perform
19 during the trial. I am the presiding officer and therefore
20 see that the trial is run in an orderly manner. I decide
21 based on rules of civil and criminal procedure whether
22 testimony and exhibits are admissible into evidence for
23 your consideration, and at the conclusion of the trial I
24 instruct you as to the law you must apply to the facts in
25 this case in reaching your verdict. You, ladies and

1 gentlemen, are also judges in this case. You are the
2 judges of the facts. In other words, you determine the
3 truth of the facts in this case. Under our constitution I
4 am not permitted as the judge of the law to have an opinion
5 about the facts so I do not get into whether I believe a
6 witness or not, that is not my function. I am not even
7 permitted to express an opinion if I had one as to the
8 facts of this case. So you, the jurors, determine what is
9 the truth of the facts. Now, I do not permit jurors to
10 take notes during the trial because it's my experience that
11 while writing notes you may miss something very important
12 for you to hear and you may fail to observe a witness when
13 testifying. It is important that you pay careful attention
14 to all testimony and introduction of evidence since you
15 must judge the credibility or believability of the
16 witnesses and the weight to give all evidence introduced in
17 this case in determining the truth of the facts. Now,
18 during the trial the attorneys may object to the
19 admissibility of certain testimony or other evidence. I
20 will either sustain the objection, which means I agree and
21 the testimony or evidence may not be made part of the
22 record for your consideration, or I will overrule the
23 objection, which means as the judge of the law I have
24 determined that it is admissible as part of the record for
25 your consideration. The mere fact that I have admitted it

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1 does not mean that you must believe it or disbelieve it. I
2 have simply determined that it is admissible under our
3 rules and it is up to you then to believe it or disbelieve
4 it and to assign such weight to it as you determine to be
5 appropriate. At the conclusion of the trial we will send
6 you to the jury room and every exhibit that is admitted
7 into evidence will be sent to the jury room for you to
8 examine further and to consider. I'll remind you that one
9 of the most important aspects of your duty as a jury lies
10 essentially in the oath that you have just taken to well
11 and truly try this case and to determine the truth of the
12 facts in the case. That oath once again in a very
13 essential way says that you are the sole judges of the
14 facts in this case. As jurors in this case it will be your
15 exclusive duty to determine the facts in this matter
16 through your evaluation of the evidence that was received
17 during the course of this trial and to give such evidence
18 whatever value, weight or effect as you deem appropriate
19 with the goal of reaching the truth in this matter. In
20 doing so you will have fulfilled your obligations as jurors
21 and that is to give both the State and the defendant a fair
22 and impartial trial in this matter. Mr. Foreman, ladies
23 and gentlemen of the jury, whatever your verdict in this
24 case it must be your unanimous verdict. All 12 jurors must
25 agree on the verdict because the foreperson is then

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1 authorized to then write for the jury. I'm concerned about
2 your comfort and your ability to see and hear the testimony
3 and evidence so you can properly do your job. I will try
4 to take breaks about every hour and a half, if you need to
5 break before the time a break is taken please raise your
6 right hand and let me know, then I will take a break as
7 quickly after that as I may do so. If you cannot hear or
8 see something and you cannot -- you need to hear or see
9 during the course of the trial, please do not hesitate to
10 raise your right hand and let me know and I'll make sure
11 you are able to hear and see so you can properly do your
12 job. I try to anticipate that but I can't always
13 anticipate it so don't hesitate to raise your hand if you
14 cannot see or hear something that you need to hear or see
15 so you can properly do your job. Now, I allow jurors to
16 bring something back in your box with you to drink, so if
17 you have water, coke or coffee back in the jury room and
18 you want to bring that back out -- back in with you I will
19 allow you to do that and sip on it during the trial.
20 Counsel and myself, others will be sipping some water as we
21 go through the trial and you're welcome to bring something
22 back into the jury box with you if you wish. Thank you for
23 your attention, ladies and gentlemen, we are now ready to
24 begin the trial. I would ask that you listen attentively
25 as counsel addresses you in opening statements. Counsel,

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1 read to proceed?

2 MR. KINKARD: Thank you, Your Honor. May it please
3 the Court?

4 THE COURT: Counsel.

5 MR. KINKARD: Good afternoon, ladies and gentlemen.

6 Last summer on July 19, 2002 little ^{Minor 1} her
7 mom dropped her and her younger brother, ^{S.M.} off at the
8 home of ^{A.F.} and ^{Minor 2} ^{A.F.} and
9 ^{Minor 2} are half sisters. She dropped them off to
10 spend the afternoon or spend the night, or spend the
11 evening into the night until ^{Minor 1} mom could come back
12 and pick her up after she got off work, I think she worked
13 at the country club at that time, I believe. Shortly after
14 ^{Minor 1} and ^{S.M.} arrived over at ^{Minor 2} and ^{A.F.}
15 house, ^{Minor 2} suggested that they all go to the street
16 behind where they lived and meet and play with her
17 boyfriend, ^{J.L.} So ^{Minor 2} asked her mom if that would be
18 okay and ^{Minor 2} mom said, yeah, that's fine, just don't
19 go anywhere else. So she went over there and I think they
20 saw ^{J.L.} I think ^{J.L.} had a bicycle and I believe it
21 didn't have any brakes on it. They played for awhile and
22 they thought it would be kind of a neat idea at that time
23 just to go down the street a little ways where there's a
24 big hill where there's an embankment actually and it goes
25 down to the sidewalk, they thought wouldn't it be neat to

1 go down that hill and take turns riding that bicycle down
2 the hill and pick feet up and so forth and see who's the
3 daredevil and who's got the courage to do that as kids want
4 to do. So they did that and played for awhile and that
5 embankment happens to be in front of the defendant's home,
6 and the defendant at the time was outside of his home
7 sitting outside of his home in front of that hill. And as
8 they rode their bikes a little bit the defendant called out
9 to them and said, "Y'all daredevils?" And they respond,
10 "Yeah." "Y'all want to ride my go cart?" "Yeah." And I
11 don't think any of them had ever met him except for ^{Minor 2}
12 and ^{A.F.} So they all went to the defendant's and he
13 pulled out that go cart of his, which happens to be pink,
14 managed to find some gas for it and they spent the next I
15 think roughly two hours, hour and 45 minutes, two hours
16 over at his house taking turns riding that go cart. Now,
17 ladies and gentlemen of the jury, if I categorize the
18 defendant's behavior in the course of those next two hours
19 toward those children as inappropriate that would be
20 grossly understated. His behavior as the testimony and as
21 the evidence will show in this case during those roughly
22 two hours that the children were at his home can be best
23 described by one word, a word that's in the allegations
24 that he's charged with and that's lewd. Let me tell you
25 what I mean. You will hear testimony during this trial

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1 where at one point ^{Minor 2} is standing just a little too
2 close to that go cart and she manages to touch her foot
3 against the hot exhaust as it's been running for awhile and
4 she burns her foot. The defendant sees that and comes
5 over -- of course, she's not wearing any shoes or socks, I
6 think she's wearing flip flops at the time -- the defendant
7 comes over and he doesn't kiss it like a mom or dad would
8 kiss a booboo, he licks her foot. There will be testimony
9 that will indicate that later on in the day in the course
10 of the afternoon that ^{Minor 1} and ^{Minor 2} are over by the
11 pickup truck, the defendant's pickup truck, I think ^{Minor 2}
12 is sitting on it and the defendant is in between them.
13 They'll testify that he got behind them in turn, one at a
14 time, and put his arms around them and at the same time
15 felt and rubbed their butts and their hip area, and he even
16 manages at some point in there to tell ^{Minor 2} that she had
17 cute panties. You will also hear testimony from a witness,
18 A.F. who will testify that the defendant asked her if
19 she would sell her body to him for \$200. And you will hear
20 other testimony from not only the victims in this case but
21 also witnesses that I think paint a pretty sorry picture of
22 the events that happened that day between the defendant,
23 Mr. Malpass, and these young girls, these young victims in
24 this case. At some point, of course, they all go back up
25 to the top of that hill frightened after each of them has

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1 experienced or seen what had happened to them. They
2 compare notes and frightened they run off, they tell
3 Ms. Fox, ^{A.F.} and ^{Minor 2} mom, what happened and she in
4 turn notifies the police. Good afternoon again, ladies and
5 gentlemen, my name is Dan Kinkard, it's my privilege to
6 serve here in Union County as an assistant solicitor. As
7 such I have the responsibility that I share with my
8 cocounsel, Lisa Collins, to represent the State of South
9 Carolina specifically the citizens of Union County against
10 those who are charged with breaking the law. As you know
11 by now, we are here this afternoon because this defendant
12 is charged with lewd act upon a minor, has exercised his
13 constitutional right to a trial by jury. I won't presume
14 to tell you what the law is because Judge Alford, as he
15 already mentioned to you, is the source of authority of
16 what the law is in this courtroom. But I think as a point
17 departure, as point of reference let me just briefly tell
18 you that our state legislature has determined that in South
19 Carolina one is guilty of committing a lewd act on a minor
20 when one, a person is over the age of 14 and who commits or
21 willfully commits or attempts to commit the lewd act upon
22 the body or any part, any part of the body of a minor who
23 is under 16 years of age for the purpose of gratifying,
24 appealing to or arousing his own personal lust or arousing
25 the sexual desires of the victim, that's what the law says

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1 and the judge will talk to you more about that later on.
2 Now, having said all of that, you all know as well as I do
3 that that defendant who sits over there is absolutely
4 presumed innocent unless and until the State proves his
5 guilt beyond a reasonable doubt and the Judge just told
6 that to you as well. That's as true in this courtroom as
7 it is in every criminal courtroom in this country, that's
8 the heart and soul in the criminal justice system. It's a
9 high burden, it's a burden that the State I think in this
10 case will meet through the evidence that we will put up in
11 this trial. You're going to hear from the victims in this
12 case, they will testify to what happened to each of them.
13 You will also hear from witnesses in this case who were
14 there and saw what happened. You will hear from law
15 enforcement officers who responded, who arrested the
16 defendant and who took statements from the defendant. You
17 will hear statements that the defendant made after he was
18 arrested. And I think when you hear all of the evidence
19 you will be able to go back into that jury room honestly
20 with a clear conscious and render a decision for the State.
21 Now, let me just take a moment to thank you in advance, I
22 might not get a chance to do it. Again, I do want to thank
23 you on behalf of the State and Ms. Collins for your time
24 today in serving on this jury, I know you had other things
25 to do but I appreciate it. It's an important case for the

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1 State as well as for the defendant. Thank you for your
2 time.

3 MR. AUL: Your Honor, if it pleases the Court? Ladies
4 and gentlemen, Mr. Foreman, my name is Bill Aul, I'm the
5 public defender for Union County. I represent Mr. Malpass
6 in regards to two charges that have been alleged against
7 him, two very serious charges, two charges of lewd act on a
8 minor. Now, I want to explain something to you. The Judge
9 in the beginning gave you the instructions as to law and
10 told you that we would be making opening statements and if
11 I ever say anything contrary to what the Judge said was the
12 law, ignore me because the Judge tells you what the law is.
13 You determine -- the 12 of you determine what the facts are
14 in this case. Anything I say up here is not a fact. The
15 facts will be shown on the witness stand. The reason I
16 want to point that out is the State got up here and
17 described a scenario that is the scenario they must prove,
18 they must prove that scenario. They must prove that a lewd
19 act was committed on two minors. All we have now is simple
20 allegations. One thing the State stated that was
21 absolutely correct, the State would say and the Judge would
22 say and I can say Mr. Mack Malpass as he sits right here is
23 innocent of these charges. Because our law states that you
24 are innocent of a charge unless and until the State proves
25 your guilt beyond a reasonable doubt. No, these are not

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1 pleasant charges, that's one of the first things Judge
2 Alford told to you before we even swore you in, he says you
3 can't even start talking about the evidence in this case
4 with each other, don't even be thinking about the evidence
5 until you hear everything because you'll just hear one side
6 at a time. The State goes first. The reason the State
7 goes first is they have to prove Mack's guilt beyond a
8 reasonable doubt, and that truly is the burden they must
9 prove. The question is not whether after hearing the
10 evidence I think most likely it happened, that's not the
11 question. It's not a question of I think there is a good
12 possibility it happened, or a great possibility it
13 happened, the question is whether the State proves his
14 guilt beyond a reasonable doubt. The Judge has already
15 told you Mack is innocent now, he's not required to produce
16 any evidence whatsoever. You will hear from some
17 witnesses, you will hear from witnesses that saw certain
18 things. There will be our witnesses. What you will need
19 to do is you will need to take and put everything together,
20 all of the evidence and determine at that point whether the
21 State has met their burden, and it's a heavy burden as they
22 indicated, it is a heavy burden because we live in America
23 and to be convicted of a crime they have to prove guilt.
24 Now, as I told you, my name is Bill Aul, I'm the public
25 defender. After the State -- when the State calls their

1 witness I can ask questions of the witness, I don't have to
2 ask questions of a witness and that will go on for awhile.
3 It may be tomorrow before we even have a chance to present
4 any evidence. I just ask that you remember the oath that
5 you took not to start deciding the facts based on the
6 State's opening statement, which is no evidence at all, or
7 based on witnesses that you will hear tonight because we
8 won't get done tonight, it's 20 minutes until 4:00, the
9 State probably won't have all of their witnesses done
10 tonight. So I just ask that you follow those requests and
11 at the end of the case I will get up and have a chance to
12 talk to you again to address some of the issues that I feel
13 are relevant. I just want to ask you to pay close
14 attention to the evidence, because these next two days are
15 the two most important days in Mack Malpass' life. Thank
16 you.

17 The witness, ^{Minor 2} was first duly sworn and
18 Testified as follows, on:

19 DIRECT EXAMINATION

20 BY MS. COLLINS:

21 Q. Would you please tell the jury your full name?

22 A. ^{Minor 2}

23 Q. All right. ^{Minor 2} you're going to have to speak up
24 a little bit, maybe even speak more into that microphone
25 and make sure everybody can hear you. All right?

- 1 Minor 2 how old are you?
- 2 A. 14.
- 3 Q. That's good, keep that volume up if you would. When
- 4 is your birthday?
- 5 A. [REDACTED].
- 6 Q. What year were you born?
- 7 A. [REDACTED].
- 8 Q. Do you attend school at the public schools or in
- 9 private school or do you attend school somewhere else?
- 10 A. I attend school at home.
- 11 Q. You're home schooled?
- 12 A. Uh-huh.
- 13 Q. Is that correct, yes or no?
- 14 A. Yes, ma'am.
- 15 Q. All right. And if you would, answer out loud and not
- 16 just shaking your head because the court reporter has to
- 17 write down everything you say. Okay? Minor 2 what grade
- 18 level are you on in your home schooling process?
- 19 A. 7th.
- 20 Q. All right. When you're home schooled, does it kind
- 21 of run along the same calendar year as the other schools,
- 22 like from September or so or August until May?
- 23 A. Yes, ma'am.
- 24 Q. All right. I want to direct your attention, Minor 2
- 25 back to last summer before this school year started.

1 Okay. All right? You need to answer yes or no.

2 A Yes, ma'am.

3 Q. And specifically I want to direct your attention to

4 Saturday, July 19th, 2003. Okay?

5 A. Okay.

6 Q All right. Do you remember who you were with and
7 what you were doing that day?

8 A. Yes, ma'am.

9 Q. Can you tell the jury, who were you t with and
10 what -- who were you playing with and what were y'all
11 doing?

12 A. I was playing with Minor 1 S.M. A.F. and
13 Minor 1 brother, S.M.

14 Q. Now, let's back up because the jury may not know some
15 of these people that you're talking about. When you say
16 Minor 1 do you know Minor 1 last name?

17 A. [REDACTED].

18 Q. How about S.M.

19 A. [REDACTED].

20 Q. Are S.M. and Minor 1 related?

21 A. They're brothers.

22 Q. Brother and sister?

23 A. Uh-huh.

24 Q All right. And you need to speak up a little bit
25 more. Okay? Now, how about A.F. what is her last

1 name?

2 A. [REDACTED].

3 Q. Is she related to any of those people?

4 A. She's my sister.

5 Q She's your sister. Okay. And was there another
6 young man there that y'all were playing with, too?

7 A. J.L.

8 Q What is J.L. last name?

9 A. [REDACTED].

10 Q. Okay. All right. Now, where were y'all playing,

11 Minor 2 ?

12 A. At Doug and Jill Howard's house.

13 Q All right. And where is that located?

14 A. About four houses from the Malpass'.

15 Q. You live in that neighborhood, too?

16 A. Yes, ma'am.

17 Q. All right. And that's here in Union County?

18 A. Yes, ma'am.

19 Q. All right. When y'all started off playing together,
20 what kind of activities were y'all doing?

21 A. One of us was riding a bike, it was -- I think it was
22 my sister.

23 Q. All right. And again, keep your voice up if you
24 would. Was there anything special or wrong with that
25 bike?

- 1 A. No, ma'am.
- 2 Q. Whose bike was it?
- 3 A. J.L.
- 4 Q. All right. And where were y'all riding that bike?
- 5 A. We was riding it down in the road from where J.L.
- 6 lives.
- 7 Q. All right. And while y'all were riding the bike, did
- 8 you have an occasion to see the defendant, Donnie Malpass,
- 9 that day?
- 10 A. Yes, ma'am.
- 11 Q. And where did y'all see him, where did you see him?
- 12 A. He was at one of his friend's, Blue's, house.
- 13 Q. Where was that in relation to where y'all were riding
- 14 that bike?
- 15 A. It's like four houses down from the Malpass' house.
- 16 Q. All right. When you first saw the defendant, Donnie
- 17 Malpass, did y'all go over to him or did he come over to
- 18 you kids?
- 19 A. He come over to us.
- 20 Q. All right. When the defendant came over to y'all,
- 21 what did he say? Had you ever met him before?
- 22 A. No?
- 23 Q. So that was the first day you had met him?
- 24 A. Yes, ma'am.
- 25 Q. And who introduced you to the defendant, Donnie Mack

1 Malpass, at that time?

2 A. He introduced him to us.

3 Q. And what did he ask you to -- what did he say his
4 name was?

5 A. He told us to call him Mack.

6 Q. Did you call him Mack?

7 A. Yes, ma'am.

8 Q. All right. And at that time did the defendant, Mack,
9 say anything to y'all regarding what y'all were doing with
10 the bike?

11 A. He asked us if we was daredevils.

12 Q. And what did y'all say?

13 A. Yeah.

14 Q. And then what -- did the defendant ask y'all about
15 doing other activities?

16 MR. AUL: Your Honor, I have to object to some
17 leading. I understand she's leading a little bit but she's
18 leading on and on.

19 THE COURT: I will allow a little leeway but please
20 avoid the leading.

21 MS. COLLINS: I can rephrase that, Your Honor.

22 Q After the defendant, Mr. Malpass, asked y'all to call
23 him Mack, what, if anything, happened after that, ^{Minor 2}

24 A. What did you say?

25 Q. What happened after the defendant asked y'all -- let

- 1 me rephrase. What happened after the defendant asked
2 y'all if y'all were daredevils and you said yes?
- 3 A. He asked us if we wanted to see his go cart.
- 4 Q And again be clear, when you say he, who do you mean?
- 5 A. Mack Malpass.
- 6 Q. Okay. And what did y'all say in response to his
7 question of wanting to see the go cart?
- 8 A. We said yeah.
- 9 Q. Again, I know it's hard, it's a big room, if you can,
10 please try to keep your voice up. And so then what
11 happened after y'all said yeah you wanted to see the go
12 cart?
- 13 A. He showed us his go cart.
- 14 Q. What did it look like?
- 15 A. It was pink and it was dirty.
- 16 Q. All right. And ultimately, did y'all do something
17 with that go cart?
- 18 A. We rode it.
- 19 Q. Okay. Who rode it?
- 20 A. Me, my sister, A.F. J.L. and S.M. and Minor 1
- 21 Q Okay. And the go cart, was it the type -- how many
22 people could ride on it at a time?
- 23 A. One.
- 24 Q. All right. So when y'all were riding the go cart and
25 only one person would ride it, what were the other people

1 doing?

2 A. Waiting.

3 Q. All right. Now, at some point did something happen
4 to you?

5 A. I asked Mack Malpass if I could go to use his
6 bathroom.

7 Q. All right. At some point, did you suffer any
8 injuries that day?

9 A. My sister -- the go cart burned my foot.

10 Q. All right. And you said your sister, that was

11 Minor 2

12 A. A.F.

13 Q. I'm, sorry ^{A.F.} you're ^{Minor 2} all right. And
14 how did the go cart burn your foot, ^{Minor 2}

15 A. It rolled back when my sister was riding it.

16 Q. What are you wearing on your feet that day?

17 A. Sandals.

18 Q. So did you have any socks on that day?

19 A. I don't remember.

20 Q. All right. And when the go cart hurt your foot,
21 what, if anything, did the defendant do at that time?

22 A. He licked it.

23 Q. Okay. When he came over to you and you said -- how
24 many times did he lick it?

25 A. Once.

- 1 Q. Did he say anything when he licked?
- 2 A. No, ma'am.
- 3 Q. Did he ask your permission to do that?
- 4 A. No, ma'am.
- 5 Q. Did you ask him to do that?
- 6 A. No, ma'am.
- 7 Q. When the defendant licked your foot, did you have --
- 8 were you close enough then to smell any odor about his
- 9 body?
- 10 A. Yes, ma'am.
- 11 Q. What if any odor did you smell on the defendant at
- 12 that time?
- 13 A. He was drinking beer.
- 14 Q. All right. Did you see him drinking beer on that
- 15 occasion?
- 16 A. Yes, ma'am.
- 17 Q. Do you know how many beers you saw him drink?
- 18 A. There was a lot of it on the table, I didn't see how
- 19 much he drank.
- 20 Q. All right. And did you see him with a beer not just
- 21 on the table but in his hand?
- 22 A. Yes, ma'am.
- 23 Q. And you saw him actually drink it?
- 24 A. Yes, ma'am.
- 25 Q. And how many -- what kind of beers were they, do you

1 know?

2 A. No, ma'am.

3 Q. Were they in a bottle or in a beer can?

4 A. In a can.

5 Q. Okay. To the best of your memory, ^{Minor 2} do you
6 know about what time this all started in terms of riding
7 the bike and then seeing the defendant?

8 A. It was like 3:00 in the day.

9 Q. And about how long to the best of your memory did
10 y'all spend in the presence of the defendant riding his go
11 cart?

12 A About four hours.

13 Q. Now, ^{Minor 2} at some point did you go inside the
14 defendant's home or one of the houses?

15 A. Yes, ma'am.

16 Q. Can you tell the jury about that?

17 A. I asked him if I could use the bathroom, he told me
18 yeah and I went in, he showed me where his bathroom was.
19 And he come in behind me and I went to the bathroom and
20 locked the door and he was jiggling the handle. And

21 ^{Minor 1} she come in behind him.

22 MR. AUL: Your Honor, object to anything ^{Minor 1} saw
23 or said, that would have to be hearsay, Your Honor.

24 MS. COLLINS: Right.

25 Q Don't say anything that ^{Minor 1} may have seen or

- 1 said. But did you see ^{Minor 1}
- 2 A. I was in the bathroom.
- 3 Q. Okay. All right. And ultimately did you come out of
- 4 the bathroom then?
- 5 A. Yes, ma'am.
- 6 Q. All right. And when you came out of the bathroom,
- 7 did you have occasion -- and you went out of the house; is
- 8 that right?
- 9 A. Yes, ma'am.
- 10 Q. And then at what point did you next see the
- 11 defendant, Mack Malpass?
- 12 A. I was -- can you repeat that?
- 13 Q. Yeah. After you come out of the house using the
- 14 restroom, ^{Minor 2} when did you next see the defendant?
- 15 A. Over at his truck.
- 16 Q. Okay. And what, if anything, happened between you
- 17 and the defendant at that point?
- 18 A. He was talking to me. He told me I was a pretty
- 19 lady, pretty young lady.
- 20 Q And again, try to keep your voice up. And after he
- 21 told you were a pretty young lady, what, if anything, did
- 22 the defendant do?
- 23 A. He touched me on my rear end and towards my front
- 24 area.
- 25 Q. All right. Now, who all was around when the

TESTIMONY OF Minor 2

1 defendant touched you on your rear end and towards your
2 front area?

3 A. A.F. Minor 1 and S.M. and all of them was around,
4 but Minor 1 is the one who saw it.

5 Q But were they right there with y'all or were they
6 some distance away?

7 A. They was sitting on the sidewalk.

8 Q. All right. And how far was that from where you and
9 the defendant were?

10 A. It was from about me to him.

11 Q. To the court reporter?

12 A. Uh-huh.

13 Q. Let the record reflect that's approximately 12 feet.

14 You've testified, Minor 2 that the defendant touched you
15 on your rear end and towards your front area. Could you
16 please stand and show the jury where the defendant touched
17 you?

18 A. He touched my right here (indicating.)

19 Q. All right. And I would ask that the record reflect
20 that the witness put her hand on her right hip area near
21 her buttock and brought it around to her right front area
22 toward her right pelvic/hip bone. How many times did the
23 defendant touch you where you just showed the jury,

24 Minor 2

25 A. Once.

1 Q. All right. What, if any, comments or statements did
2 the defendant make to you regarding your clothing?

3 A. No, ma'am.

4 Q. Did he make any statements to you specifically
5 regarding panties?

6 A. Yeah. He said they were pretty.

7 Q. He told you they were pretty?

8 A. Yes, ma'am.

9 Q. And at what point did the defendant tell you your
10 panties were pretty?

11 A. I was sitting on his car -- I mean, his truck, he
12 told me that.

13 Q. I'm sorry, I couldn't hear you.

14 A. He was -- I was sitting on his truck and he told me
15 my panties were pretty.

16 Q. Now, what kind of outer clothing were you wearing
17 that day?

18 A. I was wearing shorts and a shirt.

19 Q. All right. And how long were your shorts?

20 A. Almost to my knees.

21 Q. Almost to your knees?

22 A. Uh-huh.

23 Q. To your knowledge, were your panties exposed at all
24 or did your outer clothing cover them?

25 A. Yes, ma'am.

1 Q. Which of those?

2 A. My clothes covered them.

3 Q. All right. And let me back up and ask you, when you
4 indicated the defendant touched you as you showed the
5 jury, was that on the outside of your clothing or did he
6 reach under your clothing against your skin?

7 A. On the outside.

8 Q. All right. Minor 2 at anytime did you see the
9 defendant touch any of the other girls that day?

10 A. Yeah, he touched Minor 1

11 Q. Did you see that?

12 A. Yes, ma'am.

13 Q. Tell the jury what you saw.

14 A. I saw him, he come up behind her and hugged her back
15 and he was touching the outside of her clothes on the back
16 and on the front the same place he touched me.

17 Q. He touched her the same place he touched you?

18 A. Yes, ma'am.

19 Q. On the outside of her clothes you said?

20 A. Yes, ma'am.

21 Q. How many times did you see him touch her?

22 A. Once.

23 Q. All right. Now, Minor 2 were you the oldest girl
24 there?

25 A. Yes, ma'am.

1 Q. After this -- did the defendant touch ^{Minor 1} before
2 or after the incident where he touched you?

3 A. After.

4 Q. All right. After you saw the defendant touch
5 ^{Minor 1} how much longer did y'all stay there playing with
6 the go cart?

7 A. About 15 or 20 minutes.

8 Q. All right. Did you ultimately leave that area where
9 the defendant was?

10 A. No, ma'am. I waited for everybody else.

11 Q. Did you and everybody else, the other kids,
12 eventually leave, though?

13 A. Yes, ma'am.

14 Q. And where did y'all go?

15 A. We went to my house.

16 Q. Who did y'all speak with?

17 A. My mom and daddy.

18 Q. What is your mother's name?

19 A. Lynn Fox.

20 Q. Did you tell your mother, Lynn Fox, what had
21 happened?

22 A. Yes, ma'am.

23 Q. Did you tell your mother, Lynn Fox, what you have
24 told the jury today?

25 A. Yes, ma'am.

TESTIMONY OF Minor 2

1 Q. And is everything that you've told the jury today
2 true?

3 A. Yes, ma'am.

4 Q. And all of that really happened?

5 A. Yes, ma'am.

6 Q. Minor 2 I'm almost finished. Minor 2 do you see
7 the man here in the courtroom that you told the jury
8 touched you and that you saw touch Minor 1 that day?

9 A. Yes, ma'am.

10 Q. Can you stand up and point him out to the jury?

11 A. (Witness complies.)

12 Q. And can you describe what he's wearing?

13 A. A gray T-shirt and -- a gray shirt.

14 Q. Does that shirt have long or short sleeves?

15 A. Short sleeves.

16 Q. Can you describe his hair for the jury?

17 A. Black and short.

18 Q. All right. And where is he in the courtroom? Can
19 you say is he seated or standing or in the back or in the
20 front?

21 A. He's in the front sitting down.

22 Q. All right.

23 MS. COLLINS: And I would ask that the record reflect
24 that the witness has also in addition to verbally
25 describing the defendant has pointed in the direction of

1 the defendant and that the victim has identified the
2 defendant. Minor 2 thank you, please answer any questions
3 Mr. Aul may have of you.

4 CROSS EXAMINATION

5 BY MR. AUL:

6 Q. Minor 2 you had indicated that your foot was burned
7 when A.F. was riding the cart, is that what happened?

8 A. Yes, sir.

9 Q. So the go cart shot hot exhaust on it or did you rub
10 your foot against the hot metal.

11 A. It had a hot exhaust on it.

12 Q. So I mean, did you holler or --

13 A. Well, I just said ouch, it hurt.

14 Q. You said, ouch, it hurt?

15 A. Yes, sir.

16 Q. And you said this was around 3:00 in the day?

17 A. Yes, sir.

18 Q. And you say Mack had been drinking?

19 A. Yes, sir.

20 Q. Now, did you say Mack touched you first or touched
21 Minor 1 first?

22 A. Me, he touched me first.

23 Q. Okay. Touched You first. And you say after he
24 touched you you played around about 15 minutes and waited
25 for everybody else to ride some mother?

1 A. Yes, sir.

2 Q. And then that's when you left?

3 A. Yes, sir.

4 Q. So how long was it after Mack touched you that he
5 touched ^{Minor 1}

6 A. About five or 15 minutes.

7 Q. About five or 15 minutes?

8 A. Yes, sir.

9 Q. Do you recall giving a statement to this gentleman
10 here, Detective Shugart?

11 A. Excuse me?

12 Q. Do you recall giving a statement to him at some time?

13 A. Yes, sir.

14 Q. And you gave that statement about two days after you
15 say this happened? Is that about the time frame that you
16 gave him the statement?

17 A. It was that day.

18 Q. You gave a statement?

19 A. Oh, you're talking about him. I gave it to him about
20 two days, yeah.

21 Q. Okay. You gave it to him two days -- do you recall
22 what you said in that statement?

23 A. I told him -- I wrote on the statement what --

24 Q I'm sorry, I can't hear you.

25 A I wrote on the statement what he had done to me at

1 his house.

2 Q So you actually wrote that statement out?

3 A. No, he wrote it but I told him.

4 Q. You signed it?

5 A. Yes, sir.

6 Q. Is everything true that you said in that statement?

7 A. Yes, sir.

8 Q. Do you remember what you said in that statement?

9 A. Yes, sir.

10 Q. Okay. Do you remember saying it was around 8:00 when
11 y'all were walking around there?

12 A. No, sir.

13 Q. You don't remember saying it was around 8:00? Do you
14 remember saying that he touched ^{Minor 1} first?

15 A. No, sir.

16 Q. You don't remember saying that? Do you remember
17 saying, "When he touched me I walked away?"

18 A. No, sir.

19 Q. You don't remember saying any of that?

20 THE COURT: Ma'am, I'm going to get to you speak up
21 just a little bit. And also, when you respond to the
22 question do so verbally because the reporter has to take
23 down everything you say so instead of nodding your head if
24 you could please speak verbally. Okay? Thank you.

25 Q. Let me show you that. Look at that for a moment.

- 1 Have you had a chance to look at it?
- 2 A. Yes, sir.
- 3 Q. The very first sentence that you told Detective
- 4 Shugart, what time did you say it was that you were
- 5 walking on Haywood Street?
- 6 A. 8:00.
- 7 Q So when you gave your statement to Detective Shugart
- 8 you said it was 8:00?
- 9 A. Uh-huh.
- 10 Q. Okay. Direct your attention to those sentences right
- 11 there. In your statement it indicates that, "After he
- 12 rubbed me I walked away," doesn't it?
- 13 A. Yes, sir.
- 14 Q. Okay. And that's not what you testified in court a
- 15 few minutes ago, was it?
- 16 A. Huh?
- 17 Q. That's not what you testified a few minutes ago, was
- 18 it?
- 19 A. Yes, sir.
- 20 Q. I thought you testified that you waited around 15
- 21 minutes for the other people to ride their go cart and
- 22 then you left.
- 23 A. Yes, sir.
- 24 Q. And doesn't this statement indicate that ^{Minor 1} was
- 25 rubbed first and then you?

1 A. Yes, sir.

2 Q. But a few minutes ago you indicated you were rubbed
3 first and then ^{Minor 1} correct?

4 A. Yes, sir.

5 Q. Did you indicate anything in your statement about
6 Mack kissing your foot?

7 A. No, sir.

8 Q. Where do you indicate Mack touched you? Not on your
9 body, where were you standing or sitting when Mack -- when
10 you say Mack touched you?

11 A. Beside his car -- truck.

12 Q. Beside his truck?

13 A. Yes, sir.

14 Q. And his truck is outside of his home in front of his
15 house?

16 A. Yes, sir.

17 Q. And this is still daylight?

18 A. Yes, sir.

19 Q. Is his truck in the front yard?

20 A. Yes, sir.

21 Q. When the children would ride the go carts, would Mack
22 come up and have to start it each time for you?

23 A. Huh?

24 Q. Would Mack have to start the go cart each time
25 someone finished riding the go cart because it would cut

- 1 off?
- 2 A. Yes, sir.
- 3 Q. And there was at least three children standing in
- 4 line to ride the go cart, correct?
- 5 A. Yes, sir.
- 6 Q Were any of the people riding the go cart that day?
- 7 A. My sister and all of them was.
- 8 Q. Was anyone other than the ones you've already
- 9 mentioned that were riding the go cart?
- 10 A. Yes, sir.
- 11 Q. Who else was riding the go carts?
- 12 A. Doug, he come down there, I don't remember if he rode
- 13 it.
- 14 Q. You said Doug came down there, is that Doug Howe?
- 15 A. Yes, sir. And another man, I don't know who he was.
- 16 Q. So another man came down and rode the go cart also?
- 17 A. Yes, sir.
- 18 Q. Did you see Tommy Dow and Scotty Darling there?
- 19 A. No, sir.
- 20 Q. You never saw them there that day?
- 21 A. No.
- 22 Q. Did you see any people across the street cooking out?
- 23 A. No. But there was two people on the porch.
- 24 Q. So there were people in the porch across the street?
- 25 A. Yes, sir.

1 Q. And they were doing something on that porch the whole
2 time this was going on?

3 A. Yes, sir.

4 Q. And this street, it's a pretty wide street, isn't it?

5 A. Yes, sir.

6 Q. And it's a pretty busy street actually, isn't it?

7 A. Yes, sir.

8 Q. A lot of people travel up and down on that street if
9 you're traveling in Buffalo.

10 A. Yes, sir.

11 Q. And this was in the summer so it was middle of the
12 day so there was sunlight?

13 A. Yes, sir.

14 Q. No problem for people to see or anything like that.

15 A. No, sir.

16 Q. At some point did you ride a go cart all of the way
17 around the block?

18 A. Yes, sir.

19 Q. Did Mack actually fuss at you about riding around the
20 block?

21 A. No, sir.

22 Q. He didn't fuss at you about riding it around the
23 block?

24 A. No. He told us we could.

25 Q. He told you you could ride all of the way around the

- 1 block?
- 2 A. Yes, sir.
- 3 Q. At some point did you come up to Mack and ask him to
- 4 buy some cigarettes for you?
- 5 A. No, sir.
- 6 Q. You didn't do that?
- 7 A. No, sir.
- 8 Q. Did you ever ask him to buy any beer for you?
- 9 A. No, sir.
- 10 Q. Mack never pushed you away and said, "No, I'm not
- 11 going to do that?"
- 12 A. No, sir.
- 13 Q. You're sure of that?
- 14 A. Uh-huh. Yes, sir.
- 15 Q. How many people would you say were out there?
- 16 A. About seven people.
- 17 Q. About seven people?
- 18 A. Yes, sir.
- 19 Q. Did you see Mr. Lawson there?
- 20 A. Who is Mr. Lawson?
- 21 Q. Did you see Mack's uncle there?
- 22 A. No, sir.
- 23 Q. Do you know who he is?
- 24 A. No, sir.
- 25 Q. Okay. So you wouldn't recognize him if you saw him.

TESTIMONY OF Minor 2

1 MR. AUL: I don't have any further questions at this
2 time, Your Honor.

3 MS. COLLINS: Just a few, Your Honor.

4 REDIRECT EXAMINATION

5 BY MS. COLLINS:

6 Q Minor 2 the defense attorney asked you about the
7 statement you gave to law enforcement. Do you still have
8 a copy of that in front of you?

9 A. Yes, ma'am.

10 Q. And on the first page where Mr. Aul was asking you
11 about saying it was a around 8:00 p.m. you told that to
12 law enforcement and Lieutenant Shugart; is that right?

13 A. Yes, ma'am.

14 Q. Now, this being a summer day, were you keeping track
15 of the exact time?

16 A. No, ma'am.

17 Q. Did you have anywhere precisely to be later at any
18 precise time?

19 A. No, ma'am.

20 Q. When you said it was around 8:00, was that an
21 approximation?

22 A. Yes, ma'am.

23 Q. All right. Now, in terms of page two of your
24 statement that Mr. Aul asked you about walking away after
25 the defendant rubbed you, do you remember Mr. Aul asking

1 you about that?

2 A. Yes, ma'am.

3 Q. When you told Lieutenant Shugart that you walked away
4 after the defendant rubbed you, where did you walk away
5 to?

6 A. I went and sat with my sister, I went on the
7 sidewalk.

8 Q. All right. So you went on the sidewalk with your
9 sister?

10 A. Yes, ma'am.

11 Q. You didn't walk away home at that point or back to an
12 adult that the kids knew, you walked over to where your
13 sister was on the sidewalk?

14 A. Yes, ma'am.

15 Q. Okay. And it was some time later that y'all all left
16 and went to talk to your mom, was it?

17 A. Yes, ma'am.

18 Q. All right. Now, in terms of these people that were
19 there you said -- well, Mr. Aul asked you about how many
20 people and you said about seven people; is that right?

21 A. Yes, ma'am.

22 Q. Does that include the children, the kids that were
23 there with you?

24 A. Yes, ma'am.

25 Q. All right. So you and your sister, ^{A.F.} were

- 1 there, right?
- 2 A. Yes, ma'am.
- 3 Q. And J.L. was there, right?
- 4 A. Yes, ma'am.
- 5 Q. And Minor 1 was there, right?
- 6 A. Yes, ma'am.
- 7 Q. And Minor 1 brother, S.M. was there, right?
- 8 A. Yes, ma'am.
- 9 Q. So five children, right?
- 10 A. Yes, ma'am.
- 11 Q. And the defendant was there, right?
- 12 A. Yes, ma'am.
- 13 Q. And then some man named Blue was there, too, right?
- 14 A. Yes, ma'am.
- 15 Q. Was he an adult or was he young like y'all?
- 16 A. He was old.
- 17 Q. Okay. Now, in terms of Doug coming and riding the go
- 18 cart, is he an adult?
- 19 A. Yes, ma'am.
- 20 Q. Was he there the whole time or just part of the time?
- 21 A. He was there part of the time.
- 22 Q. All right. Was he there when the defendant was
- 23 touching you or Minor 1 that you told the jury about?
- 24 A. No, ma'am.
- 25 Q. In terms of this other man, you said another man came

1 and rode the go cart, was he there the whole time or part
2 of the time?

3 A. Part of the time.

4 Q. And the time that he was there, this other adult
5 male, is that when the defendant touched on you and
6 Minor 1 that you saw or was that a later time?

7 A. Later time.

8 Q. All right. After those two men had left?

9 A. Yes, ma'am.

10 Q. And the defense attorney asked you in terms of two
11 people on the porch across the street, do you remember Mr.
12 Aul asking you about that?

13 A. Yes, ma'am.

14 Q. All right. And you said that when the defendant
15 touched you you were by his truck; is that right?

16 A. Yes, ma'am.

17 Q. Okay. Well, thinking back, Minor 2 can you describe
18 for the jury where you and the defendant were and where
19 the truck was in relation to where those two people were?

20 A. They was across the road and me and A.F. was beside
21 his truck.

22 Q. Okay.

23 A. In his front yard.

24 Q. All right. So y'all were in his front yard beside
25 his truck and they were across the street; is that right?

1 A. Yes, ma'am.

2 Q. And was -- were you -- you said you were beside the
3 truck, was the truck in any way blocking the view between
4 those two people on the porch and y'all or was there
5 nothing blocking?

6 A. It was blocking.

7 Q. Okay. So you said you were beside the truck. Were
8 you, in fact, in relation to the where the two people on
9 the porch were, in front of the truck or behind the truck?

10 A. Behind it.

11 Q. All right. And those two people, they were doing
12 something on the porch?

13 A. Yes, ma'am.

14 Q. Did you ever happen to notice them stopping and
15 looking over at y'all?

16 A. No, ma'am.

17 MS. COLLINS: Okay. All right. Thank you, nothing
18 further.

19 RE CROSS EXAMINATION

20 BY MR. AUL:

21 Q. ^{Minor 2} you just said on redirect that you walked to
22 A.F. to the sidewalk.

23 A. Yes, sir.

24 Q. ^{A.F.} was on the sidewalk waiting for a ride?

25 A. Yes, sir.

1 Q. Let me direct you to your statement again. Read the
2 sentence immediately after where it said after rubbing I
3 walked away. Where did you say ^{A.F.} was when you gave
4 your statement?

5 A. On top of the hill.

6 Q. Read the rest of that sentence.

7 A. "And she had pushed the go cart because it was broke
8 down."

9 Q. So she was actually riding the go cart when you gave
10 that statement is what you said then, wasn't it?

11 A Yes, sir.

12 Q So she wasn't sitting on the sidewalk waiting, she
13 was on the top of the hill, the go cart had broke down is
14 what you said then.

15 A. Yes, sir.

16 Q. Okay. Now, when you were watching the people ride
17 the go cart, that's what you were doing when you were
18 waiting.

19 A. Yes, sir.

20 Q You stood behind a truck to watch them?

21 A. Yes, sir.

22 Q. You didn't stand in front of the truck?

23 A. No, sir.

24 Q. You could see over the truck?

25 A. Yes, sir.

TESTIMONY OF ^{Minor 1}

1 MR. AUL: I don't have any further questions, Your
2 Honor.

3 THE COURT: Thank you, ma'am, you may stand down.

4 The witness, ^{Minor 1} was first duly sworn and
5 Testified as follows, on:

6 DIRECT EXAMINATION

7 BY MR. KINKARD:

8 Q. ^{Minor 1} how are you this afternoon?

9 A. Fine.

10 Q. I'm going to ask you to do a couple of things for us.
11 Okay. When you testify today I need you to first of all
12 speak up, try to speak into that microphone so everybody
13 can hear you. Okay. And also I need you to when you are
14 asked a question give a verbal response, don't just nod
15 your head because the court reporter can't get that
16 information down so you have to say something. Okay?

17 A. Yes, sir.

18 Q. All right. There you go. Would you please tell the
19 jury, ^{Minor 1} where you live?

20 A. I'm not -- we just moved and I'm not sure.

21 Q. Okay. That's fine. You live here in Union County?

22 A. Yes, sir.

23 Q. Okay. That's fine. How old are you?

24 A. Eleven.

25 Q. Eleven?

1 A. Yes, sir.

2 Q. Okay.

3 MR. AUL: Your Honor, she does talk a little soft,
4 would it be okay if she starts talking soft if I can stand
5 a little closer?

6 THE COURT: Yes, sir.

7 Q ^{Minor 1} would you tell the jury where you go to
8 school?

9 A Monarch.

10 Q. Monarch?

11 A. Yes, sir.

12 Q. What grade are you in?

13 A. Fourth.

14 Q. Fourth grade? Are you looking forward to the summer?

15 A. Yeah.

16 Q. Okay. ^{Minor 1} what I want to do now is I want to go
17 back to last summer, July 19, 2003. Do you remember what
18 you did that day?

19 A. Yes, sir.

20 Q. Can you tell the jury what you did that day.

21 A. We went over to my friend, ^{Minor 2} and ^{A.F.}
22 house?

23 Q When you say we, who went with you?

24 A. Me and my brother.

25 Q. What's his name?

- 1 A. S.M.
- 2 Q. Okay. You went over to Minor 2 and A.F. house?
- 3 A. Yes, sir.
- 4 Q. Where do they live?
- 5 A. I'm not sure.
- 6 Q. Okay. Does Minor 2 have a sister?
- 7 A. Yes, sir.
- 8 Q. What is her name?
- 9 A. A.F.
- 10 Q. Okay. And when you and S.M. went over to Minor 2
- 11 and A.F. house after your mom dropped you off, what
- 12 did y'all do next?
- 13 A. We went over to J.L. house.
- 14 Q. Now, who is J.L.
- 15 A. It was Minor 2 boyfriend at the time.
- 16 Q. Okay. What is his last name?
- 17 A. I'm not sure.
- 18 Q. Okay. Do you know -- will you tell the jury where
- 19 J.L. lives in relation to where A.F. and Minor 2 live?
- 20 A. That was the house right in front of it, we could
- 21 have went on the street but all we had to do is go in
- 22 somebody's yard and just pass by.
- 23 Q. Was it behind them?
- 24 A. It was in front.
- 25 Q. Okay. It was nearby?

- 1 A. Yeah.
- 2 Q. Okay. So y'all were at J.L. house?
- 3 A. Yes, sir.
- 4 Q. What were y'all going to do at J.L. house that day?
- 5 A. Ride his bike.
- 6 Q. Ride his bike? Okay. And did you go anywhere to
- 7 ride that bicycle?
- 8 A. We had to go down the road because it didn't have no
- 9 brakes.
- 10 Q. Okay. And so you went down the street on the
- 11 bicycle. Did you go anywhere and ride the bike, a special
- 12 place?
- 13 A. We had to stop at the end of the road in a little
- 14 grassy spot.
- 15 Q. So y'all rode the bikes down the hill?
- 16 A. Yes, sir.
- 17 Q. Were y'all taking turns riding the bikes down the
- 18 hill?
- 19 A. Yes, sir.
- 20 Q. Okay. When this was going on did you happen to see
- 21 Mr. Malpass?
- 22 A. Yes, sir.
- 23 Q. Would you tell the jury how you saw him?
- 24 A. He was sitting on a picnic table with somebody else.
- 25 Q. Okay. Sitting on a picnic table?

- 1 A. Yes, sir.
- 2 Q. And did he say anything to y'all?
- 3 A. The last time ^{Minor 2} went down there he said hey.
- 4 Q. He said what?
- 5 A I almost wrecked and I had to go right beside him to
- 6 stop at this other hill and he said, "Y'all are
- 7 daredevils," and we said, "Yeah."
- 8 Q. Again, I want you to speak up just a little louder,
- 9 okay, so everybody can hear you. So he asked you if y'all
- 10 were daredevils?
- 11 A. Yes, sir.
- 12 Q. What did y'all say?
- 13 A. Yeah.
- 14 Q. Did he say anything else to you?
- 15 A. Yeah. He said, "Do you want to see our go cart?" We
- 16 said, "Yeah."
- 17 Q. You said yes. Okay. Did y'all go over and see his
- 18 go cart?
- 19 A. Yes, sir.
- 20 Q. And did y'all get to ride the go cart that day?
- 21 A. Yes, sir.
- 22 Q. What did the go cart look like?
- 23 A. It was pink.
- 24 Q. Okay. And now, when y'all started riding the go
- 25 cart, do you remember who rode first?

1 A. A.F.

2 Q A.F. rode first. All right. And what were you and

3 Minor 2 and S.M. and J.L. doing when A.F. was riding?

4 What were y'all doing?

5 A We were sitting near his truck.

6 Q. Sitting near his truck? Okay. Did you that day when

7 you are over at Mr. Malpass' house, did you ever have a

8 chance to go into his house or anything?

9 A. Yes, sir.

10 Q Would you tell the jury why you went into his house?

11 A. Minor 2 had to use the bathroom and I went with her.

12 Q. Okay. You went with her?

13 A. Yes, sir.

14 Q. Okay. And did you follow Mr. Malpass in?

15 A. Yes, sir.

16 Q. Okay. Did Minor 2 use the bathroom?

17 MR. AUL: Your Honor --

18 THE COURT: Hold on just a second.

19 MR. AUL: I object to him leading, giving testimony

20 she had not indicated. He asked her, "Did you follow Mr.

21 Malpass in" and she had not even said Mr. Malpass had go

22 in. I have been letting him lead some because I agree

23 she's a young child but she needs to do the testifying.

24 THE COURT: I overrule.

25 Q You said you went in the house. Did you go into the

1 house that day?

2 A. Yes, sir.

3 Q. Did Mr. Malpass go in the house?

4 A. Yeah. He showed us where the bathroom was.

5 Q. Okay. And did Minor 2 use the bathroom?

6 A. Yes, sir.

7 Q. Where were you at this time when she was using the
8 bathroom?

9 A. I stood outside the door.

10 Q. What did Mr. Malpass do as you were standing outside
11 the door?

12 A. He had just walked right up to the door and Minor 2
13 just slammed the door in his face because she thought he
14 was going to come in, so she just shut it.

15 Q. Okay. After Minor 2 used the bathroom, did you have
16 to use the restroom that day?

17 A. No.

18 Q. When Minor 2 came out what happened then?

19 A. We went outside.

20 Q. Okay. What happened when y'all went outside?

21 A. It was Minor 2 turn.

22 Q. It was Minor 2 turn to ride the go cart?

23 A. Uh-huh.

24 Q. She rode it?

25 A. Yes, sir.

TESTIMONY OF ^{Minor 1}

- 1 Q. Okay. Then after ^{Minor 2} rode it, whose turn was it?
- 2 A. Mine.
- 3 Q. It was your turn? Okay. Did ^{A.F.} ever ride the go
- 4 cart?
- 5 A. Yeah.
- 6 Q. Did ^{S.M.} get to ride the go cart?
- 7 A. He doesn't ride it by himself because he didn't know
- 8 how.
- 9 Q. Who did he ride with?
- 10 A. Huh?
- 11 Q. Who does ^{S.M.} ride the go cart with?
- 12 A. With ^{A.F.}
- 13 Q. When ^{S.M.} and ^{A.F.} were getting on the go cart,
- 14 what are you doing?
- 15 A. We were sitting -- I tried to crank it up and
- 16 accidentally burned ^{Minor 2}
- 17 Q. Accidentally burned ^{Minor 2}
- 18 A. Uh-huh.
- 19 Q. Where?
- 20 A. On her foot.
- 21 Q. Did you see that?
- 22 A. Yes, sir.
- 23 Q. Where did she burn her foot on?
- 24 A. Right near her ankle.
- 25 Q. Okay. And what happened after she burned her foot?

- 1 A. Donnie asked to see it.
- 2 Q. Asked to what?
- 3 A. See her foot.
- 4 Q. Okay. And he asked to see it?
- 5 A. Yes, sir.
- 6 Q. Okay. And did he do anything else?
- 7 A. He picked it up and he licked it.
- 8 Q. And he licked it?
- 9 A. Yes, sir.
- 10 Q. Okay. What did Minor 2 do when he did that?
- 11 A. She wiped it off.
- 12 Q. Okay. Did she do anything else?
- 13 A. We made faces.
- 14 Q. Okay. Well, after the defendant, Mr. Malpass, licked
- 15 Minor 2 foot, what did y'all do then?
- 16 A. He asked us for something to drink, me and Minor 2
- 17 A.F. and S.M. said just water.
- 18 Q. Okay. Did y'all get some water?
- 19 A. Yes, sir.
- 20 Q. Okay. And then where did y'all go after that?
- 21 A. It was J.L. turn to ride the go cart.
- 22 Q. J.L. turn?
- 23 THE COURT: Your voice is trailing off, let me get you
- 24 to speak up just a little bit.
- 25 Q. You're doing fine, we've got to keep talking loud so

- 1 everybody can hear you, especially me. Did you go by his
2 truck at anytime or were you near his truck at anytime?
- 3 A. Sir?
- 4 Q Were you by Mr. Malpass' truck at anytime?
- 5 A. Yes, sir. We was sitting on it with him.
- 6 Q. Okay. When you say we, who was with you when you
7 were on the truck?
- 8 A. Me and ^{Minor 2}
- 9 Q Do you remember -- where was ^{Minor 2} on the truck?
10 Was she on the truck or just standing by the truck?
- 11 A. She was on it.
- 12 Q. Where were you?
- 13 A. Sometimes I would sit on it and I would just get down
14 and just stand beside it.
- 15 Q. Okay. Was Mr. Malpass around you at that time?
- 16 A. Yes, sir.
- 17 Q. Okay. So he was with you all and you all were
18 watching people ride; is that right?
- 19 A. Yes, sir.
- 20 Q. Tell the jury, ^{Minor 1} what happened at this point
21 when you all were by the truck.
- 22 A. He would hug me and ^{Minor 2} and just touch us near
23 our butt and our belly and he would say that we were
24 pretty all of the time.
- 25 Q. Okay. He touched you?

1 A. Yes, sir.

2 Q. Would you tell the jury, can you show the jury where
3 he touched you?

4 A. Do you want me to stand up?

5 Q Yes, please. If you would, stand in front of the
6 jury there and show them where he touched you.

7 A. He would hug me right here and he would get right
8 here and just do like this, or he would just stand right
9 here and just lean on my shoulder like this.

10 MR. KINKARD: Your Honor, I would like to ask the
11 record to reflect that the witness testified that he hugged
12 her a couple of times, touched her on the hip area, I think
13 touched her on the shoulders.

14 THE COURT: The record will reflect what she said,
15 Counsel.

16 Q. Minor 1 you can sit down. Did he touch Minor 2

17 A. Yes, sir.

18 Q. Did you see him touch Minor 2

19 A. Yes, sir.

20 Q Where did you see him touch Minor 2

21 A. The same place he touched me.

22 Q. The same place?

23 A. Yes, sir.

24 Q. Can you tell the jury what place that was?

25 A. He would touch near her belly area and near her butt.

TESTIMONY OF ^{Minor 1}

- 1 Q. All right. I want to ask you, ^{Minor 1} is the person
2 that touched you that day, is that person in the courtroom
3 today?
- 4 A. I can't see.
- 5 Q. Can you see that person in the courtroom today?
- 6 A. I can't see anything.
- 7 Q. Do you need glasses? You're squinting, I don't know.
- 8 A. Yes, sir.
- 9 MR. KINKARD: Beg the Court's indulgence.
- 10 (Break in proceedings.)
- 11 Q. I have just got a couple of more questions for you,
12 ^{Minor 1} Do you remember what happened after Mr. Malpass
13 touched you and ^{Minor 2} what did y'all do at that time?
- 14 A. We moved standing near ^{J.L.} or ^{S.M.} and ^{A.F.} if
15 they're not riding.
- 16 Q. I'm sorry, I'm going to have a move back like
17 Mr. Aul, you're going to have to talk up a little louder.
18 Now, after the truck and after Mr. Malpass touched you,
19 what did y'all do again? And speak up.
- 20 A. We would move away and we would stand near ^{A.F.}
21 ^{S.M.} or ^{J.L.} and talk to them.
- 22 Q. Okay. Where did y'all talk together?
- 23 A. I remember that we would talk near the truck and ^{J.L.}
24 was sitting on it so we moved near him.
- 25 Q. Where did y'all go after you talked? Speak up.

- 1 A. We just sat down right there.
- 2 Q. Okay.
- 3 A. And we waited for our turn to come up.
- 4 Q. Did you go back over to Ms. Lynn Fox's house?
- 5 MR. AUL: Your Honor, I object to the leading.
- 6 THE COURT: Avoid the leading, Counsel.
- 7 MR. KINKARD: Yes, sir.
- 8 Q. Did you go -- after the truck incident, did you go
- 9 anywhere else.
- 10 A. No, sir. We just stayed there for a minute.
- 11 Q. Okay. Did you that afternoon or that evening, that
- 12 night, did you see Mrs. Fox?
- 13 A. Yes, sir.
- 14 Q. Okay. And when you saw Mrs. Fox, can you tell the
- 15 jury how -- what you were feeling?
- 16 A. We were feeling kind of scared of knowing what he
- 17 said to ^{A.F.} and we would tell her kind of in a soft
- 18 voice, me and ^{Minor 2} we were scared so we wouldn't say
- 19 anything to her. ^{A.F.} told her.
- 20 MR. AUL: I object to anything ^{A.F.} said.
- 21 MR. KINKARD: I'm sorry?
- 22 THE COURT: He's objecting to anything ^{A.F.} said.
- 23 MR. AUL: I thought she said ^{A.F.} told her.
- 24 MR. KINKARD: I didn't hear, Your Honor, pardon me.
- 25 Q. Just talk about what you said and what you saw.

1 Okay? Don't talk about what anybody else said. Okay?

2 A. Okay.

3 Q Did you tell Ms. Fox what happened?

4 A. Yes, sir.

5 Q. Okay. I've just got one more question for you, I
6 should have asked you this before. When were you born,
7 the month you were born and what year you were born?

8 A. [REDACTED].

9 Q. [REDACTED]?

10 A. Yes, sir.

11 Q. Okay. Do you know how old your brother, ^{S.M.} is?

12 A. Yes, sir.

13 Q. When was he born?

14 A. [REDACTED].

15 Q. [REDACTED]?

16 A. [REDACTED].

17 MR. KINKARD: No further questions, Your Honor, thank
18 you. Thank you, ^{Minor 1} Please answer any questions Mr.
19 Aul may have.

20 CROSS EXAMINATION

21 BY MR. AUL:

22 Q. ^{Minor 1} you're almost done, just a few questions I
23 need to ask you. Who else was there when everybody was
24 riding the go carts, do you remember?

25 A. One time in the middle while we were riding there was

1 this guy that came down to ride the go cart.

2 Q. I'm sorry, I could not hear the last part of what you
3 said, somebody moved?

4 A. During this time when we was riding the go carts
5 somebody came down to ride the go cart.

6 Q. Somebody else came and rode the go cart? Do you know
7 who it was?

8 A. I'm not sure who.

9 Q. Now, did Doug Howe ride the go cart sometime?

10 A. No, sir, I don't think.

11 Q I'm sorry, Your Honor, I didn't hear what she said.
12 I'm going to have to ask her to repeat it.

13 THE COURT: Please repeat your answer, ma'am, right
14 into the mic. if you will.

15 A No, sir.

16 Q. Did ^{A.F.} cousin ride the go cart?

17 A. I think that's who rode the go cart.

18 Q. Okay. Now, when you were -- did anybody other than
19 ^{A.F.} cousin ride the go cart that you remember?

20 A. No.

21 Q When you weren't riding the go cart you were sitting
22 on the truck?

23 A. Uh-huh.

24 Q. Waiting for a ride?

25 A. Yes, sir.

- 1 Q. Were you sitting on the hood of the truck or do you
2 know if you were sitting on the tailgate of the truck? Do
3 you remember where you were sitting?
- 4 A. Tailgate.
- 5 Q. You were sitting on the tailgate of the truck?
- 6 A. Uh-huh.
- 7 Q. And how many times does Mack hug you?
- 8 A. He would hug us every time he got a chance. He would
9 just kind of stand there and hug us, I'm not sure how many
10 times.
- 11 Q. Okay. And you're talking about you and ^{Minor 2}
- 12 A. Yes, sir.
- 13 Q. How many times did he hug ^{Minor 2}
- 14 A. I only saw him hug her once.
- 15 Q. So he hugged her once. And did you indicate ^{Minor 2}
16 slammed the door in his face?
- 17 A. Yes, sir.
- 18 Q. He slammed the door or she slammed the door?
- 19 A. She slammed the door.
- 20 Q. I'm going to let you read this if that's okay.
- 21 A. Where?
- 22 Q. I'll let you read the whole -- do you recall talking
23 to Detective Shugart at some time? Do you remember
24 talking to this gentlemen right here? Can you see him,
25 darling?

1 A. No, sir.

2 Q. Okay. Do you remember talking to a police officer
3 about what happened?

4 A. Yes, sir.

5 Q. Do you remember the police officer writing down what
6 happened?

7 A. Huh?

8 Q. Do you remember the police officer writing down what
9 you told him happened? Did you sign that piece of paper?
10 Did you read what you wrote down?

11 A. What he wrote down?

12 Q. Yes, ma'am. Did you read what he wrote?

13 A. No, sir.

14 Q. You don't remember if you read it or not? I'll take
15 that back.

16 MR. AUL: Your Honor, I don't have any further
17 questions for her.

18 REDIRECT EXAMINATION

19 BY MR. KINKARD:

20 Q ^{Minor 1} I just have one question for you. Let me
21 ask you something, do you have a problem with your vision?

22 A. Yes, sir.

23 Q. Do you wear glasses?

24 A. Yes, sir.

25 Q. Are they broken?

1 A. Yes, sir.

2 Q. You don't have them today?

3 A. No, sir.

4 Q. Is it difficult for you to see?

5 A. Yes, sir.

6 MR. KINKARD: I don't think I have any further
7 questions, Your Honor. Thank you, ^{Minor 1}

8 THE COURT: Thank you. You may stand down.

9 The witness, ^{J.L.} was first duly sworn and
10 Testified as follows, on:

11 DIRECT EXAMINATION

12 BY MR. KINKARD:

13 Q. ^{J.L.} would you tell the jury how old you are?

14 A. 13.

15 Q. What grade are you in now?

16 A. 8th.

17 Q. Okay. Where do you go to school, ^{J.L.}

18 A. Sims Junior High School.

19 Q. Okay. What I want to do is go back to last summer,
20 that will be July 19, 2003. Do you remember playing with

21 ^{A.F.} ^{Minor 2} and ^{Minor 1} that day?

22 A. Yes, sir.

23 Q. Would you tell the jury how it was that you came to
24 see them that day?

25 A. ^{Minor 2} and ^{A.F.} and ^{Minor 1} came over to my house

1 and we was riding my bike and it didn't have no brakes or
2 anything and we rode up and down a hill. And Mack called
3 or -- Mr. Malpass --

4 Q Let me stop you there real quick, let me just stop
5 you. Y'all got on your bike?

6 A. Yes, sir.

7 Q And where did you go with your bike?

8 A. We went I think two houses down and rode up and down
9 a hill.

10 Q. Okay. And you got to Mr. Malpass's house, where is
11 that hill that you rode down in relation to Mr. Malpass'
12 house?

13 A. Two houses away.

14 Q Okay. Did you see Mr. Malpass out there that day?

15 A. Yes, sir.

16 Q. Okay. Was he in front of his house?

17 A. He was at his friend's house.

18 Q Okay. Do you know who his friend is?

19 A We call him Blue, I don't really know his name,
20 though.

21 Q. Okay. And did he say anything to y'all?

22 A. He asked us did we want to go see his go cart.

23 Q. Okay. He asked y'all if y'all wanted to ride the go
24 cart?

25 A. Yes, sir.

TESTIMONY OF J.L.

- 1 Q. What did y'all say?
- 2 A. We said okay.
- 3 Q. Okay. Did you go over there and ride?
- 4 A. Yes, sir.
- 5 Q. Okay. And do you remember who got a chance to ride
- 6 that go cart first that afternoon?
- 7 A. It was ^{A.F.}
- 8 Q. Okay. And what did you do while ^{A.F.} was riding
- 9 that go cart, where were you?
- 10 A. I think I was leaning up against the truck and ^{A.F.}
- 11 was riding the go cart.
- 12 Q. Was ^{S.M.} with you all that day?
- 13 A. Yes, sir.
- 14 Q. And who was ^{S.M.}
- 15 A. ^{Minor 1} I think, little brother.
- 16 Q. Do you remember if he ever got a chance to ride that
- 17 go cart?
- 18 A. Not alone.
- 19 Q. Did he ride with somebody?
- 20 A. Yes, sir.
- 21 Q. Who did he get to ride with?
- 22 A. ^{A.F.}
- 23 Q. Okay. And do you recall what happened when ^{S.M.} and
- 24 ^{A.F.} got ready to ride the go cart?
- 25 A. Not really.

TESTIMONY OF J.L.

- 1 Q. Okay. Was ^{Minor 2} anywhere near that go cart when
2 S.M. and ^{A.F.} were riding it?
3 A. Yes, sir.
4 Q. Okay. Did anything happen to ^{Minor 2}
5 A. She burned her foot.
6 Q. Do you remember how she burned it?
7 A. It was near the exhaust or the tire.
8 Q. Okay. And did you see her -- you said her foot got
9 burned?
10 A. Yes, sir.
11 Q. Did you see that happen?
12 A. Yes, sir.
13 Q. What happened after she burned her foot?
14 A. She went and sat beside me and Mack came over there
15 and said, "Let me see it," and he bent down and licked it.
16 Q. Okay. And how close are you to Mack, as you call
17 him -- who is Mack?
18 A. Mr. Malpass.
19 Q. How close are you to Mr. Malpass and ^{Minor 2} when he
20 licked it ^{Minor 2} foot?
21 A. I --
22 Q. Tell me to stop when I'm close enough.
23 A. About right there.
24 Q. Okay. Was ^{Minor 2} wearing any socks?
25 A. I don't think she was.

1 Q. Okay. Do you remember what kind of shoes she was
2 wearing that day?

3 A. I think she was wearing sandals.

4 Q. Okay. Let me ask you this, did you ever get near Mr.
5 Malpass that day? You just said you were pretty close to
6 him.

7 A. Yes, sir.

8 Q. Okay. Did you notice anything about him?

9 A. He smelled like he had been drinking.

10 Q. Have you ever smelled alcohol before?

11 A. Yes, sir.

12 Q. Okay. Did you see Mr. Malpass drinking that day?

13 A. Yes, sir.

14 Q. Do you remember what he was drinking?

15 A. He was drinking beer out of a can and then when we
16 got to his house he had a styrofoam cup and I'm not sure
17 if it was liquor or beer.

18 Q. Okay. I'm going to ask one last question, J.L. is
19 the person that you just testified to that you saw lick
20 Minor 2 foot, is that person in the courtroom today? Do
21 you see that person in the courtroom?

22 A. He must look kind of different then from what he did
23 that day, I'm not sure.

24 MR. KINKARD: I have no further questions, J.L. If
25 you would answer any questions that defendant's counsel

TESTIMONY OF J.L.

1 has.

2

CROSS EXAMINATION

3 BY MR. AUL:

4 Q. J.L. I'm Bill Aul, I'm the public defender here in
5 Union County, just a couple of questions for you. This is
6 Mack Malpass, is that the man you were talking about?

7 A. Yes, sir.

8 Q. Okay. And what happened was ^{Minor 2} burned her foot.

9 A. Yes, sir.

10 Q Did it hurt her?

11 A. Yes, sir.

12 Q. Okay. How long did y'all stay riding go carts, do
13 you remember?

14 A. Probably about an hour and a half or something, two
15 hours.

16 Q. Or two hours? Okay. How many times did you get to
17 ride the go cart?

18 A. Twice.

19 Q Now, when you rode the go cart and when you got
20 finished riding it, did Mack have to start the go cart up
21 for everybody?

22 A. Yes, sir.

23 Q. Did you stay longer than everybody else?

24 A. Yes, sir.

25 Q. Were you actually the last one to ride the go cart?

- 1 A. Yes, sir. No, I wasn't really the last person. I
2 was like near the last person to ride it.
- 3 Q. You were near the last one?
- 4 A. Yes, sir.
- 5 Q. Did the chain come off when you were riding it one
6 time?
- 7 A. Yes, sir.
- 8 Q Did they have to help you put it back on?
- 9 A. Yes, sir.
- 10 Q. Do you remember who came and helped?
- 11 A. It was Mr. Malpass.
- 12 Q. Mr. Malpass. There were a couple of other gentlemen
13 that came over and helped, too?
- 14 A. Yeah. The people across the street, they came over
15 to see what was wrong with it.
- 16 Q So people across the street came over and they helped
17 see what was wrong?
- 18 A. Yes, sir.
- 19 Q. You rode the go cart some, ^{Minor 2} rode the go cart
20 some; is that correct?
- 21 A. Yes, sir.
- 22 Q. ^{A.F.} rode the go cart some?
- 23 A. Uh-huh.
- 24 Q. ^{S.M.} rode the go cart with ^{A.F.} some?
- 25 A. Yes, sir.

- 1 Q. Did Doug Howe ever ride the go cart?
- 2 A. Yes, sir.
- 3 Q And Doug Howe is?
- 4 A. My adoptive father.
- 5 Q How many times did he ride the go cart, do you know?
- 6 A. Once.
- 7 Q. Did anybody else ride the go cart?
- 8 A. What do you mean?
- 9 Q. Anybody else other than the people I just named ride
- 10 the go cart that afternoon that you can remember right
- 11 now?
- 12 A. I think Mack rode it one time.
- 13 Q. Mack may have ridden it? Okay. Anybody else
- 14 possibly ride it?
- 15 A. No, sir.
- 16 Q. Okay. And this is right down the street from your
- 17 house?
- 18 A. Yes, sir.
- 19 Q. Actually down at the bottom of the hill. Can you see
- 20 your house at the top of the hill?
- 21 A. Yes, sir.
- 22 Q. And this was summertime?
- 23 A. Yes, sir.
- 24 Q. Broad daylight.
- 25 A. Yes, sir.

1 Q. It was a Saturday?

2 A. Sir?

3 Q Was it a Saturday?

4 A. I don't remember.

5 Q. It was summertime, you were out of school, right?

6 A. Yes, sir.

7 Q. All right.

8 MR. AUL: I don't have any further questions for J.L.

9 Your Honor.

10 REDIRECT EXAMINATION

11 BY MR. KINKARD:

12 Q. J.L. you said Doug Howe, that's going to be your

13 adopted father?

14 A. Yes, sir.

15 Q. He was there riding the go cart?

16 A. Yes, sir.

17 Q. But he wasn't there the whole time, was he?

18 A. No, sir.

19 Q. When did he ride the go cart?

20 A. Sir?

21 Q. When did he ride the go cart?

22 A. I think it was after ^{Minor 2}

23 Q Okay. Did he leave after that?

24 A. Yes, sir.

25 Q. And go home?

1 A. Yes, sir.

2 Q. How about these people across the street, were they
3 there the whole time?

4 A. Not that I know of, they wasn't outside like long if
5 they were outside.

6 Q. Okay.

7 MR. KINKARD: Thank you, J.L. I don't have any other
8 questions, thank you.

9 MR. AUL: Thank you, Your Honor.

10 THE COURT: Thank you, sir. You may stand down, sir.

11 MS. COLLINS: Your Honor, we would ask that each
12 witness be excused.

13 THE COURT: Counsel, it's probably a good time to go
14 ahead recess for the day, the next witness might run a
15 little longer than I anticipate. So Mr. Foreman, ladies
16 and gentlemen of the jury, we're going to go ahead and
17 recess for the afternoon. Ask you to be back in the jury
18 room in the morning at 9:30 ready to go at that time and we
19 will try to get started promptly at 9:30. In the interim
20 please do not discuss the case among yourselves, please do
21 not discuss it with anyone else including family and
22 friends. If there should be any media coverage of this
23 trial, I do not know of any, but if there should be any
24 media coverage of this trial please do not read, listen to
25 or watch any media account of this trial until after the

1 trial is over. If someone wanted to save it for you until
2 after the trial, that's fine, but while the trial is going
3 on please do not read, listen to or watch any media
4 account. I will remind you that you are not to get on the
5 computer. And as I say, this is a new age, but we would
6 ask that you not get on the computer during this trial.
7 The trial is not anticipated to take more than another day
8 or so and so that's not a real hardship on anybody I don't
9 think to do that. All right. Thank you, Mr. Foreman,
10 ladies and gentlemen of the jury, you may retire at this
11 time.

12 (The jury left the courtroom.)

13 THE COURT: Is there any matter we need to take up out
14 of the presence of the jury at this time from the State?

15 MR. KINKARD: Not from the State, Your Honor.

16 THE COURT: Defense?

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

18 (Court adjourned for the evening and resumed on March
19 10, 2009, at 9:30 a.m.)

20 THE COURT: Counsel, any matter that we need take up
21 outside of the presence of the jury from either side?

22 MR. KINKARD: Not from the State, Your Honor.

23 MR. AUL: None by the defense I know of, Your Honor.

24 I assume the Court is going to as we talked about our
25 concern originally with sequestration is going to ask in

TESTIMONY OF J.L.

1 general about media and then sort of slip over to the
2 computer area just to make sure no one had any contact if
3 you think that's necessary.

4 THE COURT: Well, I have given them that instruction a
5 couple of times about not doing that, I don't know of any
6 media coverage. Does anybody know of any?

7 MR. AUL: There was none.

8 THE COURT: I have instructed them twice, I think that
9 will be sufficient. There has not been any media coverage.
10 Bring in our jury, please, sir.

11 (The jury returned to the courtroom.)

12 THE COURT: Good morning, Mr. Foreman, ladies and
13 gentlemen, I hope you had a pleasant evening last night.
14 We are ready now to resume with the trial. Is counsel
15 ready to proceed?

16 MS. COLLINS: Yes, Your Honor. Thank you.

17 THE COURT: Please call your next witness.

18 MS. COLLINS: The State's next witness is ^{A.F.}

19 The witness, ^{A.F.} was first duly sworn and
20 Testified as follows, on:

21 DIRECT EXAMINATION

22 BY MS. COLLINS:

23 Q. Would you please tell the jury your full name?

24 A. ^{A.F.}

25 Q Okay. ^{A.F.} we're going to need you to speak up a

1 little bit more and you can actually move that chair
2 forward a little bit and speak right into that microphone.

3 A. Yes, ma'am.

4 Q. All right. A.F. how old are you?

5 A. Thirteen.

6 Q. That's good, that's a good distance from the
7 microphone, try to keep that up. You are 13?

8 A. Yes, ma'am.

9 Q. When is your birthday?

10 A. [REDACTED]?

11 Q. [REDACTED]?

12 A. Yes, ma'am.

13 Q. Do you go to a regular school with other kids or are
14 you home schooled?

15 A. I'm home schooled.

16 Q. You are home schooled with your sister, ^{Minor 2} ?

17 A. Yes, ma'am.

18 Q. And what level are you at in home schooling?

19 A. 7th.

20 Q. 7th grade?

21 A. Yes, ma'am.

22 Q. All right. I want to direct your attention back to
23 last summer, the month of July. Okay?

24 A. Yes, ma'am.

25 Q. Specifically I want you to think about Saturday, July

- 1 19, 2003.
- 2 A. Yes, ma'am.
- 3 Q. Do you know where you were that day and what you were
- 4 doing?
- 5 A. Yes, ma'am.
- 6 Q. Who were you with that day?
- 7 A. Minor 1 and Minor 2 S.M. and J.L.
- 8 Q. Okay. All right. And what were y'all doing?
- 9 A. We were at J.L. house playing.
- 10 Q. And Minor 2 is your sister?
- 11 A. Yes, ma'am.
- 12 Q. And S.M. is Minor 1 brother?
- 13 A. Yes, ma'am.
- 14 Q. And what were y'all playing at J.L. house?
- 15 A. We was taking turns riding a bike.
- 16 Q. Okay. And at some point, did you have an occasion
- 17 that day to see the defendant, Donnie Mack Malpass?
- 18 A. Yes, ma'am.
- 19 Q. And where did you see him?
- 20 A. We was riding down the road and he stopped and asked
- 21 us what -- were we daredevils and K.M. said yes.
- 22 Q. Had you ever met the defendant before that day?
- 23 A. No, ma'am.
- 24 Q. Who introduced the defendant to you that day?
- 25 A. He did.

- 1 Q. How did he introduce himself, what name did he give
2 you?
- 3 A. Mack.
- 4 Q Did he tell you to call him Mack?
- 5 A. Yes, ma'am.
- 6 Q After Mack came and asked y'all if y'all were
7 daredevils, what happened then?
- 8 A. He asked us did we want to ride his pink go cart, did
9 we want to see it.
- 10 Q. What did y'all say?
- 11 A. We said yes.
- 12 Q. What happened then?
- 13 A. Then he said he doesn't have no gas for it, he had to
14 have certain gas for it but he put regular gas in it and
15 it run.
- 16 Q Okay. And again, if you can just try to speak up
17 just a little bit more.
- 18 A. Yes, ma'am.
- 19 Q. What happened after that, after y'all were able to
20 crank up that go cart?
- 21 A. We was just riding and it was ^{Minor 2} turn and the
22 motor -- I had run over her foot, it was hurting her and
23 he grabbed her foot and licked it. He said, "Oh, poor
24 baby."
- 25 Q Now, let me just kind of back up and slow that down

- 1 just a little bit. You said you ran over ^{Minor 2} foot?
- 2 A. Yes.
- 3 Q. Do you know what she was -- kind of shoes she was
- 4 wearing that day?
- 5 A. She didn't have none on.
- 6 Q. Okay. And did she have any socks?
- 7 A. No.
- 8 Q. All right. And you said it hurt her foot?
- 9 A. Yes, ma'am.
- 10 Q. And at that point did she ask Mack to come over and
- 11 look at her foot?
- 12 A. No, ma'am.
- 13 Q. He just came over on his own?
- 14 A. Yes, ma'am.
- 15 Q. And you said he licked her foot?
- 16 A. Yes, ma'am.
- 17 Q. How many times did he lick it?
- 18 A. Just one time.
- 19 Q. And what did he say?
- 20 A. He said, "Oh, poor baby."
- 21 Q. And what did ^{Minor 2} do?
- 22 A. She said "Yuck."
- 23 Q. And what did she do in terms of her foot?
- 24 A. She pulled it back.
- 25 Q. Okay. What happened after that?

1 A. It was ^{Minor 1} turn to ride the go cart, me and her
2 was fussing. She wanted to go around the block like I did
3 and I told her no. Because my daddy and them wanted to
4 stop her and tell her to bring the go car back because I
5 wanted to ride it again.

6 Q So y'all were having a disagreement about that.

7 A Yes.

8 Q Did Mack get involved in that?

9 A He called me over to the side and told me not to be
10 fussing with her.

11 Q. At any point did the defendant, Mack, say to you that
12 day anything that made you feel uncomfortable?

13 A. Yes, ma'am.

14 Q. What did he say?

15 A. He put his arm around me and told me if I would sell
16 my body to him for \$200. He said he would give me \$200 if
17 I sold my body to him.

18 Q What did you say to him?

19 A. I told him no.

20 Q Did he say anything else?

21 A. He said, "A higher amount?" I said, "No."

22 MS. COLLINS: Nothing further, ^{A.F.} please answer
23 any questions of Mr. Aul.

24 CROSS EXAMINATION

25

1 BY MR. AUL:

2 Q. A.F. you ran over ^{Minor 2} foot?

3 A. Yes, sir.

4 Q. And did it hurt her?

5 A. Yes, sir.

6 Q. And that is when Mack went over and licked her foot?

7 A. Yes, sir.

8 MR. AUL: Okay. I don't have any other questions.

9 MS. COLLINS: Nothing further.

10 THE COURT: Thank you, ma'am. You may stand down.

11 MS. COLLINS: And we would ask that this witness be
12 excused, Your Honor.

13 THE COURT: Any objection?

14 MR. AUL: No, sir.

15 THE COURT: Thank you for coming, you may be excused.

16 The witness, JUDY LYNN FOX, was first duly sworn and
17 Testified as follows, on:

18 DIRECT EXAMINATION

19 BY MR. KINKARD:

20 Q. Ms. Fox, would you please state your full name for
21 the record?

22 A. Judy Lynn Fox.

23 Q. Do you live here in Union County?

24 A. Yes, sir.

25 Q. Do you know ^{Minor 2}

- 1 A. She's my daughter.
- 2 Q. Do you know ^{A.F.}
- 3 A. She's my daughter, too.
- 4 Q. Do you also know ^{Minor 1}
- 5 A. Yes, she's my friend's daughter.
- 6 Q. Ms. Fox, what I would like to do is go back to July
- 7 19, 2003, last summer. Do you recall what your daughters
- 8 ^{A.F.} and ^{Minor 2} did that day?
- 9 A. Yes. They went to ^{J.L.} house to play with ^{J.L.}
- 10 and, yes, I do.
- 11 Q. And was ^{Minor 1} with them?
- 12 A. Yes.
- 13 Q. Why were ^{Minor 1} and ^{J.L.} and ^{S.M.} -- was also ^{S.M.}
- 14 there?
- 15 A. Yes.
- 16 Q. Why were they over there that day?
- 17 A. They were spending the night with ^{Minor 2} and I was
- 18 babysitting them.
- 19 Q. So they came over to your home; is that correct?
- 20 A. That's true.
- 21 Q. And what happened after they came to your home?
- 22 A. They asked if they could go play at Jill's with ^{J.L.}
- 23 and I told them yes.
- 24 Q. You told them that was all right? Okay. Where did
- 25 they live in relation to your house?

- 1 A. The next street over.
- 2 Q. Behind?
- 3 A. Yes.
- 4 Q. Okay. And do you know about what time of day this
- 5 was?
- 6 A. Not really sure, but I think around 2:30.
- 7 Q. Okay. After they left your house to go play over
- 8 there, when was the next time that you saw them?
- 9 A. When they came in with it was -- I think the sun had
- 10 just went down.
- 11 Q. Okay. Will you tell the jury what their demeanor was
- 12 like and how they were acting?
- 13 A. Very scared, screaming, upset.
- 14 Q. They were screaming?
- 15 A. Yes.
- 16 Q. What were they screaming about?
- 17 A. Just trying to tell me what was going on, all of them
- 18 at one time.
- 19 Q. What did you learn was going on?
- 20 A. That Mack --
- 21 MR. AUL: I'm going to object to the hearsay.
- 22 THE COURT: I sustain the objection as to any hearsay.
- 23 MR. KINKARD: Beg the Court's indulgence.
- 24 (Break in proceedings.)
- 25 MR. KINKARD: Your Honor, can we approach the bench

1 for a moment?

2 THE COURT: Yes.

3 (A bench conference was held.)

4 Q. Just one last question, Ms. Fox. Did you ultimately
5 that day report to law enforcement what had happened?

6 A. Yes, we did.

7 MR. KINKARD: No further questions, thank you. Please
8 answer any questions Mr. Aul may have.

9 MR. AUL: Your Honor, we have no questions of this
10 witness.

11 THE COURT: Thank you, ma'am. You may stand down.
12 The witness, TROY BRUINGTON, was first duly sworn and
13 Testified as follows, on:

14 DIRECT EXAMINATION

15 BY MS. COLLINS:

16 Q. Would you please state your name for the jury?

17 A. Sergeant Troy Bruington.

18 Q. What is your occupation?

19 A. I'm a deputy with the Union County Sheriff's Office.

20 Q. And were you on duty on July 19, 2003?

21 A. Yes, ma'am, I was.

22 Q. And did you respond to a call that ultimately
23 resulted in the charges that are before the court today?

24 A. Yes, ma'am.

25 Q. When did you arrive at the residence to talk with

1 these young ladies?

2 A. It was approximately 10:16 in the evening.

3 Q. All right. And were you dressed as you are today?

4 A. Short sleeves.

5 Q. But in uniform otherwise?

6 A. Yes, ma'am.

7 Q. And upon your arrival, who did you interview?

8 A. I talked with miss -- I believe her name is Ms. Fox,
9 the mother of the alleged victims.

10 Q. Did you talk to the girls?

11 A. Yes, ma'am.

12 Q. All right. And those girls being ^{Minor 2} did
13 you speak with ^{Minor 2}

14 A. Yes, ma'am.

15 Q. And ^{Minor 1} did you speak with ^{Minor 1}

16 A. Yes, ma'am.

17 Q. Did you speak to ^{A.F.} also?

18 A. Yes, ma'am.

19 Q Now, without going into what they said because that
20 would be hearsay, can you describe for the jury their
21 demeanor, their emotional appearance?

22 A. When I got there the girls were, of course, the
23 mother had told me --

24 Q. No, stop. Don't talk about -- excuse me, but I'm
25 sorry to interrupt but don't go into anything that might

TESTIMONY OF TROY BRUINGTON

1 be hearsay of what someone else said. But if you could
2 just visually describe by words the emotional appearance,
3 how the girls appeared to you, their demeanor.

4 A. Okay. The girls were -- they were very nervous
5 acting yet they were very talkative and open to me.

6 Q. All right. Did they appear upset?

7 A. A little. They were -- like I said, they were pretty
8 nervous.

9 Q. Okay. All right. And after you spoke with them
10 regarding the allegations, what further action did you
11 take as a law enforcement officer?

12 A. I, of course, questioned the girls and took a report
13 and then I contacted my -- at the time it was my
14 lieutenant, my investigator on my shift, Lieutenant
15 Shugart, and advised him what I had. And he advised me
16 just to go ahead and take the report and that he would
17 contact the girls on Monday as far as getting any
18 statements.

19 Q. All right. So the girls did speak with you that day
20 and you wrote an incident report and then the case was
21 turned over to Lieutenant Marty Shugart; is that correct?

22 A. Yes, ma'am.

23 MS. COLLINS: Okay. Thank you, nothing further.

24 CROSS EXAMINATION

25 BY MR. AUL:

TESTIMONY OF TRAVIS SHUGART

1 Q. Sergeant; is that correct?

2 A. Yes, sir.

3 MR. AUL: I have no questions of Sergeant Bruington.

4 THE COURT: Thank you, sir, you may stand down.

5 MS. COLLINS: We ask that this witness be excused to
6 return to his other duties.

7 THE COURT: Thank you for coming, you may be excused.

8 The witness, TRAVIS SHUGART, was first duly sworn and
9 Testified as follows, on:

10 DIRECT EXAMINATION

11 BY MS. COLLINS:

12 Q. Would you please state your name for the jury?

13 A. Travis Shugart.

14 Q. What is your occupation?

15 A. Sheriff's deputy.

16 Q. With what department?

17 A. Union County Sheriff's Office.

18 Q. All right. And were you, in fact, on duty in that
19 capacity on July 22, 2003?

20 A. Yes, ma'am.

21 Q. Did you have an occasion to see the defendant, Donnie
22 Mack Malpass, that day?

23 A. Yes, ma'am.

24 Q. Where did you see him?

25 A. At his residence.

- 1 Q. And that's in Union County?
- 2 A. Yes, ma'am.
- 3 Q. What was your business with him as a law enforcement
- 4 officer that day, Deputy?
- 5 A. We had two warrants we were out trying to serve.
- 6 Q You said we, who was with you?
- 7 A. My supervisor, Robert Malone.
- 8 Q Lieutenant Malone?
- 9 A. Uh-huh.
- 10 Q. And were you and Lieutenant Malone in uniform
- 11 basically as you are today?
- 12 A. Yes, ma'am.
- 13 Q. And when you saw the defendant at his residence, did
- 14 you serve the arrest warrants on him?
- 15 A. Yes, ma'am.
- 16 Q And those were two warrants for lewd act upon a
- 17 child?
- 18 A. Yes, ma'am, that's right.
- 19 Q The warrants that are at issue in this case?
- 20 A. Yes, ma'am.
- 21 Q And did you sign one of those warrants as having
- 22 served it on the defendant and Lieutenant Malone signed
- 23 the other one?
- 24 A. Yes, ma'am.
- 25 Q When y'all went to serve the warrants on the

1 defendant, did you have your service revolver on your hip?

2 A. Yes, ma'am.

3 Q. Was it in its holster?

4 A. Yes, ma'am.

5 Q. Did it remain in its holster?

6 A. Yes, ma'am.

7 Q. At anytime did you threaten the defendant?

8 A. No, ma'am.

9 Q. At anytime did you offer the defendant any promises
10 of leniency or reward if he would give you a statement?

11 A. No, ma'am.

12 Q. Did you question the defendant in any way?

13 A. No, ma'am.

14 Q. At anytime after being served with these two
15 warrants, did the defendant make any spontaneous
16 statements to you and Lieutenant Malone?

17 A. Yes, ma'am.

18 Q. Can you tell the jury what those were? Well, let me
19 back up and ask you more question. Did the defendant ask
20 for an attorney at anytime?

21 A. No, ma'am.

22 Q. Thank you. At anytime did the defendant then make
23 any spontaneous statements to you?

24 A. Yes, ma'am.

25 Q. And what were those?

TESTIMONY OF TRAVIS SHUGART

1 A. After we told him he was under arrest and read the
2 arrest warrant to him, which is what we do when we serve
3 warrants, we read the warrant to the suspect and tell him
4 who signed it, what day it was signed on and the criminal
5 violation. And we placed the handcuffs on him, put him in
6 the car and as we were going down the road he made the
7 statement they were out -- the girls were out there riding
8 my go cart and somebody, so and so, I can't remember who
9 he said it was, came over to the house, he had some
10 liquor. "I started drinking the liquor and the next thing
11 I remember is I woke up the next mornings on the couch."
12 He said, "So I can't say it didn't happen, but if it did I
13 don't remember it."

14 Q. All right. Thank you. Where were y'all when the
15 defendant made that spontaneous statement to you and
16 Lieutenant Malone?

17 A. We were on the road between Buffalo and the jail.

18 Q. All right. And about how long a drive is that from
19 the defendant's residence in Buffalo to the jail?

20 A. I would say probably six or eight minutes.

21 Q. And again, at no time were any threats made to the
22 defendant to illicit that statement?

23 A. No, ma'am.

24 Q. And at no time were any promises made to the
25 defendant to illicit that statement?

1 A. No, ma'am.

2 Q. And at no time the defendant requested an attorney?

3 A. No, ma'am.

4 Q. And at no time did you question the defendant, these
5 are spontaneous statements?

6 A. No, ma'am.

7 Q. Were they spontaneous statements or did you question
8 him?

9 A. They were spontaneous, he just up and said it.

10 MS. COLLINS: Okay. Thank you. Please answer any
11 questions of Mr. Aul.

12 CROSS EXAMINATION

13 BY MR. AUL:

14 Q Deputy, you said he was upset?

15 A. I didn't understand you.

16 Q. Did you say he was upset? I wasn't sure what you had
17 said, that's why I am asking you.

18 A. Did I say he was upset?

19 Q. The last thing you said.

20 A. No, I didn't say he was upset. He just came out and
21 said it.

22 Q. Oh, said it, that's what you had said. I couldn't
23 quite understand what you said. When you went -- you and
24 Lieutenant Malone went to arrest him, did he put up any
25 fight?

TESTIMONY OF TRAVIS SHUGART

- 1 A. No, sir.
- 2 Q Did he cooperate fully?
- 3 A. Yes, sir.
- 4 Q. Did he get in the car and cooperated?
- 5 A. Yes, sir.
- 6 Q. And he gave you this statement voluntarily?
- 7 A. Yes, sir.
- 8 Q. Y'all didn't do any coercion or anything like that?
- 9 A. No, sir.
- 10 Q He hadn't been advised of his rights though, had he?
- 11 A. No, sir.
- 12 Q. But he did voluntarily give this statement?
- 13 A. Yes, sir.
- 14 Q. And he cooperated the whole time all of the way to
- 15 the jail?
- 16 A. Yes, sir.
- 17 Q Did not cause my problems whatsoever?
- 18 A. No.
- 19 MR. AUL: Okay. Thanks you, sir.
- 20 MS. COLLINS: Nothing further, we ask this witness be
- 21 excused.
- 22 MR. AUL: No objection.
- 23 THE COURT: Thank you for coming, sir, you may be
- 24 excused.
- 25 The witness, ROBERT MALONE, was first duly sworn and

1 Testified as follows, on:

2 DIRECT EXAMINATION

3 BY MS. COLLINS:

4 Q Would you please state your full name to the jury?

5 A Robert Malone.

6 Q. What is your occupation?

7 A. I'm a lieutenant with the Union Sheriff's Office.

8 Q. And how long have you been with the Union Sheriff's
9 Department, lieutenant?

10 A. It will be seven years this September.

11 Q. Were you, in fact, on duty in your capacity as a
12 lieutenant with the sheriff's department for Union on July
13 22, 2003?

14 A. Yes, ma'am.

15 Q. Did you have an occasion to see the defendant, Donnie
16 Mack Malpass, on that day in your capacity as a law
17 enforcement officer?

18 A. Yes, ma'am.

19 Q. What was your business with him?

20 A. We had two warrants for his arrest and myself and
21 Deputy Travis Shugart went to his residence to serve those
22 warrants and arrest him.

23 Q. Did y'all travel in the same patrol car?

24 A. Yes, ma'am.

25 Q. Was that a marked unit?

TESTIMONY OF ROBERT MALONE

1 A. Yes, ma'am.

2 Q And were y'all dressed as you are today in a law
3 enforcement uniform?

4 A. Yes, ma'am.

5 Q. When you got to the defendant's home to serve the
6 warrants on him, he was, in fact, there?

7 A. Yes, ma'am.

8 Q. All right. And those were two arrest warrants for a
9 lewd act upon a child that are at issue in this case
10 today; is that right?

11 A. That's correct.

12 Q And in fact, you signed one as you were serving it on
13 the defendant and Deputy Shugart signed the other as he
14 having served it; is that right?

15 A. That's correct.

16 Q But y'all did that in each other's presence; is that
17 right?

18 A. That's correct.

19 Q Now, you stated you were in uniform. Were you
20 carrying a weapon at that time?

21 A. Yes, ma'am, dressed just as I am today except we were
22 in summer uniforms which is short sleeves and no ties.

23 Q. So your service revolver was in your holster?

24 A. Yes, ma'am.

25 Q. Did it remain in your holster the entire time?

1 A. Yes, ma'am. There was not a situation where we
2 needed to draw weapons in that case.

3 Q. All right. At anytime did you or Deputy Shugart or
4 anyone else in your presence make any threats to the
5 defendant?

6 A. No, ma'am.

7 Q. At anytime did you or Deputy Shugart or anyone else
8 in your presence make any promises of reward or leniency
9 if he were to give a statement?

10 A. No, ma'am.

11 Q. Did the defendant ask for an attorney at anytime?

12 A. No, ma'am.

13 Q. Was the defendant questioned by you or Deputy Shugart
14 in your presence at anytime?

15 A. No, ma'am. The only question that we asked of him
16 was as we went to handcuff him and he was patted down was
17 did he have any weapons or anything in his pockets that we
18 needed to know about and he replied that he didn't and he
19 was handcuffed and patted down.

20 Q. All right. Did you or Deputy Shugart in your
21 presence ask the defendant any questions at all regarding
22 the facts of this incident?

23 A. No, ma'am.

24 Q. At any point in time did the defendant make any
25 spontaneous statements to you or Deputy Shugart in your

1 presence?

2 A. Once he was in the car and we were transporting him
3 to the Union County jail, he began to make spontaneous
4 statements about the time in question on the warrants and
5 during the trip.

6 Q. And what did the defendant say at that time,
7 lieutenant?

8 A. He stated that somebody had came to his house on that
9 day and they had brought alcohol and that he had started
10 drinking, and that he had drank heavily and gotten drunk
11 and that he didn't remember anything happening, but he was
12 drunk, he couldn't say that it didn't happen.

13 Q. All right. Where was the defendant when he made this
14 statement to you and Deputy Shugart?

15 A. On the -- he was in the back seat of Deputy Shugart's
16 patrol car.

17 Q. Were you and the deputy in the front seat?

18 A. We were both in the front seat.

19 Q. And that was in route from the defendant's home to
20 the jail?

21 A. From his residence to the jail.

22 Q. All right. And that's about what, five to eight
23 minute drive?

24 A. Probably about eight minutes.

25 Q. And now, when did you last see the defendant, when

1 y'all delivered him to the jail for booking and
2 processing?

3 A. Yes, ma'am. We turned him over to the custody of the
4 jail staff.

5 Q. At that time up to when you left him, had the
6 defendant at any point asked for an attorney?

7 A. No, ma'am.

8 Q. At that time had any promises of reward or leniency
9 been made in exchange for statements to the police?

10 A. No, ma'am.

11 Q. And at the time you left him, had any threats been
12 made to his welfare to coerce a statement?

13 A. No, ma'am.

14 MS. COLLINS: Thank you, lieutenant. Please answer
15 any questions defense counsel has.

16 CROSS EXAMINATION

17 BY MR. AUL:

18 Q. Lieutenant, I just have a -- not a whole lot of
19 questions but if you could clear a few things up. As I
20 sit and listened to your testimony I realize it may be a
21 little confusing to the jury. When the assistant
22 solicitor asked if you had signed serving the warrants,
23 all that means is you actually just signed on the warrant
24 that I served Donnie Mack Malpass; correct?

25 A. That's correct. I read the charges on the warrant, I

1 signed my name that I gave him a copy and he had been
2 served.

3 Q. So you are not one that brought the charges or
4 anything like that.

5 A. No. I didn't bring the charges, I'm just delivering
6 the warrant, serving it.

7 Q. And so you just indicated then you read what the
8 warrant said.

9 A. Right.

10 Q. So you read the allegations that he had committed a
11 lewd act upon a minor to him.

12 A. That's correct.

13 Q And so at that point he then knows all of the sudden
14 what someone has said has happened, correct?

15 A. He knows the wording as it is on the warrant.

16 Q. Yes, sir. Okay. And you indicate that there was no
17 need to pull a revolver because Mack cooperated; is that
18 correct?

19 A. That's correct. He cooperated when we told him that
20 he was under arrest and that we were going to have to take
21 him with us and there was not any resistance on his part.

22 Q. In fact, he didn't cause any problems at all, did he?

23 A. No.

24 Q. In fact, he voluntarily talked about the incident
25 even though y'all didn't ask him any questions; is that

1 correct?

2 A. That's correct.

3 Q And y'all haven't advised him of his rights but he
4 still was willing to talk; is that correct?

5 A. That's correct. We were not inquiring, he was just
6 talking.

7 Q. Okay. Now, when he was talking he said I don't think
8 I did nothing, I don't remember anything happening; is
9 that correct?

10 A That's correct. He said that he had been drinking
11 and if something happened basically he didn't remember it.

12 Q. Okay.

13 MR. AUL: I don't have any further questions for
14 Lieutenant Malone. And if there is no redirect I have no
15 objection to him being excused.

16 MS. COLLINS: And there is no redirect, thank you, Mr.
17 Aul.

18 THE COURT: Thank you, sir, you may be excused at this
19 time.

20 The witness, MARTY SHUGART, was first duly sworn and
21 Testified as follows, on:

22 DIRECT EXAMINATION

23 BY MS. COLLINS:

24 Q. Would you please state your name for the jury?

25 A. Lieutenant Marty Shugart.

TESTIMONY OF MARTY SHUGART

1 Q What's your occupation?

2 A. I'm a lieutenant with the Union County Sheriff's
3 office assigned to the detective division.

4 Q. Lieutenant, how long have you served with law
5 enforcement?

6 A. 17 years, nine months.

7 Q. Were you on duty the date of incident on this case,
8 July 19, 2003?

9 A. No, ma'am, I was on call.

10 Q. Tell the jury what that means.

11 A. We right now are assigned to a shift, that shift
12 rotates every three days working 12 hour shifts. The
13 detectives are assigned to a shift and anytime they work
14 we are on call. If they need anything from a detective
15 they call me.

16 Q. And did you, in fact, receive a call from Sergeant
17 Troy Bruington?

18 A. Yes, ma'am.

19 Q. And without going into what he said since that would
20 be hearsay, what action did you take on this case and when
21 was your first action on this case, lieutenant?

22 A. From the information he gave me I advised him to take
23 the report and I would talk to the victims in the case on
24 Monday. He did that, I received a report Monday morning
25 and then I contacted the mother of the victims and she

1 brought them into the sheriff's office.

2 Q All right. And did you have any difficulty in
3 getting the cooperation of these parents to bring these
4 children in to be interviewed by you?

5 A. No, ma'am.

6 Q. Where did you interview the victims?

7 A. They brought them to the sheriff's office, which I
8 have a little small office and we have an interview room
9 just down the hall in the basement of the courthouse and
10 we took them in there and interviewed them.

11 Q Was anyone present with you when you interviewed
12 them?

13 A. Yes, ma'am.

14 Q. Who was that?

15 A. Michelle Peehuff, the victim advocate for Union
16 County.

17 Q Were the parents present when you talked to the
18 girls?

19 A. We basically talked to them at first and then we sent
20 everybody out and interviewed the girls independently by
21 themselves, myself and Ms. Peehuff did.

22 Q Now, you said the girls, would that be ^{Minor 2}

23 ^{Minor 1} and also ^{A.F.}

24 A. That's correct.

25 Q Did y'all have interview ^{J.L.}

1 A. No, ma'am, I did not.

2 Q. Did you interview ^{S.M.}

3 A. No, ma'am, I didn't talk to ^{S.M.} From my

4 understanding from his mother there was nothing he could
5 tell me.

6 Q. Now, when you interviewed the children without going
7 into what they said, they have certainly testified and
8 that would be hearsay at this point coming from you, did
9 y'all memorialize that in a written statement for the
10 girls?

11 A. Yes, ma'am.

12 Q. And did the girls review those statements and sign
13 them?

14 A. Yes, ma'am. We read them back to them and they
15 signed them.

16 Q. Did you determine that the age of these two girls at
17 issue, ^{Minor 2} and ^{Minor 1} was, in fact, under 16?

18 A. Yes, ma'am.

19 Q. As a result of the statements of these young ladies
20 at the conclusion of your investigation, what, if any,
21 arrest warrants did you pursue from the magistrate or the
22 city judge?

23 A. I went to the magistrate and got arrest warrants for
24 a lewd act upon a minor under 16 for both ^{Minor 2} and

25 ^{Minor 1}

1 Q So two counts?

2 A. Two counts.

3 Q Who did you charge with that?

4 A. Donnie Malpass.

5 Q Now, after you obtained these warrants from the

6 magistrate, were you present when Lieutenant Malone and

7 Deputy Shugart served these warrant upon the defendant?

8 A. No, ma'am. I wasn't on the scene when they served
9 them.

10 Q. After these warrants were served on the defendant,
11 July 22, 2003, did you yourself have an occasion to speak
12 with the defendant?

13 A. Yes, ma'am.

14 Q. Where was that?

15 A. That was at the Union County jail.

16 Q. Was the defendant in custody at that time on these
17 warrants?

18 A. Yes, ma'am.

19 Q. Where within the jail did you speak to the defendant?

20 A. They have an office that's used by the magistrate
21 that we use also for our interview room and he was brought
22 into that interview room.

23 Q Were you dressed then as you are today in a suit, or
24 coat and tie?

25 A. Probably not the coat, it was summertime, but tie and

1 shirt, yes, ma'am.

2 Q. You were not in -- being a lieutenant in the
3 detective division you were not in a uniform?

4 A. It was just plain clothes, no uniform.

5 Q. All right. But you made it clear to him that you are
6 a law enforcement officer and your role in speaking with
7 him; is that right?

8 A. Yes, ma'am.

9 Q. Did you have a weapon on you when you talked to the
10 defendant?

11 A. No, ma'am.

12 Q. At any point in time did you threaten the defendant
13 in any way to encourage him to give a statement to law
14 enforcement?

15 A. No, ma'am, I did not.

16 Q. At any point in time did you promise the defendant
17 any rewards or promises of leniency if he would give a
18 statement to you as a law enforcement officer?

19 A. No, ma'am.

20 Q. Did you observe -- well, let me back up. In your
21 capacity as an officer for over 17 years you've had
22 occasions to have contact with people who are under the
23 influence of drinking or alcohol or drugs; is that right?

24 A. Yes, ma'am.

25 Q. Did you observe the defendant's demeanor when you

1 spoke to him on July 22, 2003?

2 A Yes, ma'am, he was fine.

3 Q He did not appear to be under the influence of any
4 substances at that time?

5 A. No, ma'am.

6 Q. Did he have any difficulty in speaking with you?

7 A. No, ma'am.

8 Q. Did he seem to have any difficulty in understanding
9 what you were saying to him?

10 A. No, ma'am.

11 Q. At anytime, lieutenant, did he request an attorney?

12 A. No, ma'am, he did not.

13 Q. Did you read the defendant his Miranda rights?

14 A. I did.

15 Q. Lieutenant, I would like to show you a document
16 labeled State's Exhibit 1 and ask you, do you recognize
17 that?

18 A. Yes, ma'am.

19 Q. What is that?

20 A. That's a advice of rights form that we use at the
21 sheriff's office.

22 Q Who's signature at the bottom left corner of that?

23 A. Mine.

24 Q. And your signature is there as a witness, who's
25 signature is in the right-hand corner?

1 A. Donnie Malpass.

2 Q What is the date written at the top right of that
3 document?

4 A. July 22, 2003.

5 Q. And the time?

6 A. 2:51 p.m.

7 Q. And that's the original document signed by yourself
8 and Mr. Malpass in your presence on July 22nd of 2003 for
9 his waiver of rights; is that right?

10 A. That's correct.

11 MS. COLLINS: Your Honor, I would move this document
12 into evidence at this time.

13 MR. AUL: Without objection, Your Honor.

14 THE COURT: Admitted without objection.

15 (The waiver form was received as State's 1.)

16 Q. Lieutenant, if you would please -- let me ask you,
17 did you just hand the document to Mr. Malpass and let him
18 read it or did you read it out loud to him and with him?

19 A. I read it out loud to him.

20 Q. Would you please read it to the jury that day as you
21 read it to the defendant to advise him of his legal
22 rights?

23 A. Okay. This is advice of rights form. It says,
24 "Before we ask any questions you must understand your
25 rights. You have the right to remain silent. Anything

1 you say can be used against you in court. You have the
2 right to talk to a lawyer for advice before we ask you any
3 questions and have him with you during questioning. If
4 you cannot afford a lawyer one will be appointed for you
5 before any questioning if you wish. If you decide to
6 answer questions now without a lawyer present you still
7 have the right to stop answering at anytime. You also
8 have a right to stop answering at anytime until you talk
9 to a lawyer." That's broke down into six separate
10 sentences and after each sentence when I completely read
11 that sentence I put my checkmark at the end so I know that
12 I had read that line.

13 Q. At anytime in reading those six sentences expressing
14 his legal rights to him, did the defendant stop you and
15 ask you for clarification or express any confusion to you?

16 A. No, ma'am, he did not. After I read that part I
17 asked him, "Do you understand these rights?" He said,
18 "Yes." I said, "Do you have any questions?" And he had
19 none.

20 Q. Did you then go forward and read the bottom portion
21 of the page, waiver of rights?

22 A. Yes, ma'am. I then advised him that in order for him
23 to talk to me he would have to sign a waiver of his
24 rights. And it says, "I read this statement of my rights,
25 I understand what my rights are. I am willing to make a

TESTIMONY OF MARTY SHUGART

1 statement and answer questions. I do not want a lawyer at
2 this time. I understand and know what I am doing. No
3 promises or threats have been made to me and no pressure
4 or coercion of any kind has been used against me." And
5 again, at the end of that I put my checkmark and showed
6 him where he needed to sign if he wished to talk to me and
7 he signed his name.

8 Q. So he indicated he did wish to speak with you and he
9 signed his name to that regard?

10 A. Yes, ma'am.

11 Q. And at the bottom it states 2:53 p.m. that is the
12 time that y'all concluded reviewing these rights?

13 A. Yes, ma'am.

14 Q. At anytime did the defendant request the presence of
15 an attorney?

16 A. He did not.

17 Q. After you reviewed his waiver of rights form with him
18 that you have now reviewed with the jury, what did you do
19 then?

20 A. Well, the first thing I did was give him a copy and
21 that comes in duplicate form. And I tear -- after I
22 signed it, put date and time I tear it off and give him
23 his copy, which is yellow. After that we talked for just
24 a minute, I advised him I needed to take a statement on
25 what happened that day and if he would tell me what

1 happened and I would write it down.

2 Q. I would like to show you what's been previously
3 marked as State's Exhibit 2, a two page document on carbon
4 back paper, and ask you do you recognize State's Exhibit
5 2?

6 A. Yes, ma'am.

7 Q. What is that, lieutenant?

8 A. It's a written statement I took from Donnie Malpass
9 on July 22, 2003.

10 Q. And again, did you review his rights with him again
11 on that statement?

12 A. Yes, ma'am.

13 Q. At anytime did he request an attorney?

14 A. He did not.

15 Q. This document, does it contain your original
16 signature on both pages?

17 A. Yes, ma'am, it does.

18 Q. And does it contain the defendant's original
19 signature made in your presence on both pages?

20 A. Yes, ma'am.

21 Q. Has the document been altered in any way since the
22 conclusion of your interview of the defendant on July 22,
23 2003?

24 A. Only two punch holes in the top for our file.

25 Q Let me back up and ask you that in regard to State's

TESTIMONY OF MARTY SHUGART

1 Exhibit 1, had that been altered in any way?

2 A. Just the two punch holes.

3 MS. COLLINS: At this time, Your Honor, I would move
4 State's Exhibit 2 into evidence.

5 MR. AUL: We have no objection whatsoever, Your Honor.

6 THE COURT: Admitted without objection.

7 (The statement was received as State's 2.)

8 Q. Lieutenant, if you could, at the top of the voluntary
9 statement page one it notes time started 3:06 p.m. is that
10 right?

11 A. That's correct.

12 Q And that's the time that his official interview
13 started; is that right?

14 A. That's correct.

15 Q And then at the bottom it notes that the statement
16 was completed at 3:36 p.m. is that right?

17 A. That's correct.

18 Q Did you take some preliminary information from the
19 defendant regarding his age?

20 A. Yes, ma'am. I got his full name and date of birth
21 and his address where he is living now.

22 Q. What did the defendant tell you his full name was?

23 A. Donnie Mack Malpass.

24 Q What did the defendant tell you his date of birth
25 was?

1 A. [REDACTED]

2 Q Where was he born?

3 A. He was born in Union County, South Carolina.

4 Q. So with him sharing with you that he was born in 1956
5 you confirmed that certainly he was over the age of 14
6 years at the time of these incidents, correct?

7 A. Yes, ma'am.

8 Q. Now, where did the defendant indicate to you that he
9 lived at that time when you were speaking to him?

10 A. [REDACTED] in Buffalo.

11 Q Now, the next portion of the statement to share with
12 the jury also again reviews the rights with the defendant;
13 is that right?

14 A. That's correct.

15 Q And did you read that again to the defendant out
16 loud?

17 A. Yes, ma'am.

18 Q. Could you please read it to the jury today as you did
19 that day and advising the defendant of his rights?

20 A. It says, "Before answering any questions or making
21 any statements, Lieutenant James M. Shugart, the person
22 who identified himself as a detective with the Union
23 County Sheriff's Office, duly warned and advised me and I
24 know and understand that I have the following rights: I
25 have the right to remain silent and I do not have to

TESTIMONY OF MARTY SHUGART

1 answer any questions or make any statements at all. That
2 any statement I make can and will be used against me in a
3 court of law for the offense or offenses concerning which
4 the following statement is hereinafter made. That I have
5 the right to consult with a lawyer of my own choice before
6 or at anytime during any questioning or statement I make.
7 That if I cannot afford to hire a lawyer I may request to
8 have a lawyer appointed for me by the proper authority
9 before or at anytime during any questions or statements
10 that I make without cost or expense to me. I could stop
11 answering any questions or making any statements at
12 anytime that I choose and call for the presence of a
13 lawyer to advise me before continuing anymore questioning
14 or making anymore statements whether or not I have already
15 answered some questions or made some statements. I do not
16 want to talk to a lawyer and I hereby knowingly and
17 purposely waive my right to remain silent and my right to
18 have a lawyer present while I make the following statement
19 to the aforesaid person knowing that I have the right and
20 privilege to terminate any interview at anytime hereafter
21 and have a lawyer present with me before answering anymore
22 questions or making anymore statements if I choose to do
23 so. I declare that the following voluntary statement is
24 made of my own free will without promise of hope of reward
25 and without fear of threat or physical harm without

1 coercion, favor or offer of favor, without leniency or
2 offer of leniency by any person or persons whomsoever."

3 Q. Now, when you concluded reading those rights to the
4 defendant for a second time, at any portion of your
5 reading those rights to him at the same time did he ask
6 you for some explanation or have any question about his
7 rights?

8 A. No, ma'am.

9 Q. Did he express any confusion about his rights?

10 A. No, ma'am.

11 Q. Did he indicate to you that he still wished to waive
12 his rights and give you a statement?

13 A. Yes, ma'am. We started right into the statement at
14 that time.

15 Q At any point did he ask for an attorney?

16 A. No, ma'am.

17 Q. At any point did he say he wanted to stop talking
18 with you?

19 A. No, ma'am.

20 Q. All right. Lieutenant, please read for the jury the
21 statement that was given to you by the defendant, Donnie
22 Mack Malpass, after being advised of his rights and waiver
23 form.

24 A. Starts, "On 7/19/2003 I was at my friend's trailer,
25 his name is Blue, I believe his first name is James. I

TESTIMONY OF MARTY SHUGART

1 was at his trailer for about 45 minutes to an hour. James
2 had a bottle of Vodka and asked me if I wanted some. He
3 poured me a cup full, I believe it was a 16 ounce cup.
4 Some kids came by and they were taking turns riding the
5 bicycle. One of them rode a bicycle down a hill through
6 my neighbor's yard and I made a statement about her being
7 a daredevil. The kids asked me if they could ride my go
8 cart. I told them I didn't have any methanol, I would
9 look and see if I had any gas. I found some gas on the
10 porch and put it in the go cart. They started riding and
11 I stood there and made sure they rode safe and shared
12 riding time. I remember going into the residence and
13 getting them two glasses of water, they didn't come in.
14 Sometime after this I blacked out. I don't remember
15 anything that happened after this. During this time as
16 far as I know my Uncle Harold Lawson was in the house. My
17 friend, Blue, was outside with me. The next thing I
18 remember, I woke up lying beside the couch in the floor,
19 this was the next morning. My go cart was outside beside
20 the porch. I don't know if it happened. If it did, I'm
21 sorry but I hope it didn't. I wish I would have told them
22 to wait until another day when I wasn't drinking. This
23 statement was written by Lieutenant Shugart at my request
24 after being advised of my rights and signing a waiver."
25 Then his initials at the end of that line signifying the

1 end of the statement, and his signature at the bottom of
2 each page.

3 Q His signature is on both pages?

4 A Yes, ma'am.

5 Q Now, on the second page there's a big X, tell the
6 jury why you do that.

7 A That's to show that that's the end of the statement,
8 that each line that's left has a mark through it that we
9 can't go back and add anything or take anything away.

10 Q Did you give the defendant the opportunity after he
11 had given you this statement and you had written it out
12 for him to review it fully before he signed it?

13 A Yes, ma'am. We looked at it and I even read it back
14 to him.

15 Q Did you give him the chance to make any changes,
16 additions or deletions to it?

17 A Yes, ma'am. We looked over it -- I looked over it
18 with him, there was some places where I may have
19 misspelled a word or something and had to just mark it out
20 with a pen, each one of those places he had to initial --
21 look at and initial to show that I marked it out and he
22 approved it.

23 Q And, in fact, on the second and third line of the
24 first page there's a mark-out and he has initialed the
25 corrections to reflect that his friend's name, he thinks,

TESTIMONY OF MARTY SHUGART

1 is James?

2 A. That's correct.

3 Q And then on the second page there again are two

4 deletions with his initials, DMM as deleted a word; is

5 that right?

6 A. That's correct.

7 Q After he had approved this statement and signed it

8 again, had there been any changes at all whatsoever to

9 this statement -- the original statement you hold in your

10 hand between then and now bringing it to court?

11 A. No, ma'am.

12 Q Did you give him a copy of the statement after he

13 signed it?

14 A. Yes, ma'am. This form is carbon, it has three

15 copies; a white copy, yellow copy and pink copy and the

16 pink copy would have been given to him.

17 Q So you gave him the pink copies?

18 A. That's correct.

19 Q And, of course, you determined that this incident

20 occurred in your jurisdiction in Union County, South

21 Carolina, is that right, lieutenant?

22 A. That's correct.

23 MS. COLLINS: One moment, please, Your Honor.

24 (Break in proceedings.)

25 MS. COLLINS: Thank you. No further questions, please

1 answer any questions Mr. Aul may have.

2 CROSS EXAMINATION

3 BY MR. AUL:

4 Q. Lieutenant, you just finished reading the statement
5 that you took from Mack; is that correct?

6 A. That's correct.

7 Q And that statement was actually made after he had
8 already been charged and arrested; is that correct?

9 A. That's correct.

10 Q Did you talk to Mack before you charged him?

11 A. No, sir.

12 Q. Did you talk to any of Mack's immediate neighbors
13 before you charged him?

14 A. No, sir.

15 Q. Did you speak to his Uncle Harold Lawson who lives in
16 the house?

17 A. No, sir. Before I charged him I was unaware that
18 Harold Lawson was in the house.

19 Q Did your investigation before you signed the warrants
20 consist mainly of talking to the three alleged -- with the
21 two alleged victims and their friend, ^{A.F.} with the
22 parents?

23 A. Yes, sir. After talking to them probable cause had
24 been established to get the warrants, I went and signed
25 the warrants.

TESTIMONY OF MARTY SHUGART

1 Q. You didn't talk to anyone other than the victims and
2 the parents?

3 A. That's correct.

4 Q Now, when Mack was read his Miranda warnings he
5 voluntarily agreed to give a statement?

6 A. That's correct.

7 Q And he cooperated with you throughout the time he was
8 giving the statement.

9 A. Yes, sir.

10 Q. Even mark -- it looks like you originally called his
11 friend's name originally marked as Jimmy, that was changed
12 to James and he initialed that, those two places?

13 A. Yes, sir.

14 Q. So he cooperated fully with you in regards to the
15 giving a statement?

16 A. That's correct.

17 MR. AUL: I don't have any further questions, Your
18 Honor.

19 MS. COLLINS: Nothing further on redirect. Thank you.

20 THE COURT: Thank you, sir. You may stand down, sir.

21 MS. COLLINS: May it please the Court, at this time
22 the State rests its case.

23 THE COURT: Mr. Foreman, ladies and gentlemen of the
24 jury, we will go ahead and take a recess at this time. We
25 will take probably about 15 minutes, are there any smokers

1 on the panel? Raise your hand if you smoke. Nobody
2 smokes? Good. Okay. We're going to -- you can refresh
3 yourselves during this break. As I say, we'll take
4 probably about 15 minutes and then resume. Of course,
5 please do not begin discussing the case, we are not nearly
6 ready to do that. Thank you. Please retire to the jury
7 room.

8 (The jury left the courtroom.)

9 THE COURT: Any matter we need to take up out of the
10 presence of the jury at this time from the State?

11 MS. COLLINS: Not from the state, Your Honor.

12 THE COURT: From the defense?

13 MR. AUL: Yes, Your Honor. The defense would like to
14 make a motion for a directed verdict in this case, in
15 particularly we feel that the State has failed to show that
16 my client committed a lewd or lascivious act on the body of
17 the children with the intent to arouse, appeal, gratify the
18 lust or passions of himself or the children, Your Honor.
19 Your Honor, the testimony from the younger child was that
20 my client hugged her and the testimony of the other
21 individual was that she was hugged, Your Honor. There was
22 testimony that when he hugged he had his hands on the
23 outside of their clothes, that there was nothing as I
24 recall the testimony done. I think he had his hands like
25 that. There was testimony that apparently he had been

TESTIMONY OF MARTY SHUGART

1 drinking and such, Your Honor. It would be our position
2 that there's not any evidence to show that that was a lewd
3 or lascivious act or there was any attempt to arouse or
4 appeal to gratify himself or the young ladies, Your Honor.

5 THE COURT: Does the State wish to be heard on the
6 motion?

7 MS. COLLINS: Briefly, Your Honor. Of course, Your
8 Honor is aware of the standard that if there's any evidence
9 tending to prove the allegations, that the Court is not
10 concerned with the weight, if there's any direct or
11 circumstantial evidence, certainly has the direct evidence,
12 being the testimony of these children. The statute just
13 requires that any touching of any part of the body, it
14 doesn't require that it be underneath the clothing, that
15 any part of the body can constitute a lewd act upon a
16 child. Mr. Aul is correct, however, that the intent has to
17 be established for it to be lewd or lascivious or intending
18 to arouse his lust or passion or sexual desires or that of
19 a child. In this case placed in context of the entire
20 surrounding circumstances you have the defendant asking
21 A.F. about selling her body to him for \$200 and she
22 declined that, he asked her higher and she again said no.
23 You have, of course, the defendant licking we would contend
24 inappropriately the foot of ^{Minor 2} You have the
25 defendant asking ^{Minor 2} about her panties saying

1 that he liked her panties, which she stated to the jury
2 were not visible due to the length of her shorts being
3 almost knee length. You have ^{Minor 2} testimony that he
4 tried, she felt, to follow her into the bathroom. And you
5 also have the testimony of the two children, ^{Minor 2} and
6 ^{Minor 1} that the defendant rubbed their hip/butt area and
7 then toward their front pelvis kind of stopping at the
8 pelvic bone/hip bone. We would contend that putting all of
9 this in context that we have certainly established
10 sufficient evidence for this to go to the jury at this
11 point. Thank you.

12 THE COURT: All right. In looking at a motion for
13 directed verdict I'm required to look at the evidence in
14 the light most favorable to the party against whom the
15 motion is being made. In this case looking at the evidence
16 in the most light most favorable to the State there has to
17 be a touching, also an intent to arouse the passions or
18 lusts of either the victims themselves or, in this case,
19 the defendant who was alleged to have done that, either or
20 both. In this case -- and again, the Court is not
21 concerned with the weight of the evidence, that's a matter
22 for the jury to determine, only if there is any substantial
23 evidence from which the jury could infer that the State had
24 met its burden of proof on the elements of the offense of
25 lewd act on a child under 16. In looking at all of the

TESTIMONY OF MARTY SHUGART

1 evidence there is testimony as the State has pointed out,
2 there's testimony concerning the licking of the child, I
3 believe ^{Minor 2} testified of him licking her foot and her
4 drawing it back and saying, "Oooo," like that. That's just
5 something to be taken into consideration, that wouldn't be
6 a lewd act in and of itself, but that's something the jury
7 can look at in all of the circumstances in the case. There
8 is testimony that ^{Minor 2} -- I believe it's ^{Minor 2} asked
9 to use the restroom, if she could use the restroom, he took
10 her in the house, he followed her in there and that she
11 thought he was going to come into the bathroom with her and
12 she shut the door. The other child, ^{Minor 1}
13 testified that she slammed the door in his face basically
14 that he was going to go in, that was the testimony as I
15 recall it, and that she stayed there outside of the door
16 until she came out. There is testimony from ^{A.F.}
17 that he asked her if she would sell her sexual favors for
18 him for \$200 and when that was rejected he offered more
19 money, and that she again declined. And then you have the
20 actual touching in the case testified to by the girls, and
21 that would be ^{Minor 2} and ^{Minor 1} and each
22 of them testified that he did touch them on the their
23 buttocks area, move his hand around to the front. And I
24 believe it was ^{Minor 1} testified -- I'm not sure
25 about ^{Minor 2} but I know ^{Minor 1} testified that he

1 had his hands on both of their buttocks, on hers more than
2 once. On ^{Minor 2} she only saw it once but she testified
3 on her more than once, he would do it more than once while
4 they were there and this interchange was talking place.
5 She also testified that he slipped his hands around on
6 their stomach. They went further than the hip, at least
7 ^{Minor 1} did, testified and demonstrated that the
8 hands went around to her stomach and she specifically
9 testified about his hands reaching around on her stomach.
10 And so there is testimony on that issue and that he was
11 making comments to them, "You are a pretty girl, pretty
12 girls," and that kind of thing. Then there's a statement
13 by ^{Minor 2} that he told her that she had on pretty
14 panties. So looking at all of that, and I'm just reciting
15 all of the testimony that I recall off the top of my head
16 with which the jury could look at in determining whether
17 the intent of the touching and what have you was done for
18 the purpose of arousing and with the intent of arousing
19 lust or passion of sexual desire on the part of the victims
20 or the defendant himself. I find looking at all of the
21 evidence in the light most favorable to the State, and I
22 find there is substantial evidence from which the jury
23 could infer and they would have to make it appears to me
24 some inferences from all of the conduct and the statements
25 and conduct and all of that that the jury could infer that

TESTIMONY OF MARTY SHUGART

1 the State had met its burden of proof as to the elements of
2 each of these two charges and therefore the Court would
3 deny your motion for a directed verdict. The weight of the
4 evidence is not up to the Court, the jury weighs the
5 evidence and makes that determination. Anything else?

6 MS. COLLINS: Nothing from the State.

7 THE COURT: Okay. Anything else from the defendant?

8 MR. AUL: Your Honor, we will take up at this time
9 about my client testifying if you so chose.

10 THE COURT: Has he made his decision on that?

11 MR. AUL: Yes, sir. I understand he has decided he is
12 not going to testify, yes, sir.

13 THE COURT: All right, sir. For the record, you are
14 Donnie Mack Malpass; is that correct?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Mr. Malpass, we have reached the stage of
17 your trial where you may present your defense. You have
18 the right to testify in your own behalf, however no one can
19 make you testify. In the event you have a record of any
20 convictions involving dishonesty or false statement or any
21 crime punishable by imprisonment for more than one year and
22 this Court determines that the probative value of admitting
23 this evidence outweighs its prejudicial effect to you, the
24 solicitor will be able to introduce this record for
25 impeachment purposes to attack your credibility. If you

TESTIMONY OF MARTY SHUGART

1 elected not to take the stand I will charge the jury that
2 they are not to give the fact that you did not testify any
3 consideration whatsoever and there is to be absolutely no
4 prejudice to you because you did not testify. It is left
5 entirely up to you whether or not you testify. You may
6 talk with your attorney, your family and friends or anyone
7 else but the ultimate decision is left entirely up to you.
8 Do you understand that it is your decision as to whether
9 you will or will not testify in your case?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Have you discussed with your attorney the
12 advantages and disadvantages of testifying?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: And do you wish to testify, sir?

15 THE DEFENDANT: No.

16 THE COURT: Is that your decision?

17 THE DEFENDANT: It's my decision.

18 THE COURT: Thank you, you may return to your seat.
19 Anything else?

20 MS. COLLINS: No, sir, not from the defense.

21 THE COURT: Let's take about 10 or 15 minutes and we
22 will resume.

23 (A recess was taken.)

24 THE COURT: Counsel, ready to proceed?

25 MR. AUL: Your Honor, defense would call Leonard

TESTIMONY OF LEONARD BENFIELD

1 Benfield.

2 The witness, LEONARD BENFIELD, was first duly sworn

3 And testified as follows, on:

4 DIRECT EXAMINATION

5 BY MR. AUL:

6 Q. Mr. Benfield, would you state your name full name for
7 the record and spell your last name, please?

8 A. Leonard H. Benfield, B-e-n-f-i-e-l-d.

9 Q. Okay. Mr. Benfield, you need to pull up a little bit
10 and talk a little bit louder. I'm going to try again,
11 what's your name?

12 A. Leonard H. Benfield.

13 Q. That's very good, thank you. Mr. Benfield, where do
14 you live?

15 A. [REDACTED].

16 Q. And where do you work?

17 A. Filtration Group in York.

18 Q. Your house is located where in relation to the house
19 of that Mack lives in?

20 A. Right across the street.

21 Q. How far across the street would you say it is?

22 A. 50 feet, give a little, take a little.

23 Q. Okay. You're aware that Mack has been accused of
24 committing a lewd act upon two girls; is that correct?

25 A. Correct.

1 Q. The incident is alleged to have taken place on July
2 19, 2003. Were you present at your house that day?

3 A. Yes, sir.

4 Q. Who was present with you?

5 A. Mark Coker.

6 Q Were you present when some children were riding go
7 carts?

8 A. Yes, sir.

9 Q. Can you tell the ladies and gentlemen of the jury
10 what you were doing at that time?

11 A. I was grilling out.

12 Q And where were you grilling out?

13 A. On the front porch.

14 Q. And you said your address was [REDACTED].

15 That's in the Buffalo mill village?

16 A. Yes, sir.

17 Q. And you have one of the two story mill houses?

18 A. Yes, sir.

19 Q. With a front porch --

20 A. Yes, sir.

21 Q. -- on the front of the house?

22 A. Yes, sir.

23 Q. Is your view obstructed, too? Can you see from your
24 house to Mack's house?

25 A. Yes, sir.

TESTIMONY OF LEONARD BENFIELD

1 Q. Are you and Mack related at all?

2 A. No, sir.

3 Q. Do you go over to his house all of the time and talk
4 to him or anything?

5 A. No, sir.

6 Q. Are you real close friends?

7 A. No, sir.

8 Q. How would you characterize your relationship?

9 A. Well, when I'm cutting grass or either step out on
10 the front porch me and my fiance', I'll speak to him,
11 other than that --

12 Q. Okay. Can you tell the ladies and gentlemen of the
13 jury anything that you -- what you observed in regards to
14 the girls riding the go carts that afternoon?

15 A. Well, the one little blond headed girl --

16 Q. You said blonde headed, you don't know the names of
17 these --

18 A. No, sir. Little blond headed girl, she had rode the
19 go cart around the block and when she got back Mack told
20 her that she couldn't be going around the block on it
21 because he wasn't going to be responsible for it.

22 Q. How did she react?

23 A. She got upset.

24 Q. Very upset?

25 A. Pretty upset.

2 THE COURT: Sustained.

3 Q. Did you observe any of the girls enter Mack's house
4 at anytime?

5 A. Yes, sir.

6 Q. Would you please tell the ladies and gentlemen of the
7 jury about that.

8 A. Well, the little blond headed girl, she said she had
9 to go to the bathroom so she asked where the bathroom was
10 and Mack told her inside. The little girl started to the
11 door and the other little girl went with her and Mack
12 walked behind them, walked inside the door for a second
13 and back out and showed them where the bathroom was.

14 Q. Of your own knowledge, do you know whether anyone
15 else was in the house at the time those girls went to the
16 bathroom?

17 A. Yes, sir.

18 Q. Who was in that house?

19 A. His Uncle Harold.

20 Q. His Uncle Harold, it's his Uncle Harold's house,
21 isn't it?

22 A. Yes, sir.

23 Q. And that's Harold Lawson?

24 A. Yes, sir.

25 Q. Are you and Harold Lawson related?

TESTIMONY OF LEONARD BENFIELD

1 MS. COLLINS: Objection to leading.

2 THE COURT: Sustained.

3 Q. Did you observe any of the girls enter Mack's house
4 at anytime?

5 A. Yes, sir.

6 Q. Would you please tell the ladies and gentlemen of the
7 jury about that.

8 A. Well, the little blond headed girl, she said she had
9 to go to the bathroom so she asked where the bathroom was
10 and Mack told her inside. The little girl started to the
11 door and the other little girl went with her and Mack
12 walked behind them, walked inside the door for a second
13 and back out and showed them where the bathroom was.

14 Q. Of your own knowledge, do you know whether anyone
15 else was in the house at the time those girls went to the
16 bathroom?

17 A. Yes, sir.

18 Q. Who was in that house?

19 A. His Uncle Harold.

20 Q. His Uncle Harold, it's his Uncle Harold's house,
21 isn't it?

22 A. Yes, sir.

23 Q. And that's Harold Lawson?

24 A. Yes, sir.

25 Q. Are you and Harold Lawson related?

TESTIMONY OF LEONARD BENFIELD

1. MS. COLLINS: Objection to leading.

- 1 A. No, sir.
- 2 Q. Are you real close buddies?
- 3 A. No, sir.
- 4 Q. How would you describe your relationship with them?
- 5 A. Well, I speak to him when I go out on the front porch
- 6 or either I'm cutting grass I might holler across the
- 7 street.
- 8 Q. How long have you lived at [REDACTED] [REDACTED]?
- 9 A. It will be three years August.
- 10 Q. This was a Saturday. Does Haywood Street have a lot
- 11 of traffic on it?
- 12 A. Well, I stay in the house most of the time except I
- 13 was grilling out. There was some traffic.
- 14 Q. Now, you said you stayed in the house most of the
- 15 time you were grilling or most days?
- 16 A. Just most days.
- 17 Q. Okay. What were your grilling?
- 18 A. Two pork roasts.
- 19 Q. How long did it take you to cook those pork roasts?
- 20 A. I cooked for about 5 hours, around four and a half to
- 21 five hours.
- 22 Q. So you were on the porch for a long time?
- 23 A. Yes, sir.
- 24 Q. Were you on the porch when the children started
- 25 riding the go carts?

1 A. Yes, sir.

2 Q. Were you on the porch when the children finished
3 riding the go carts?

4 A. Yes, sir.

5 Q. I realize you weren't timing or anything, do you have
6 any idea approximately how long go carts may have been
7 ridden?

8 A. No, sir.

9 Q. At anytime did you see Mack place his hands on any of
10 the children in an inappropriate manner?

11 A. No, sir.

12 Q. Did you see him place his hands on any of the
13 children at anytime?

14 A. No, sir.

15 Q. What did you observe Mack do?

16 A. Well, mainly he was cranking the go cart. When they
17 come back down the road he was sitting on the curb and the
18 go cart would cut off because he didn't have racing fuel
19 in it, he was using regular gasoline and it would cut off
20 just as soon as they stopped and he would crank it and
21 they would take off again.

22 Q So he didn't have methanol in it, he just had regular
23 gasoline?

24 A Just regular gasoline.

25 MR. AUL: If you would, please answer any questions

1 whichever assistant solicitor asks you.

2 CROSS EXAMINATION

3 BY MS. COLLINS:

4 Q. Mr. Benfield, you never work on Saturdays? Is that
5 your schedule, or just some Saturdays you do and some you
6 don't?

7 A. Some Saturdays I'm scheduled to work.

8 Q. But on this Saturday you specifically recall that you
9 did not work that day?

10 A. Yes, ma'am.

11 Q. And when did you recall that? Did you recall that
12 after the inquiry was made of you regarding that by Mr.
13 Aul or immediately when the charges were brought you
14 remembered you weren't working that day?

15 A. Well, some weeks will be on short time, some weeks we
16 work on on Saturday. But I was informed a couple of days
17 later of what had happened.

18 Q. All right. Now, you said you were grilling two pork
19 roasts?

20 A. Yes, ma'am.

21 Q. And that took about four and a half to five hours?

22 A. Yes, ma'am, right at four or five hours.

23 Q Is that like a slow cooker or is that like a cold
24 grill or --

25 A. It's a gas grill.

TESTIMONY OF LEONARD BENFIELD

1 Q. Oh, okay. And were you then continuously on your
2 front porch for four and a half hours or did you go in and
3 get something to drink or go to the bathroom and other
4 stuff?

5 A I went to the bathroom, I went in the house.

6 Q So there were some times that you were inside the
7 house and not on your front porch?

8 A. Yes, ma'am.

9 Q. And I imagine there were other times that you were on
10 your front porch but your attention was directed to what
11 you were doing, making sure you wouldn't burn yourself or
12 whatever and dealing with that meat; is that right?

13 A. Yes, ma'am.

14 Q. So even when you were on your front porch your
15 attention -- you weren't just standing there focused on
16 what Mack was doing; is that right?

17 A. That's right.

18 Q. You had no reason to focus your attention
19 specifically on him, right?

20 A. No, ma'am.

21 Q. Now, of course, you are an adult, you're grilling
22 your supper or grilling. Had you had anything to drink
23 that day, it being a Saturday?

24 A. Yes, ma'am.

25 Q. Do you recall how much you had had?

- 1 A. Three, maybe four beers.
- 2 Q Okay. All right. And how about your friend, was it
- 3 Mark that was there with you?
- 4 A. Mark.
- 5 Q. Had Mark had anything to drink in your presence?
- 6 A. Well, when he come down there I noticed he had a
- 7 beer.
- 8 Q. Okay. Now, did you notice whether or not Mack, the
- 9 defendant, was drinking anything?
- 10 A. He had a cup over there, yes, ma'am.
- 11 Q. All right. You indicated, too, that you heard the
- 12 little blond hair girl talk about going to the bathroom;
- 13 is that right?
- 14 A. Yes, ma'am.
- 15 Q. Now, there were two blond headed girls, do you
- 16 remember that, or do you remember?
- 17 A. No, ma'am.
- 18 Q. Do you even remember how many children there were out
- 19 there?
- 20 A. I seen two girls and a little boy.
- 21 Q Two girls and a little boy. All right. So you said
- 22 your house is about 50 feet from the defendant's. You
- 23 were close enough, though, to hear the little girl say she
- 24 had to go to the bathroom?
- 25 A. Yes, ma'am.

TESTIMONY OF LEONARD BENFIELD

1 Q. All right. But you yourself being an adult, you
2 never walked over there and infiltrated the play of these
3 girl children; is that right?

4 A. No.

5 Q. You kept to your adult business of making supper,
6 right?

7 A. Yes, ma'am.

8 Q. You didn't ride the go cart; is that right?

9 A. No, ma'am.

10 Q. You said that when the two girls went inside the
11 house after they had asked about going to the bathroom
12 that you saw the defendant walk in the door just a second
13 and come right back out, right?

14 A. Yes, ma'am.

15 Q. But he fully went in the door, right?

16 A. Yes, ma'am.

17 Q. And then he came right back out.

18 A. Yes, ma'am.

19 Q. Have you ever been in that house?

20 A. Yes, ma'am.

21 Q. That bathroom isn't too far from that door, is it?

22 A. I don't know where the bathroom is.

23 Q. You don't know?

24 A. I just went in -- straight in the house, picked some
25 eggs up and come back out.

1 Q. Okay. But you said that you knew of your own
2 knowledge at that time that the defendant's Uncle Harold
3 was, in fact, in the house at that time; is that right?

4 A. Yes, ma'am.

5 Q. You had seen him; is that right?

6 A. I seen him when we went in the house, yes, ma'am.

7 Q. All right. But you didn't know where within the
8 house he was; is that right?

9 A. No, ma'am.

10 Q. You didn't know if he was toward the back of the
11 house or right there at the bathroom; is that right?

12 A. That's right.

13 Q. You stated that during that four and a half, five
14 hours you never saw the defendant place his hands on the
15 children inappropriately; is that right?

16 A. That's right.

17 Q. And that you during that time never saw him place his
18 hands on the children, in fact, at all; is that right?

19 A. Yes, ma'am.

20 Q. But again, of course, respecting that you are under
21 oath, you can't tell this jury under oath that you saw
22 where the defendant's hands were those entire four and a
23 half to five hours, can you?

24 A. No, ma'am.

25 Q. Because again, there were times that you were in your

TESTIMONY OF LEONARD BENFIELD

1 house, right?

2 A. Yes, ma'am.

3 Q. And there were times that even when you were on your
4 porch your attention was not directed specifically to look
5 looking at where the defendant's hands were; is that
6 right?

7 A. Yes, ma'am.

8 MS. COLLINS: Thank you, Mr. Benfield.

9 REDIRECT EXAMINATION

10 BY MR. AUL:

11 Q Mr. Benfield, you indicated when the solicitor asked
12 you a couple of days after this day when you found out
13 Mack had been arrested, is that when you commented to
14 people about it?

15 A. Well, Mary come over to the house and told me and
16 Nancy, we was in the yard. And other than that I didn't
17 know he had been arrested.

18 Q. Mary is who?

19 A. His girlfriend.

20 Q. Okay. So Mack's girlfriend, Mary, told you, so you
21 found out just a couple of days after that?

22 A. Yes, sir.

23 Q. Did you tell Mary what you had seen at that time?

24 A. Yes, sir.

25 Q. Okay.

1 MR. AUL: No further questions, Your Honor.

2 MS. COLLINS: Nothing further, Your Honor.

3 THE COURT: Thank you, sir, you may stand down, sir.

4 MR. AUL: I would ask this witness be excused.

5 MS. COLLINS: No objection.

6 THE COURT: Thank you for coming, sir, you may be
7 excused.

8 The witness, MARK COKER, was first duly sworn and
9 Testified as follows, on:

10 DIRECT EXAMINATION

11 BY MR. AUL:

12 Q. Mark, would you give your full name for the record
13 and spell your last name, please?

14 A. Timothy Mark Coker, it's C-o-k-e-r.

15 Q. Okay. And Mark, where do you live?

16 A. [REDACTED], Buffalo.

17 Q. Where do you work?

18 A. Console Products.

19 Q. How long have you worked at Console?

20 A. About 11 years.

21 Q. Leonard Benfield, what relation is he to you?

22 A. It's my wife's mother's boyfriend.

23 Q. Your wife's mother's boyfriend?

24 A. Mother's boyfriend.

25 Q. What relation is Mack Malpass to you?

TESTIMONY OF MARK COKER

- 1 A. None.
- 2 Q. Not any relative at all?
- 3 A. No.
- 4 Q. And he doesn't even live on the same street as you?
- 5 A. No.
- 6 Q. The day that Mack is accused of committing a lewd act
7 upon two females, are you familiar with that charge?
- 8 A. Yes, I am.
- 9 Q. Are you familiar with that day?
- 10 A. Uh-huh.
- 11 Q. Do you recall what you were doing that afternoon?
- 12 A. Me and Leonard was down at my mother-in-law's, we was
13 down there cooking on the front porch.
- 14 Q. Do you remember what you were cooking?
- 15 A. It was a roast.
- 16 Q. Okay. Were you able to observe any children riding
17 go carts or anything like that that afternoon?
- 18 A. Yes, I was.
- 19 Q. Can you tell the ladies and gentlemen of the jury
20 what you observed?
- 21 A. There were two girls and a boy was playing, they was
22 up and down the street and Mack and Blue was up at Blue's
23 trailer and the kids walked up there to them and it wasn't
24 long they came down the street, the two girls and the boy
25 and Mack. And Mack hollered across the road and told us

TESTIMONY OF MARK COKER

1 that he was going to let the kids ride the go cart, they
2 wanted to ride it. So he got it where they could ride it
3 because he had to switch it over from the racing fuel to
4 the gas and they started riding the go carts and it went
5 on all day long. Each one of them each time they would
6 come back it would cut off so Mack would have to restart
7 the go cart. And the little blond headed girl, she had
8 done got mad because Mack wasn't wanting her to ride all
9 of the way around the block, he was just wanting them to
10 ride up and down the road. So at that point it done got
11 just about dark so they wouldn't ride much and then the
12 little boy got on it, he run into the curb and knocked the
13 chain off it. So me and Leonard walked across the road
14 and put the chain back on it and pushed it up against the
15 house and at that time all of the kids had left.

16 Q. Okay. You're helping cook out or were you just
17 watching?

18 A. Well, he was doing the cooking, I was there.

19 Q. Okay. Can you see from -- where were y'all cooking?

20 A. Across the road. The grill was on the porch so we
21 was on the porch the whole time.

22 Q Okay. Were you sitting in a chair or where were you
23 sighting?

24 A. Swing facing the road where they were riding at.

25 Q. So you had a good view of the children?

TESTIMONY OF MARK COKER

1 A. Yeah. It was -- we could see pretty good.

2 Q Were there a lot of people out that day?

3 A. It was an average summer day, people coming up and
4 down the road, people cutting grass. It was an average
5 day.

6 Q. Now, on that road, that road goes down to where
7 Leonard's is?

8 A. Yeah, down at the bottom, yeah.

9 Q. Okay. A lot of people travel down that way?

10 A. Uh-huh.

11 Q. Were Mack and the children the only ones out during
12 the day?

13 A. No. Dale, he was out cutting grass, he lives beside
14 Mack, he was cutting grass and his grandkids, I guess
15 that's what you call them, whatever, they were outside.
16 And Doug and his boy, they were out, they had walked down
17 there. I mean, there was just different people out.

18 Q You said Doug and his boy, Doug and his boy were
19 riding the go carts, do you know?

20 A. Yeah. They was there -- they walked down, he got on
21 it and rode it and after that they walked back home. They
22 wasn't down there all day like the girls and that other
23 boy was.

24 Q. The girls were down there a pretty long time?

25 A. Yeah, just about all day long.

1 Q. Okay. At anytime did you ever see Mack place his
2 hands inappropriately on any of the children?

3 A. No, sir, I didn't.

4 Q Did you ever see Mack touch any of the children?

5 A. No, not -- other than he might have been a regular
6 brush or something where he would start the go cart or
7 something up. I didn't see where he went out of the way
8 to touch, no.

9 Q. Okay. Did you ever see any of the children enter the
10 house?

11 A. Yes. They -- I seen the blond headed girl, she had
12 told Mack that she needed to go to the bathroom. She had
13 walked in, Mack walked in and I guess he showed her where
14 the bathroom was at and he come back out. And Harold was
15 in the house at that time.

16 Q. Harold is?

17 A. Mack's uncle.

18 Q. Harold Lawson?

19 A. Yeah.

20 Q. Do you know what Harold's name was?

21 A. No.

22 Q. So you're not related to Harold?

23 A. No.

24 Q Not close friends with Harold?

25 A. No.

TESTIMONY OF MARK COKER

1 Q. Okay. Now, you weren't watching every moment what
2 was going on.

3 A. No.

4 Q. You were grilling out.

5 A. It was an average day. At that time we wasn't
6 thinking that something was going to happen and we got to
7 remember every little moment that happened, it was just an
8 average day. I'm just telling you what I seen, I know I
9 probably didn't see everything, you know.

10 Q. Okay. You didn't see anything out of the ordinary?

11 A. No.

12 Q. Okay.

13 MR. AUL: Thank you. Answer whichever assistant
14 solicitor asks you questions. Okay.

15 CROSS EXAMINATION

16 BY MR. KINKARD:

17 Q. Is it Mr. Coker?

18 A. Yes, sir.

19 Q. Mr. Coker, are you friends with the defendant?

20 A. I know him, we're not what you say friends. I know
21 him, he lives across from my mother-in-law.

22 Q. Okay. And you said that you were with Leonard
23 Benfield, is that his name, cooking that day, cooking a
24 roast?

25 A. Uh-huh.

1 Q. And about how long did that process take?

2 A. It was around dinner time and I don't know how long
3 as far as the cooking took. We were on the porch and it
4 was dark before we went in, so we was out there all day.

5 Q. So you said it was what, dark?

6 A. It got dark before we went in.

7 Q. Okay. Were you over there that day with the
8 defendant at his house and the girls, were you over there
9 in his yard?

10 A. No.

11 Q. You're on the porch in the swing?

12 A. Right across the road.

13 Q. And you were cooking that roast with Leonard.

14 A. Right.

15 Q. And I suspect you probably went in the house several
16 times.

17 A. Yeah. I went in, yeah.

18 Q. Did you ever go across the street and visit with the
19 defendant?

20 A. No.

21 Q. So you really can't tell this jury that you know
22 without a shadow of a doubt what happened at all times
23 over there during this time that those girls were over
24 there, can you?

25 A. Not at all times, no.

TESTIMONY OF MARK COKER

1 Q. You can't truthfully say that the defendant did not
2 touch those girls; isn't that correct?

3 A. I'm telling you I didn't see it.

4 Q. You didn't go to the house in the defendant's house?

5 A. No.

6 Q. You said you saw or that you knew Mr. Lawson was in
7 the house; is that correct?

8 A. Right.

9 Q. But you don't know where he was in the house, do you?

10 A. No. He was on the living room side. I don't know
11 that much about the house, I know on the right-hand side
12 he would come out every once in awhile and sit in the
13 front porch. He's got a bad leg so every now and again he
14 would come out on the front porch and go in, so I knew he
15 was in the house.

16 Q But you didn't go in that house.

17 A. No.

18 Q. You didn't see Mr. Leonard in that house? You didn't
19 see Mr. Leonard in that house, did you?

20 A. No.

21 Q. Now, let me ask you about that girl, that blond
22 headed girl that you said got mad about the go cart.

23 A. Uh-huh.

24 Q. Was that the same blond headed girl that you say you
25 saw go in the house?

1 A. That's who I seen go in.

2 MR. KINKARD: Thank you.

3 MR. AUL: I don't have any further questions. We ask
4 that he be excused.

5 THE COURT: Any objection to his being excused?

6 MS. COLLINS: No, sir.

7 THE COURT: Thank you for coming, sir, you may be
8 excused at this time.

9 The witness, DALE GUERTON, was first duly sworn and
10 Testified as follows, on:

11 DIRECT EXAMINATION

12 BY MR. AUL:

13 Q. Mr. Guerton, would you give your full name and spell
14 your last name, please?

15 A. Dale Alton Guerton, G-u-e-r-t-o-n.

16 Q. Mr. Guerton, where do you live?

17 A. [REDACTED], Buffalo.

18 Q. Could you pull that microphone a little closer?

19 A. [REDACTED], Buffalo, South Carolina.

20 Q. [REDACTED]?

21 A. Yes.

22 Q. Where is that in relation to where Mack Malpass
23 lives?

24 A. Right next door.

25 Q. Okay. Are there any houses between you and his

TESTIMONY OF DALE GUERTON

- 1 house?
- 2 A. No.
- 3 Q. How long have you lived where you live now?
- 4 A. About 12 years.
- 5 Q. About 12 years. What is your occupation?
- 6 A. I'm disabled, retired.
- 7 Q. What did you do before you were disabled and retired?
- 8 A. Truck driver.
- 9 Q. How long were you a truck driver?
- 10 A. 32 years.
- 11 Q. Okay. You are familiar with the day that Mack is
- 12 accused of molesting those two children?
- 13 A. Yes.
- 14 Q. Were you present that day?
- 15 A. Yes.
- 16 Q. Do you recall what you were doing?
- 17 A. Yes.
- 18 Q. Would you tell the ladies and gentlemen of the jury
- 19 what you were doing?
- 20 A. I was mowing the grass between my house and his.
- 21 Q. You were mowing the grass between your house and his.
- 22 Was anybody else present with you?
- 23 A. No.
- 24 Q. Okay. Did you observe the children riding go carts
- 25 at anytime?

- 1 A. I seen them riding the go carts, yes.
- 2 Q. Would you tell the ladies and gentlemen of the jury
- 3 what you actually saw?
- 4 A. I seen Mack and a couple of other guys take the go
- 5 cart off of the stand it was on and they took it out
- 6 beside the road. Mack started it and he rode up the road
- 7 first and come back and he let the young girls ride down
- 8 the road.
- 9 Q So he took it off the rack. When you say that, where
- 10 is the rack from the house?
- 11 A. The rack was sitting next to Mack's house.
- 12 Q In the front of the house?
- 13 A. Yes.
- 14 Q. So you could --
- 15 A. I could see it.
- 16 Q. You could see it?
- 17 A. Yes.
- 18 Q. Can you see the go cart from the road?
- 19 A. Yes.
- 20 Q. So it was sitting out in the open?
- 21 A. Yes.
- 22 Q. Was it chained up or something?
- 23 A. Locked to the corner of the house.
- 24 Q Locked to the corner of house. Okay.
- 25 A Corner of the porch, whatever.

TESTIMONY OF DALE GUERTON

- 1 Q. So Mack's house has a porch on it?
- 2 A. Pardon me?
- 3 Q. Mack's house has a porch on it?
- 4 A. Yes.
- 5 Q. Okay. Did you stay there the whole time the girls
- 6 were riding?
- 7 A. No. Myself and my wife went to Wal-Mart, then we
- 8 came back and they were still riding around the block.
- 9 Q. Did you have an opportunity to talk to Mack at
- 10 anytime?
- 11 A. Yes. When I went to Wal-Mart I told Mack he should
- 12 be careful letting them ride it because he could probably
- 13 get in trouble if one of them got hurt or something.
- 14 Q. So you told Mack to be careful about letting them
- 15 ride?
- 16 A. Yes.
- 17 Q. But --
- 18 A. When I came back they were still riding.
- 19 Q. They were still riding?
- 20 A. Right.
- 21 Q. Was anybody at your house other than you and your
- 22 wife?
- 23 A. Yeah, my grandson and my nephew.
- 24 Q. What's your grandson's name?
- 25 A. S.D.

- 1 Q. What's your nephew's name?
- 2 A. Tommy Dow.
- 3 Q. Were they inside your house or outside your house
- 4 when the girls were riding these go carts?
- 5 A Well, they were in and out, you know.
- 6 Q. Okay. At anytime did you see any of the girls go
- 7 into Mack's house?
- 8 A. No.
- 9 Q. Okay. At anytime did you see Mack touch the girls?
- 10 A. No.
- 11 Q. Okay. Did you see when the girls left Mack's house?
- 12 A. Yes. They left Mack's house and I seen them walk up
- 13 the street to Jill's house, I don't know what their last
- 14 name was, Jill and Doug's house.
- 15 Q Jill and Doug's house?
- 16 A. Yes.
- 17 Q. And did they run up the street?
- 18 A. No, they walked up the street.
- 19 Q Okay. Do you know how long they stayed out there?
- 20 A. No, no idea.
- 21 Q. Okay. Had you been drinking this day.
- 22 A Pardon?
- 23 Q Had you been drinking?
- 24 A Me? No, I don't drink.
- 25 Q. Okay. Are you familiar with a truck being parked in

TESTIMONY OF DALE GUERTON

1 front of that house for a long time?

2 A. Yeah, black Toyota.

3 Q. Black Toyota?

4 A. Yeah.

5 Q. And when I say parked, did they move that vehicle?

6 A. I have never seen it moved.

7 Q. How long was it sitting there?

8 A. Four or five months.

9 Q. Do you know which way it was facing?

10 A. Facing up toward the post office, the old post
11 office.

12 Q. You say up towards the post office.

13 A. Toward 215.

14 Q. Is that up the hill?

15 A. Yes.

16 Q. Is it facing -- parallel with the road?

17 A. Yes.

18 Q. And so the tail of the truck would be facing
19 toward --

20 A. Toward my house.

21 Q. Toward your house.

22 A. Right.

23 MR. AUL: Okay. Thank you, Mr. Guerton, if you would
24 answer any questions that the solicitor would have.

25

CROSS EXAMINATION

1 BY MS. COLLINS:

2 Q Mr. Guerton, how long were you and your wife at
3 Wal-Mart that night, do you remember, or that afternoon?

4 A. 45 minutes to an hour.

5 Q. So you were away from your home about 45 minutes to
6 an hour?

7 A. Right.

8 Q. And during that 45 minutes to an hour, of course,
9 therefore you weren't there to observe what was going on
10 with these children; is that right?

11 A. Right.

12 Q. How many children did you see there?

13 A. I seen two girls and a boy.

14 Q. You saw two girls and one boy?

15 A. Right.

16 Q. Okay. You didn't see three girls and two boys?

17 A. No.

18 Q. Now, how large is your yard between you and the
19 defendant's home?

20 A. 100 feet maybe, not even that far. I'm just
21 guestimating 100 feet.

22 Q. Push mower?

23 A. Pardon me?

24 Q. Push mower you use or a riding?

25 A. Push mower.

TESTIMONY OF DALE GUERTON

1 Q About how long does it take to you cut that side
2 yard?

3 A. 15 or 20 minutes.

4 Q. About 15 or 20 minutes?

5 A. Right.

6 Q So the time that you were out there and able to
7 observe these children riding the go cart was the 15 or 20
8 minutes you were cutting that side yard?

9 A. Right.

10 Q. All right.

11 MS. COLLINS: I don't have anything further. Thank
12 you.

13 MR. AUL: No further questions, ask if he can be
14 excused.

15 THE COURT: Any objection to him being excused?

16 MS. COLLINS: No, Your Honor.

17 THE COURT: You may be excused.

18 The witness, ^{S.D.} was first duly sworn and

19 Testified as follows, on:

20 DIRECT EXAMINATION

21 BY MR. AUL:

22 Q. Would you state your name for the record?

23 A. ^{S.D.}

24 Q. Would you spell your last name, please?

25 A. ^{S.D.}

- 1 Q. S.D. I need you to speak loud enough so the
2 furthest juror can hear. How old are you?
3 A. 15.
4 Q. Where do you live?
5 A. In Buffalo.
6 Q. You live in Buffalo now?
7 A. Yeah.
8 Q. And what relation is Dale Guerton to you?
9 A. Grandfather.
10 Q. And what relation is Mack Malpass to you?
11 A. Nextdoor neighbor.
12 Q. Nextdoor neighbor? Are you familiar with the day
13 that Mack is accused of committing a lewd act upon two
14 children?
15 A. Yes, sir.
16 Q. Were you present anytime when the children were
17 riding the go carts?
18 A. Yes, sir.
19 Q. Could you tell the ladies and gentlemen of the jury
20 what you saw?
21 A. I didn't see nothing. They were just riding the go
22 cart up and down the road.
23 Q. What children did you see riding the go cart up and
24 down and road?
25 A. Minor 2 and A.F. and I don't know the

TESTIMONY OF S.D.

- 1 other girl's name.
- 2 Q. Did you see any boys riding the cart?
- 3 A. J.L.
- 4 Q. Okay. At anytime did you see any of the girls enter
- 5 Mack's house?
- 6 A. Yes, sir.
- 7 Q. Would you tell the ladies and gentlemen of the jury
- 8 what you saw?
- 9 A. They walked in the house I guess to go to the
- 10 restroom and Mack like walked in and showed them, I guess,
- 11 and came right back out.
- 12 Q. How long would you say Mack was in the house?
- 13 A. About 30 seconds.
- 14 Q. Okay. Can you recall which two girls went in?
- 15 A. A.F. and Minor 2 I think.
- 16 Q. Are you sure of that?
- 17 A. Not real sure, but I believe it was them two.
- 18 Q. You are sure it was two girls?
- 19 A. It was two or three. I know they walked in the
- 20 house.
- 21 Q. At anytime did you see Mack touch any of the
- 22 children?
- 23 A. No, sir.
- 24 Q. He never touched them at anytime?
- 25 A. No.

1 Q. Did you see any of the children ever touch Mack?

2 A. Yes, sir.

3 Q. Would you tell the ladies and gentlemen of the jury
4 about that?

5 A. Minor 2 like hugged Mack and asked him to buy
6 her some beer and some cigarettes, Mack told her no, and
7 pushed her away and said he wasn't going to do something
8 stupid like that.

9 Q. So you did see Mack actually push her away?

10 A. Right, push her away.

11 Q. Did you ever see him touch her in any inappropriate
12 manner?

13 A. No, sir.

14 Q. Were you there when the girls stopped riding go
15 carts?

16 A. No, sir.

17 Q. Okay.

18 MR. AUL: S.D. you need to answer any questions that
19 either of the solicitors ask you. Okay?

20 CROSS EXAMINATION

21 BY MS. COLLINS:

22 Q S.D. do you prefer that I call you S.D. or
23 S.D. , or do you have a preference?

24 A. S.D.

25 Q. S.D. you are 15?

TESTIMONY OF ^{S.D.}

- 1 A. Yes, ma'am.
- 2 Q. When is your birth date?
- 3 A. [REDACTED].
- 4 Q. [REDACTED] when?
- 5 A. [REDACTED].
- 6 Q. So you just turned 15 this past December?
- 7 A. Yes, ma'am.
- 8 Q. Do you go to school?
- 9 A. Yes, ma'am.
- 10 Q. What grade are you in?
- 11 A. 8th.
- 12 Q. Did you know ^{Minor 2} and ^{A.F.} from school?
- 13 A. Yes, ma'am.
- 14 Q. But you didn't know ^{Minor 1} the other girl?
- 15 A. No, ma'am.
- 16 Q. You said that you saw the other children riding the
- 17 go cart, you saw a boy, ^{J.L.} ^{Minor 2} and ^{A.F.} and
- 18 another girl; is that right?
- 19 A. Yes, ma'am.
- 20 Q. You don't recall seeing another little boy named
- 21 ^{S.M.} riding the go cart?
- 22 A. No, ma'am.
- 23 Q. And the defendant, Mr. Mack, is your nextdoor
- 24 neighbor; is that right?
- 25 A. Yes, ma'am.

- 1 Q. Y'all hang out a little bit?
- 2 A. A little bit.
- 3 Q. You ride that go cart some?
- 4 A. Yes, ma'am.
- 5 Q. Do you remember whether or not you saw the defendant
- 6 drinking anything that day, any alcohol?
- 7 A. A little bit.
- 8 Q. Little bit. Were you hanging out on -- do y'all have
- 9 a porch?
- 10 A. Not really.
- 11 Q. Were you like hanging out in the yard the whole time
- 12 the children were out there riding the go carts or what
- 13 were you doing?
- 14 A. I was over there with Mack.
- 15 Q. You were over there with Mack? Were you there the
- 16 whole time the children were riding go carts?
- 17 A. Most of the time.
- 18 Q. How long did that last would you say?
- 19 A. I don't know.
- 20 Q. Don't know? During that time, did you ever need to
- 21 go to the bathroom?
- 22 A. No, ma'am.
- 23 Q. During that time, did you ever need to go get
- 24 something to drink?
- 25 A. No, ma'am.

TESTIMONY OF ^{S.D.}

1 Q. So you were out there with the defendant the whole
2 time -- I'm sorry, you said most of the time; is that
3 right?

4 A. Yes, ma'am.

5 Q. So there were some times you weren't out there?

6 A. I walked over to my yard.

7 Q. Okay.

8 A. And that's like 20 feet.

9 Q. I'm sorry, I can't hear you.

10 A. It was like 20 feet away from Mack's house.

11 Q. You told Mr. Aul just now that you were not there
12 when the girls stopped riding the go carts, right?

13 A. No, ma'am. I was at my house.

14 Q. Okay. And you said when the girls went in the house,
15 was it two girls or three that went into the house?

16 A. I believe it was two.

17 Q. Which two do you think it was?

18 A. I think it was ^{A.F.} and ^{Minor 2}

19 Q. And you said the defendant walked in the house behind
20 them?

21 A. Yes, ma'am.

22 Q. And that he was in there about 30 seconds?

23 A. Yes, ma'am.

24 MS. COLLINS: Thank you, nothing further.

25 MR. AUL: I don't have any further questions, Your

TESTIMONY OF T.D.

1 Honor. I would ask that this witness be excused.

2 MS. COLLINS: No objection.

3 THE COURT: Thank you for coming, sir, you may be
4 excused at this time.

5 The witness, T.D. was first duly sworn and
6 Testified as follows, on:

7 DIRECT EXAMINATION

8 BY MR. AUL:

9 Q. I need for you to give your full name for the record
10 and spell your last name. Okay?

11 A. T.D.

12 Q. Okay. Do you go by T.D. ?

13 A. T.D.

14 Q. T.D. ? T.D. , how old are you?

15 A. 16.

16 Q. Are you in school?

17 A. Yes, sir.

18 Q. Where are you in school?

19 A. Union High School.

20 Q. And where do you live?

21 A. [REDACTED], [REDACTED], right by the motor speedway.

22 Q. So you live on [REDACTED]?

23 A. Yeah.

24 Q. Okay. So you actually don't live in the mill village
25 of Buffalo?

1 A. No.

2 Q. Okay. What relation are you to Dale Guerton?

3 A. He's my Godfather.

4 Q. He's your Godfather? And what relation are you to

5 S.D.

6 A. He's my cousin.

7 Q. He's your cousin. Okay. And what relation are you

8 to Mack Malpass?

9 A. We ain't related, I just know him. He worked on my
10 go cart a couple of times and we started becoming sort of
11 like friends or whatever.

12 Q. So you are sort of friends with him?

13 A. Yeah.

14 Q. Were you present the day that the two girls have
15 accused Mack of molesting them?

16 A. Yes, I was.

17 Q. Where were you at that time?

18 A. I was at my uncle's house.

19 Q. You were at your uncle's house?

20 A. Yes.

21 Q. Where is this compared to Mack's house?

22 A. Right beside it.

23 Q. What were you doing, do you recall?

24 A. Messing around with lawn mowers.

25 Q. What do you mean messing around with lawn mowers?

1 A. I fix them, just get them running, sometimes we sell
2 them, using them to cut grass.

3 Q. Okay. Did you see any girls riding go carts that
4 day?

5 A. Yes.

6 Q. Do you know who they were?

7 A. A.F. was riding it, ^{Minor 2} was riding it, I think
8 there was more girls, a short girl.

9 Q. Short girl was riding it?

10 A. Yeah.

11 Q. Okay. Do you recall seeing any boys riding it?

12 A. Yes, sir.

13 Q. What boys did you see riding it?

14 A. J.L. or something like that, and Mack rode it.

15 Q. I'm sorry, what was the last thing you said?

16 A. Mack rode it.

17 Q. Mack rode it.

18 A. Doug Howe.

19 Q. Anybody else ride it?

20 A. Not that I recall.

21 Q. What was Mack doing when he wasn't -- well, did you
22 see Mack when he wasn't riding the go carts?

23 A. Yeah.

24 Q. What was he doing at those times?

25 A. Just standing in the front yard watching.

TESTIMONY OF T.D.

- 1 Q. When the go cart came back, what did he do?
- 2 A. He asked Ashley and them to stop riding it, the girls
- 3 were asked to stop riding the go cart.
- 4 Q And the girls stopped riding at that point?
- 5 A. Yeah.
- 6 Q. Okay. Were they riding go carts for a long time?
- 7 A. Not very long, about 20 minutes.
- 8 Q 20 minutes?
- 9 A. Somewhere in there.
- 10 Q. Okay. Did you ever see any of the girls go into
- 11 Mack's house?
- 12 A. No.
- 13 Q. Okay. Did you ever see Mack touch any of the girls?
- 14 A. No.
- 15 Q. You weren't watching the girls the whole time they
- 16 were riding the go carts, were you?
- 17 A. No.
- 18 Q. You weren't watching Mack the whole time, were you?
- 19 A. No.
- 20 Q. But the times you were watching you never saw Mack
- 21 touch the girls.
- 22 A. Not at all.
- 23 Q. Okay.
- 24 MR. AUL: If you would answer any questions the
- 25 solicitor would have.

TESTIMONY OF T.D.

1 CROSS EXAMINATION

2 BY MR. KINKARD:

3 Q. You said it's okay to call you T.D. ?

4 A. Yeah.

5 Q. Do you recall -- did you go to Wal-Mart that
6 afternoon with S.D. who's your cousin I think you said?

7 A I might have. I don't remember going but it's
8 possible.

9 Q Okay. And I think you mentioned that you were kind
10 of sort of friends with the defendant; is that correct?

11 A. Yeah.

12 Q. Because he helped you work on go carts?

13 A. Yeah.

14 Q. Okay. You wouldn't want to see him get in trouble,
15 would you?

16 A. Not particularly, no.

17 MR. KINKARD: Okay. No further questions.

18 MR. AUL: Your Honor, I would ask this witness be
19 excused.

20 MR. KINKARD: That's fine, Your Honor.

21 THE COURT: Thank you for coming, you may be excused
22 at this time.

23 The witness, ASHLEY MALPASS, was first duly sworn and
24 Testified as follows, on:

25 DIRECT EXAMINATION

TESTIMONY OF ASHLEY MALPASS

1 BY MR. AUL:

2 Q. Ashley, I need to you state your name for the record,
3 please.

4 A. Ashley Malpass.

5 Q. And Ashley, what relation are you to Mack Malpass?

6 A. That's my father.

7 Q. He's your father. And where do you live?

8 A. [REDACTED], Buffalo.

9 Q You live at the house that your father lives in.

10 A Harold Lawson and Mack Malpass.

11 Q. Okay. So Harold Lawson, who is Harold Lawson?

12 A. That's my great uncle.

13 Q. He's your great uncle. It's actually his house that
14 you are living in? You need to answer yes or no because
15 they he can't pick up nods of the head.

16 A. Yes.

17 Q. Okay. You are familiar with the allegations against
18 your father, correct?

19 A. Yes, sir.

20 Q. And that happened on July 19th. Were you living
21 there at that time?

22 A. Yes, sir.

23 Q. At anytime did you come to the house when there were
24 children riding the go carts?

25 A. Yes, sir. I pulled up at the house and there was I

1 would say around 12 or 13 kids there riding my dad's go
2 cart.

3 Q. Speak up a little bit louder.

4 A There was about 12 or 13 kids riding in my dad's go
5 cart up and down the highway.

6 Q. You saw say lot of kids there?

7 A A lot of kids, everybody was outside that day.

8 Q. Okay. How long did you stay at the house?

9 A. Probably about 20 or 25 minutes.

10 Q. What were you doing at the house?

11 A. I had come home to pick up my uncle's truck to go
12 pick up a recliner in Jonesville to take it to my
13 ex-boyfriend's house and then come back there that day.

14 Q What kind of truck was it?

15 A. Ford.

16 Q It wasn't a black Toyota truck?

17 A. No.

18 Q Okay. Did you have a discussion with your father at
19 anytime regards to the girls riding the go cart?

20 A. Yes, I did.

21 Q. Don't say -- what did you tell your father?

22 A. Well, when I come up to the house and I seen all of
23 the kids riding the go cart, I wasn't going to say
24 anything at first but then I saw this little blond headed
25 girl getting on the go cart and I went up and told my dad,

TESTIMONY OF ASHLEY MALPASS

1 I told him he needed to get the girls off the go cart
2 because if the police rode by and seen him letting the
3 kids ride the go cart it would get him in trouble. And
4 when I said that this blond headed girl looked up at me
5 and gave me a look that could kill, but I didn't say
6 nothing after that, I just let him do what he wanted.

7 Q. Okay.

8 A. But after then he got them off the go cart.

9 Q. Did he get them off while you were there?

10 A. Yes.

11 Q. Okay. Were they still around the house when you
12 left?

13 A. Well, they kind of scattered, they weren't all in
14 that one spot.

15 Q. Okay. And you weren't there when they got there.

16 A. No.

17 Q. So all you can testify to is that 15 or 20 minutes
18 you were at the house?

19 A. Yes.

20 Q. Okay.

21 MR. AUL: Answer any questions the solicitor may have
22 of you.

23 MR. KINKARD: We have no questions of this witness,
24 Your Honor.

25 THE COURT: Thank you, ma'am, you may stand down.

TESTIMONY OF HAROLD LAWSON

1 The witness, HAROLD LAWSON, was first duly sworn and
2 Testified as follows, on:

3 DIRECT EXAMINATION

4 BY MR. AUL:

5 Q Mr. Lawson, would you give us your full name and
6 spell your last name for the record, please?

7 A. Harold Lawson, L-a-w-s-o-n.

8 Q. Okay. Mr. Lawson, where do you live?

9 A. Above Buffalo.

10 Q What address?

11 A. It's [REDACTED].

12 Q. Is that your house?

13 A. Yes, sir.

14 Q. Mack lives in that house with you?

15 A. Yes, sir.

16 Q Who else lives in the house with you?

17 A. His daughter, Ashley.

18 Q Are you currently working, Mr. Malpass (sic)?

19 A. I'm retired.

20 Q. Mr. Lawson?

21 A. I'm retired.

22 Q How old are you, Mr. Lawson?

23 A. How old? 72.

24 Q. What kind of work have you done in the past?

25 A. I worked in five or six places, but at the cotton

TESTIMONY OF HAROLD LAWSON

1 mill at Buffalo, I was a guard for awhile, then I quit at
2 Burlington Music, they sell CD's and cassette tapes.

3 Q. When did you retire?

4 A. '71 -- I mean, 2001.

5 Q. Okay. Now, Mr .Lawson, you are aware of the charges
6 that are against Mack, correct?

7 A. Yes, sir.

8 Q. Were you present at your house that day?

9 A. Yes, sir.

10 Q. Were you present there all day?

11 A. Yes, sir.

12 Q. Did you see girls riding go carts?

13 A. Yes, sir. I stayed out there about 15 or 20 minutes
14 watching them.

15 Q. Well, tell the ladies and gentlemen of the jury what
16 you did see riding the go carts.

17 A. Well, he had the go cart on a thing he had made to
18 pull it around in taking it to race with. But them girls
19 and the boy took that off of that themselves, he went
20 downstairs to get gas for it and the thing to crank it
21 with, they had -- the starter is not connected to it. I
22 just watched them race out there for awhile.

23 Q. Then what did you do?

24 A I went back into the house and I read the paper or
25 magazine.

1 Q. Okay. Mr. Lawson, I want to show you a photograph.

2 A. That's my kitchen.

3 Q. You are familiar with this? This is your kitchen?

4 A. Right.

5 MR. AUL: Your Honor, I would like to mark this as
6 Defendant's Exhibit Number 1.

7 MS. COLLINS: Your Honor, our only opposition is he
8 needs to lay a foundation that it is an accurate
9 depiction --

10 THE COURT: He's just marking it for ID.

11 MS. COLLINS: I'm sorry.

12 Q. Once again I'm going to show you what's marked as
13 Defendant's Exhibit Number 1 that you identified as your
14 kitchen. Is that a fair and accurate representation of
15 how your kitchen was on July 19, 2003?

16 A. Yes, sir.

17 Q. Have you remodeled your kitchen since then?

18 A. Since when?

19 Q. Since this incident, have you remodeled the kitchen?

20 A. No, sir.

21 Q. Okay. And the room in the back.

22 A. That's the bathroom.

23 Q. That's the bathroom?

24 A. Yeah.

25 Q. Were you present in the house when some girls came in

TESTIMONY OF HAROLD LAWSON

1 to use the bathroom?

2 A. Yes, sir.

3 Q. Can you tell the ladies and gentlemen of the jury
4 what you saw?

5 A. Well, Mack brought them through the kitchen door,
6 where they could use the bathroom, we showed them where
7 the bathroom was and they used the bathroom, them two
8 girls.

9 Q. Okay. When you said brought through the kitchen
10 door, does your house open in the kitchen?

11 A. No. It come in through the living room and there's
12 the bathroom on the right.

13 Q. So you have to walk through the living room and then
14 the next room is the kitchen?

15 A. Yeah.

16 Q. And the bathroom is to the -- what were you doing
17 when the girls were using the bathroom?

18 A. I was reading the paper or magazine or something.

19 Q. You were reading. Where were you reading?

20 A. At the table.

21 Q. Were you reading at the table shown on this picture?

22 A. Right.

23 Q. Can you see the bathroom from that picture?

24 A. Yes, sir.

25 MR. AUL: Your Honor, I would ask to publish it to the

1 jury.

2 THE COURT: You haven't got it admitted yet, Counsel.

3 MR. AUL: Thank you, Your Honor. I would ask to admit
4 the exhibit at this time.

5 MS. COLLINS: At this time I have no objection. Thank
6 you.

7 THE COURT: Admitted without objection, you may
8 publish.

9 (The photograph was received as Defendant's 1.)

10 Q. You were sitting at the table in the kitchen?

11 A. Right.

12 Q. The girls went in the bathroom.

13 A. Yes, sir.

14 Q. Did Mack go into the bathroom?

15 A. No.

16 Q. Did Mack --

17 A. He come to the kitchen door and pointed to the
18 bathroom where it was, then he went back outside.

19 Q. Okay. Did you stay in your house the rest of that
20 afternoon?

21 A. I believe I did, I'm not sure. I don't think I went
22 back outside.

23 Q. Okay. Did you see anymore of the riding the go carts
24 or anything like that?

25 A. No.

TESTIMONY OF HAROLD LAWSON

1 Q. Okay. So you observed the very beginning of riding
2 the go carts?

3 A. Right.

4 MR. AUL: If you would, Mr. Lawson, answer any
5 questions either of the solicitors have.

6 CROSS EXAMINATION

7 BY MS. COLLINS:

8 Q Mr. Lawson, do you recall a time that day, the date
9 of this incident, that Mack, the defendant, went into the
10 house to get these girls some water? Do you recall that?

11 A. Nobody went in there and got water when I was in
12 there.

13 Q. So the defendant to your recollection never went in
14 the house and got these girls some water while you were in
15 there, is that right? Is that what you just said?

16 A. Who went in there and got it?

17 Q. The defendant, Mr. Mack Malpass, your nephew.

18 A. I don't remember if he did or not.

19 Q. You don't remember him doing that?

20 A. No.

21 Q. Do you remember your nephew, Mack Malpass, drinking
22 that day?

23 A. I didn't see him drinking.

24 Q. Okay. Of course, you are an adult, old enough to
25 drink, did you have anything to drink that day?

- 1 A. I don't drink, I don't smoke either. I don't need
2 it, I don't need to drink.
- 3 Q. Mr. Lawson, are you on any prescription medicine?
- 4 A. I take Placic everyday and aspirin everyday.
- 5 Q. What does that do for you?
- 6 A Prevents a heart attack or stroke.
- 7 Q. Does that make you sleepy at all?
- 8 A. No.
- 9 Q. Do you ever take a Saturday afternoon nap?
- 10 A. I get sleepy sometimes but I wake up a lot of time at
11 1:30, different times everyday.
- 12 Q. Were you sleepy that day at all, do you remember?
- 13 A No, I wasn't sleepy.
- 14 Q But you don't remember what you're reading, just some
15 magazine or paper, not sure?
- 16 A. Well, I got -- I read a paper or a magazine there, I
17 don't know what I was reading at that time. I didn't know
18 I was going to have to remember it.
- 19 Q. But it's your testimony that the girls, in fact, did
20 come in the house; is that right?
- 21 A. Right. Two of them came in to use the bathroom.
- 22 Q. What did they look like?
- 23 A. They had black hair and they looked like they were
24 sisters, might could have passed for twins to me.
- 25 Q. You say they had black hair?

TESTIMONY OF HAROLD LAWSON

- 1 A. Yes, ma'am.
- 2 Q. So two girls with black hair that could have been
- 3 twins came into your house?
- 4 A. Ma'am?
- 5 Q. Looked like sisters or --
- 6 A. They were sisters, I believe they were.
- 7 Q. Okay. And you're saying your nephew, Mack, just came
- 8 in and just pointed at the bathroom?
- 9 A. Yes, ma'am. He showed them where the bathroom was.
- 10 Q. You've only got one bathroom in the house?
- 11 A. Right.
- 12 Q. You don't remember Mack drinking that day?
- 13 A. I didn't see him drinking, he could have, you know.
- 14 But if he's drunk I don't have to see him, I can hear him
- 15 talk.
- 16 Q. If he was drunk you would have known that? If he
- 17 would have been passed out by your couch the next morning,
- 18 would you have known that?
- 19 A. If he was --
- 20 Q. Did you see him passed out by your couch the next
- 21 morning?
- 22 A. No. I don't know, I don't remember.
- 23 Q. You were still in your house that morning, right?
- 24 A. Uh-huh, I was still there.
- 25 Q. And you never saw him black out from the drinking

1 liquor that day?

2 A. No, I didn't.

3 Q. All right.

4 MS. COLLINS: Thank you. Thank you, Mr. Lawson, very
5 much.

6 REDIRECT EXAMINATION

7 BY MR. AUL:

8 Q. Mr. Lawson, where do you sleep in the house?

9 A. My bedroom is next to the kitchen.

10 Q. In the back?

11 A. Uh-huh.

12 Q. Where does Ashley sleep in the house?

13 A. In the front room.

14 Q. The front?

15 A. Yes, sir, on the --

16 Q. Front bedroom?

17 A. Yes, sir.

18 Q. Where does Mack sleep?

19 A. He sleeps on the couch.

20 Q. He sleeps on the couch?

21 A. I sleep -- I have been sleeping on it a couple, two
22 or three days ago.

23 Q. But that's where Mack sleeps, on the couch?

24 A. Yeah. I would rather sleep on the couch than the
25 bed.

TESTIMONY OF HAROLD LAWSON

1 Q. But does Mack have a separate bedroom?

2 A. It's in the living room, the couch in the living
3 room.

4 MR. AUL: Okay. Thank you, sir.

5 MS. COLLINS: Nothing further.

6 THE COURT: Thank you, sir, you may stand down.

7 MR. AUL: Your Honor, that's going to be the defense's
8 case.

9 THE COURT: Anything in reply, solicitor?

10 MR. KINKARD: No, sir, Your Honor.

11 THE COURT: Mr. Foreman, ladies and gentlemen, this
12 concludes all of the testimony of the case. We have yet
13 remaining final arguments of counsel and instructions with
14 regard to the law that applies to the issues in this case.
15 We are going to go ahead and recess for lunch at this time,
16 I'm going to ask you to be back in your jury room at 2:00,
17 that should give everybody plenty of time to get lunch and
18 be back in the jury room by 2:00. During the break for
19 lunch please do not discuss this case among yourselves or
20 with anybody else you might see during the break. Even
21 though we have heard the testimony and evidence you have
22 not heard my instruction with regard to the law that
23 applies to the issues in this case so you are not ready yet
24 to begin discussing the case or forming opinions on it
25 until you have that information. So during the lunch break

1 please do not discuss the case among yourselves or with
2 anyone else you may see during the lunch break. I will
3 remind you if there should be any media coverage out there,
4 if there should be any please do not read, listen to it or
5 watch it during the break from court. I will remind you I
6 will require you not to get on the computer or stay off the
7 computer, if you have a computer access not to get on the
8 computer until this case is over and we should conclude
9 it -- or at least we will have final arguments and
10 instructions and begin deliberations this afternoon so
11 that's not a hardship so I will remind you not to get the
12 computer. All right. Thank you. Please enjoy your lunch
13 and please be back in the jury room at 2:00. Thank you.

14 (The jury left the courtroom.)

15 THE COURT: Any matters we need to take up out of the
16 presence of the jury at this time from the State?

17 MR. KINKARD: Not from the State, Your Honor.

18 THE COURT: From the defense?

19 MR. AUL: Yes, sir, Your Honor. And I know there's a
20 difference of opinion whether to renew your motion for a
21 directed verdict. I would like to renew my motion for a
22 directed verdict, Your Honor, on the same grounds that I
23 had stated earlier, Your Honor.

24 THE COURT: All right. The record will reflect your
25 motion and the Court will deny the motion for the same

TESTIMONY OF HAROLD LAWSON

1 reasons given at the end of the State's case, it's made for
2 the record.

3 (A lunch break was taken.)

4 THE COURT: Good afternoon, Mr. Foreman, ladies and
5 gentlemen, I hope you enjoyed your lunch today. We are
6 ready now to resume the trial and we are to that part of
7 the trial where counsel will make their final arguments to
8 you. I ask that you listen attentively as counsel address
9 you in final argument. Counsel, are you ready to proceed?

10 MR. AUL: Please the Court, Your Honor? Ladies and
11 gentlemen of the jury, Mr. Foreman, as y'all recall
12 yesterday, maybe about this time yesterday, I came up here
13 and made an opening statement to you. At that time I think
14 I walked over here and introduced you to Mack Malpass. I
15 told you that the law in South Carolina states he's an
16 innocent man, that the solicitor's office would not dispute
17 that, the Judge would not dispute that, that he was an
18 innocent man and that the State of South Carolina had the
19 burden of proving his guilt beyond a reasonable doubt that
20 he had committed the crime that was alleged. And I told
21 you a couple of things about if I stated anything factual
22 wise that you remember different, remember it how you
23 remember it because you are the deciders of the facts. If
24 I say anything about the law that the Judge says different,
25 follow what the Judge says because the Judge decides the

1 law. My client, Mack, is charged with committing a lewd
2 act upon a minor, and I think before I start really
3 discussing this evidence we've heard we need to hear a
4 little bit what a lewd act on a minor is. It's unlawful
5 for any person over the age of 14 years or 16 years --
6 that's not even an issue, Mack is 40 something years of
7 age -- to willfully and lewdly commit or attempt a lewd or
8 lascivious act upon or with the body or any part or any
9 member thereof a child under the age of 14 with the intent
10 of arousing, appealing to or gratifying the lust or passion
11 of such person or such child. Now, the Judge may instruct
12 you as to what willfully means. He may instruct you
13 something along the line of willfully means to act
14 voluntarily and intentionally, voluntarily, intentionally
15 with the specific intent to do something the law forbids,
16 and acts with a bad purpose to disobey or disregard the
17 law. So for someone to commit this crime they have to
18 willfully commit the crime, and if you're like me you want
19 to know what's lewd and lascivious. Lewd is an act that's
20 obscene, lustful, indecent, lecherous or wanton. And
21 lascivious is one for lewd, indecent, obscene or intends to
22 incite lust and create the morals and respect of sexual
23 relations. That's what the State has the burden of proving
24 beyond a reasonable doubt that Mack Malpass is guilty of.
25 The question is not whether Mack Malpass did something

CLOSING ARGUMENTS

1 inappropriate, the question is not whether Mack Malpass had
2 been drinking or done something stupid, that's not the
3 question. The question is whether he committed a lewd act
4 upon a minor willfully and with the intent, that's the
5 question. And I told you at the beginning -- and I know
6 I'm rehashing some of this stuff but it helps me to rehash
7 it in my mind, it flows better in my mind when I do that --
8 they have to prove his guilt beyond a reasonable doubt.
9 And if y'all remember, I told you and the Judge instructed
10 you as to what reasonable doubt means, beyond a reasonable
11 doubt does not mean that you think more likely he did do
12 this than he didn't or there's a better possibility that he
13 did do it, but they have got to prove his guilt beyond a
14 reasonable doubt. Some judges will define a reasonable
15 doubt as a doubt that causes a person to hesitate to act,
16 and I say it's not a fanciful doubt but some reason to
17 doubt. And in this case what do we have? We have two
18 young girls both under the age of the part for the statute
19 so that's not an issue, it's not an issue of how old Mack
20 is, how old the girls are, that's not an issue. The
21 question is what, if anything, was done and what, if
22 anything, that was done, what is that. Is that a crime
23 or -- not is it a crime, but is it this crime? That's the
24 key question, is it this crime? And I hope I don't confuse
25 the young girls because in my mind sometimes it is

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1 difficult to remember which girls they were and sort of
2 difficult -- I think you've heard the witnesses talk, you
3 heard about blonde haired girls, dark haired girls because
4 all the witnesses didn't know the names, so I will try to
5 keep everything as straight as I can. Minor 2 that was
6 the first young lady that testified, Mack is accused of
7 committing a lewd act upon her. Well, what is the lewd
8 act? Well, there's testimony that, the best I recall,
9 three times he touched her in some regard, not saying that
10 he actually touched her all three of those times, that's
11 what the testimony was. The first time, and all of the
12 young girls testified about it and a young boy testified
13 about it, her foot either got ran over by the go cart when
14 her sister was driving it or had the exhaust blow on her or
15 she rubbed it against the exhaust, I'm not sure exactly how
16 it happened. But it either burned her or it hurt, there
17 was no question about that, said it hurt her or it burned
18 her. And the girls testified that Mack said something
19 along the lines of, "Let me look at it," he looks at it and
20 he licked it. You know, I have a three-year-old, I kissed
21 boo boos, I don't lick boo boos and I don't know what --
22 and she goes something like, "Ooh," or something like that
23 and she walks away and she stayed and she rode the go cart
24 more. So that's obviously not the act they're talking
25 about for a lewd act. We submit that's not a lewd act at

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1 all. What that is I'm not really sure. There is some
2 testimony that he had been drinking, I'm not quite sure how
3 much the children had him drinking, I don't know if that's
4 the man that had too much to drink attempt at a kiss, I
5 don't know if that's a man that had been drinking, doing
6 something foolish with alcohol. But there is, I submit, no
7 intent to arouse himself or a young girl by licking her
8 foot after she burned it. And she didn't leave, I don't
9 think there was any thought in her mind that that was the
10 case. When is the second time? If I recall right, I think
11 that was the first time, the second time if I recall
12 correctly from her own testimony is that her testimony is
13 he touched me once other than the licking, he touched me
14 one time is what she said. Now, there was some confusion
15 on her statement to whether he touched her before he
16 touched the other girl, touched her after the other girl,
17 that was a little bit strange, couldn't quite figure out
18 what was going on there. He touched her and he touched her
19 here. I don't know if y'all heard the same words I heard,
20 she testified he hugged her, not the first time when she
21 commented, but somewhere in there she testified when he
22 hugged me he did like this -- and you recall the other
23 testimony about when he hugged the other girl, the other
24 word hugged was used. I don't know, it wasn't used every
25 time but it was used in relation to both girls more than

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1 once. Hugged. Was it what were those words I used
2 willfully with intent to do something the law forbids? Was
3 it for a bad purpose? Was it to arouse himself? Was it
4 obscene, lustful, indecent? It may have been inappropriate
5 is what I would submit but it's not those other things.
6 It's not an intent to do a lewd act on a minor, it's not
7 that. When was the third time, when was the third time he
8 touched them? There was testimony the third time he
9 touched them was when she asked about how about buying some
10 cigarettes or beer for us and he pushed her away and said,
11 "No, I'm not going to do something like that and get in
12 trouble," that's the third time he touched them. So
13 obviously that's not what they're claiming is a lewd act.
14 Ladies and gentlemen of the jury, I would submit that if
15 you hold the State to their burden of proof that they have
16 to prove his guilt beyond a reasonable doubt, that you will
17 find there was reasonable doubt that would cause a
18 reasonable person to hesitate to act and find him guilty of
19 that charge. We have some -- we had some bathroom talk, I
20 don't remember the bathroom word, we talked about what
21 happened in the bathroom. That was interesting. That was
22 very interesting. There's testimony that two girls went
23 in, and apparently the two girls were ^{Minor 2} and ^{Minor 1}
24 there's some confusion on blond hair, black hair and
25 something about eye witnesses, they weren't quite sure if

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1 they went in the house. Several of them knew that Harold
2 Lawson was in his house sitting down. Y'all saw Mr. Lawson
3 yourselves walk down the aisle there, you can tell he's
4 not -- I forget all he testified, he's not a man that's
5 going to be standing there watching children ride carts all
6 day. One of the girls testified that she went in there and
7 he tried to jiggle the door. I think I asked her about
8 that and she said, "Well, that's not what I said the first
9 time when I gave my statement." But the other girl
10 testified that she slammed the door on his face. Well,
11 those are entirely two different things. What's the third
12 testimony in regards to the bathroom? The third testimony
13 in regards to the bathroom is by Harold Lawson who lives in
14 the house, this is the bathroom we're talking about right
15 here, ladies and gentlemen of the jury, that's the
16 bathroom. The bathroom is right here where he pointed to,
17 right there is the bathroom. Mr. Lawson testified that he
18 was sitting in this chair right here when all of this
19 happened. Why did he address that bathroom issue? Because
20 a lot was made of the bathroom. Nothing, no matter how you
21 take the evidence was ever said that Mack Malpass committed
22 any sort of a lewd act at that bathroom. I think they're
23 trying to insinuate that that's showing he's got some sort
24 of lust or something like that. None of the girls
25 testified that he ever touched anybody in the bathroom or

1 anything like that. So the bathroom, it's out there but
2 there's -- he didn't do anything, no matter whose testimony
3 you take. There is some question -- you might have some
4 reasonable doubt in your mind whether the versions that
5 you've heard from the girls about Mack at all because
6 there's so many versions entirely different of it. But the
7 important things is no matter how you look at it, nothing
8 was done in the bathroom. Let's talk about young ^{Minor 1}
9 was the second girl that testified, she is the one
10 that didn't have her eyeglasses on because they had broken
11 so she couldn't identify Mack. Mack is the man she was
12 talking about, I'm not going to try and say she couldn't
13 identify him, therefore -- that's who she's talking about.
14 The poor girl couldn't see, I wanted to show her a
15 statement and to ask her some questions about that, she
16 couldn't even read the statement so I didn't get to ask her
17 about inconsistencies in her statement. But what did she
18 testify to? He hugged me more than once, he hugged me
19 several times. Was there testimony that he ever hugged her
20 in the house, either of the girls in the house? No. Where
21 he supposedly hugged the girls was at the end of the truck,
22 they were behind the truck. Well, behind the truck depends
23 on where the truck is. The truck, you heard the testimony,
24 was a Toyota truck that's been sitting facing the post
25 office going up the hill in Buffalo with the tail -- and

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1 one of the girls testified they were sitting on the
2 tailgate at times. The tailgate, and the testimony is
3 facing Dale Guerton's home, it's facing our two barbecuer's
4 home. So where did these hugs take place? Those hugs took
5 place out in the open in the middle of broad daylight where
6 children riding a go cart back and forth waiting in line to
7 take turns. Now, did Mack inappropriately touch the girl
8 when he hugged her? He may have, I don't know, Mack
9 doesn't know where he touched her. You have Mack's
10 statement, it's going to be in evidence. I don't know if
11 it happened, if it did I'm sorry. He doesn't know, and
12 he'd been drinking, if he touched those girls, that girl
13 there, when he hugged her. If he did and he'd been
14 drinking the question was -- is did he do it willfully with
15 voluntary and intentionally with specific act to do
16 something the law forbids? Was it obscene, lust, indecent?
17 It may have been inappropriate. If he did, it's definitely
18 inappropriate, but it's not attempting to commit a lewd act
19 on a minor. How did the girl react? He hugged her more
20 than once, she never -- she didn't leave, she didn't leave.
21 Do you remember ^{Minor 2} the first girl that testified when
22 she testified what happened, did she leave? She testified
23 to two different things. One time she said, "I stayed
24 around for 15 more minutes riding the go cart," and another
25 time she said, "I walked away." She didn't walk away and

1 keep going when she walked away, she may have walked away
2 from him when he hugged her like, you know, but none of
3 these actions were enough for these girls to take off and
4 leave at that moment. Now, I called some witnesses to
5 testify to various things. Mr. Benfield was the first
6 witness, he was barbecuing, he barbecued y'all remember how
7 long, he said four or five hours, pork roast, he was
8 slow-cooking it on his gas grill. Mr. Coker was with him,
9 neither one of them are friends of Mack's, one of them
10 lives across the street, hollers at him he says once in a
11 while. The other one doesn't even live across the street
12 from him, they didn't see anything inappropriate. Well, I
13 realize they're not watching every second, that's not the
14 purpose of their testimony. They were out there, though,
15 they were out there and why in the world would someone do
16 something inappropriate in front of his house on the street
17 in Buffalo going down to Winter's Restaurant in plain view
18 where these gentlemen were? No, they weren't looking all
19 of the time, but it was daylight and it was out there.
20 Now, they testified that Harold was -- Harold Lawson was in
21 the house. They testified Mack was in there just a very
22 short time. Dale Guerton and Mark Coker testified next, he
23 testified to basically the same thing. They were out, they
24 both had a couple of beers. I mean, there was no question
25 of that and they didn't deny that. All they are testifying

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1 to is to what they saw or didn't see. Dale Coker gets up
2 there and testifies, he's his neighbor, he was cutting
3 grass there for awhile when this was going on, him and his
4 wife go to Wal-Mart, tells Mack, "You really don't need to
5 have these children out here playing with the go cart out
6 in the road." But Mack, for whatever reason, let's the
7 children keep on going. He said he saw the children leave
8 when they left and finally finished riding the go cart, he
9 saw him walk up to the houses and go up there. He didn't
10 see them run up there and panic or something like that,
11 they walked up there. No, he didn't see anybody in her
12 house, he didn't see any touching. And, of course, you can
13 argue whether at times he didn't see, of course there's
14 times he didn't see. But there were times out there when
15 he was cutting grass he was out there. The two boys,
16 S.D. and Tyler, were out there working on the lawn mower,
17 they knew the girls, they were watching what was going on
18 some of the time, not all of the time. One of them
19 indicated either one of the girls asked for either beer or
20 cigarettes or both of them, I can't remember which exactly
21 now, and Mack says, "No," and pushes her and says, "No, I'm
22 not going to do that." Ashley, his daughter, testified.
23 All she testified was the little bit she knew she had told
24 her daddy he simply shouldn't be letting them ride that
25 moped and one of the girls, I forget the word it was, one

1 of those I'm mad at you looks but we're having fun riding
2 go carts out there. Harold Lawson testified -- and
3 Mr. Harold is the last witness that testified, he was the
4 older gentlemen, he had a little bit of difficulty walking
5 down the aisle. He testified -- he's explained some of the
6 go cart, what's going on with the go cart. If I remember
7 right I think he's the one that told us why Mack was
8 actually having to go out there and start this up for them
9 every time is because it was the wrong type of gas and
10 there was some mechanical thing, and I'm not a mechanical
11 person at all, I can't remember what it was, there was some
12 reason that Mack had to keep doing that. And he watched it
13 for a little bit, basically sounds like he got tired of
14 watching children ride up and down the road and went inside
15 to read. And when asked, no, he doesn't remember because
16 he doesn't know he was going to be called some time to say
17 what he was reading. He knows he went inside, went to the
18 table I showed you and was reading his newspaper, his
19 magazine, whatever it is and nothing happened in the house,
20 nothing happened in the bathroom. Well, why in the world
21 would anyone try anything in the house of his uncle? I ask
22 y'all to use your common sense and to think this thing
23 through, whether the State has proven beyond a reasonable
24 doubt that Mack has committed a lewd act on these two
25 girls. I can see very easily where you see he did

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1 something inappropriate, but the question is whether he
2 committed a lewd act upon these minors. And I would submit
3 when you look at the evidence and hold the State to the
4 burden you will find a reasonable doubt and you will come
5 back with a verdict of not guilty, and on both counts.
6 Thank you.

7 MR. KINKARD: Good afternoon, ladies and gentleman. I
8 think that every story -- fictional story, even a
9 non-fictional story like we have here, one that happened to
10 ^{Minor 2} and ^{Minor 1} back on July 19th of 2003 ought to have
11 a theme, something to tie it all together and bring
12 everything close in together. And I think if I had to come
13 up with a theme about what this case is about I would call
14 it breach of trust. I'm not talking about the breach of
15 trust that you and I know about. I'm talking about a
16 higher kind of breach of trust, I'm talk about the moral
17 breach of trust. I'm talking about the kind of breach of
18 trust that exists or ought to exist between every adult and
19 every child, certainly between a parent and child, school
20 teacher and small pupil, little league coach and ball
21 player, and even in this case the trust that should have
22 existed on that July 19th day, July 19, 2003 day between
23 Mr. Malpass and those young children who came over to his
24 house. And I think that really this kind of breach of
25 trust is the worst kind of breach of trust and is a theme

1 for this case because it involves the loss of innocence.
2 What I would like to do now is take a few moments to review
3 with you the State's evidence that we put up in the trial
4 and tell you what I mean and kind of compare that with what
5 the defense put up. First all, we have these young
6 children, ^{Minor 2} and ^{Minor 1} and little brother, ^{S.M.}
7 and ^{J.L.} and ^{A.F.} they were all playing there with ^{J.L.}
8 they have his bike, they're going down the street, riding
9 down that hill to be daredevils. They got where Mack is
10 out there in the front of his house near that hill like the
11 old preverbal bag of candy a long time ago, he's got the go
12 cart, that is his lure. He lures those children over to
13 his house. "Y'all want to ride my go cart?" Sure, that's
14 attractive to young children. So they go over to his house
15 and for the next several hours, two hours, three hours, I'm
16 not exactly sure of the time, I think Mr. Aul seemed to
17 make a point on his cross examination that nobody was sure
18 of the exact time. These are small children, it's the
19 summertime, I dare say not one of them had a watch on and
20 could careless about what time it was. But it was two
21 hours, two and a half hours, something like that. The next
22 period of time Mr. Malpass begins to -- he kind of makes
23 his rounds with these children. He's drinking, by his own
24 statement he's drinking, by the testimony of the witnesses
25 he's been drinking. He starts out with ^{Minor 2} and he

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1 licks her foot, she burns it on the hot manifold of the go
2 cart. I don't care what Mr. Aul says, if that's not a lewd
3 act on a minor I don't know what it is when you lick -- I'm
4 not talking about a kiss, we've already mentioned that
5 before, but he licks that foot. He's not her grandfather,
6 he's not her uncle, he's not her dad, she doesn't even know
7 him. He takes it upon himself to lick her foot and she
8 doesn't like it. She testified she made a face and made
9 some kind of yuck sound and moved away. Of course she did,
10 it's a lewd act on a minor, absolutely it is. Well, that's
11 the first incident we have. Then we've got Mr. Malpass
12 somehow he -- ^{Minor 2} needs to use the bathroom so he
13 follows them into the bathroom, ^{Minor 1} goes in there and
14 there's testimony that he jiggles on the door somehow and
15 ^{Minor 2} slams the door, there's that kind of testimony.
16 Then after that, after that happens they all come outside,
17 and then the next thing we hear is that Mr. Malpass is over
18 there by that pickup truck of his with the defendant -- or
19 with the -- ^{Minor 1} and ^{Minor 2} and they testified that he
20 puts his arms around them individually one at a time on two
21 different occasions and rubs them and touches them on the
22 hip and the buttocks area. And he also manages to tell
23 ^{Minor 2} by the way, you've got pretty panties. If that
24 isn't a lewd act I don't know what is. Then we've got a
25 situation where he goes up to ^{A.F.} and asks her if she

1 will sell her body to him for \$200. She says, "No."
2 "Higher?" "No." Then there's also testimony -- and I need
3 to refer to my notes, just bear with me -- I think those
4 are the key points that happened that afternoon, the
5 totality of the circumstances of the defendant,
6 Mr. Malpass, with those young children. Now, of course,
7 the defense puts up about six witnesses and I would like to
8 kind of review that testimony with you a little bit. First
9 we hear from Mr. Benfield, Leonard Benfield and Mr. Mark
10 Coker and they both admit that they're up on the porch
11 across the street cooking a roast for four or five hours
12 and they both admit they're not out there the entire time
13 looking across the street watching everything, they're
14 going into the house several times to use the bathroom or
15 do whatever they need to do. Okay. They admit that. They
16 also said that there were -- they said they saw two girls
17 and two boys, there were three girls and two boys. And
18 Leonard says the defendant only goes in the house a second,
19 I think that's what Leonard said. Then you have got
20 Mr. Dale Guerton, I hope I pronounce that right, he says
21 he's cutting grass for 15 or 20 minutes and then he has to
22 go to Wal-Mart and he's gone for about 45 minutes to an
23 hour, so he doesn't see a whole lot, he's not there the
24 whole time. Then ^{S.D.} and ^{T.D.}, they get on
25 the stand and testify. ^{T.D.} couldn't recall if he

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1 went to Wal-Mart or not. S.D. says the defendant went to
2 the bathroom for 30 seconds. I am going to give a military
3 hack for 30 seconds is up. I will start the hack right
4 now. That's 30 seconds. Then you've got Ashley Malpass
5 who gets up and testified. Ashley is the defendant's
6 daughter, of course she's going to remember things that are
7 favorable to her father, that stands to reason. And then
8 she says that there were 12 or 13 kids out there, she said
9 12 or 13 kids. No other witness said the were 12 or 13
10 kids out there. Then you've got Mr. Lawson who gets up
11 there and says that he would have known if the defendant
12 was drunk and the defendant wasn't drunk. Well, ladies and
13 gentlemen, the defendant says in his own statement he was
14 drunk and even blacked out. Mr. Lawson says he never saw
15 the defendant go into the house, and yet the defendant says
16 in his own statement he went in the house to get the water
17 for the girls. You will have that in evidence. The
18 situation we have here, ladies and gentlemen, is not only
19 due to the defendant's witnesses, not only are they
20 inconsistent with each other but they're also inconsistent
21 with the defendant's own statement, that's the situation we
22 have in this case. I have got some final thoughts for you.
23 I want to remind you again, and I don't want to beat a dead
24 horse and the Judge is the sole authority on the law in
25 this case and he will tell you what the law is. But lewd

1 act on a minor is when somebody willfully commits or
2 attempts to commit a lewd act on any part -- on the body or
3 any part of the body of a child who is a minor. It doesn't
4 say on the vagina, it doesn't say it has to be the breast,
5 it's on the body or any part of the body, that is the
6 definition of a lewd act. I also want you to consider when
7 you go into the jury room the totality of the
8 circumstances, the events that happened during those two or
9 three hours, whatever it was, the alcohol that was being
10 used by the defendant, different things that happened,
11 comments that he made. Look at all of that, of the
12 totality of those circumstances and you make a
13 determination of what happened that day with the defendant
14 and what the defendant was trying to do or not trying to
15 do. I also want you to look at the victims in this case.
16 You know, it took a lot of courage for them to come into
17 this courtroom today, this big cold courtroom in front of
18 the judge with a black robe on and law enforcement officers
19 with guns and 12 people sitting in the box and they came up
20 here, they swore, they took a solemn oath to tell the truth
21 and got on the stand under direct examination and cross
22 examination, and Mr. Aul was very nice with them, I
23 certainly appreciate that, he's a fine gentleman. But it
24 took a lot of courage for them to come in this courtroom to
25 testify to tell the truth. Why would anybody want to do it

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1 just for fun and accuse somebody of a lewd act on a minor
2 so we get to go to court and testify? I don't think so,
3 that doesn't make sense to me at all. There was another
4 comment that struck me during the direct testimony of
5 Ashley Malpass. She said that ^{A.F.} got mad at her about
6 maybe having to get off that go cart or something like, she
7 shouldn't be riding down the street and she gave Ashley a
8 dirty look or looks that could kill or some kind of look
9 like that. Well, if ^{A.F.} was so mad and so forth like
10 that, then why didn't she make up a story too? Why didn't
11 she get in on the act and make herself a victim along with
12 ^{Minor 1} or ^{Minor 2} She's telling the truth. Those are
13 the key points that I wanted to cover with you, ladies and
14 gentlemen, in my closing statement. Let me just tell you
15 in conclusion that I think that this case, as I told you,
16 is about breach of trust and it's also about lost
17 innocence. There's not a thing that I or you or anybody
18 else could do to ever bring that innocence back. I hope
19 that you will go in there and honestly and sincerely from
20 within consider all of the evidence for both the State and
21 the defendant and return a verdict of guilty against Mr.
22 Malpass, and hopefully that will at least bring some
23 closure to these young children. Thank you very much.

24 THE COURT: Mr. Foreman. ladies and gentlemen of the
25 jury, you've heard the final arguments from counsel and it

1 is now time for me to charge and instruct the law to you
2 that applies to the issues in this case. The defendant is
3 charged in this case with two counts of lewd act upon a
4 child under the age of 16. To these charges the defendant
5 has pled not guilty which places upon the State the burden
6 of proving the defendant guilty. A person charged with a
7 criminal offense in South Carolina is never required to
8 prove himself or herself innocent. I charge you that it is
9 a vital important rule of law that a defendant in a
10 criminal trial no matter how great or serious may be the
11 offense with which he is charged must always be presumed
12 innocent until his guilt has been proved beyond a
13 reasonable doubt. This presumption of innocence remains
14 with the defendant and at all times throughout the trial,
15 and it is only removed when and if the State has proved
16 guilt beyond a reasonable doubt. For it is your solum
17 duty, ladies and gentlemen, if not clearly convinced of
18 guilt beyond a reasonable doubt to the contrary to find the
19 defendant not guilty. So the State has the burden of
20 proving the defendant guilty beyond a reasonable doubt.
21 Some of you may have served as jurors in civil cases where
22 you were told that it is only necessary to prove the fact
23 is more likely true than not such as by the greater weight
24 or preponderance of the evidence. However in criminal
25 cases the State's proof must be more powerful than that, it

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1 must be beyond a reasonable doubt. Now, ladies and
2 gentlemen, proof beyond a reasonable doubt is proof that
3 leaves you firmly convinced of the defendant's guilt.
4 There are very few things in this world that we know with
5 absolute certainty, and in criminal cases the law does not
6 require proof that overcomes every possible doubt. A
7 reasonable doubt may also be described as the kind of doubt
8 that would cause a reasonable person to hesitate to act.
9 If you have such a doubt as to the guilt of the defendant
10 then he would be entitled to a verdict of not guilty.
11 Reasonable doubt may arise from evidence which is in the
12 case and from the absence or lack of evidence in the case.
13 If based on your consideration of the evidence you are
14 firmly convinced that the defendant is guilty of the crimes
15 charged you must find him guilty. If, on the other hand,
16 you think there is a real possibility that he is not
17 guilty, you must give him the benefit of the doubt and find
18 him not guilty. You alone must make the determination of
19 whether or not reasonable doubt exists as to the guilt of
20 the defendant. Mr. Foreman, ladies and gentlemen of the
21 jury, I instruct you now and emphasize to you that the fact
22 that the defendant did not testify in his own behalf in
23 this trial is not a factor to be considered by you in any
24 way in your deliberations. You must not consider the fact
25 that the defendant has chosen not to testify when you

1 determine the guilt or the innocence of the defendant. It
2 must not be considered by you in any manner whatsoever
3 either against or for the defendant. A defendant has the
4 constitutional right to remain silent. The assertion of
5 that constitutional right cannot be and must not be
6 considered by you in your deliberations. Under your oath
7 you are to reach no inference and draw no conclusion
8 whatsoever from the fact that the defendant in this case
9 did not testify. The fact that the defendant did not
10 testify should not even be discussed in your jury room.
11 The burden of proof as I have stated to you is upon the
12 State. It is not the burden of the accused to prove his
13 innocence. The burden of proof remains upon the State to
14 prove guilt beyond a reasonable doubt. Again, I emphasize
15 that the fact that the defendant did not testify is not a
16 factor to be considered by you in determining the guilt or
17 the innocence of the defendant or in any other aspect of
18 your deliberations. Mr. Foreman, ladies and gentlemen of
19 the jury, under the Constitution of South Carolina you are
20 the finders of facts in this case. I do not have the right
21 to pass upon the facts or even to express any opinion I
22 might have as to the facts, nor may I suggest in any way
23 what I may think about the guilt or innocence of the
24 defendant. You should form no opinion in that regard from
25 anything I may have said or any ruling that I have made

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1 during the course of the trial. As the sole judges of the
2 facts of this case you are also necessarily the sole judges
3 of the credibility or believability of each of the
4 witnesses that have testified during the course of the
5 trial. Now, there are a number of factors which you may
6 consider in arriving at your assessment as to a particular
7 witness' credibility or believability. Some factors I'm
8 going to list for you and should you think of other factors
9 that you believe also ought to be considered when you go
10 back into your jury room on the question of credibility,
11 then you should consider those factors as well. But you
12 may consider the demeanor of a witness from the witness
13 stand. What was that witness' manner or appearance? Was
14 the witness straight forward in answering the questions or
15 hesitant in responding to the questions? Simply put, do
16 you believe the witness was telling the truth or not
17 telling the truth? Do you believe the witness knew of what
18 that witness testified or did not know of what that witness
19 testified? You may consider whether or not the testimony
20 of a witness is consistent or inconsistent with that
21 witness' own testimony, or with other testimony or evidence
22 presented during the course of the trial. You may also
23 consider how the witness came to know the facts to which he
24 or she testified. You may consider the opportunity that a
25 witness had to observe or hear, that is to perceive the

1 existence of a fact by means of their senses. You may also
2 consider whether or not a witness is biased or prejudiced,
3 that simply means do you find that a particular witness has
4 some reason to come into court and testify one way or
5 another to help or hurt one side or the other. You may
6 also consider whether or not the testimony of a witness was
7 strengthened or weakened by other testimony or other
8 evidence presented during the course of the trial. Now,
9 you as the finders of the facts in this case and you as the
10 judges of the credibility or believability of each of the
11 witnesses that have testified may believe as much or as
12 little of what a witness testifies to as you deem
13 appropriate. You may believe all of what a witness says,
14 you may believe none of what a witness says, or you may
15 believe only part of what a witness says. You may believe
16 one witness as against several, or several as against one.
17 Whatever your good judgment and common sense tells you is
18 the most believable testimony is the testimony that you
19 should accept and reject that testimony which you find not
20 to be credible or believable. Mr. Foreman, ladies and
21 gentlemen of the jury, I charge you with regard to
22 evidence. While there are various forms of the evidence
23 such as testimony or photographs or documents or some other
24 physical exhibits which might be introduced during the
25 course of a trial, there are only two types of evidence,

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1 and either or both of those types of evidence may be used
2 to prove a fact or issue. There is direct evidence and
3 circumstantial evidence. Direct evidence is the testimony
4 of a person or persons who have perceived the existence of
5 a fact by means of their senses, as where a person views
6 the commission of an act and then comes into court and
7 testifies as to what he or she saw. Circumstantial
8 evidence, on the other hand, is proof of other fact or
9 facts which taken into singularly or collectively prove the
10 existence of some other fact as a necessary consequence,
11 that is by inference. The commission of a criminal offense
12 may be proved by direct evidence or circumstantial or a
13 combination of those two types of evidence. Now, to the
14 extent that the State relies upon evidence which is
15 circumstantial in nature, they must prove all of the
16 circumstances relied upon beyond a reasonable doubt. You
17 may not convict the defendant based upon circumstantial
18 evidence alone unless every circumstance relied upon by the
19 State is proven beyond a reasonable doubt and all of the
20 circumstances so proven are consistent with each other and
21 taken together point conclusively to the guilt of the
22 accused to the exclusion of every other reasonable
23 explanation. Mr. Foreman, ladies and gentlemen of the
24 jury, the same constitution that makes you the finders of
25 the facts makes me the sole and only instructor in the law.

1 You must accept as correct the law that I charge and apply
2 to the law the evidence that you find and reach your
3 verdict and put aside any conceptions that you may have had
4 as to the law before coming here today and accept the law
5 as I instruct it to be. You, for purposes of your duty as
6 jurors today, should not be concerned about what the law
7 ought to be, but what I charge you the law is now in this
8 state. Mr. Foreman, ladies and gentlemen of the jury, I
9 charge you with regard to criminal intent. Criminal intent
10 is a necessary element of each crime that must be proved by
11 the State beyond a reasonable doubt. Criminal intent is
12 always a matter that must be determined by the jury from
13 the circumstances surrounding the situation. There is no
14 way to prove intent to a mathematical certainty, there is
15 no way that medical science can dissect a person's brain
16 and to determine what he had in mind. So the law says that
17 criminal intent may be inferred from the circumstances
18 shown to have existed. This is how the jury makes a
19 determination of whether or not the element requiring
20 intent is present. Criminal intent is a state of mind
21 which operated jointly with an act is the commission of a
22 crime. Criminal intent is a mental state, a conscious
23 wrongdoing. So it is up to you, the jury, to determine
24 what the defendant intended to do based on the
25 circumstances shown to have existed. I tell you that the

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1 State must prove criminal intent beyond a reasonable doubt
2 just as the State must prove every element beyond a
3 reasonable doubt as I previously explained to you. It is
4 not necessary to establish intent by direct and positive
5 evidence, but intent may be established by inference in the
6 same way as any other fact by taking into consideration the
7 acts of the parties and all of the facts and circumstances
8 of the case. While the State may prove motive, it's
9 unnecessary that the State do so, however the State must
10 prove intent. Mr. Foreman, ladies and gentlemen of the
11 jury, I charge you voluntary intoxication is never an
12 excuse for intent of a crime. Regardless of whether the
13 crime is involving general or a specific intent a person
14 who voluntarily renders himself intoxicated is no less
15 responsible for his acts while in such condition. If one
16 voluntarily drinks intoxicating liquors, wine or beer, and
17 becomes intoxicated to whatever degree, if while in that
18 condition commits an act which would be a crime that had
19 been committed by a sober person, the fact of drunkennesses
20 would not relieve the intoxicated person from
21 responsibility. I charge you now as to the law on lewd act
22 upon a minor. Pursuant to section 16-15-140 of the South
23 Carolina Code of Laws 1946 as amended, it is unlawful for
24 any person over the age of 14 years to willfully and lewdly
25 commit or attempt any lewd or lascivious act upon or with

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1 the body or its parts of a child under the age of 16 years
2 with the intent of arousing, appealing to or gratifying the
3 lust or passion or sexual desires of such person or the
4 child. A person acts willfully when he acts voluntarily
5 and intentionally with a specific intent to do something
6 the law forbids, that is to say he acts with a bad purpose
7 either to disobey or to disregard the law. A lewd act is
8 one that is obscene, lustful, indecent, lecherous or
9 wanton. A lascivious act is one which is lewd, indecent,
10 obscene or tends to excite, lust or deprave the morals in
11 respect to sexual relations. Mr. Foreman, ladies and
12 gentlemen of the jury, I instruct you that you are not to
13 take into account the fact that the accused has been
14 charged in more than one indictment. The reason for this
15 is that the accused is entitled to a fair and impartial
16 determination on each indictment based upon your
17 determination of the evidence on each separate indictment.
18 The accused is not to be prejudiced by the fact that there
19 is more than one pending charge against him. Mr. Foreman,
20 ladies and gentlemen of the jury, nothing that I may have
21 said or done during the course of this trial has been in
22 any way intended to express or suggest a view in the case
23 or an opinion as to the facts, the weight of the evidence
24 or the credibility of the witnesses. If any of my actions
25 or words have seemed to so indicate you will disregard such

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1 and form your own opinion as to these matters. You've been
2 selected as fair and impartial jurors sworn to impartially
3 try and to determine the facts of this case, and when you
4 comply with your oath to do so then no one will have a
5 right to criticize your verdict and you will have fully
6 discharged your duty as jurors. You ought to decide this
7 case according to the testimony that you've heard from the
8 lips of the sworn witnesses, along with other evidence
9 introduced during the course of the trial. I charge you
10 that as jurors you must decide the issues in this
11 proceeding without bias and without prejudice to any party
12 you cannot allow yourself to be governed by sympathy, by
13 prejudice, by passion, by public opinion or any other
14 arbitrary factor. Both the State and the defendant have
15 the right to expect that each of you will carefully and
16 impartially consider all of the evidence in the case and
17 that you will follow the law as I have explained it to you
18 Mr. Foreman, I have prepared for your use in the jury room
19 two verdict forms in this case, one as to each of the two
20 separate charges. And on the verdict form I have
21 designated which charge is which, we have the indictment
22 number on here. But one we have put up at the top under
23 the word verdict and the indictment number the name of the
24 minor who was involved in that particular charge who was
25 named in that particular indictment. And in this case this

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1 one says up at the top in parenthesis ^{Minor 2} and
2 the two possible verdicts that appear on the verdict form
3 are, "We, the jury, find the defendant guilty of committing
4 a lewd act upon a child under the age of 16 years." And
5 the second possible verdict that appears on the verdict
6 form is "We, the jury, find the defendant not guilty." The
7 same is the other verdict form shows at the top, ^{Minor 1}
8 and that's how you can distinguish between the two
9 when you begin your deliberations and you have the same two
10 possible verdicts which appear on that verdict form and
11 they appear in the same order. Now, let me say to you that
12 in preparing the verdict forms I have to put the possible
13 verdicts on the verdict form in some order. I do it the
14 same way every time. The way the possible verdicts appear
15 on the verdict form means absolutely nothing and you should
16 infer nothing from it. What you should do is deliberate as
17 to each of these charges separately and make a separate
18 finding as to each charge. Mr. Foreman, once you have
19 reached a unanimous verdict, and your verdict does have to
20 be unanimous, all 12 jurors must agree on the verdict which
21 the foreperson is authorized to sign as to each of these
22 separate charges, again, it has to be unanimous. Once a
23 unanimous verdict is reached by the jury after
24 deliberations then you would simply go to the verdict form,
25 select the verdict on the verdict form which corresponds to

1 the verdict the jury has reached, the unanimous verdict the
2 jury has reached, you would simply then put a check mark by
3 that particular verdict on the verdict form, sign your name
4 on the line above the word foreperson's signature, date it,
5 knock on the door and let the bailiff know you have reached
6 a verdict and once you've done that as to both of these
7 particular charges -- and again, you are to make a separate
8 finding as to each charge, once you've done that then you
9 will knock on the door, let the bailiff know you have
10 reached a verdict, he will let me know and we will bring
11 you back in to receive those verdicts. Now, I charge you,
12 Mr. Foreman, that once you begin your deliberations that
13 you maintain some order in those deliberations, that
14 everyone who wishes to be heard and participate in those
15 deliberations be allowed to do so. If for any reason any
16 members of the jury panel take a break from the
17 deliberations, all should take a break. By that I mean all
18 12 jurors should be present and deliberating when the
19 deliberations are going on. All right, Mr. Foreman, ladies
20 and gentlemen of the jury, I'm going to ask you if you will
21 at this time to retire to the jury room but do not yet
22 begin your deliberations. I have to give counsel an
23 opportunity to request additional instructions on the law.
24 If additional instructions are requested and I deem them
25 necessary I will bring you back out and give you those

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1 additional instructions. It follows that you should not
2 begin deliberating until we've made sure all instructions
3 are complete. If no additional instructions are necessary
4 I will send to you by means of the bailiff the verdict
5 forms, any exhibits that have been admitted into the record
6 and instructions to begin your deliberations. Please do
7 not begin deliberating until you get that instruction. I
8 will ask you to retire to the jury room at this time, all
9 except the two alternates. Now, I will ask the alternates
10 at this time not to go into the jury room but wait just
11 outside the courtroom door here for further instructions,
12 but again, do not go into the jury room at this time.
13 Thank you.

14 (The jury left the courtroom.)

15 THE COURT: Any exceptions or additional requests to
16 charge by the State?

17 MR. KINKARD: No exceptions or objections from the
18 State, Your Honor.

19 THE COURT: From the defense?

20 MR. AUL: No, sir, Your Honor.

21 (The jury began deliberations and returned with a
22 Question.)

23 THE COURT: Mr. Foreman, ladies and gentlemen, I have
24 your note back in which you asked me to explain a lewd act.
25 I will remind you, of course, you are the finders of facts

1 in this case, you have to decide what are the facts and
2 apply those to the law as I give it to you in determining
3 in your deliberations your verdict. So you recall the
4 facts, and, of course, I don't go into the facts of the
5 case. I'm going to recharge you on the law, so listen
6 carefully again as I go through the law on those two lewd
7 acts upon a minor. I charged you before that section
8 16-15-140 of the 1976 Code of Laws for South Carolina as
9 amended, provides that it is unlawful for any person over
10 the age of 16 years to willfully and lewdly or attempt any
11 lewd or lascivious act upon or with the body or its parts
12 of a child under the age of 16 years with the intent of
13 arousing, appealing to or gratifying the lust or passions
14 or sexual desires of such person or of the child. A person
15 acts willfully when he acts voluntarily and intentionally
16 with the specific intent to do something the law forbids,
17 that is to say he acted with bad purpose either to disobey
18 or disregard the law. A lewd act is defined as one that is
19 obscene, lustful, indecent, lecherous or wanton. A
20 lascivious act is defined as one which is lewd, indecent,
21 obscene or tends to excite lust or deprave the morals in
22 respect to sexual relations. Now, do you need me to
23 recharge any part of that? Okay. I'll ask you then to
24 please retire to the jury room and resume your
25 deliberations.

JURY VERDICT

1 (The jury left the courtroom.)

2 THE COURT: Any exceptions from the State?

3 MR. KINKARD: Not from the State, Your Honor.

4 THE COURT: From the defense?

5 MR. AUL: None, Your Honor.

6 (The jury returned with a verdict.)

7 THE COURT: Mr. Foreman, ladies and gentlemen of the
8 jury, have you reached a unanimous verdict in the two
9 cases?

10 THE JUROR: Yes, we have.

11 THE COURT: Would you please hand the verdict forms up
12 to the bailiff? If the Clerk will please publish the
13 verdict.

14 THE CLERK: Docket number 2003-773, the State vs.
15 Donnie Mack Malpass, we, the jury, find the defendant not
16 guilty. Richard Cobb, foreperson. Docket number 2003-772,
17 we, the jury, find the defendant guilty of committing a
18 lewd act upon a child under the age of 16 years old.
19 Richard S. Cobb, foreperson. If this is your verdict
20 please raise your right hand. All raised in the
21 affirmative.

22 THE COURT: Any questions for the jury panel from the
23 State?

24 MS. COLLINS: Not from the State, Your Honor.

25 THE COURT: From the defense?

1 MR. AUL: No, sir, Your Honor.

2 (The jury was dismissed.)

3 THE COURT: I will hear from the State first and then
4 the defendant.

5 MS. COLLINS: Yes, Your Honor. At this time I would
6 hand up the two South Carolina Victim Impact Statements,
7 which have been completed by the parents of both of these
8 young ladies. While I realize that, of course, the
9 conviction is for one indictment, since both of these young
10 girls testified I am handing up both of those. In regard
11 to the defendant's prior record, Your Honor. In 1977 he
12 was convicted of two separate cases of public drunk, in
13 April and June of '77. In 1978 resisting arrest and open
14 container. In 1979 breach of the peace. In 1980
15 possession of open container. May of 1981 driving under
16 the influence second offense is how it is delineated,
17 although I don't have an indication of when the first was.
18 July of 1981, DUI third offense, failure to stop blue
19 light. October of 1998 a conviction for possession with
20 intent to distribute scheduled one, two or three drugs
21 first offense, for which he received a sentence of five
22 years and it looks like suspended on five years probation.
23 October of '98 also pled to lewd act upon a child, the
24 sentence was 10 years suspended three months house arrest
25 followed by five years probation. I would note, Your

SENTENCING HEARING

1 Honor, at the time of these charges he was still on
2 probation for lewd act upon a child, although subsequently
3 he did finish it before this trial date so he is not on
4 probation at this time. December of 2000 public disorderly
5 conduct and open container, and August of 2002 DUI first
6 offense, I guess that's the reason it is considered a first
7 is because of the 10 year period that they consider priors.
8 Your Honor, it would be the State's position that clearly
9 Mr. Malpass has two issues that he, as an adult, needs to
10 deal with. One, of course, is the substance abuse issue
11 that appears to be affecting other actions on his behalf.
12 And the other the State would contend is the
13 inappropriateness of his actions toward young females. On
14 behalf of the children of this community, particularly the
15 victim in this case for which he has been convicted,
16 against the fact that he was at the time of this offense on
17 probation for lewd act upon a child, we would submit should
18 certainly have encouraged him not only to stay sober but
19 also to stay away from children and he did not do either.
20 We would submit, Your Honor, that this conviction requires
21 a significant sentence of prison time. I do note that the
22 touching could have been more egregious in regard he could
23 have touched them in a more private area of their body, he
24 also could have touched underneath the clothing and I do
25 recognize that, that the touching could have been more

SENTENCING HEARING

1 egregious, for whatever weight the Court wishes to give
2 that at sentencing I will rely on your wisdom for that.
3 But, you know, the girls not only suffered at the actions
4 and they did immediately report it and the victim in this
5 case again for which the conviction was did come and did
6 testify, and so it's an affect on a child that goes beyond
7 the moment of the touching. And again, we just trust in
8 your wisdom in giving what you feel is the appropriate
9 sentence. But we would submit that due to his prior record
10 and the fact that he was on probation at the time that he
11 be given a significant prison sentence. Thank you. And at
12 this time I think the solicitor would like to be heard in
13 regard to that and I will see if the victims wanted to
14 address the Court.

15 MR. KINKARD: I have nothing else to add to that, Your
16 Honor.

17 MS. COLLINS: They've indicated they do not wish to
18 make independent remarks, and we thank you, Your Honor, for
19 your consideration of our position.

20 THE COURT: Counsel?

21 MR. AUL: Your Honor, frankly I'm a little -- the
22 verdict and the girl that he was found guilty I would have
23 anticipated may have been the opposite from the girl they
24 found him guilty of. If I read this correctly is the young
25 girl that he licked the foot of and is accused of touching

1 one time, Your Honor, as opposed to the other girl that he
2 was accused of touching numerous times, Your Honor. So I
3 guess I have some concern in my mind whether the licking of
4 the foot was what was determined to be the lewd act on the
5 minor. And there's no way of telling, that's just -- in my
6 mind I'm sitting there -- the verdict just shocks me the
7 way it went, Your Honor. Your Honor, it is obvious that
8 Mack has a drinking problem of some sort, you know, there
9 is no question about that. His record reads public drunk,
10 DUI, there is no question he was drinking when this
11 incident occurred, Your Honor. Your Honor, Mack was
12 arrested either July 21st or July 22nd, I don't recall the
13 exact date right now, Your Honor. He has been in jail
14 since that time, Your Honor. Your Honor -- and I realize
15 he has a past conviction on his record for this, Your
16 Honor, and he had explained his pleading to that, Your
17 Honor. Your Honor, we would ask that the Court consider
18 that this was not -- you know, the solicitor indicated it
19 was not an egregious act, as far as committing a lewd act
20 on a minor it could have been much more egregious. We do
21 not -- we realize anytime you touch a minor and the jury
22 finds him guilty we have to abide by that decision, Your
23 Honor. Your Honor, Mack -- let me just tell you a little
24 bit about Mack himself, Your Honor, when we get to what we
25 are going to ask the Court to consider. He's a 1975

1 graduate of Union High School. He was in the National
2 Guard for several years and in construction work on and off
3 for years, pipe fitter, welding. I think somebody
4 testified, too, he was a handyman type person and the
5 individual I talked to said Mack was an absolutely type to
6 give you the shirt off your back person and would do
7 anything for you. And we realize that Mack has a drinking
8 problem, Your Honor, and he has -- this incident occurred,
9 Your Honor, so obviously there is a problem that needs to
10 be dealt with in that manner. Your Honor, we would ask the
11 Court to consider giving him some sort of sentence
12 suspended down to -- we would ask for -- we would ask the
13 Court to consider the 9 months he's already served in time
14 to be enough at this point, but significant time over his
15 head requiring maybe some significant house arrest with
16 required drug and alcohol treatment or possible inpatient
17 drug and alcohol treatment. Obviously he needs some sexual
18 counseling, Your Honor, in regards to the problem that
19 appears to be there, Your Honor. Your Honor, we would just
20 ask again that the Court consider the extent of the nature.
21 One could almost interpret the evidence as this was a
22 drunk, which does not excuse the action, Your Honor, I'm
23 not saying that -- that was hugging on these girls and he
24 hugged inappropriately, Your Honor. So we would ask the
25 Court to consider some sort of sentence where the Court

1 possibly loads up the potential he could face and gives him
2 his chance to clean himself up, and realize the Court may
3 be concerned of him being dangerous so we would say any
4 extent, house arrest, whatever is necessary in that regard,
5 Your Honor, we would ask the Court to consider.

6 THE COURT: Mr. Malpass, anything you wish to say to
7 the Court?

8 THE DEFENDANT: (Shakes head no.)

9 THE COURT: Let me say I have no idea what went on the
10 in jury room and the reasons for their decision except to
11 say that I did instruct them properly to consider each case
12 separately and make a separate finding as to each. And
13 obviously there are some different facts from one to the
14 other and I would assume that they did that. And I would
15 point out that you're always a little surprised when you
16 have got two girls involved like this, some of the type
17 facts when they come back with guilty on one and not guilty
18 on the other one. But again, I think they just followed
19 the instructions of the Court. There was some additional
20 matters with regard to ^{Minor 2} and I think that's the one
21 where they found him guilty on. There was some additional
22 factors and one was, of course, the licking of the foot,
23 the comment about that she had on pretty panties, following
24 her to the bathroom and that sort of thing. But I think
25 that -- of course, the other little girl testified as to

SENTENCING HEARING

1 exact touching she saw on ^{Minor 2} and that was fondling of
2 her buttocks, coming around the side and rubbing her
3 stomach. And so based on all of that and his comments to
4 her about being a pretty girl and that sort of thing the
5 jury could have found that that was sufficient as to her,
6 maybe perhaps not as to the other little girl who was --
7 testimony was still rubbing the buttocks and the hip area
8 and around the pelvis. But in any event there was some
9 additional evidence as to ^{Minor 2} as opposed to the other
10 little girl, ^{Minor 1} So the jury made its decision and
11 followed the instructions of the Court. I would take into
12 consideration the fact that it was not egregious, we have
13 seen a lot worse cases of lewd acts and we've seen much
14 worse cases, I will agree with that. At the same time I've
15 got to consider the fact that this man was put on probation
16 for a lewd act before with another child, got through
17 probation -- I don't know how he made it through probation
18 without getting violated for this, I don't see how they
19 could have not violated him once he got charged. I think
20 he should have been served with a warrant, I don't know
21 why. That's not a criticism, I just don't know why it
22 wasn't done. I also don't know why he wasn't violated if
23 he got another DUI while he was on probation and another
24 charge. Maybe he was brought up, I don't know. But those
25 it appears to me were violations and he could have been

1 brought back before the Court on these and violated as to
2 his probation before. Why that got done, I don't know. In
3 any event he made it off probation without getting in these
4 violations or arrest warrant and a violation of probation.
5 I'm not taking that into consideration, believe me, I'm
6 not, I'm just making an observation. That has nothing to
7 do with it except to say that he did get charged and he did
8 get put on probation for the same thing and here he is
9 back -- really this happened while he was still on
10 probation before he got released from probation you are
11 back in here for the same thing again, this time as to at
12 least two little girls and making a comment to a third. So
13 I have to take that into consideration in deciding, plus I
14 go back and look at his record, back in the seventies and
15 as to his record I have to take all of that into
16 consideration as well. What I'm going to do is what I
17 think is an appropriate sentence in any event in this case.
18 I can tell you if it was a very egregious lewd act,
19 fondling private parts and that sort of thing, I wouldn't
20 hesitate to give him the 15 years, I can tell you that with
21 this record, but I'm taking into consideration the facts of
22 this case. Case number 2003-GS-44-772, Donnie Mack
23 Malpass, having been found guilty by a jury of lewd act
24 upon a child, sentence of the Court is he be committed to
25 the State Department of Corrections for a determinate term

SENTENCING HEARING

1 of 10 years, provided upon the service of five years, the
2 balance is suspended with probation for five years. The
3 Court will recommend the alcohol and drug treatment unit
4 during incarceration. The Court will give him credit for
5 the time he has served. Special conditions of the
6 probation, substance abuse counseling. He's required to
7 get sexual abuse counseling and he's required to have
8 absolutely no contact with the victims who testified in
9 this case.

10 (END OF TRIAL PROCEEDINGS.)

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1 I, the undersigned Michael C. Watkins, Official Court
2 Reporter for the Sixth Judicial Circuit of the State of
3 South Carolina, do hereby certify that the foregoing is a
4 true, accurate and complete transcript of record of the
5 proceedings had and evidence introduced in the trial of
6 the captioned case, relative to appeal, in the Court of
7 General Sessions for Union County, South Carolina, on the
8 9-10th days of March, 2004.

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

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September 19, 2009.

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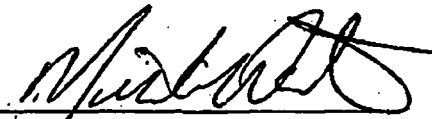
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Michael C. Watkins
Court Reporter

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

Place Union Co Jail
Date 07-22-03
Time 2:51 pm

Before we ask you any questions, you must understand your rights. ✓

You have the right to remain silent. ✓

Anything you say can be used against you in court. ✓

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. ✓

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish. ✓

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer. ✓

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me. ✓

Signed

Louis M. Mifano

Witness

James M. Shigart

Witness:

Time:

2:53 pm

UNION COUNTY SHERIFF'S OFFICE

VOLUNTARY STATEMENT

DATE 07-22-03 PLACE Union Co Jail TIME STARTED 3:06 PM

I, the undersigned, DONNIE MACK MALPASS, am _____ years of age, my date and place of

birth being the 10 day of DECEMBER 19 56 at Union Co, SC

I now live at Buffalo, SC

Before answering any questions or making any statements, Lt. JAMES M SHUGART

a person who identified himself as a DETECTIVE with Union Co Sheriff's office (52)
 duly warned and advised me, and I know and understand that I have the following rights: That I have the right to remain silent and I do not have to answer any questions or make any statements at all; that any statement I make can and will be used against me in a court of law for the offense or offenses concerning which the following statement is hereinafter made; that I have the right to consult with a lawyer of my own choice before or at anytime during any questioning or statements I make; that if I cannot afford to hire a lawyer, I may request and have a lawyer appointed for me by the proper authority, before or at anytime during any questions or statements that I make, without cost or expense to me; that I can stop answering any questions or making any statements at any time that I choose, and call for the presence of a lawyer to advise me before continuing any more questioning or making any more statements, whether or not I have already answered some questions or made some statements.

I do not want to talk to a lawyer, and I hereby knowingly and purposely waive my right to remain silent, and my right to have a lawyer present while I make the following statement to the aforesaid person, knowing that I have the right and privilege to terminate any interview at any time hereafter and have a lawyer present with me before answering any more questions or making any more statements, if I choose to do so.

I declare that the following voluntary statement is made of my own free will without promise of hope or reward, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any person or persons whomsoever.

ON 7-19-03 I WAS AT MY FRIENDS TRAILER. HIS NAME IS BLUE. I BELIEVE HIS FIRST NAME IS JAMES DM. I WAS AT HIS TRAILER FOR ABOUT 45 MINS TO AN HOUR. JAMES DM HAD A BOTTLE OF VODKA AND ASK ME IF I WANTED SOME. HE POURED ME A CUP FULL. I BELIEVE IT WAS A SIXTEEN OZ. CUP. SOME KIDS CAME BY AND THEY WERE TAKING TURNS RIDING A BICYCLE. ONE OF THEM RODE THE BICYCLE DOWN A HILL THRU MY NEIGHBORS YARD AND I MADE A STATEMENT ABOUT HER BEING A DARE-DEVIL. THE KIDS ASK ME IF THEY COULD RIDE MY GO-CART. I TOLD THEM I DIDN'T HAVE ANY METHONAL I WOULD LOOK AND SEE IF I HAD ANY GAS. I FOUND SOME GAS ON THE FRONT PORCH AND PUT IT IN THE GO-CART. THEY STARTED RIDING AND I STOOD THERE AND MADE SURE THEY RODE SAFE AND SHARED RIDING TIME. I REMEMBER GOING IN TO THE RESIDENCE AND GETTING THEM TWO GLASSES OF WATER. THEY DIDN'T COME IN. →

I have read each page of this statement consisting of 2 page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement. I have received a copy of this statement this date.

This statement was completed at 3:36 PM on the 22nd day of July 2003

WITNESS:

James M Shugart

WITNESS:

Donnie Malpass

Signature of person giving voluntary statement

SWORN to and Subscribed before me this

day of

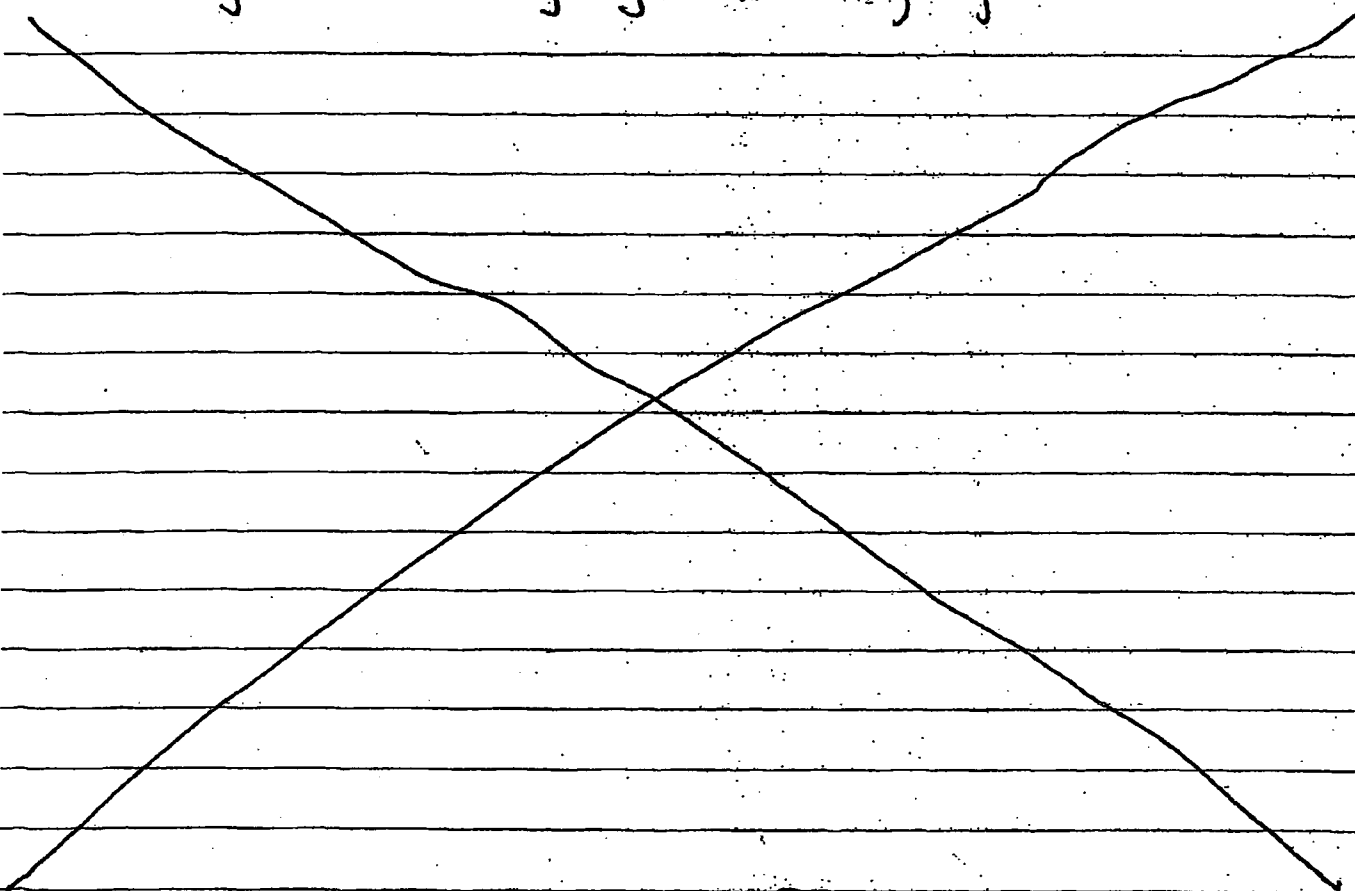
19

UNION COUNTY SHERIFF'S OFFICE

Date 07-22-03 Page No. 2STATEMENT OF: DENNIS MARK MALPASS

SOMETIME AFTER THIS I BLACKED OUT. I DON'T REMEMBER ANYTHING THAT HAPPENED AFTER THIS. DURING THIS TIME AS FAR AS I KNOW MY UNCLE HAROLD LAWSON WAS IN THE HOUSE. MY FRIEND BLUE WAS OUTSIDE WITH ME. THE NEXT THING I REMEMBER I WOKE UP LAYING ~~DOWN~~ ^{DOWN} BESIDE THE COUCH IN THE FLOOR. THIS WAS ~~THE~~ ^{THE} NEXT MORNING. MY GO-CART WAS OUTSIDE BESIDE THE PORCH. I DON'T KNOW IF IT HAPPENED IF IT DID I'M SORRY BUT I HOPE IT DIDN'T. I WISH I WOULD HAVE TOLD THEM TO WAIT UNTIL ANOTHER DAY WHEN I WASN'T DRINKING.

THIS STATEMENT WAS WRITTEN BY LT. SHUGART AT MY REQUEST AFTER BEING ADVISED OF MY RIGHTS AND SIGNING A WAIVER. DM



James M Shugart

Dennis Malpass

STATE OF SOUTH CAROLINA)

County of UNION)

IN THE COURT OF COMMON PLEAS

#164744
DONNIE MACK MALPASE)
Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

FILE FOR RECORD
2008 AUG -1 A 9:33
CLERK OF COURT
UNION, SCINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LIEBBA CORRECTION INSTITUTE
2. Name and location of Court which imposed sentence UNION County
Municipal Court 216 West Main St Union SC 29379
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) UNKNOWN 03-65-44-0772

- (b) X
- (c) X
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) ~~unknown~~ 7-19-03
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
NO
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. _____
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) Negligence of Attorney

II. State concisely and in the same order the facts which support the grounds set out in (10):

(a) trial counsel failed to ~~cross-examine~~ ^{cross-} thoroughly examine the alleged victims, counsel did no investigation, ~~nor~~ nor provided petitioner with any evidence from Discovery Motion (Brady): statements, police reports etc.)

(b) upon being sentenced petitioner requested from [trial counsel] that he wanted to appeal the conviction before leaving the courtroom; the court also failed in not making a notice of appealability.

(c) Constitution violations
6th amendment - speedy trial

(b) _____

(c) _____

10. 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 Counsel for not appearing(c) Right of Bail

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

SEE ATTACHED

(a) _____

(b) _____

(c) _____

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

(a) any petition in a State Court under South Carolina Law? NONE

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. NONE

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. NONE

ii. _____

iii. _____

iv.

(c) the disposition thereof:

i.

ii.

iii.

iv.

(d) the date of each such disposition:

i.

ii.

iii.

iv.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i.

ii.

iii.

iv.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i.

NONE

ii.

iii.

(b) the proceedings in which each ground was raised:

i.

NONE

ii.

iii.

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) NONE
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? _____
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NA

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

(a) the name and address of each attorney who represented you:

i. William D. All - Union SC 29379

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. TRIAL, preliminary HEARING

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

Reverse conviction

20. Are you now under sentence from any other court that you have not challenged?

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Union)

I, DONNIE MACK MALPASS, 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.

Donnie M. Malpass

SWORN to and subscribed before me this 1st
day of August, 2008.

Virginia L. Walker (L.S.)
Notary Public

My Commission Expires: 4/4/2011

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Domini Mack Malpass, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Domini M. Malpass
Applicant

SWORN or affirmed to and subscribed before me this

1st day of August, 2001

Debra L. Uhler
Notary Public

My Commission Expires:

4/4/2001

STATE OF SOUTH CAROLINA)

COUNTY OF UNION)

Donnie M. Malpass, #164744,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE 16TH JUDICIAL CIRCUIT
Case No.: 2008-CP-44-0269**RETURN AND MOTION TO DISMISS**

Respondent, making its Return to the application for Post-Conviction Relief filed August 7, 2008, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. The Applicant was indicted in September 2003, by the Union County Grand Jury for Lewd Act Upon A Child Under 16 (2003-GS-44-0772). William D. All, II, Esquire represented him on the charge. On March 10, 2004, Applicant proceeded to trial and was found guilty as indicted. The Honorable Lee S. Alford sentenced him to confinement for a period of ten (10) years. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein are the records of the Union County Clerk of Court regarding the subject convictions and the Applicant's records from the South Carolina Department of Corrections. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current application for post conviction relief the Applicant alleges that he is

being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel; and
2. 6th Amendment Violation.

III.

The Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (2003).

S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on March 10, 2004. The Applicant was therefore required to file his application before March 11, 2005. This Application was filed on August 7, 2008, which was four years beyond the time that the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for

failure to file within the time mandated by the Post Conviction Procedure Act.

IV.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115 at 117, 386 S.E.2d 624 at 625 (1989), *citing Strickland*.

Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *Id.* Applicant must overcome this presumption in order to receive relief. Cherry, *Id.*

Where there has been a guilty plea, the applicant must prove prejudice by showing that, but for counsel's errors, there is a reasonable probability he would not have pleaded guilty and instead would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203, 210 (1985); Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). In determining guilty plea issues, it is proper

to consider the guilty plea transcript as well as evidence at the PCR hearing. Harres v. Leeke, 282 S.C. 131, 133, 318 S.E.2d 360, 361 (1984).

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

Applicant claims an allegation of infringement upon the Applicant's constitutional rights. However, the Applicant does not explain with any specificity the grounds upon which these constitutional violations are based. The Uniform Post-Conviction Procedure Act requires the Applicant to "specifically set forth the grounds upon which the application is based." S.C. Code Ann. §17-27-50 (2003).

Before the Court will hold an evidentiary hearing, the Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). This allegation is so vague that it is impossible for the State to respond. Since the Applicant has not made the minimum *prima facie* showing, the Court should dismiss this ground for failure to comply with the Uniform Post-Conviction Procedure Act.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, Respondent moves to summarily dismiss the application because it was filed after the statute of limitations had expired.

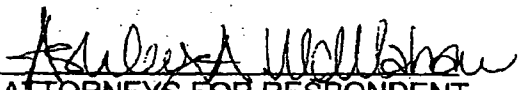
Respectfully submitted,

HENRY D. MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

ASHLEY A. McMAHAN
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

OCT. 14th, 2008

STATE OF SOUTH CAROLINA)

COUNTY OF UNION)

IN THE COURT OF COMMON PLEAS

2008-CP-44-0269

DONNIE M. MALPASS,)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

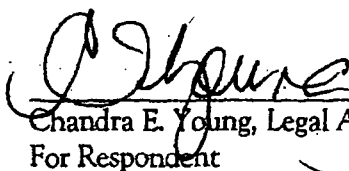
STATE OF SOUTH CAROLINA,)

Respondent.)

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return and Motion to Dismiss in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Donnie M. Malpass, 164744
 Lieber Correctional Institution
 Post Office Box 205
 Ridgeville, South Carolina 29472

DATED this 14th day of October, 2008.


 Chandra E. Young, Legal Assistant
 For Respondent

state of South Carolina

Court of Common Pleas

Donnie M. Malpass #164744

CA/no. 2008-CP-44-0269

- V -

Petitioner

opposition & Reply
to the Respondent's

State

motion to Dismiss

Respondent

Comes now Donnie M. Malpass pro-se, who respectfully lodges his opposition and reply to the Respondent's motion to dismiss the above captioned case number 2008-CP-44-0269

Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. The Applicant was indicted in September 2003, by the Union County Grand Jury for Lewd Act on a Child under 16 (2003-GS-44-0772) William D. Akh, II, Esquire represented him on the charge. On March 10, 2004, Applicant proceeded to trial and was found guilty

AS INDICATED.

The Honorable Lee S. Alford sentenced him to confinement for a period of ten (10) years. The Applicant did not appear his conviction or sentence.

Applicant's Current PCR Application

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel; And
2. 6th Amendment Violation.

Before this court are the records of the Union County Clerk of Court regarding the subject conviction, the PCR Application and the records of the South Carolina Department of Corrections.

~~Try~~ for Lewd A^t on A Child under 16 (2003-GS-44-07;
William D. Alt, II, Esquire represented him on the
charge. ON March 10, 2004, Applicant proceeded
to TRAIL AND WAS found guilty as indicated.
The Honorable Lee S. Altord sentenced him
to confinement for a period of ten(10) years.
The Applicant did not appeal his conviction
OR sentence.

Applicant's CURRENT PCB Application
IN his current application for post con-
viction relief the Applicant alleges
that he is being held in custody unlaw-
fully for the following reasons:

1. Ineffective Assistance of Counsel; and
2. 6th Amendment Violation.

Before this court ARE the records of the
Union County Clerk of Court REGARDING the
subject conviction, the PCR Application,
And the records of the South Carolina
Department of Corrections,

DISCUSSION

Petitioner objects to the summary

dismissal of his Application. When considering a motion for summary dismissal of an Application for PCR, A judge must assume the facts presented by an Applicant are true and most favorable to the Applicant.

AK-546422 v. State 328 SC 354, 363, 527

524, 742, 747 to waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the Appeal. Davis v. State 288 SC 296, 342

524 68(1986) White v. State 263 SC 110, 208 524 35(1974).

This Court has already ruled in Don

V. State 337 SC 256, 523 524 753(1999),

that the one year statute of limitations required by SC Code Ann. 17-27-45(A) does

Not Apply to Huster Appeals. See Huster

V. State 308 SC 453, 409 524 395(1991).

Furthermore if the defendant ask for

an Appeal and Counsel fails to file it,

the defendant would be entitled to a

relatod Appeal in such that the

petitioner is entitled to his 'one bite

of the Apple." Wilson v. State 559 Sd 581
at 583 (2002)

Reviewing a South Carolina Federal Case

factural identical to the case Moultra

U. S. 147 Fsupp 2d 905, The court did not

enforce the limitation period against him

At 409. Allegations that raise questions

of fact not conclusively refuted by the

Record require an evidentiary hearing

be covered. Shaper v State 279 Sc 264

305 Sd 247 (1983) Clearly there are issues

material fact in dispute that require a

hearing. Even when there is no dispute

As to evidentiary fact - but only as to

the conclusion or inference to be drawn

from them, Summary Judgment should be

denied.

STEWART V. STATE FARM Mut. Auto 341 SC 143
 533 SE2d 597 Summary Judgment is not
 appropriate when further inquiry into
 the facts of the case is desirable to
 clarify the application of law.

Middleboro Horizontal V. Montedison 320 SC
 470, 465 SE2d 765

CONCLUSION

wherefore, these are issues of
 material fact in dispute and this
 Petitioner respectfully ask that
 the Respondent motion for summary
 Judgment be denied and a evidentiary
 hearing be held pursuant to

SHARPER V. STATE 279 SC 264
 305 SE2d 247 (1983)

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF UNION
4 2012-CP-44-0327
5

6 Donnie Malpass

7 vs.

8 State of South Carolina
9

10

11 York, South Carolina

12 February 4, 2010

13 Before the Honorable Brooks P. Goldsmith
14

15 APPEARANCES

16 For the State: Jennifer Kinzeler

17 For the Applicant: Melinda Butler
18

19 Reported by: Michael C. Watkins

20 Official Court Reporter
21
22
23
24
25

1	Donnie Malpass:	4
2	William Aul:	13
3	Certificate:	14

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NO EXHIBITS

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1 MS. KINEZELER: Your Honor, may it please the Court?
2 This is the case of Donnie Malpass versus the State of South
3 Carolina, case number 2008-CP-44-0269. A brief procedural
4 history, Mr. Malpass is incarcerated in the South Carolina
5 Department of Corrections. He was indicted in September of
6 2003 for lewd act upon a child under 16. He proceeded to
7 trial on March 10th of 2004 where he was represented by
8 Mr. William Aul, he was found guilty as indicted and Judge
9 Alford sentenced him to confinement for a period of ten
10 years. Mr. Malpass didn't appeal his conviction or his
11 sentence. The State would move to dismiss any allegations
12 related to ineffective assistance of counsel as barred by
13 the statute of limitations. He had one year from the date
14 of his conviction or appeal, which he didn't appeal, to file
15 any claims he may have had against Mr. Aul, it is now 2010,
16 the applicant filed this application on August 7th of 2008,
17 he was more than four years late raising these claims. I
18 believe he may have other issues that might be appropriate
19 but any allegations with regard to ineffective assistance of
20 counsel should be dismissed.

21 MS. BUTLER: Your Honor, we actually have no objection
22 to dismissing the PCR. My understanding is we are here
23 today to see if Mr. Malpass is entitled to a direct and
24 belated appeal as Mr. Malpass had asked his trial attorney
25 to file an appeal on his behalf and thought that that appeal

1 had been filed. He found after he filed for his PCR that
2 his appeal had not been filed. Once his PCR was rejected on
3 those grounds we learned that his appeal had not been filed,
4 so we're actually here today to see if he can get his appeal
5 granted, direct belated appeal. And we would like to call
6 Mr. Malpass to the stand to testify to the fact that he did
7 request an appeal to be filed on his behalf and thought that
8 it had been filed.

9 THE COURT: Is that the State's understanding of what
10 we're doing?

11 MS. KINEZELER: Yes, Your Honor.

12 THE COURT: Okay. You can proceed.

13 MS. BUTLER: May it please the Court? We call Donnie
14 Malpass to the stand.

15 The witness, DONNIE MALPASS, was first duly
16 sworn and testified as follows, on:

17 DIRECT EXAMINATION

18 BY MS. BUTLER:

19 Q Will you state your name?

20 A Donnie Malpass.

21 Q. Where are you incarcerated at?

22 A. Kershaw Correctional Institution.

23 Q. Did you plead guilty to these charges?

24 A No.

25 Q You had a jury trial?

1 A Yes, ma'am.

2 Q And why did you decide to have a jury trial?

3 A I'm totally innocent of these charges.

4 Q Was your attorney of your jury trial Mr. Aul?

5 A Yeah.

6 Q Did you tell Mr. Aul that you were innocent of these
7 charges?

8 A Yes, I did.

9 MS. KINEZELER: Your Honor, I would object, that's not
10 related to the appeal issue with regard to his innocence or
11 guilt, that was determined by a jury. We're just here on
12 the direct appeal issue.

13 MS. BUTLER: Your Honor, if he held to his innocence
14 the whole time it would go to show he was certainly asking
15 for an appeal in the end if he would have claimed that he
16 was innocent for the entire time.

17 THE COURT: Overruled, I will allow it.

18 MS. BUTLER: Thank you, Your Honor.

19 A. May I repeat a statement that he made to me when I
20 first came to the jailhouse to talk to me about my case?

21 Q Would you like to go ahead and tell the Court that
22 statement?

23 A Yes, I would. When he approached me at the courthouse
24 prior to me going to court, he said, "First of all I want to
25 tell you right now if that was my kids I would whip your ass

1 right now." See, I didn't know at the time I could get
2 another attorney.

3 MS. KINEZELER: My objection would be to relevance,
4 Your Honor.

5 THE COURT: What's the relevance of this, Ms. Butler?
6 I'm going to sustain the objection, you may go ahead and ask
7 your next question.

8 MS. BUTLER: Thank you, Your Honor.

9 Q Did the jury, in fact, find you guilty of these
10 charges, Mr. Malpass?

11 A Yes.

12 Q And when the jury deliberated and they came back in
13 with a verdict and you heard guilty, what did you tell
14 Mr. Aul?

15 A I told him right there I wanted to appeal it. He said,
16 "Do you want to appeal it?" I said, "You're durn right I
17 want to appeal it, I shouldn't have lost this trial." And
18 he said, "Okay."

19 Q Why did you want to appeal it?

20 A Because I'm innocent.

21 Q And when did you first learn that an appeal had not
22 been filed on your behalf?

23 A Gosh, it was several months after I had been -- well,
24 actually it was about seven or eight months. I was at Broad
25 River when I found out my appeal didn't go there, or that he

1 didn't put my appeal in.

2 Q So you realized that they did not -- that Mr. Aul did
3 not file an appeal on your behalf, then what did you do?

4 A. Well, I started asking around, then about a year after
5 I had been incarcerated somebody said, "You ought to go back
6 on PCR." So I got my girlfriend to get a PCR application
7 and get my transcript taken to another attorney because I
8 didn't know anything about all of that stuff and I was under
9 the impression that he had done my PCR and that never took
10 place either.

11 Q So you thought Mr. Aul had did your appeal and had
12 appealed on your behalf for the jury trial finding of guilt.

13 A Yes.

14 MS. BUTLER: That's all of the questions I have for
15 this witness, Your Honor. Please answer any questions the
16 State has for you.

17 THE COURT: Ms. Kinzeler?

18 CROSS EXAMINATION

19 BY MS. KINEZELER:

20 Q. Hi, Mr. Malpass. I believe you just testified with
21 Ms. Butler that you learned Mr. Aul hadn't filed your notice
22 of appeal in about seven or eight months after your trial
23 was over?

24 A That's right.

25 Q And your trial was in March of 2004. So I'm just doing

1 the math, so seven or eight months afterward would have been
2 approximately April 2005, does that sound right?

3 A I guess somewhere like that.

4 Q And you filed your application on August 7th of 2008.

5 So it's your testimony today that you waited three years
6 once you knew he didn't file your notice of appeal that you
7 say you asked for?

8 A Well, I was ignorant of the law I guess you could say.
9 I didn't know until I went back to prison, I went to the law
10 library and I found out that I could get back to court on my
11 case, it wasn't until then.

12 MS. KINEZELER: Your Honor, that's all I have. Thank
13 you.

14 THE COURT: Ms. Butler?

15 MS. BUTLER: No further questions, Your Honor.

16 THE COURT: Thank you. You may step down.

17 MS. BUTLER: The applicant rests, Your Honor.

18 THE COURT: The applicant rests. Ms. Kinzeler?

19 MS. KINEZELER: Your Honor, the State would like to
20 call Mr. Aul to the stand, please.

21 The witness, WILLIAM AUL, was first duly sworn
22 and testified as follows, on:

23 DIRECT EXAMINATION

24 BY MS. KINEZELER:

25 Q State your name for the record, please.

1 A William D. Aul, II, people actually call me Bill.

2 Q Mr. Aul, how long have you been practicing criminal
3 law?

4 A I've been practicing law 26 years. I worked for the
5 general assembly for about three years and I started
6 practicing after that, so 20 something years.

7 Q Do you recall how you came involved in Mr. Malpass'
8 case? Were you appointed or retained?

9 A I was the public defender and Mr. Malpass qualified for
10 the public defender.

11 Q Going forward to Mr. Malpass' trial and the issue that
12 we're here to talk about today, did he ask you to file an
13 appeal?

14 A Can I straighten out some of the factual information
15 that hasn't been given correctly about what happened?

16 Q. Absolutely.

17 A. He was charged with two counts of lewd act to minors,
18 he went to trial. He was found guilty of one and he was
19 found not guilty of the other. He did not receive a ten
20 year sentence, he received a ten year sentence suspended
21 upon five years and then probation for five years, so he has
22 not been in prison since this event occurred. He got out of
23 prison -- he's in prison now for a probation violation of
24 this sentence and he was found not guilty of the other
25 charge. We talked after the trial about whether he wanted

1 to appeal or not and he indicated he did not want to appeal,
2 because we talked about the fact if he had an appeal he
3 could be not tried again on the one charge but on the one
4 that he was found guilty of he would be tried again and he
5 might get a more substantial sentence and he indicated that
6 he was okay with that.

7 Q So he actually told you not to file an appeal.

8 A That's what he told after we met in the back of the
9 courtroom, yes, ma'am.

10 Q Did you all have a lengthy discussion about that before
11 he told you or was it a very quick in the courtroom
12 conversation?

13 A I want to think like a five minute conversation, and
14 I'm guessing, that was a long time ago.

15 MS. KINEZELER: I believe that's all we have, Your
16 Honor. Thank you.

17 MS. BUTLER: May it please the Court?

18 CROSS EXAMINATION

19 BY MS. BUTLER:

20 Q Mr. Aul, is it your testimony that y'all discussed the
21 appeal right after the sentence was read right after
22 Mr. Malpass was found guilty?

23 A We discussed it in the back, you know, in the back of
24 the little room they have behind the courtroom. You know,
25 whether it was five minutes or 30 minutes later I don't

1 recall exactly.

2 Q After the jury had found him guilty?

3 A Yes, ma'am, after the jury found him guilty, because
4 that's the only way I knew what the sentence was.

5 Q Mr. Aul, in your experience as an attorney for a good
6 number of years, is this a crime that a reasonable person
7 would normally want to appeal from? What was his crime
8 again?

9 A Well, that's a complicated question, because
10 Mr. Malpass already had a conviction for lewd act on a minor
11 so this was not going to place him on the sex offender
12 registry anymore than he already was on the sex offender
13 registry. So when you ask that question I don't know what
14 different people would want but this was not going to put
15 him on the registry for the first time so this was not -- if
16 that was the case, yeah, I would say he would want to appeal
17 that and other people would.

18 Q So it's your testimony that Mr. Malpass was aware of
19 his right to appeal and y'all discussed that?

20 A We discussed it, yes.

21 Q And he specifically told you not to appeal?

22 A He told me no when we were in the courthouse, yes.

23 Q Did he ever tell you he was guilty of this crime during
24 your representation of him?

25 A He said he did not remember what happened. He gave a

1 statement to the police, "I don't know what happened. I
2 hope I didn't do it," that was his statement to the police.

3 Q So he did maintain his innocence throughout.

4 A No. He said what I just said he said. He said, "I
5 hope I didn't do it. I don't know whether I did, I hope I
6 didn't do it," is what he told the police.

7 Q But he did go to a jury trial on it, correct?

8 A Yes, ma'am. He was found not guilty of one and found
9 guilty of the other.

10 Q And did he sign anything stating that he didn't want an
11 appeal?

12 A No, ma'am.

13 MS. BUTLER: That's all of the questions I have.

14 MS. KINEZELER: Nothing further from the State, Your
15 Honor.

16 THE COURT: Thank you, sir, you may step down.

17 MS. KINEZELER: The State rests, Your Honor.

18 THE COURT: State rests. Ms. Butler?

19 MS. BUTLER: Nothing further, Your Honor.

20 THE COURT: Brief argument?

21 MS. BUTLER: No thank you, Your Honor.

22 MS. KINEZELER: Your Honor, the State would just like
23 to state its position for the record that we believe the
24 record and the testimony taken today establishes that
25 Mr. Malpass made a knowing and voluntary waiver of his right

1 to a direct appeal and therefore his request for a belated
2 direct appeal should be denied.

3 THE COURT: Ms. Butler, the Court agrees with the
4 position of the State on that issue and therefore dismisses
5 your application.

6 MS. BUTLER: Thank you, Your Honor.

7 (End of the hearing.)

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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 and
5 evidence introduced in the trial of the captioned case,
6 relative to appeal, in the Court of Common Pleas for York
7 County, South Carolina, on the 4th day of February, 2010.

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

10
11 September 24, 2013

12
13 
14 Michael C. Watkins
15 Court Reporter
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JUDGEMENT ROLL NO. 2010-44-223

STATE OF SOUTH CAROLINA)

COUNTY OF UNION)

Donnie M. Malpass, #164744,)

Applicant.)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
Case No. 2008-CP-44-0269

OCT 31 2008

ORDER OF DISMISSAL

This matter comes before this Court by way of an application for Post-Conviction Relief filed August 7, 2008. Respondent made its Return and Motion to Dismiss on October 14, 2008. Pursuant to that motion, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed October 31, 2008, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Applicant then filed a document in response captioned "Opposition and Reply to the Respondent's Motion to Dismiss."

An evidentiary hearing was subsequently convened at the Moss Justice Center in York County, South Carolina on February 5, 2010. The Applicant was present and was represented by Melinda I. Butler, Esquire. Jennifer A. Kinzeler, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. At the hearing, the Applicant testified on his own behalf. William D. All, III also testified. This Court also had before it the records of the records of the Union County Clerk of Court regarding the subject convictions; the Applicant's records from the South Carolina Department of Corrections, and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. The Applicant was indicted in September 2003 by the Union County Grand Jury for Lewd Act Upon A Child Under 16 (2003-GS-44-0772). William D. All, II, Esquire represented him on the charge. On March 10, 2004, Applicant proceeded to trial and was found guilty as indicted. The Honorable Lee S. Alford sentenced him to confinement for a period of ten (10) years, suspended upon the service of five (5) years confinement and five (5) years probation. The Applicant did not appeal his conviction or sentence.

ALLEGATIONS

In his current application for Post-Conviction Relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel:
 - a. Failure to adequately cross-examine witnesses,
 - b. Failure to investigate,
 - c. Failure to provide Applicant with discovery,
 - d. Failure to Appeal, and
2. 6th Amendment Violations.

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).

At the hearing, the Respondent moved to dismiss all of the allegations regarding ineffective assistance of counsel and Sixth Amendment Violations as procedurally barred by the statute of limitations, except for the Applicant's allegation regarding counsel's alleged failure to appeal. S.C. Code Ann. §17-27-45(a). The parties agreed that the only issue the Applicant was proceeding on at the hearing was his allegation that he is entitled to a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Accordingly, this Court finds any and all claims raising allegations of ineffective assistance of counsel or allegations of Sixth Amendment violations are dismissed with prejudice for failure to file within the time mandated by statute. S.C. Code Ann. §17-27-45(a). See also McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994).

Failure to Appeal

In his application, the Applicant claims that he was denied effective assistance of counsel because trial counsel did not appeal his conviction. 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The United States Supreme Court has held that counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (U.S., 2000). When the question is whether counsel was ineffective in failing to file a direct appeal from the conviction and sentence following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White, supra. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967). Id.

The Applicant testified that he went to trial on the charges for which he is now incarcerated, and that a jury found him guilty. He testified that he told trial counsel in the courtroom to file an appeal because he was innocent. The Applicant stated he always maintained his innocence, and that he learned seven to eight months after his trial ended that trial counsel did not file an appeal. He stated it was not until one year later that someone told him he could file a PCR action.



On cross-examination, the Applicant conceded that even though he knew within seven to eight months after his trial ended that trial counsel did not appeal his conviction and sentence, he waited three more years before filing this PCR action alleging he is entitled to a belated direct appeal. The Applicant explained that the reason he waited so long was because he was "ignorant of the law."

Trial counsel testified that he has been practicing criminal law for over twenty (20) years. He testified that he was working as a public defender when he was appointed to represent the Applicant. Counsel testified that the Applicant was charged with two counts of lewd act upon a child under the age of sixteen years, and that the jury convicted him of one charge but acquitted him of the other charge. Counsel stated the Applicant was sentenced to ten (10) years confinement suspended upon the service of five (5) years and five (5) years probation.

Counsel testified that he and the Applicant discussed an appeal in the back room after the trial ended and after the Applicant was sentenced. Counsel stated he could remember having this discussion with the Applicant because he explained to the Applicant that at that time, he was convicted of one charge and acquitted of the other charge, but that if he won on appeal and were granted a new trial, he could face both charges again. This result would possibly subject him to more time if a jury convicted him of both charges, rather than one charge or neither charge. He testified that the Applicant told him he did not want to appeal because he did not want to take the chance of getting more time.

In response to the Applicant's testimony that he always maintained his innocence, counsel testified further that the Applicant told him prior to trial he could not remember what happened the night this incident occurred, and that he hoped he did not do what the victims said he did. He



testified the Applicant also gave a statement to law enforcement to that effect. Counsel stated the Applicant already had a prior lewd act conviction, so he was already required to register on the Sex Offender Registry before he was convicted of this offense. Counsel reiterated that the Applicant was aware of his right to appeal his conviction and sentence, and that the Applicant told him not to appeal. He also stated the Applicant and his family have hired him to do other legal work on their behalf since the Applicant was convicted of this charge.

This Court finds the Applicant's testimony is not credible while also finding trial counsel's testimony is credible. The Applicant has failed to carry his burden in this action. This Court further finds the Applicant knowingly and voluntarily waived his right to appeal. Therefore, this Court finds that this allegation is denied and this application must be denied and dismissed with prejudice.

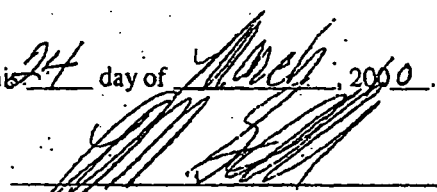
CONCLUSION

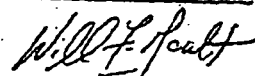
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 24 day of March, 2000.

Brooks P. Goldsmith
Presiding Judge
Sixteenth Judicial CircuitLancaster, South Carolina.JUDGEMENT SIGNED AND
ENTERED UP 4-1-10

CLERK OF COURT

FORM 5

2012 -CP-44- 327

STATE OF SOUTH CAROLINA

County of UNIONDONNIE MACK MALPASS

Full name and prison number (if any) of Applicant

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

APPLICATION FOR

POST-CONVICTION RELIEF

WILLIAM F. EARL
CLERK OF COURT
UNION COUNTY
2012 AUG -2 PM 2:14

FILE FOR RECORD

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention KERSHAW CORRECTIONAL INSTITUTION
4848 GOLDMINE HIGHWAY, KERSHAW, SC 29067-8136
2. Name and location of Court which imposed sentence UNION COUNTY (S.C.)
COURT OF GENERAL SESSIONS, UNION, SOUTH CAROLINA
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2003-GS-44-0772, S.C. CODE ANN. SEC. 16-15-140
 - (b) (SUPP. 2003) LEWD ACT UPON A CHILD

- (c) N/A
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) MARCH 10, 2004
- (b) 10 YEARS SUSPENDED TO 5 YEARS WITH 5
- (c) YEARS PROBATION
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty YES
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
NO
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. N/A
- ii. N/A
- iii. N/A
- (b) the result in each such Court to which you appealed:
- i. N/A
- ii. N/A
- iii. N/A
- (c) the date of each such result:
- i. N/A
- ii. N/A
- iii. N/A
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. N/A
- iii. N/A
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) TRIAL COUNSEL FAILED TO FILE DIRECT APPEAL
- (b) AS REQUESTED BY DEFENDANT @ JURY TRIAL.

- (c) N/A
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) APPT. COUNSEL FAILED TO FILE PCR APPEAL
- (b) AS REQUESTED BY APPLICANT @ CONCLUSION
- (c) OF PCR HEARING
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) AGAIN, APPT. COUNSEL FAILED TO FILE NOTICE
- (b) OF APPEAL TO COURT OF APPEALS OF SOUTH
- (c) CAROLINA AS REQUESTED BY APPLICANT
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? YES
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? YES
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. APPLICATION FOR POST-CONVICTION RELIEF (APCR)
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. UNION COUNTY (S.C.) COURT OF COMMON PLEAS
- ii. UNION, SOUTH CAROLINA
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Dismissed
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. MARCH 2009 ?!!
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. 2008-Cp-44-0269
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. N/A
- iii. N/A

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. N/A
- iii. N/A

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) FIRST TIME RAISING THIS ISSUE
 (b) _____
 (c) _____

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

(a) your arraignment and plea? NO
 (b) your trial, if any? YES
 (c) your sentencing? YES
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? NO
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
YES

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

(a) the name and address of each attorney who represented you:
 i. MELINDA INMAN BUTLER, esq.
 ii. _____
 iii. _____
 (b) the proceedings at which each such attorney represented you:
 i. APPLICATION FOR POST-CONVICTION RELIEF (APCR)
 ii. _____
 iii. _____

19. State clearly the relief you seek in filing this application:

A RELATED PCR APPEAL TO THE STATE SUPREME
COURT OR COURT OF APPEALS PURSUANT TO AICE
V. STATE

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

VERIFICATION

County of UNION)

I, DONNIE M. MALPASS, SCDC # 164744, 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.

Don M. Malpass

SWORN to and subscribed before me this 31
 day of July, 2012.

Catherine A. Cameron (L.S.)
 Notary Public

My Commission Expires: My Commission Expires December 22, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF UNION	)	SIXTEENTH JUDICIAL CIRCUIT
	)	
Donnie Mack Malpass, #164744,	)	2012-CP-44-0327
	)	
Applicant,	)	
	)	
v.	)	RETURN AND MOTION TO
	)	DISMISS ALL CLAIMS EXCEPT
	)	<u>AUSTIN REVIEW</u>
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return and Motion to Dismiss the current application for post-conviction relief filed August 2, 2012, respectfully submits the following:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Union County Clerk of Court. The Applicant was indicted in September 2003 by the Union County Grand Jury for Lewd Act Upon A Child Under 16 (2003-GS-44-0772). William D. All, II, Esquire represented him on the charge. On March 10, 2004, Applicant proceeded to trial and was found guilty as indicted. The Honorable Lee S. Alford sentenced him to confinement for a period of ten (10) years, suspended upon the service of five (5) years confinement and five (5) years probation. The Applicant did not appeal his conviction or sentence.

2008-CP-44-0269

The Applicant filed his first application for Post-Conviction Relief (PCR) on August 7, 2008. The Respondent made its Return and Motion to Dismiss on October 14, 2008. Pursuant to that motion, and after reviewing the pleadings in this matter and all of

the records attached thereto, this Court issued a Conditional Order of Dismissal filed October 31, 2008, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Applicant then filed a document in response captioned "Opposition and Reply to the Respondent's Motion to Dismiss."

An evidentiary hearing was subsequently convened at the Moss Justice Center in York County, South Carolina on February 5, 2010. The Applicant was present and was represented by Melinda I. Butler, Esquire. Jennifer A. Kinzeler, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

In his first PCR application, he alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel;
 - a. Failure to adequately cross-examine witnesses,
 - b. Failure to investigate,
 - c. Failure to provide Applicant with discovery,
 - d. Failure to Appeal, and
2. 6th Amendment Violations.

The Honorable Brooks P. Goldsmith denied and dismissed the Applicant's application by written Order on March 24, 2010.

II.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "APPT. Counsel failed to file PCR appeal as requested by Applicant @ conclusion of PCR hearing."

For the purpose of this Return, the Respondent incorporates the Clerk of Court's records for the Applicant's convictions, the records from the South Carolina Department of Corrections, the application and the prior PCR Order of Dismissal. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

Except for Applicant's claim that he was denied an appeal from his first PCR application, the Court should summarily dismiss the current Application because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise

those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

Accordingly, Respondent moves for a summary dismissal of the application because it is successive.

IV.

Except for Applicant's claim that he was denied an appeal from the denial of his first PCR application, the Respondent submits that this Application for Post-Conviction Relief should also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to —160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offenses he challenges in this application on March 10, 2004. The Applicant was therefore required to file his application before March 1, 2005. This application was filed on August 2, 2012, almost two years after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985)

authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

V.

There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under § 17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation" Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, with the exception of Applicant's allegation that he is entitled to belated review of his first PCR application, Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action and was filed after the statute of limitations had expired. Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

Respectfully submitted,

ALAN WILSON
Attorney General

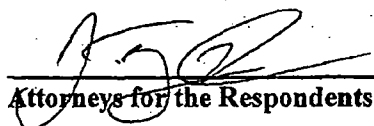
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Senior Assistant Deputy
Attorney General

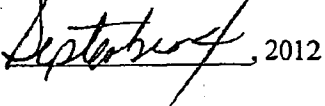
J. RUTLEDGE JOHNSON
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

Columbia, South Carolina

 2012

State of South Carolina)	In the Common Pleas
)	Court of York
)	
County of York)	Case No.: 2012-CP-44-00327
Donnie Mack Malpass.,)	
)	
Applicant.,)	
)	
-vs-)	Transcript of Record
)	Post Conviction Relief
State of South Carolina.,)	
)	
Respondent.)	
_____)	

May 14, 2013
York, South Carolina

B E F O R E:

Honorable John C. Hayes, III., Judge.

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

Ms. Carolina Horlbeck
Law Offices of Lawrence W. Crane
101 Whitsett Street
Greenville, South Carolina 29601
864-235-2900
864-467-1916
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ORIGINAL

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803-734-1867
803-734-4113
rjohnson@scag.gov
For the Respondent

Wanda Nelson, CVR-M
Circuit Court Reporter
Sixteenth Judicial Circuit
To The Honorable John C. Hayes, III

I N D E XE-X-A-M-I-N-A-T-I-O-NWITNESSBY:PAGE NO.

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Melinda Butler	Ms. Horlbeck	P.8-10
	Mr. Johnson.	P.10
Court Reporter's Certificate Page. P.14		

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I-N-D-E-X- CON'TE-X-H-I-B-I-T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>

No Exhibits were received into the record.

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1 (ON THE RECORD IN THE MATTER OF DONNIE MALPASS V.
2 STATE OF SOUTH CAROLINA TUESDAY, MAY 14, 2013 AT 10:15
3 A.M..)

4 (APPLICANT, DONNIE MALPASS, WHITE MALE, ENTERS
5 COURTROOM.)

6 THE COURT: All right.

7 MR. JOHNSON: May it please the court, Your Honor.

8 This is Donnie Malpass versus State of South Carolina
9 it's Case No. 2012-CP-44-0-3-2-7. Mr. Malpass was indicted
10 at the September 2003, Union Count Grand Jury for lewd act
11 upon a child under sixteen. On March 10th, 2004, he
12 proceeded to trial and was found guilty as indicted. The
13 Honorable Lee S. Alford sentenced him to confinement for a
14 period of ten years suspended upon the service of five
15 years confinement and five years probation. He did not
16 appeal his conviction.

17 There was a prior PCR 2008-CP-44-0-2-6-9 when he filed
18 his application August 2nd 2008 the State made it's return
19 Motion to Dismiss October 14th, 2008. After an evidentiary
20 hearing - Yes, evidentiary hearing on February 5th, 2010,
21 he was represented there by Ms. Melinda Butler. The
22 Honorable Brooks P. Goldsmith denied and dismissed his
23 application by written order on March 24th, 2010. His
24 claim here today is that Ms. Butler failed to file a PCR
25 appeal and so the State filed it's return Motion to Dismiss

DONNIE MALPASS: BY MS. HORLBECK

-5-

1 all claims except for the Austin review on October - On -
2 excuse me, Your Honor. September 4, 2012. He is
3 represented here today by Ms. Caroline Horlbeck.

4 THE COURT: All right, Ms. Horlbeck.

5 MS. HORLBECK: Judge, that's correct. And we would
6 call Donnie Malpass to the stand please.

7 THE COURT: All right, please come up and be sworn.

8 MADAME CLERK: Mr. Malpass, if I can have you place
9 your left on the Bible and raise your right.

10 (WHEREUPON: DONNIE MALPASS,
11 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

12 DIRECT EXAMINATION

13 DONNIE MALPASS BY MS. HORLBECK:

14 Q. Mr. Malpass, who represented you at your PCR hearing
15 in 2010?

16 A. Ms. Melinda Butler.

17 Q. All right. And ultimately as a result of that
18 hearing, was your petition for post conviction relief
19 denied?

20 A. Yes, ma'am.

21 Q. All right. And did you discuss with Ms. Butler the
22 filing of an appeal in the event that your petition was
23 denied?

24 A. Yes, ma'am.

25 Q. When did you have that discuss with her?

1 A. That was before I went back to the holding cell.

2 Q. All right. And what - What did you ask her to do
3 when you discussed the appeal with her?

4 A. I told her that I'd like to appeal it. We didn't get
5 to - Well actually it just didn't go well. The hearing
6 didn't go well at all.

7 Q. Okay.

8 A. I was very unsatisfied with it.

9 Q. All right. And as a result of that did you ask her
10 to appeal the case in the event that the petition was
11 denied?

12 A. Yes, ma'am.

13 Q. All right. And what was her response to the best of
14 your recollection?

15 A. She said okay.

16 Q. All right. Okay. Now was an appeal ever filed?

17 A. I thought so but undoubtedly not.

18 Q. All right. Is that a no? I just couldn't hear you.

19 A. No.

20 Q. All right. And at what point did you find out that
21 an appeal had not been filed in this case?

22 A. Well I waited and waited and never heard anything from
23 it and I checked in and found out it wasn't appealed and I
24 thinking about doing the proceeding again.

25 Q. Okay. Did you file your appeal - Did you file a

DONNIE MALPASS: BY MS. HORLBECK
BY MR. JOHNSON

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1 PCR Petition as soon as you learned that there had not been
2 an appeal filed?

3 A. Yes, ma'am.

4 Q. All right. And are you asking the court today to
5 grant a belated appeal in this case?

6 A. Yes, ma'am.

7 Q. All right. Was anyone present with you when you -
8 You were in the holding cell talking to Ms. Butler about
9 filing an appeal?

10 A. No we were in the courtroom.

11 Q. Oh, you were in the courtroom. Okay. But you were
12 still serving a sentence at SCDC?

13 A. Yes, ma'am.

14 Q. All right. That's all I have. Please answer any
15 questions the Attorney General may have for you.

16 CROSS EXAMINATION

17 DONNIE MALPASS BY MR. JOHNSON:

18 Q. Mr. Malpass, I just have a few questions for you.

19 When exactly did you find out that Ms. Butler had
20 not filed an appeal on your behalf?

21 A. Well actually nothing never became of it so I filed
22 out a little PCR paper out actually. I never - no feedback
23 from it at all. The same thing as before and I ask my
24 other lawyer to appeal and he didn't do it.

25 Q. Did you ever write her office to ask about the status

DONNIE MALPASS: BY MR. JOHNSON
MELINDA BUTLER: BY MS. HORLBECK

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1 of your case?

2 A. No, sir, I didn't

3 Q. Okay. So you never ask her. Is there any proof
4 that you have today that you ask her to file an appeal on
5 your behalf?

6 A. Just my word.

7 Q. No further questions, Your Honor.

8 THE COURT: All right. Any redirect?

9 MS. HORLBECK: No, Judge.

10 THE COURT: All right. You can step down. Thank you,
11 Mr. Malpass.

12 (WITNESS LEAVING WITNESS STAND.)

13 MS. HORLBECK: Judge, we would call Ms. Butler.

14 THE COURT: All right. Mr. Butler, if you'll please
15 come forward and be sworn.

16 (WHEREUPON: MELINDA BUTLER,
17 BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS FOLLOWS:)

18 DIRECT EXAMINATION

19 MELINDA BUTLER BY MS. HORLBECK:

20 Q. Ms. Butler, do you recall representing Mr. Malpass on
21 his post conviction relief case in 2010?

22 A. I do.

23 Q. Was this an appointed case or a retained case?

24 A. It was an appointed case.

25 Q. And at the conclusion of the hearing did you and Mr.

MELINDA BUTLER: BY MS. HORLBECK

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1 Malpass discuss the filing of an appeal?

2 A. No. We discussed what happened in the hearing and
3 what the judge ruled but not an appeal.

4 Q. All right. And did the judge rule right there in
5 court?

6 A. No he did not. He actually - There was a written
7 order issued later but when everything went through and the
8 attorney's questioning that's what I discussed with Mr.
9 Malpass and explained to him exactly what took place in the
10 hearing. He was confused as to what was going on.

11 Q. All right. And during your discussion with Mr.
12 Malpass after the hearing, did you advise him that he had
13 the right to an appeal in the event that his petition was
14 denied?

15 A. We didn't discuss an appeal at all. I really didn't
16 know that he even had the right to appeal a PCR, you know,
17 just very frankly. And so we didn't discuss an appeal at
18 all. That's how I know for sure he did not ask me for an
19 appeal because had he ask then certainly I would have
20 checked into that because I didn't know that he had the
21 right.

22 Q. Okay. All right. And did you receive a copy of the
23 order denying the PCR petition?

24 A. I did.

25 Q. And did you forward a copy of that order to Mr.

MELINDA BUTLER: BY MS. HORLBECK
BY MR. JOHNSON

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1 Malpass?

2 A. My assistant would have yes, yes, ma'am.

3 Q. And are you - Do you feel comfortable saying that
4 - Did you mail the order or are you saying your assistant
5 did?

6 A. My assistant would have mailed the orders. I don't
7 do that.

8 Q. Did your assistant also include a cover letter along
9 with the order?

10 A. That would be normal routine yes.

11 Q. Okay. And do you have a copy of that in your file?

12 A. No I do not.

13 Q. Okay. All right. That's all I have. Thank you.

14 Please answer any questions the Attorney General may
15 have for you.

16 CROSS EXAMINATION

17 MELINDA BUTLER BY MR. JOHNSON:

18 Q. Just to reiterate. Mr. Malpass never ask you for you
19 to file an appeal on his behalf?

20 A. No, sir.

21 Q. But you did send him the order of dismissal?

22 A. That's correct.

23 Q. Okay.

24 MR. JOHNSON: Your Honor, do you have a copy --

25 THE COURT: I've got the Order of Dismissal. Yeah,

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1 I've got it. I know I hand it and I'm looked at the
2 language.

3 MR. JOHNSON: No further questions, Your Honor.

4 MS. HORLBECK: That's all I have, Judge.

5 THE COURT: You can step down.

6 MS. BUTLER: Thank you.

7 (WITNESS LEAVING WITNESS STAND.)

8 MS. HORLBECK: And I don't have anything further.

9 MR. JOHNSON: No witnesses from the State, Your Honor.

10 THE COURT: I've got a question.

11 Mr. Malpass, did you get a copy of the order from
12 Judge Goldsmith where your application for post conviction
13 relief was denied?

14 You did not? You've got to answer with words.

15 MR. MALPASS: Oh no.

16 THE COURT: All right, you may be seated.

17 Ms. Horlbeck, what's your position?

18 MS. HORLBECK: Judge, he is asking that you grant
19 him a belated appeal or I guess in this case it's an Austin
20 Review. In this situation it doesn't sound - Well if you
21 ask my client you know he says that he did instruct her to
22 appeal. Ms. Butler very clearly stated on the stand that
23 she wasn't aware of her right to appeal. So I'm not sure
24 whether maybe Mr. Malpass tried to explain where he wanted
25 on in his unsophisticated ways, he's certainly not an

1 attorney. And she may not have understood what he was
2 talking about since she was not aware that he had the right
3 to appeal. It may have been just a mis-communication in
4 this case, Judge, so I would ask that Your Honor grant this
5 request.

6 THE COURT: All right. The State?

7 MR. JOHNSON: Your Honor, the State's position is that
8 Ms. Butler sent him a copy of the order and that in the
9 order on Page 6 the Court advised him about appealing under
10 Austin and so the State would ask you to deny his
11 application. Furthermore I believe that if Mr. Malpass is
12 successful in this action he still is exposed to
13 incarceration and we ask you to deny his application.

14 THE COURT: All right. What's the Supreme Court rule,
15 Appellate Court rule on Austin? Appellate Court rule on
16 Austin Review?

17 MR. JOHNSON: Oh at 243, his appeal from the PCR.

18 THE COURT: My only concern is that - and I certainly
19 know Ms. Butler and know how sufficient she is, but I'm
20 concerned that she was unaware of the opportunity for an
21 appellate appeal - appeal, appellate appeal. Kind of
22 redundant. An appellate an opportunity for post conviction
23 and while she says she feels comfortable that someone in
24 her office did send Mr. Malpass a copy of Judge Goldsmith's
25 order it clearly as indicated by or preserved by counsel

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1 for the State sets for the thirty day requirement for writ
2 certiorari from Judge Goldsmith's order I am going to allow
3 a review under Section - I'm sorry, Appellate Court Rule
4 243 and allow an Austin Review.

5 Ms. Horlbeck, are you familiar with that?

6 MS. HORLBECK: Yes, sir, I am.

7 THE COURT: Okay.

8 MS. HORLBECK: I'll take care of it.

9 THE COURT: All right. Well we need a short order.
10 If you'll just give me a short order saying that I find
11 that he is entitled and make sure that the order outlines
12 the fact I cannot grant him an appeal I can only grant him
13 the right to request an appeal. And that I'm doing that.

14 And that's based on what I've already said that while
15 I trust Ms. Butler and know her very well, I think that
16 there is a little bit of a gap, enough of a gap to give him
17 the benefit of the doubt.

18 MS. HORLBECK: All right. Thank you, Judge.

19 THE COURT: Thank you all.

20 (END OF TRANSCRIPT OF RECORD.)
21
22
23
24
25

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete/partial Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for York County, South Carolina, on the 14th day of May, 2013.

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

Wanda Nelson

Wanda Nelson, CVR-M

Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.
My Commission Expires: 1/21/2021

DATE: 11-04 1 2013

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF UNION)

C.A. No.: 2012-CP-44-0327

Donnie M. Malpass,
S.C.D.C. No. 164744,

Applicant,

v.)

State of South Carolina,

Respondent.)

ORDER OF DISMISSAL
GRANTING AUSTIN V. STATE
BELATED PCR APPEALWILLIAM F. GAULT
CLERK OF COURT
UNION, SCFILED FOR RECORD
2013 JUN 13 PM 2 50

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed August 2, 2012. An evidentiary hearing into the matter was convened on May 14, 2012 at the Moss Justice Center, York County South Carolina. The Applicant was present at the hearing and represented by Caroline M. Horlbeck, Esquire. J. Rutledge Johnson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

PROCEDURAL HISTORY

The Applicant is no longer confined in the South Carolina Department of Corrections. The Applicant was indicted at the September 3, 2003 term of the Union County Grand Jury for Lewd Act Upon A Child Under 16 (2003-GS-44-0772). William D. All, II, Esquire represented the Applicant on the charge. After the State called the case to trial on March 10, 2004, the Applicant was found guilty as indicted. The Honorable Lee S. Alford sentenced the Applicant to confinement for a period of ten (10) years, suspended upon the service of five (5) years confinement and five (5) years probation.

The Applicant did not appeal his conviction(s) or sentence(s).

2008-CP-44-0269

The Applicant filed his first application for Post-Conviction Relief (PCR) on August 7, 2008. The Respondent made its Return and Motion to Dismiss on October 14, 2008. Pursuant to that Motion, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed October 31, 2008, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Applicant then filed a document in response captioned "Opposition and Reply to the Respondent's Motion to Dismiss."

An evidentiary hearing was subsequently convened at the Moss Justice Center in York County, South Carolina on February 5, 2010. The Applicant was present and was represented by Melinda I. Butler, Esquire. Jennifer a Kinzeler, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

In his first PCR application, Respondent alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel;
 - a. Failure to adequately cross-examine witnesses
 - b. Failure to Investigate
 - c. Failure to provide Applicant with discovery
 - d. Failure to Appeal, and
2. 6th Amendment Violations

The Honorable Brooks P. Goldsmith denied and dismissed the Applicant's application by written Order on March 24, 2010.

ALLEGATIONS

In his current application for post-conviction relief, Applicant raised the following issues:

1. "Appointed counsel failed to file PCR appeal as requested by Applicant at the conclusion of the PCR hearing."

The Applicant filed his current PCR application on August 2, 2012. Respondent moved to dismiss all claims except for the Austin Review on grounds that all other claims are successive to the previous application for post-conviction relief. Therefore, at the evidentiary hearing, the Applicant proceeded solely on the allegation of ineffective assistance of PCR counsel in failing to file a notice of appeal from the Applicant's first PCR action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

The Applicant testified that he verbally requested that Ms. Butler file an appeal of the Court's Order denying and dismissing his PCR Petition (2008-CP-44-0269). PCR counsel testified that she was not aware that she could appeal an Order denying and dismissing a PCR Petition. Counsel also testified she did not review the appeal process with Applicant. Counsel further testified that her assistant mailed a cover letter and copy of Judge Goldsmith's Order to Applicant but she was unable to find a copy of the cover letter in her file.

This Court finds that any allegation other than the belated PCR appeal allegation is

geth 3

successive and therefore denied. Successive applications for post-conviction relief are clearly disfavored. See S.C. Code Ann. § 17-27-90 (2003); Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980).

This Court also finds the Applicant's allegation that he is entitled to a belated appeal due to his prior PCR attorney's failure to perfect an appeal on his behalf is not procedurally barred and is meritorious. Where a post-conviction relief judge determines the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of post-conviction relief issues pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).¹ See also King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992).

This Court further finds the Applicant did not knowingly and voluntarily waive his right to appellate review and this therefore entitled to a belated review of the denial of his first PCR application. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). The Applicant's denial of an appeal can be remedied by a petition for belated review by his current PCR attorney pursuant to Austin v. State. See id.

CONCLUSION

All allegations except the belated appeal pursuant to Austin v. State are barred because they are successive. The Applicant has proven by a preponderance of the evidence that he did not knowingly and voluntarily waive the direct appeal of the denial of his first PCR application. Any grounds for relief that are not specifically addressed in this Order are denied for failure to meet the requisite burden of proof.

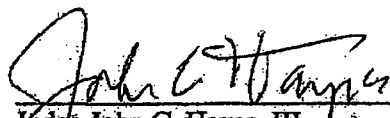
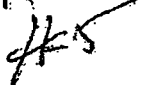
IT IS THEREFORE ORDERED:

¹ Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis. Instead, the Applicant must petition the Supreme Court for a belated review. Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986).

Jeffrey

1. That the application for post-conviction relief be denied and dismissed with prejudice;
2. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction relief action. Counsel and the Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR for the appropriate procedure for a belated appeal.
1. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 3rd day of June, 2013.


Judge John C. Hayes, III
Sixteenth Judicial Circuit 

York, South Carolina.

WITNESSES

M. Shugart/UCSO

DOCKET NO. 2003-GS-44-772

The State of South Carolina

County of Union

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment of to

Defendant

Witness:

C.C.C. PLS. AND G.S.

ARREST WARRANT NUMBER

H429589

THE STATE

VS.

DONNIE MACK MALPASS

ACTION OF GRAND JURY

FORFEITURE

Ronald J. Williams Sr.
Foreperson of Grand Jury
SEP 11 2003
Date:

VERDICT

Indictment for
LEWD ACT UPON A CHILD UNDER
THE AGE OF SIXTEEN YEARS

SC Code: 16-15-140
CDR Code: 2468

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
)
COUNTY OF UNION)

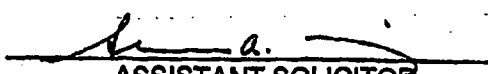
INDICTMENT

At a Court of General Sessions, convened on September 11, 2003, the Grand Jurors of Union County present upon their oath:

LEWD ACT UNDER THE AGE OF SIXTEEN

The Defendant, Donnie Mack Malpass, did on or about July 19, 2003, commit the crime of Lewd Act upon a Child under the age of Sixteen Years, in that the Defendant, date of birth _____, who was over the age of fourteen (14) years at the time of the incident, did wilfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body, or any part or member thereof, of the victim, ^{Minor 2} _____ a child under the age of sixteen (16) years at the time of the incident, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the Defendant or of the victim. Said incident occurred in Union County, South Carolina. All in violation of §16-15-140, Code of Laws of South Carolina, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR