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S.C. Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

William P. Keesley, Circuit Court Judge

MICHAEL D. DAY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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ORIGINAL

STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON

STATE OF SOUTH CAROLINA

-VS-

TRANSCRIPT OF RECORD

MICHAEL DWIGHT DAY,

06-GS-32-3249

Defendant.

November 6, 7, & 9, 2006
Lexington, South Carolina

B E F O R E:

HONORABLE R. KNOX MCMAHON, Judge

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1 (The following proceedings were reported on
2 November 6, 2006).

3 THE COURT: I have before me Indictment
4 2006-GS-32-3249, the State versus Michael Dwight Day,
5 a.k.a Brian Jones Day. It is a true bill indictment for
6 criminal sexual conduct with a minor in the first
7 degree.

8 The indictment reads that Michael Dwight Day
9 did in Lexington County, on or about or between
10 December 1st, 2000, and January 31st, 2001, knowingly
11 and willfully commit a sexual battery on and with the
12 body of the minor listed therein, approximate age four,
13 a child under the age over 11 years to wit: Coerce the
14 victim into performing oral sex on him in violation of
15 16-3-655(1) of the Code of Laws of South Carolina, 1976
16 as amended.

17 As I understand it, Solicitor, this was your
18 first case to be called for trial this week; is that
19 correct?

20 MS. HEATH: Yes, Your Honor.

21 THE COURT: The State is ready for trial?

22 MS. HEATH: Yes, Your Honor.

23 THE COURT: Mr. Cheatham, you represent
24 Michael Dwight Day?

25 MR. CHEATHAM: That is correct, Your Honor.

1 THE COURT: Is the Defendant ready for trial?

2 MR. CHEATHAM: Your Honor, we had explained to
3 you the witness problem. Other than the witness
4 problem, we are ready for trial?

5 THE COURT: Does the Defendant wish to have a
6 jury trial?

7 MR. CHEATHAM: No, sir, Your Honor.

8 THE COURT: What is the Defendant's wish in
9 that regard?

10 MR. CHEATHAM: The Defendant wishes for His
11 Honor to hear the matter.

12 THE COURT: All right. And you have discussed
13 a jury trial with Mr. Day?

14 MR. CHEATHAM: Yes, Your Honor. We have been
15 discussing it for a couple of weeks now.

16 THE COURT: All right, sir.

17 Mr. Day, would you please stand.

18 Madame Clerk, would you place the Defendant
19 under oath.

20 MICHAEL DWIGHT DAY is first
21 duly sworn.

22 THE COURT: Would you remain standing for me,
23 Mr. Day. Are you Michael Dwight Day?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Are you also known as Brian Jones

1 Day?

2 THE DEFENDANT: No, sir.

3 THE COURT: Do you understand the State has
4 called for trial the case against you for criminal
5 sexual conduct with a minor in the first degree?

6 THE DEFENDANT: I understand.

7 THE COURT: And that it involves an incident
8 which occurred between December 1st of 2000 and
9 January 31st of 2001?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: You are represented by Mr. John
12 Cheatham; is that correct?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: You understand you have certain
15 very important constitutional rights, Mr. Day? Do you
16 understand that?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Among those rights, you have a
19 right to demand a jury trial in this case. Do you
20 understand that?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Have you talked about that right
23 and your other constitutional rights with your attorney,
24 Mr. Cheatham?

25 THE DEFENDANT: Yes, sir, I have.

1 THE COURT: Have you discussed the right to a
2 jury trial fully and completely with Mr. Cheatham?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you understand you have a right
5 to select a jury to try your case? There would be 12
6 people sitting over in this box.

7 THE DEFENDANT: Yes, Your Honor.

8 THE COURT: They would determine the facts of
9 the case, listen to the witnesses' testimony, apply the
10 law as I told them the law was, and there would have to
11 be a unanimous verdict finding you guilty beyond a
12 reasonable doubt before you could be convicted of this
13 charge. Do you understand that, Mr. Day?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: The jury panel has been here this
16 morning. It has been generally qualified, and it would
17 be specifically qualified as to whether or not they
18 could sit as fair and impartial jurors in the trial of
19 your case. Do you understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Do you understand that you or your
22 lawyer would have the right to strike ten people, to not
23 choose ten people whose names were called, provided the
24 striking of those individuals was for a constitutionally
25 appropriate purpose? In other words, there would be

1 peremptory strikes. Do you understand that?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: As the Defendant, you would have
4 ten strikes and the State would have five strikes in
5 that regard. Do you understand that?

6 Have you talked with him about that,
7 Mr. Cheatham?

8 MR. CHEATHAM: I don't know that I talked with
9 him about the State having that number of strikes. I
10 told him that we had those.

11 THE COURT: What I'm saying is you wouldn't
12 have to take the first 12 people that came up out of the
13 jury pool, Mr. Day. Do you understand that?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: If you waive your right to a jury
16 trial -- typically I would be the judge of the law and
17 the jury would be the judge of the facts.

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you understand they would be
20 the fact finder, the jury?

21 THE DEFENDANT: (Nods head). (Indicating
22 affirmative response).

23 THE COURT: If you waive your right to a jury
24 trial, I then become the judge of the facts and the
25 judge of the law. Do you understand that?

1 THE DEFENDANT: Yes, sir.

2 THE COURT: That you would not have a jury
3 determine what the facts are, that I would determine
4 what the facts are in the case and apply the facts as I
5 determine them to be to the law that will apply in the
6 case. Do you understand that?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: You have an absolute right to a
9 jury trial, correct?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Have you had adequate time to
12 discuss that with your attorney?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Do you need anymore time to talk
15 about that with your attorney?

16 THE DEFENDANT: No, sir.

17 THE COURT: Do you have any questions you
18 would like to ask me about your right to a jury trial?

19 THE DEFENDANT: I'm pretty well set on the
20 judge trying it.

21 THE COURT: You don't need anymore time to
22 make up your mind?

23 THE DEFENDANT: No, sir, I've had plenty of
24 time.

25 THE COURT: All right. I find that the

1 Defendant has knowingly, voluntarily, and intelligently
2 waived his right to have a jury trial and that he has
3 had the advice and counsel of a very competent attorney
4 with whom he says he has had discussions and discussed
5 this issue with him.

6 You don't have any question about
7 Mr. Cheatham's ability to defend you; do you, Mr. Day?

8 THE DEFENDANT: No, sir.

9 THE COURT: You have been able talk with him
10 for as long and as much as you think necessary for him
11 to properly defend you?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: You are well satisfied with his
14 representation?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Do you have any complaints you
17 want to make about Mr. Cheatham?

18 THE DEFENDANT: None, sir.

19 THE COURT: All right. Thank you, Mr. Day.
20 You may be seated.

21 Again, I find the Defendant has knowingly,
22 voluntarily, and intelligently waived his right to a
23 jury trial. He has had the advice and counsel of a very
24 competent attorney with whom he says he is well
25 satisfied.

1 With that being said, what is your proposed
2 schedule as far as Mr. Cheatham's trial with Mr. Day?

3 MS. HEATH: Your Honor, the first trial would
4 be Michael Day's trial.

5 THE COURT: Mr. Cheatham, you and Mr. Day may
6 stand aside for a minute.

7 (Whereupon there was a recess in the
8 proceedings).

9 THE COURT: Solicitor, are you ready to
10 proceed?

11 MS. HEATH: Your Honor, we have two pretrial
12 matters to take up.

13 THE COURT: All right.

14 MS. HEATH: One, we have filed a motion in
15 limine for the defense to comply with the rape shield
16 statute. The second motion would be a motion for
17 admission of the videotaped forensic interview of the
18 victim, [REDACTED] in this case.

19 THE COURT: As to the first motion in limine
20 on the rape shield statute, that's under what, State
21 versus Jenkins, something like that, Madame Solicitor?

22 MS. HEATH: Your Honor, I have the code
23 section. It was 16-3-659.1. We notified the Defendant.
24 I sent him a notice that we had filed this, along with
25 the motion.

1 We have asked that he prohibit any reference
2 to any prior sexual activity of the victim, [REDACTED]
3 [REDACTED] The victim has -- [REDACTED] was a victim in another
4 sexual abuse case. The Defendant's name was Francis
5 Oxner.

6 We have asked the defense not to bring
7 anything into the trial regarding that case. At the end
8 of the motion, we did ask that if he intended to proffer
9 any evidence, that he send us notice. He has not done
10 so. So I assume they are complying with the statute,
11 Your Honor, with the law.

12 THE COURT: Mr. Cheatham.

13 MR. CHEATHAM: Your Honor, this is sort of a
14 double-edge sword in reference to the video which should
15 be argued at the same time. In the video that they want
16 to admit, which we contend is inadmissible, there is
17 reference to this same conduct that they are saying
18 should be excluded.

19 THE COURT: Well, they are saying that under
20 the statute, and I'm not sure just because a victim may
21 reference it in a forensic interview with an officer or
22 counselor -- I'm not sure who the interviewer is --
23 doesn't exclude it from the protection of the statute.
24 Do you intend to offer that?

25 MR. CHEATHAM: We don't intend to offer it,

1 Your Honor, but we would move that that portion of the
2 video, if the video is admissible, be excluded because,
3 again, they are bringing in evidence that they say
4 should be excluded.

5 MS. HEATH: We have a redacted version, Your
6 Honor.

7 THE COURT: You are moving that it be
8 excluded?

9 MR. CHEATHAM: We are moving that the whole
10 video be excluded, yes, sir.

11 THE COURT: All right, sir.

12 MR. CHEATHAM: The video that they are
13 referencing, they are trying to get in evidence through
14 a statute that was passed June 9th of this year.
15 Therefore, it would not be applicable to this case.

16 THE COURT: Well, what about -- I haven't
17 decided on whether the tape is admissible or not at this
18 point. So you are saying that I need to take up the
19 matter of the tape first and determine its
20 admissibility?

21 MR. CHEATHAM: If they are going to do the
22 redacted part of the tape, then we don't have any
23 problem with making reference to other conduct because
24 we are not going to do that. We just want to make sure
25 the playing field is level.

1 THE COURT: You don't have any problems with
2 not making any reference to other conduct?

3 MR. CHEATHAM: That's correct.

4 THE COURT: I think I understand. Is that
5 right, Solicitor?

6 MS. HEATH: Yes, Your Honor.

7 THE COURT: So the issue then becomes the
8 admissibility of the tape?

9 MR. CHEATHAM: Correct.

10 MS. HEATH: Yes, Your Honor.

11 THE COURT: All right.

12 MS. HEATH: Under Code Section 17-23-175, the
13 videotape of the forensic interview -- [REDACTED] had a
14 forensic interview at the Assessment Resource Center in
15 Columbia. The forensic interviewer was Melanie Trimble.
16 She is here, Your Honor. The video was taken while he
17 was in the room at the Assessment Resource Center. This
18 occurred on January 11, 2005.

19 Under that statute, which was passed in
20 June of this year, the videotape is admissible if the
21 statement was given in response to questioning conducted
22 during an investigative interview of a child.

23 Under 17-23-175(d) an investigative interview
24 is defined as the questioning of a child by a
25 professional interviewing the child on behalf of law

1 enforcement.

2 Detective Russell did refer [REDACTED] to the
3 Assessment Resource Center, and he was interviewed. It
4 was basically considered an investigative interview,
5 Your Honor.

6 The second prong is an audio and visual
7 recording of a statement is preserved on videotape. We
8 do have a videotape, Your Honor.

9 The third prong is that the child testifies at
10 the trial and is subject to cross examination on the
11 elements of the offense, as well as on the making of the
12 videotape.

13 We do have [REDACTED] here. He is going to
14 testify as to the events of the criminal sexual conduct,
15 as well as to the fact that he did go to the Assessment
16 Resource Center and do this forensic interview and knew
17 that he was being videotaped.

18 The fourth prong was that the Court finds in a
19 hearing, conducted outside the presence of the jury,
20 that the totality of the circumstances surrounding the
21 making of the videotape provides a particularized
22 guarantee of trustworthiness.

23 To provide a particularized guarantee of
24 trustworthiness, there are five things that the Court
25 considers. One is whether the statement was elicited by

1 leading questions.

2 The second is whether the interviewer had been
3 trained in conducting investigative interviews of
4 children. As I said, Your Honor, we do have Melanie
5 Trimble here; and we are willing to proffer her
6 testimony.

7 The third element was whether the statement
8 represents a detailed account of the alleged events.
9 The fourth is whether the statement has internal
10 coherence.

11 And the fifth is the sworn testimony of any
12 particular deemed necessary by the Court. Your Honor,
13 we do have [REDACTED] the victim, here as well. We do have
14 the videotape also available to view.

15 THE COURT: Solicitor, do you have a copy of
16 17-23-175?

17 MS. HEATH: I do, Your Honor.

18 THE COURT: May I see it, please.

19 (Hands to Court).

20 THE COURT: Well, Solicitor, I think you just
21 need to lay a foundation and proffer the testimony for
22 me to make a decision on whether or not ---

23 MR. CHEATHAM: May I be heard?

24 THE COURT: -- you meet the various factors.

25 MR. CHEATHAM: May I be heard just briefly,

1 Your Honor?

2 THE COURT: Yes, sir.

3 MR. CHEATHAM: The statute was passed June the
4 9th, 2006. Section 7 says the repeal or amendment by
5 this act of any law, whether temporary or permanent or
6 civil or criminal, does not affect pending actions.

7 THE COURT: May I see that, please.

8 MR. CHEATHAM: Yes, sir.

9 (Hands to Court).

10 (Pause).

11 THE COURT: Solicitor, would you like to be
12 heard on that issue?

13 MS. HEATH: Your Honor, under the new statute,
14 under this whole new act, if a defendant pleads guilty
15 to C.S.C., whether it happened before June or after
16 June, they are given the benefit of the new law, and
17 they are sentenced according to the new law. We feel
18 the State also deserves the benefit of the new law, and
19 we think it would apply to this case.

20 THE COURT: Do you have any law in that
21 regard? I agree with you as far as -- I agree with
22 Mr. Cheatham -- as far as the criminal sexual conduct
23 penalties are concerned, that you couldn't take a
24 pending action and increase the penalty on the defendant
25 and it go into effect after he had been charged and him

1 get the increased penalties. That happened when, I
2 guess it was armed robbery, went from 25 to 30 years or
3 what have you.

4 But do you have any law in regards to the
5 issue you are referring to now? You have really an
6 evidentiary matter only. It's the matter in which you
7 can present testimony, and this is giving you a
8 statutory structure for presenting that testimony.

9 There was also some non statutory structure
10 for presenting that type of testimony in the past. I am
11 not sure it spoke specifically to videotapes and tape
12 recordings and such, but obviously there was procedures
13 in place where corroboration testimony would be
14 admissible under various cases in the past.

15 But do you have any particular cases that
16 would go to this issue of how Section 7 of this act
17 would affect Section 2 of the act, the admissibility of
18 the out-of-court statements?

19 MS. HEATH: Your Honor, I don't have any law
20 right now.

21 (Pause).

22 THE COURT: Of course, I don't know if I took
23 your only copy, Mr. Cheatham, but Section 7 talks about
24 the repeal or amendment by this act of any law. Clearly
25 there is nothing repealed or amended that affects your

1 client's substantive rights.

2 MR. CHEATHAM: Your Honor, it does to the
3 extent that it makes admissible what was previously
4 inadmissible in evidence against him.

5 THE COURT: I'm not sure it was previously
6 inadmissible.

7 MR. CHEATHAM: Yes, sir.

8 THE COURT: It may have been not admissible
9 through a statutory proceeding, but it still might have
10 been admissible if the proper foundation was laid.

11 MR. CHEATHAM: My understanding of the prior
12 law is that it could be used only to establish the place
13 and time but no further details.

14 THE COURT: That's true under State versus
15 Munn. State versus Munn, which I happen to have a copy
16 here for other purposes which was decided in 1987, does
17 say:

18 There is no rule allowing any and all
19 statements made by the alleged victim to be admissible
20 through hearsay testimony as long as the victim
21 testifies during the case.

22 It is true that when the victim takes the
23 stand and testifies, the evidence that she -- in this
24 case -- complained of an assault may be introduced to
25 corroborate her testimony, citing State versus Cox.

1 So your issue then becomes one of whether or
2 not the details are admissible.

3 MR. CHEATHAM: Yes, sir.

4 THE COURT: Under the videotape versus whether
5 they were admissible under the prior law.

6 MR. CHEATHAM: And in my opinion they were not
7 admissible under the prior law.

8 THE COURT: What if they had an exception to
9 the hearsay rule? What if they are under 803(1) or
10 803(2) or 803(3)?

11 MR. CHEATHAM: I don't think there is an
12 exception in those rules that makes provision for that,
13 Your Honor. If you will give me just a second.

14 (Pause).

15 THE COURT: When I looked at the law on the
16 savings clause, I thought the purpose of when the
17 legislature passes a law, criminal law, and they do not
18 put a savings clause in there, that you can end up with
19 this gap in time when particular conduct is not a
20 violation of the law.

21 Therefore, if you don't have a saving clause,
22 everything that was pending prior to the bill going into
23 effect, when you have that vacuum so to speak, you carry
24 it to an extreme. Everybody -- you know, you could open
25 the doors to the jail for that period of time, and you

1 will have that happen.

2 That was always my understanding of the
3 purpose of the savings clause in any type of bill that
4 was passed. Then you have to vacate the conviction if a
5 person has been convicted and there was that time frame
6 when it wasn't a violation of the law.

7 I guess I am asking both of y'all, are y'all
8 familiar with any cases where the issue is decided as to
9 an evidentiary matter?

10 MS. HEATH: Your Honor, what section of
11 Section 7 was Mr. Cheatham referring to?

12 THE COURT: That's the entire Section 7. It's
13 one paragraph. He handed me up a copy of the bill that
14 has the criminal sexual conduct with a minor penalties.
15 It starts at Section 1. Then Section 2 is the
16 admissibility of out-of-court statements of a child
17 under the age of 12.

18 Section 3 is the electronic monitoring,
19 criminal sexual conduct with a minor offenses. Section
20 4, electronic monitoring violations. Section 5, defense
21 of constitutional challenge, Office of the Attorney
22 General.

23 Section 6, intent and conflicts. Then Section
24 7, savings clause and Section 8, severability clause.

25 MR. CHEATHAM: Then there is also Section 9

1 which says the act takes effect on July the 1st.

2 THE COURT: Section 9, time effective.

3 MS. HEATH: Your Honor, we have a copy. Your
4 Honor, the copy that you are referring to doesn't sound
5 like the same copy as the one we have.

6 THE COURT: I am referring to what he handed
7 up. You are obviously welcome to look at it.

8 MS. HEATH: Could I see that, Your Honor?

9 THE COURT: Yes, ma'am.

10 MR. CHEATHAM: I would apologize in advance,
11 Your Honor, but that's the one I downloaded from the
12 Statehouse because that the only place I could find it.
13 It wasn't on the South Carolina bar website or anywhere
14 else other than there. It says it was signed by the
15 Governor on June the 9th. I assume that is the final
16 version.

17 (Pause).

18 MR. CHEATHAM: Your Honor, I would just also
19 point out that if the legislature had sought to make it
20 retroactive, they could have easily asserted that
21 provision in the law.

22 THE COURT: I will give you both time to
23 review this. Under State versus Needs, N-E-E-D-S, 333
24 S.C. 134, headnote 17, new evidence rules usually apply
25 to trials that occur after those rules take effect.

1 If they apply to trials that occur after they
2 take effect, then it would apply here. It says: New
3 evidence rules usually apply to trials that occur after
4 those rules take place, see State versus Byram,
5 B-Y-R-A-M, which is a death penalty case out of Richland
6 County.

7 Applying case law in effect at the time of the
8 Defendant's trial is not new. There's Rule 607 on
9 impeachment that took effect later. North Carolina
10 versus McDonald -- everybody in this courtroom knows
11 what North Carolina versus McDonald is; correct,
12 Solicitor?

13 MS. HEATH: Yes, Your Honor.

14 THE COURT: Nothing in the rules of evidence
15 indicate the Court intended to delay application of the
16 rules under these circumstances. In this case, Needs
17 the rule took effect about three weeks before appellate
18 stood trial, more than enough time for the appellate to
19 receive notice of it.

20 Do you want to look at that, Mr. Cheatham?

21 MR. CHEATHAM: Your Honor, that would be
22 assuming that this is a rule of evidence, and rules of
23 evidence are included in the other provision and not
24 this provision.

25 There is a separate statutory exception and

1 not a rule of evidence. The rules of evidence are found
2 in the rules of evidence as are approved by the South
3 Carolina Supreme Court.

4 THE COURT: Yes, sir, but that's not what the
5 headnote says. The rules of evidence also had an
6 effective date. That's what I looked up. Rule 1103:
7 These rules shall be entitled South Carolina Rules of
8 Evidence and may be cited by rule number and the letters
9 S.C.R.E.

10 The effective date: These rules shall become
11 effective September 3rd, 1996. This may be a statutory
12 creation that affects the admissibility of evidence in a
13 certain manner.

14 However, I would find based on Needs that if
15 this act took effect June the 7th -- excuse me --
16 July 1st of 2006, and this trial is now being conducted
17 November 6 of 2006, some four months after the effective
18 date of this particular rule, that it would be
19 admissible.

20 MR. CHEATHAM: I would just again call the
21 Court's attention to Section 7 which says specifically
22 it does not apply to pending actions.

23 THE COURT: Right. I have read some research
24 while I was up here looking. The saving clauses
25 generally go to the issue of whether or not the Court

1 has subject matter jurisdiction at the time the case is
2 called for trial.

3 Because if the crime -- if the statute had
4 been amended somehow and there was no saving clause,
5 then the Court would not have subject matter
6 jurisdiction and everything the Court did would be null
7 and void.

8 I think a savings clause is different than my
9 ruling. But your point is well taken and you are
10 certainly protected for the record, Mr. Cheatham.

11 Yes, ma'am.

12 MS. HEATH: Your Honor, also if you look at
13 the second sentence in the saving clause, it says:
14 After the effective date of this act, all laws repealed
15 or amended by this act must be taken and treated as
16 remaining in full force and effect for the purpose of
17 any pending criminal prosecution.

18 So I think that even that second sentence says
19 that this rule should be in effect for this trial, Your
20 Honor.

21 THE COURT: I am certainly not ruling at this
22 point it's admissible. You still have to lay the
23 foundation obviously under the statute.

24 Solicitor, you may proceed.

25 MS. HEATH: Thank you, Your Honor. Your

1 Honor, the State would call Melanie Trimble.

2 MELANIE TRIMBLE, being
3 first duly sworn, testified as follows:

4 CLERK: State your full name once you have a
5 seat and spell your last, please.

6 MR. CHEATHAM: Your Honor, we would move that
7 the witnesses be sequestered.

8 THE COURT: All right. A., the victim has a
9 right to be present under the Victim/Witness Bill of
10 Rights. B., I generally always allow the chief
11 investigating officer to be present.

12 Solicitor, do you have a position?

13 MS. HEATH: Your Honor, we would ask that the
14 victim's mother be allowed to stay in here as well.

15 THE COURT: Is she a witness?

16 MS. HEATH: She is a witness, but I think
17 under the Victims' Bill of Rights, since [REDACTED] is a
18 minor, his mother has a right to be in here with him.

19 THE COURT: Is that correct? I don't have
20 that in front of me.

21 MS. HEATH: Yes, Your Honor.

22 THE COURT: Do you have objections to his
23 mother staying, Mr. Cheatham?

24 MR. CHEATHAM: Yes, sir.

25 THE COURT: How old is the victim?

MELANIE TRIMBLE -- DIRECT -- MS. HEATH

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1 MS. HEATH: Now, he is ten. He was four at
2 the time. But they are not witnesses in the pretrial
3 motion or the mother is not.

4 THE COURT: Since he has waived a jury trial,
5 I guess the pretrial motions become part of the totality
6 of the factual surroundings. I will allow the victim to
7 remain in the courtroom.

8 If he is ten years of age, which is a tender
9 age, I will allow his parent to remain with him. If the
10 parent that is in here is his mother, she can remain
11 with him. The chief officer can remain.

12 Any there other witnesses, Solicitor?

13 MS. HEATH: Yes, Your Honor, one other
14 witness.

15 THE COURT: You can have the other witness
16 step out.

17 (Pause).

18 THE COURT: You may proceed, Solicitor.

19 DIRECT EXAMINATION

20 BY MS. HEATH:

21 Q Ms. Trimble, where are you employed?

22 A My name is Melanie Trimble. My last name is
23 spelled T-R-I-M-B-L-E. I'm employed at the
24 Assessment and Resource Center, which is part of
25 the Department of Mental Health in Columbia.

1 Q What is your job there?

2 A I'm a children's therapist and a forensic
3 interviewer.

4 Q Did you have the occasion to interview [REDACTED]

5 [REDACTED]

6 A I did.

7 Q And when did you do this?

8 A On January 11, 2005.

9 Q How were you contacted to do this interview?

10 A Detective Eric Russell from the Lexington County
11 Sheriff's Department contacted our intake
12 coordinator and arranged the interview.

13 Q Can you tell me about your educational background.

14 A I have a clinical master's degree and postgraduate
15 training in mental health and trauma. I have
16 attended professional development since then in the
17 areas of mental health, childhood trauma, child
18 treatment and various types of abuse of children
19 and adults.

20 Q How much experience have you had with conducting
21 forensic interviews on children?

22 A Since I was trained in November 2004, I have
23 conducted between 80 and a hundred forensic
24 interviews at the A.R.C.

25 Q What percentage of those interviews have involved

MELANIE TRIMBLE -- DIRECT -- MS. HEATH

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1 child abuse?

2 A Ninety-eight percent probably are child abuse. We
3 occasionally have child neglect interviews, but I
4 believe I've only had one or two of those.

5 Q What, if any, guidelines are established when you
6 interview a child?

7 A The guidelines that we follow include following a
8 nationally recognized protocol. In my case I am
9 trained in the R.A.T.A.C. model, R-A-T-A-C. They
10 also include conducting the interview in a
11 child-appropriate setting and using child
12 appropriate language.

13 The language should be appropriate to the
14 child's age and development. We also have
15 guidelines of using non-suggestive and non-leading
16 or misleading language.

17 Q Is the child informed of these guidelines?

18 A The child is informed of the camera in the room,
19 the videotaping, and of the rules of the interview,
20 meaning truth telling, correcting the interviewer
21 when the interviewer is mistaken or misunderstands
22 something or in error, and the need to clarify
23 things with the interviewer and be only talking
24 about things that are true and real.

25 We go into detail about that and make sure the

1 child understands that this is a truth telling. We
2 make sure -- the environment is not child friendly
3 in the sense of having toys or games or fantasy
4 objects -- it's just child appropriate and non
5 intimidating, which research has shown is necessary
6 to achieve the best results for the child.

7 Q Are the parents of the child present in the
8 interview room?

9 A No.

10 Q Why are they not present?

11 A We make every effort to conduct forensic
12 interviewing in a way not to have outside
13 influences from other parties. We don't go into
14 the interview with any sense of anybody else's
15 opinion.

16 We try not to have any kind of opinion formed
17 at all, and we don't want the influence of a family
18 member or an important person for that child in the
19 room influencing the child's responses.

20 Q Where is the interview conducted?

21 A We have a special room set up that has closed
22 circuit video monitoring so we can record our
23 interviews, and it's conducted in our facility at
24 the Department of Mental Health.

25 Q After you interviewed [REDACTED] did you document his

MELANIE TRIMBLE -- DIRECT -- MS. HEATH

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1 interview in any form?

2 A I did. I documented it with a report that is a
3 nine-page report that was sent to Eric Russell with
4 the Lexington County Sheriff's Department outlining
5 our findings and recommendations.

6 Q Was there anything about [REDACTED] disclosure that
7 would have caused you to believe it was the result
8 of a third-party influence?

9 A No.

10 MR. CHEATHAM: I would object, Your Honor.

11 THE COURT: Rephrase that question, Madame
12 Solicitor.

13 BY MS. HEATH:

14 Q Did you believe that [REDACTED] had been influenced
15 during his interview?

16 A I did not.

17 MR. CHEATHAM: Same objection.

18 THE COURT: You may proceed, Solicitor.

19 A I did not have any concerns about outside influence
20 once the evaluation was completed.

21 Q Do you recognize this videotape that has been
22 marked as State's Exhibit Number 4?

23 A I recognize it's a videotape.

24 Q Did you videotape [REDACTED] interview?

25 A I did.

1 Q Did you give it to me?

2 A Yes, it was given to your office.

3 MS. HEATH: Your Honor, I move to publish the
4 video.

5 THE COURT: Solicitor, would it not -- it
6 still doesn't comply with 17-23-175 (3). Wouldn't there
7 have to be a foundation laid? Wouldn't there have to be
8 foundation laid under 17-23-175 (3).

9 MS. HEATH: Yes, Your Honor. I can call
10 [REDACTED] to the stand.

11 THE COURT: Let me ask, do you have any other
12 questions of Ms. Trimble at this time?

13 MS. HEATH: No further questions, Your Honor.

14 THE COURT: Mr. Cheatham, do you have any
15 cross examination?

16 MR. CHEATHAM: Yes, sir.

17 CROSS EXAMINATION

18 BY MR. CHEATHAM:

19 Q At the time you undertook this investigation, were
20 you aware of Chapter 23, Title 17 of the 1976 code?

21 A No, I was not.

22 Q So you were not making this video pursuant to this
23 section, correct?

24 A I don't read legal codes as a matter of daily
25 course. We were aware that the protocol for best

MELANIE TRIMBLE -- CROSS -- MR. CHEATHAM

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1 practices in forensic interviewing nationally is to
2 videotape all of our interviews for a number of
3 reasons. So we only videotape those interviews
4 that are part of the sexual abuse or physical abuse
5 investigations.

6 Q So you had videotaped 98 percent of your
7 interviews?

8 A I videotaped all of my forensic interviews, with
9 the exception of one when the camera malfunctioned.

10 Q The time frame reference in the video -- and I'm
11 not asking you for the specific time frame
12 reference. I want you to know that -- I just want
13 to know, is it within December of 2000 through
14 January of '01?

15 A I wouldn't know that, sir.

16 Q You would not know that?

17 A The child --

18 Q The time that he gave reference to the act
19 occurring.

20 A It would be developmentally inappropriate for me to
21 ask a child of eight, recollecting something that
22 happened at age four, for a specific date or time.
23 That's not within their developmental abilities at
24 that time. Even if the child was eight at the
25 time, a four-year-old memory is not going to be

1 that specific.

2 Q But you don't have that reference in your notes?

3 A I have a reference that the child said he was
4 around four when the incident happened.

5 Q Do you have a reference in your notes as to a time
6 frame?

7 A By my notes do you mean the report that I provided?

8 Q The time frame of Christmas of 2000 to January of
9 '01.

10 MS. HEATH: Your Honor, I object.

11 THE COURT: What is the basis of your
12 objection?

13 MS. HEATH: His questioning has nothing to do
14 with the admissibility of the videotape.

15 THE COURT: Wouldn't it go to (b)(3),
16 Solicitor, and perhaps (b)(4)? I haven't heard it all
17 yet. I am kind of ruling in a vacuum. I will overrule
18 your objection.

19 You may proceed, Mr. Cheatham.

20 MR. CHEATHAM: Thank you.

21 BY MR. CHEATHAM:

22 Q Was there any reported time frame to you of
23 December of 2000 to January of -- through the end
24 of January of '01?

25 A Not that I recall. I am just checking very quickly

MELANIE TRIMBLE -- CROSS -- MR. CHEATHAM

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1 to make sure I'm not in error.

2 (Pause).

3 A No, there was not.

4 Q And wasn't there a reference that the perpetrator
5 lived in the residence?

6 A In information provided to me or in information
7 from the forensic interview?

8 Q From the interview.

9 A I recall that the child was a little unclear on
10 that point in remembering what happened when he was
11 four. I believe he made a statement on that, and
12 it was that...

13 Q Didn't he say that the perpetrator --

14 A He was staying with him.

15 Q Didn't he also make reference to the perpetrator
16 went to the perpetrator's bedroom after it
17 occurred?

18 A Yes.

19 MR. CHEATHAM: Give me just one second, Your
20 Honor. I think I'm through.

21 (Pause).

22 MR. CHEATHAM: That's all I have at this time,
23 Your Honor.

24 THE COURT: Any redirect?

25 MS. HEATH: No, Your Honor.

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1 THE COURT: Ms. Trimble, you may step down,
2 subject to being recalled.

3 THE WITNESS: Yes, sir.

4 MS. HEATH: Your Honor, the State calls ██████

5 ██████

6 ██████ ██████ ██████ being
7 first duly sworn, testified as follows:

8 CLERK: Speak up loud and clear and state your
9 full name, please.

10 THE WITNESS: ██████ ██████ ██████

11 DIRECT EXAMINATION

12 BY MS. HEATH:

13 Q Hey, ██████ How old are you?

14 A Ten.

15 Q When is your birthday?

16 A ██████

17 Q Can you talk up a little bit louder.

18 A Yes, ma'am.

19 Q When you just held your hand up, what does that
20 mean?

21 A That pretty much if I lie, I don't believe in God.

22 MR. CHEATHAM: Your Honor, I don't mean to
23 interrupt unduly, but would it be permissible for me
24 to approach so I can hear the witness? I can't hear
25 the witness, or either adjust the microphone or

--- DIRECT --- MS. HEATH

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1 something.

2 THE COURT: I don't think our microphones are
3 working. Mr. Cheatham, you can sit over there in the
4 jury box if you would like.

5 You have no objection to that, Solicitor?

6 MS. HEATH: No objection.

7 THE COURT: All right.

8 BY MS. HEATH:

9 Q Are you going to tell the truth today?

10 A Yes, ma'am.

11 Q So if I said your shirt is yellow, is that the
12 truth or a lie?

13 A It's a lie.

14 Q I am going to ask you to remember back to your
15 Christmas break of 2000.

16 A Yes, ma'am.

17 Q Do you remember that Christmas break?

18 A Yes, ma'am.

19 Q How old were you then?

20 A Four.

21 Q Did anything bad happen to you that Christmas
22 break?

23 A Yes, ma'am.

24 Q Can you tell me about that.

25 A I was made to put Michael Day's penis in my mouth.

1 MR. CHEATHAM: Your Honor, this is just going
2 for the introduction of the video and not to his regular
3 testimony; correct? I wanted to clarify that.

4 THE COURT: Solicitor.

5 MS. HEATH: Your Honor, as part of that test,
6 the child has to testify and be subject to cross examine
7 on the elements of the offense, as well as the making of
8 the videotape. I think I need to ask him that to get
9 the videotape into evidence.

10 MR. CHEATHAM: If she is doing it for the
11 purpose of the videotape, then my objections obviously
12 would be different than if he were going to testify in
13 full. That's the question I was trying to make.

14 THE COURT: All right, sir.

15 MS. HEATH: I mean, I am questioning him about
16 the elements of the offense, Your Honor.

17 THE COURT: I understand. You may proceed,
18 Solicitor.

19 BY MS. HEATH:

20 Q You said something bad happened to you that
21 Christmas break?

22 A Yes, ma'am.

23 Q Can you tell me about that.

24 A I was made to put Michael Day's penis in my mouth.

25 Q Where were you?

[REDACTED] [REDACTED] -- DIRECT -- MS. HEATH

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- 1 A Living on [REDACTED] Highway, on [REDACTED]
2 Highway in a trailer.
3 Q In Leesville?
4 A Yes, ma'am.
5 Q And who was at the house with you?
6 A My dad, my two brothers, and Michael Day.
7 Q Was your mom there?
8 A No, ma'am.
9 Q Where was your mom?
10 A In the hospital.
11 Q How did you know Michael?
12 A A friend of my mom's.
13 Q And where were you when this happened?
14 A In the bathroom.
15 Q Can you tell me how you got in the bathroom?
16 A I was going to use it, the bathroom.
17 Q Once you were in the bathroom, what happened?
18 A Then he came in and he told me to put his penis in
19 my mouth.
20 Q And what did you do?
21 A I did it.
22 Q Did you have your clothes on?
23 A Yes, ma'am.
24 Q What about Michael, were his clothes on?
25 A Yes, ma'am.

1 Q Did he have his clothes all on?

2 MR. CHEATHAM: Objection, Your Honor, she is
3 leading.

4 THE COURT: No, sir, I would allow it.
5 Overruled.

6 A His pants and his underwear were barely pulled
7 down.

8 Q And where was his penis?

9 A In my mouth.

10 Q What happened then?

11 A I don't understand.

12 Q Did anything come out of his penis?

13 A No, ma'am.

14 Q And when did you stop having his penis in your
15 mouth?

16 A When my dad walked into the house to go fix lunch.

17 Q He walked into the house?

18 A Yes, ma'am.

19 Q How do you know?

20 A Because I could hear his footsteps.

21 Q And then what happened?

22 A Then he told me to stop.

23 Q What did you do?

24 A Stopped.

25 Q And then what did you do?

[REDACTED] [REDACTED] -- DIRECT -- MS. HEATH

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1 A I got up and when I got up, then he hid in the
2 shower; and I used the bathroom and then I went
3 out.

4 Q Did you tell anybody about this happening?

5 A Yes, ma'am.

6 Q Who is the first person that you told?

7 A Miss Melanie.

8 Q Miss Melanie.. Where were you when you told
9 Miss Melanie?

10 A At the resource center, the A.R.C. resource center.

11 Q And were you in a little room?

12 A Yes, ma'am.

13 Q And she was doing an interview on you?

14 A Yes, ma'am.

15 Q Were you being videotaped?

16 A Yes, ma'am.

17 Q How do you know?

18 A She told me.

19 MS. HEATH: Beg the Court's indulgence.

20 (Pause).

21 BY MS. HEATH:

22 Q Do you see Michael in the courtroom today?

23 A Yes, ma'am.

24 Q Can you point to him?

25 A (Indicating).

1 MS. HEATH: Let the record reflect that he
2 pointed to the Defendant.

3 BY MS. HEATH:

4 Q Did you see the video that they took of you at the
5 resource center?

6 A Yes, ma'am. The only time I seen it was here.

7 Q You saw it here?

8 A Yes, ma'am.

9 MS. HEATH: No further questions, Your Honor.

10 THE COURT: Thank you, Madame Solicitor.
11 Mr. Cheatham.

12 MR. CHEATHAM: May it please the Court.

13 CROSS EXAMINATION

14 BY MR. CHEATHAM:

15 Q I'm just going to ask you a few questions. If you
16 don't understand me, ask me to restate it, and I
17 will be glad to. Is that okay?

18 A Yes, sir.

19 Q Now, when you initially were reporting times, the
20 year 1999, was that reported?

21 A No, sir.

22 Q What?

23 A No, sir.

24 Q Was the year 2002 reported?

25 A No, sir.

-- CROSS -- MR. CHEATHAM

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1 Q So neither you nor your parents have made any
2 reference to this occurring in 1999?

3 A No, sir.

4 Q Or in 2002?

5 A No, sir.

6 Q Now, you said specifically Christmas?

7 A Yes, sir.

8 Q When did you first say that?

9 A When I was in Melanie Singleton's office.

10 Q I'm sorry, you are going to have to speak up just a
11 little.

12 A When I was in Melanie Singleton's office, Melanie's
13 office.

14 Q So you told Melanie at Christmastime?

15 A Yes, sir.

16 Q And did you tell her that your mother was in the
17 hospital?

18 A I don't remember.

19 Q When did you first realize that your mother was in
20 the hospital?

21 A The day she went in.

22 Q When did you first recall that this conduct had
23 happened while she was in the hospital?

24 A Once I started thinking about it, and I thought
25 about the year. I remember my momma not being

1 there that Christmas because we went to the
2 hospital to go see her.

3 Q And did this happen before or after you went to the
4 hospital to go see her?

5 A Before.

6 Q But you didn't tell anything to her then?

7 A No, sir.

8 Q Now, you are saying then it happened before or
9 after Christmas?

10 A Before.

11 Q Before Christmas?

12 A Yes, sir.

13 Q And you told Miss Melanie that?

14 A Yes, sir.

15 Q When did you first tell the police that or did you
16 ever tell the police that?

17 A I never told the police.

18 Q Did you tell the Solicitor's Office about
19 Christmas?

20 A Yes, sir.

21 Q When did you first tell them about Christmas?

22 A I had -- after I went to Melanie Singleton's
23 office, they told me to come here, and that's when
24 I told them.

25 Q So it would be right after you went and had the

█ █ -- CROSS -- MR. CHEATHAM

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1 visit with Miss Melanie?

2 A No, sir.

3 Q I'm sorry. I lost you there then. I'm not trying
4 to trick you. I just apologize. I didn't
5 understand you. I thought you said you went to
6 Miss Melanie's office, gave her the interview, and
7 then they told you to come to the Solicitor's
8 Office and talk with them. Is that not right?

9 A Yes, sir, but we didn't come here until a few days
10 after.

11 Q That's fine. But you came here, say, within five
12 days? Would that be right?

13 A Yes, sir.

14 Q So within five days you told the Solicitor's Office
15 about Christmastime?

16 A Yes, sir.

17 Q Now during this Christmas, who all was living in
18 the house?

19 A Me, my dad, my two brothers, and Michael was
20 partially staying there.

21 Q And when you say, "my dad," who are you referring
22 to?

23 A Lester Ruilova.

24 Q Now, Les Ruilova is not really your dad?

25 A No, sir.

- 1 Q Now, but he was staying there at this time?
- 2 A Yes, sir.
- 3 Q Was anybody else staying there?
- 4 A No, sir.
- 5 Q It was you?
- 6 A Yes, sir.
- 7 Q Your two brothers?
- 8 A Yes, sir.
- 9 Q Your mom and your dad?
- 10 A Yes, sir.
- 11 Q And then you said sometimes Michael?
- 12 A Yes, sir.
- 13 Q Do you ever remember a fellow named Troy staying at
- 14 your house?
- 15 A He would come over some nights just to sit around,
- 16 and then he would go back home. He never spent the
- 17 night.
- 18 Q So would his last name have been Hastings, do you
- 19 remember that?
- 20 A No, sir.
- 21 Q What was his last name, do you know?
- 22 A No, sir.
- 23 Q But a fellow named Troy would come over
- 24 occasionally?
- 25 A Yes, sir.

-- CROSS -- MR. CHEATHAM

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- 1 Q And he would stay there. Did he ever baby-sit for
2 you?
- 3 A No, sir.
- 4 Q He never did. What about a fellow named Dale? Did
5 he come over there?
- 6 A Yeah, but it was when I was a lot littler.
- 7 Q It was when you were what?
- 8 A A lot littler.
- 9 Q So you would have been younger, like two?
- 10 A Uh-huh. (Indicating affirmative response). Yes,
11 sir.
- 12 Q Did he live there then?
- 13 A No, sir.
- 14 Q So he never lived there either?
- 15 A No, sir.
- 16 Q How often would he come over?
- 17 A Maybe once a week.
- 18 Q And who was he coming to see?
- 19 A He was just coming to talk to my mom and to see me.
- 20 Q And did he do things with y'all?
- 21 A We would sit at home and watch a movie.
- 22 Q Did he and your mother ever go out on a date?
- 23 A No, sir.
- 24 Q Now, before Ruilova came there, did any other guy
25 live there?

- 1 A No, sir.
- 2 Q Not at all?
- 3 A No, sir.
- 4 Q Who was there before he came there, just you and
5 your mom and your brother?
- 6 A Me, my momma, and both of my brothers.
- 7 Q They were there?
- 8 A Yes, sir.
- 9 Q Was there a time that your brothers left and didn't
10 stay with you for awhile?
- 11 A While we were living on [REDACTED] Road?
- 12 Q Yes.
- 13 A No, sir.
- 14 Q When did they not stay with you for awhile then?
- 15 A When we moved to [REDACTED] Street in Batesburg.
- 16 Q Do you recall what years they were not there?
- 17 A No, sir.
- 18 Q But they were there when you said this incident
19 occurred?
- 20 A Yes, sir.
- 21 Q And I believe you also stated that at some point in
22 time, Michael had a bedroom there; is that correct?
- 23 A Yes, sir.
- 24 Q Now, when you were asked questions about what
25 happened about this incident, who else was in the

-- CROSS -- MR. CHEATHAM

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1 house?

2 A Sir, I didn't understand.

3 Q Okay. When you were talking about Michael, you
4 mentioned there were some other people in the
5 house, like your dad and your two brothers?

6 A Yes, sir.

7 Q Where were they?

8 A At the moment that I was being made to do this, my
9 dad was outside watching my brothers ride their
10 bike.

11 Q Was anybody else in the house?

12 A No, sir, just me and Michael.

13 Q And why was Michael over there?

14 A Because he just wanted to come over and stay.

15 Q Do you remember telling anybody that he was
16 baby-sitting you at one time?

17 A Yes, sir.

18 Q But that's not true?

19 A Yes, sir, he baby-sitted me for a little while
20 until my momma found out that he hit -- either it
21 was me or one of my brothers.

22 Q I'm trying to get it straight. Was he or was he
23 not baby-sitting you --

24 A He was.

25 Q -- on the incident?

1 A He was not baby-sitting me while the incident
2 happened.

3 Q But he was baby-sitting you before it happened?

4 A Yes.

5 Q And your dad Ruilova was outside?

6 A Yes, sir.

7 Q With your two brothers?

8 A Yes, sir.

9 Q And where was your mother?

10 A In the hospital.

11 Q And how long had she been in the hospital?

12 A Pretty much December, the whole December.

13 Q Now, when did you -- you told the Solicitor's
14 Office that she was in the hospital during this
15 whole December when you went to talk with them
16 after that five days; is that correct?

17 A Yes, sir.

18 Q Do you ever remember meeting a girl named Angela
19 Hastings?

20 A No, sir.

21 Q Never did?

22 A No, sir.

23 MR. CHEATHAM: Nothing further at this time,
24 Your Honor.

25 THE COURT: Anything on redirect, Solicitor?

1 MS. HEATH: Nothing further, Your Honor.

2 THE COURT: Young man, you may step down.

3 Solicitor.

4 MS. HEATH: Your Honor, I think the only way
5 to prove elements 3 and 4(b), part of (b), is to show
6 the videotape. So we would ask to publish the
7 videotape.

8 THE COURT: How long is it?

9 MS. HEATH: It's about 15 minutes.

10 THE COURT: Let's take about a 15-minute
11 break. You can set it up during that time.

12 MS. HEATH: Thank you.

13 (Whereupon there was a recess).

14 THE COURT: Solicitor, you may proceed.

15 (State's Exhibit 4 is played for the Court).

16 MS. HEATH: Your Honor, we would move the
17 videotape into evidence.

18 THE COURT: Mr. Cheatham.

19 MR. CHEATHAM: Yes, sir, Your Honor. We would
20 object. Do you want me to argue now?

21 THE COURT: You can wait until they finish.

22 MR. CHEATHAM: May it please the Court. Your
23 Honor, we think that the video in and of itself shows
24 too many inconsistencies between the testimony here and
25 the testimony there to make it admissible.

1 The live testimony indicated that the father
2 and the two sons were there. In the video he said the
3 dad was and one brother was there. He also said the dad
4 was in the house, which he said here his dad was
5 outside.

6 In the testimony here, he said he was in the
7 bathroom first. The testimony on the video he says
8 Michael was in the bathroom first. When he talked about
9 Michael staying there, he said Michael stayed there
10 part-time, and on here he said he was staying there with
11 them, and he had his own bedroom.

12 As you will notice, he also was inconsistent
13 in the reference to the male reproductive organ in his
14 testimony here and his testimony on the video. The time
15 frame was not mentioned on the video, and he clearly
16 indicated that he told her that it happened Christmas of
17 2000.

18 There was no mention of his mom being in the
19 hospital. The mom being in the hospital did not come up
20 until we were getting ready to call this case in
21 October, and that's when they finally -- it may have
22 been the end of September.

23 But anyway the last time they called the case
24 was the first time anybody ever mentioned Christmas
25 vacation. Up until then it was from June of '01 through

1 January of '02. So the time frame is completely out of
2 sequence.

3 According to the information provided to me at
4 the last time we were coming, the child and the mother
5 were prepared to testify that it happened at Christmas
6 of '01. Then when we could show he was not here during
7 Christmas of '01, it comes back Christmas of 2000.

8 That's why we were going to get the
9 out-of-state witnesses, which we were not successful,
10 but we were trying to get the photographs that showed
11 him up there because we have photographs showing him
12 down here -- that he was not here during Christmas of
13 '01.

14 So we feel like it's an attempt to bolster
15 testimony which should not be bolstered and otherwise
16 inadmissible under the statute.

17 THE COURT: Mr. Cheatham, let me ask you a
18 couple of things.

19 MR. CHEATHAM: Yes, sir.

20 THE COURT: Setting aside your previous
21 argument about the statute, 17-23-175, you do not
22 question the statement was given in response to
23 questioning conducted during an investigative interview
24 of the child?

25 MR. CHEATHAM: We would have no way to prove

1 or disprove that. If that's what the woman testified
2 to, we can't disprove it. I don't know that it was
3 necessarily an investigative interview since it happened
4 so many years after the incident.

5 I would question it from that standpoint
6 because this was an interview that happened some five
7 years after the occurrence. So I think the time frame
8 also takes it out of reliability and makes it
9 inconsistent.

10 THE COURT: But you don't question that an
11 audio and visual recording of the statement was
12 preserved?

13 MR. CHEATHAM: No, sir, we wouldn't contest
14 that.

15 THE COURT: And you don't question that the
16 child testified at the proceeding and was subject to
17 cross examination on the elements of the offense and in
18 the making of the out-of-court statement.

19 MR. CHEATHAM: We would not. Number 4, we
20 most definitely contest.

21 THE COURT: Number 4, and that goes to the
22 various factors in (B)(1) through (5); correct?

23 MR. CHEATHAM: Correct.

24 THE COURT: All right.

25 MR. CHEATHAM: It would also go to the other

1 factors that I mentioned, as well as the time frame and
2 the other things. I don't think it's just limited to
3 those factors.

4 I think you consider, as the statute says,
5 when determining whether a statement possesses
6 particularized guarantee of trustworthiness, the Court
7 may consider but is not limited to the following
8 factors.

9 So we think you can consider all of the
10 factors that we have brought forth today, including the
11 factors that the interview was done so remotely from
12 the incident and the other things that I previously
13 stated.

14 THE COURT: Thank you. Solicitor.

15 MS. HEATH: Your Honor, as to the guarantee of
16 trustworthiness, as to the leading questions,
17 Ms. Trimble testified that she did the R.A.T.A.C.
18 protocol which is a nationally recognized method of
19 interviewing children.

20 It does not elicit leading questions. I think
21 we all saw the video. She definitely didn't have any
22 leading questions. She testified, number two, that she
23 had been trained in interviewing children, went over her
24 training and her experience at the Assessment Resource
25 Center.

1 As to number three, the statement representing
2 a detailed account of the alleged offense, Your Honor,
3 it was a delayed disclosure case. This was the first
4 time [REDACTED] ever told anybody about it. I think it does
5 represent a detailed account of the offense as to the
6 elements of the criminal sexual conduct.

7 As to number four, basically I think the
8 statement does have internal coherence. There is not
9 that many inconsistencies with his statement.
10 Mr. Cheatham was referring to Les being in the house
11 versus coming in the house.

12 I think [REDACTED] on the video testified that
13 he heard his dad in the house making a noise, and
14 that's what had Michael stop -- had him stop performing
15 oral sex. Also on the statement he said he heard his
16 dad coming in the house, coming down the hall making
17 noise.

18 As to Michael staying in the house part-time,
19 I don't think there's any inconsistencies in either the
20 video or [REDACTED] testimony. [REDACTED] did say he had a
21 bed there, but he didn't know whether Mike was staying
22 there that particular night. He said in both the video
23 and his statement that he stayed there sometimes.

24 He did refer to the penis as a penis today as
25 opposed to a worm. I told [REDACTED] he could call the male

1 organ whatever he wanted to today in court. I don't
2 think that the fact --

3 MR. CHEATHAM: Your Honor, is she going to
4 testify?

5 THE COURT: Excuse me, Mr. Cheatham. Please
6 don't interrupt her. I will give you an opportunity to
7 speak after she finishes.

8 Yes, ma'am, Solicitor. You may proceed.

9 MS. HEATH: I don't think the fact that the
10 Christmas vacation was not mentioned in the video has
11 anything to do with whether the video should come in or
12 whether that affects the internal coherence of the
13 video.

14 As to the time frame, Ms. Trimble indicated
15 that she did not ask a four year old or a child that was
16 four at the time about a time frame because forensically
17 trained interviewers don't do that. They are trained
18 not to do that.

19 I think that the videotape does provide a
20 guarantee of trustworthiness and would ask to admit it
21 into evidence.

22 THE COURT: Thank you, Solicitor. I would be
23 glad to hear from you, Mr. Cheatham.

24 MR. CHEATHAM: First of all, Your Honor, I
25 don't think it's appropriate or proper for her to

1 testify as to what she told the witness to say. If she
2 is going to do that, I would request that she clarify
3 the Christmas situation, which they said they told the
4 people months ago, but it really wasn't brought up until
5 the last time we came over here to try the case, and
6 they said they weren't going to call it.

7 That's the first time Christmas was brought
8 up, which was delayed, and the son clearly stated he
9 told the interviewer that it happened at Christmas of
10 2000, and mom was in the hospital.

11 That to me seems like additional evidence that
12 has arisen since this interview, which again both of
13 them cannot be credible. Either his testimony here is
14 not credible or the testimony there is not credible.

15 Because you have a situation where he said he
16 told them -- I've been through the inconsistencies, so I
17 won't repeat all those. But there is just not enough
18 consistency with his testimony and the video to make it
19 admissible under the statute, if the statute applies,
20 which we contend it does not.

21 THE COURT: Thank you, Mr. Cheatham. As to
22 17-23-175, I do find that the statements given in the
23 videotape was given in response to questioning conducted
24 during an investigative interview of the child.

25 It is clear from Ms. Trimble's testimony that

1 the child was referred to her by Detective Russell with
2 the Lexington County Sheriff's Department or referred to
3 the intake or A.R.C. through Detective Russell at the
4 Lexington County Sheriff's Department.

5 I find there is an audio and visual recording
6 of the statement preserved on videotape. I find that
7 the child, [REDACTED] [REDACTED] has testified at this
8 proceeding and has been subject to cross examination on
9 the elements of the offense and the making of the
10 out-of-court statement, that he was informed it was
11 being videotaped by Ms. Trimble.

12 I have conducted a hearing to determine the
13 particularized guarantee of trustworthiness as to the
14 statement, based both on Ms. Trimble's testimony before
15 the Court as far as her background, that she has a
16 Master's degree in Mental Health and for trauma and
17 child abuse.

18 She has conducted 180 forensic interviews, 98
19 percent of which were child abuse interviews, that they
20 are all videotaped. She has been trained in the
21 national protocol of the R.A.T.A.C. method of conducting
22 such forensic interviews.

23 She was the only interviewer present.. There
24 was no other individual besides the child himself that
25 was present during the video. She further testified

1 that she did not ask the child about a specific date
2 frame because of his age, that he related it to a time
3 when he was four years of age. There was no time
4 reference.

5 She further testified that it was unclear on
6 the tape as to whether or not the alleged perpetrator
7 was living with the victim at the time this occurred
8 but that he was staying with them, and after it
9 happened he, the Defendant, went to his room after it
10 occurred.

11 It's clear both from her testimony and from
12 the videotape that she did not use leading questions,
13 that she didn't prompt the child in any way but only
14 asked him factually what had occurred. It's clear that
15 she has been trained in conducting these types of
16 forensic investigative interviews of children and has
17 done so many times in the past.

18 As I understand it, this videotape was -- the
19 interview on the videotape was January 11, 2005. There
20 is a detailed account of the alleged offense on the
21 videotape that is consistent with the alleged offense
22 that the child has testified to today.

23 The statement on the videotape clearly has
24 internal coherence within itself. As the defense has
25 pointed out, there may be inconsistencies as to

1 whether or not the father and both brothers were
2 present.

3 However, in both the video and the testimony
4 before the Court, the victim indicates that there was
5 hearing involved, that either he or the Defendant or
6 both heard the dad or the individual he identified as
7 his dad coming. As a result of that, the alleged
8 encounter halted.

9 Given the fact that it was five years from
10 when the incident allegedly happened and then another
11 year and 11 months before the child is testifying before
12 the Court today, I think it's got a great amount of
13 detailed account of the alleged offense consistent with
14 his testimony today, his statement in the record -- or
15 excuse me -- on the video.

16 I think the inconsistencies would obviously
17 go -- and I'm not evaluating that at this time -- the
18 weight of the testimony. Whether or not it proves the
19 case beyond a reasonable doubt or not is not what I'm
20 looking at now.

21 I am looking at whether or not the tape is
22 admissible, and then at some point in time I will give
23 it whatever weight and value I so decide it should be
24 given.

25 So I find the videotape has met all the

1 factors laid out in 17-23-175. I have also relied on
2 State versus Douglas, 626 S.E.2d 59, which recognized
3 forensic interviewing as an area of expertise in the
4 courts of South Carolina.

5 In that case an officer testified in a lewd
6 act case committed or allegedly committed upon a
7 12-year-old victim.

8 MR. CHEATHAM: Your Honor, in reference to
9 State versus Douglas, we feel like the reliance would be
10 misplaced because she was never offered as an expert.

11 THE COURT: Well, I think you have both asked
12 me to look under the various factors on 17-23-175 and
13 both have argued (b)(2), whether the interviewer has
14 been trained in conducting investigative interviews of
15 children. So I find that she has been so trained. The
16 tape is admissible.

17 (State's Exhibit Number 4 is marked for
18 identification).

19 THE COURT: Solicitor.

20 MS. HEATH: Thank you, Your Honor. That's all
21 the pretrial motions that the State has.

22 THE COURT: All right. Mr. Cheatham, do you
23 have any motions?

24 MR. CHEATHAM: Yes, sir, Your Honor. We have
25 initially a Batson versus -- not Batson -- a Jackson

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1 argument on the voluntariness of a statement given by my
2 client.

3 THE COURT: Solicitor.

4 MS. HEATH: Thank you, Your Honor. The State
5 would call Detective Eric Russell.

6 ERIC REDMOND RUSSELL, being
7 first duly sworn, testified as follows:

8 CLERK: State your full name, please.

9 THE WITNESS: Eric Redmond Russell.

10 DIRECT EXAMINATION

11 BY MS. HEATH:

12 Q Did you have the opportunity to speak with the
13 Defendant, Michael Day?

14 A Yes, ma'am, I did.

15 Q When did you do this?

16 A I believe it was the 22nd of February, 2005, I
17 believe.

18 Q Where did this take place?

19 A At the Lexington County Sheriff's Office.

20 Q How did the Defendant get there?

21 A He came with his wife. One of the two of them
22 drove. I'm not sure which one drove.

23 Q And how did he know to come to the Sheriff's
24 Department?

25 A I had spoken with him on the phone either the day

1 before or a couple of days before and asked him if
2 he would come down to the Sheriff's Office and talk
3 to me.

4 Q Did you schedule a time for him to come?

5 A We scheduled an appointment for him to come, yes,
6 ma'am.

7 Q When he got there, what did you tell him?

8 A When he arrived at the Sheriff's Office, I escorted
9 him back to an interview room.

10 Q What type of room is the interview room?

11 A We have three of them back in the Sheriff's Office.
12 They are about -- I don't know -- ten by twelve or
13 so. It's got a table and several chairs in it.

14 Q What did you tell him you wanted to speak with him
15 about?

16 A I talked with him about two separate issues. We
17 spoke about the first issue, completed that. Then
18 I told him I needed to speak with him about an
19 allegation by [REDACTED] [REDACTED]

20 Q Who was present in the interview room with you?

21 A Just myself and Mr. Day.

22 Q Was the Defendant under arrest at this time?

23 A No, ma'am.

24 Q Did you read the Defendant his Miranda rights at
25 some point?

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- 1 A Yes, ma'am.
- 2 Q When did you do this?
- 3 A After we completed talking about the first issue,
4 prior to him making a written statement, I read him
5 the Miranda rights off the top of his Miranda
6 statement form.
- 7 Q Could the Defendant read?
- 8 A Yes, ma'am.
- 9 Q Could the Defendant write?
- 10 A Yes, ma'am.
- 11 Q Detective Russell, do you recognize this form?
- 12 A Yes, ma'am, I do.
- 13 Q Is this the form you used?
- 14 A Yes, ma'am.
- 15 Q What is on the top of this form?
- 16 A At the very top is just general information: Date,
17 time, place, and Mr. Day's name, date of birth,
18 address, and so forth. Below that is his Miranda
19 warnings with his initials beside them and below
20 that is his statement.
- 21 Q Did he fill out the top of that form?
- 22 A I'm sorry?
- 23 Q Did he fill out the top of that form?
- 24 A The very top part with the general information I
25 filled out.

1 Q What time did you start filling out this form?

2 A At 21:30 hours, I believe, it says at the top
3 right-hand corner.

4 Q Do you recall what time Mr. Day came to the
5 Sheriff's Department?

6 A It was about 9:00 o'clock, about 30 minutes before
7 that.

8 Q Did you read each one of those rights to the
9 Defendant?

10 A Yes, ma'am.

11 Q Did the Defendant indicate that he understood these
12 rights to you?

13 A Yes, ma'am.

14 Q How did he indicate that?

15 A By placing his initials right beside each one of
16 the rights as I read them to him.

17 Q And did he waive each one of these rights?

18 A Yes, ma'am.

19 Q How did he do this?

20 A By giving a written statement.

21 Q Did he ask for an attorney?

22 A No, ma'am.

23 Q Did he invoke his right to remain silent?

24 A No, ma'am.

25 Q During the course of your employment at the

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1 Sheriff's Department, have you had the opportunity
2 to encounter intoxicated people?—

3 A Yes, ma'am.

4 Q Did the Defendant appear to be under the influence
5 of drugs and/or alcohol?

6 A No, ma'am.

7 Q Did he ever indicate that he felt ill?

8 A No, ma'am.

9 Q That he needed to use the rest room?

10 A No, ma'am.

11 Q That he needed a drink of water?

12 A No, ma'am.

13 Q Detective, what were you wearing at this time?

14 A Normal, something similar to what I have on today.
15 I don't remember exactly what it was.

16 Q Were you in a police uniform?

17 A I wasn't in a uniform. I was in street clothes.

18 Q Did the Defendant make any request of you when you
19 spoke with him?

20 A After this was done and after I explained to him
21 that he was going to be placed under arrest, I
22 asked him if he wanted me to inform his wife of
23 what was going on or if he would rather tell her.
24 He asked if he would be allowed to speak with her,
25 which I allowed him to do that.

1 Q Where did he speak with his wife?

2 A I went and got her out of the lobby of the
3 Sheriff's Office and brought her back to the
4 interview room where he was at.

5 Q Did the Defendant appear to understand what was
6 going on?

7 A Yes, ma'am, he did. When he was speaking with his
8 wife, he was very upset. He was crying at that
9 time when he talked with his wife and explained to
10 her what was going on.

11 Q Were there any promises made to the Defendant in
12 exchange for his written statement?

13 A No, ma'am.

14 Q Were there any threats made to the Defendant?

15 A No, ma'am.

16 Q Was any coercion used to get him to write this
17 written statement?

18 A No, ma'am.

19 Q What did the Defendant tell you regarding this
20 charge?

21 A He confessed that he had -- that this is what he
22 had done.

23 Q And did he make this written statement?

24 A Yes, ma'am, that is his writing. He wrote that.

25 Q Is this your signature on the bottom?

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1 A Yes, ma'am.

2 Q Is this the Defendant's signature?

3 A Yes, ma'am.

4 Q What's the date?

5 A February 22, '05.

6 Q Can you read this written statement, Detective
7 Russell.

8 A Go ahead and read it now?

9 Q Yes.

10 A Yes, I, Michael Day, did call Dusty into the
11 bathroom and put my penis in his mouth. Then
12 someone came in a minute later, and I took it out,
13 and that was the end of it. I did not ejaculate.
14 It being my penis is crossed out with his initials
15 over it. And it says when? Summer of 2001, I
16 think.

17 Q Detective Russell, do you see Michael Day in the
18 courtroom today?

19 A Yes, ma'am, sitting right beside Mr. Cheatham.

20 MS. HEATH: Beg the Court's indulgence.

21 THE COURT: Yes, ma'am.

22 MS. HEATH: Your Honor, Let the record reflect
23 Detective Russell pointed to the Defendant. No further
24 questions, Your Honor.

25 THE COURT: May I see the form, Madame

1 Solicitor.

2 (Hands to Court).

3 THE COURT: This is State's Exhibit Number 5
4 for identification, correct?

5 MS. HEATH: Correct, Your Honor.

6 (State's Exhibit Number 5 is marked for
7 identification).

8 THE COURT: Anything further, Solicitor?

9 BY MS. HEATH:

10 Q Regarding that form, Detective Russell, is that the
11 Defendant's handwriting in that statement?

12 A Yes, ma'am, the narrative portion of the statement
13 is the Defendant's handwriting.

14 Q No further questions.

15 A And the initials beside the Miranda rights are his.

16 THE COURT: Thank you. Mr. Cheatham.

17 MR. CHEATHAM: May it please the Court.

18 CROSS EXAMINATION

19 BY MR. CHEATHAM:

20 Q Detective Russell, you set up an appointment for a
21 day to come and talk about an entirely different
22 matter; is that correct?

23 A That's correct.

24 Q And he was coming by as a witness in the other
25 case?

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1 A That's correct.

2 Q So he had no idea that he was going to be charged
3 with anything until you sprung it on him?

4 A He wasn't charged when I set up the appointment
5 with anything.

6 Q I know, but he was under investigation, but you
7 didn't tell him?

8 A Correct.

9 Q In other words, you had a statement concerning his
10 conduct; didn't you?

11 A I'm sorry?

12 Q You had a statement concerning Michael's alleged
13 conduct?

14 A If I understand you correct, yes, I had a previous
15 allegation against him before I spoke with him if
16 that's what you are asking.

17 Q Right. And the date on the statement is the same
18 time frame that was initially started in this case
19 by the solicitor, wasn't it?

20 A I don't understand what you are asking me, sir.

21 Q The summer of '01.

22 A Okay.

23 Q That was when he was charged by the Solicitor or
24 that is when y'all understood the crime had
25 happened; is that correct?

- 1 A That was the original assumption, yes, sir.
- 2 Q So we have a situation where two people unknown to
3 each other make the same mistake?
- 4 A I'm not sure again what you are asking me, sir.
- 5 Q Well, the State is now saying that it's not the
6 summer of '01; correct?
- 7 A Correct.
- 8 Q So he is not confessing to anything that happened
9 at Christmas, is he?
- 10 A In this statement he says he thinks it happened in
11 the summer of '01.
- 12 Q Didn't the summer of '01 come from you, sir?
- 13 A I don't understand what you are asking me.
- 14 Q Didn't that date come from you?
- 15 A Did it come from me?
- 16 Q Yes.
- 17 A I don't think so, no, sir.
- 18 Q You didn't tell him: I know you did this in the
19 summer of '01 and you better sign the statement?
- 20 A No, sir.
- 21 Q Didn't bang on the table?
- 22 A No, sir.
- 23 Q Didn't intimidate him in any form or fashion?
- 24 A No, sir.
- 25 Q Y'all just sat there and had a normal conversation?

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1 A Yes, sir, it was a very -- there was no yelling or
2 screaming or anything like that.

3 Q And you never said: I know you have done this.
4 You better give me a statement.

5 A No, sir. I explained to him there were allegations
6 against him, that they were fairly detailed
7 allegations that sounded believable.

8 Q And you didn't tell him what the allegations were?

9 A No, sir.

10 Q So you are saying that he made up all of this
11 statement or he created -- let me rephrase that --
12 you are saying he created all of this statement?

13 A Yes, sir.

14 Q And the created date was the same date that y'all
15 had been given, correct?

16 A When I spoke with Michael, I didn't have a date.

17 Q You are saying when you spoke with Michael, you
18 didn't have a date?

19 A I didn't have a date when it had occurred, no, sir.

20 Q Well now, according to the interview with the
21 expert that was called earlier, Melanie Trimble,
22 she had an interview in January. Let's see, I
23 want to say January the 4th, but let me look,
24 January 14th. And she said that she had told --
25 [REDACTED] said he had told the other authorities

1 five days after that that it was Christmas of
2 2000?

3 A When I spoke with Michael, what I had was a copy of
4 the report from the A.R.C. where [REDACTED] had stated
5 he thought he was about four when this occurred. I
6 had done the math and figured that was in 2000/2001
7 range somewhere in there, but I didn't have: It
8 happened on this date.

9 Q Okay. So you didn't get that information about
10 Christmas of 2000?

11 A No, I didn't have that at that time. No, sir.

12 Q Did you ever interview [REDACTED]

13 A No, sir, I did not.

14 Q Did you ever talk with his mother?

15 A I spoke with his mother several times, yes, sir.

16 Q And during the time you talked with his mother, she
17 never mentioned Christmas of 2000 either; did she?

18 A Not that I remember, no, sir.

19 Q And as a matter of fact, she was prepared to
20 testify about a month ago that it happened at
21 Christmas of '01, wasn't she?

22 MS. HEATH: Objection, Your Honor.

23 THE COURT: What is the basis of your
24 objection?

25 MS. HEATH: Detective Russell doesn't know

1 what Ms. Floyd was prepared to testify to, and it's not
2 relevant to Jackson v. Denno.

3 THE COURT: I would sustain the objection.

4 MR. CHEATHAM: Could I ask on what grounds,
5 Your Honor?

6 THE COURT: No, sir, I sustained the
7 objection.

8 MR. CHEATHAM: All right. Can I proffer that
9 testimony?

10 THE COURT: Well, A., it's hearsay. B.,
11 whatever she was going to testify to in 2006, what does
12 that have to do with the voluntariness of Mr. Day's
13 statement?

14 I am doing exactly what I said I wasn't going
15 to do. What does that have to do with Mr. Day's alleged
16 statement on February 22, 2005? How does that go to the
17 voluntariness in a Jackson versus Denno hearing?
18 Explain that to me.

19 MR. CHEATHAM: Because he had no information
20 about the time. The time had to be given to him. All
21 the information had to be given to him.

22 THE COURT: How does that go to the
23 voluntariness of Mr. Day's statement on February 22,
24 2005, what the victim's mother said? This is police
25 conduct.

1 MR. CHEATHAM: Right.

2 THE COURT: It's intimidation, threats, force.
3 He is in custody. That's what I can't connect the dots
4 to.

5 MR. CHEATHAM: I will withdraw it.

6 THE COURT: I appreciate that, Mr. Cheatham,
7 seeing as how I sustained the objection.

8 BY MR. CHEATHAM:

9 Q In reference to that, you are saying that your --
10 let me rephrase that. Y'all have videotape
11 machines down there at the Sheriff's Department?

12 A Yeah, they have them. Yes, sir.

13 Q And you have tape recorders?

14 A Yes, sir.

15 Q And did you tape record this?

16 A No, sir.

17 Q Did you videotape this?

18 A No, sir.

19 Q Isn't it standard procedure to record or videotape
20 a statement?

21 A No, sir.

22 Q So y'all never do that?

23 A I'm sure it has been done on occasions. It's not
24 standard procedure, no, sir.

25 Q So the standard procedure is not to create

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1 documentation of whether a statement was voluntary
2 or involuntary?

3 A Standard procedure is we don't videotape and record
4 all our statements, no, sir.

5 MR. CHEATHAM: That's all.

6 THE COURT: Do you have anything in redirect,
7 Solicitor?

8 MS. HEATH: No, Your Honor.

9 THE COURT: Mr. Russell, you may step down.
10 Solicitor, you may call your next witness.

11 MS. HEATH: Your Honor, there are no other
12 witnesses on the Jackson v. Denno. We would offer the
13 statement.

14 THE COURT: Mr. Cheatham, do you have any
15 testimony you wish to offer?

16 MR. CHEATHAM: Yes, we would offer the
17 Defendant's testimony.

18 THE COURT: Mr. Day, would you come around,
19 please.

20 MICHAEL DWIGHT DAY, being
21 first duly sworn, testified as follows:

22 CLERK: State your full name on the record and
23 speak up loud and clear, please.

24 THE WITNESS: My name is Michael Dwight Day.

25 THE COURT: Yes, sir, Mr. Cheatham.

1 DIRECT EXAMINATION

2 BY MR. CHEATHAM:

3 Q Michael, where do you live?

4 A At the present time I live in West Columbia on

5 Greenwood Drive.

6 Q At the time of this incident, where did you live?

7 A On [REDACTED] Highway.

8 Q And did you receive a call from Detective Russell?

9 A I did.

10 Q And did you go to the Sheriff's Department?

11 A I did.

12 Q And what happened when you got there?

13 A He said he wished to speak with me about a case

14 concerning my sister and F.A. Oxner.

15 Q And did he take you to an interview room?

16 A Yes, he did.

17 Q Tell us what happened after that.

18 A We went into the interrogation room or however you

19 want to put it. He spoke with me for a few minutes

20 about the case against my sister having against my

21 uncle and then proceeded to tell me that I had

22 allegations against myself from [REDACTED] [REDACTED]

23 Q Did he tell you what those allegations were?

24 A He said they were serious allegations. As far as

25 to naming what the crime was itself, no, he didn't.

MICHAEL DAY -- DIRECT -- MR. CHEATHAM

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1 Q And did you freely and voluntarily initial these
2 things? Let me show you what has been marked for
3 identification as State's 5.

4 A Yes, that is my initials.

5 Q Now, was anything said or promised to you in
6 reference to this statement?

7 A I was told that if I cooperated, he would talk to
8 the judge, if I cooperated.

9 Q Anything else?

10 A No, sir.

11 Q The word leniency never was mentioned?

12 A No, sir.

13 Q So the promise was that if you cooperated, he would
14 talk with the judge?

15 A Yes, sir.

16 Q And that was all that was stated?

17 A Yes, sir.

18 Q And as far as writing down the words, did you
19 create those words or were those words given to
20 you?

21 A He had hinted at what was said to me. As far as
22 the summer of 2001, that was given to me. I had no
23 knowledge of any dates until going into this room.

24 Q And as far as the conduct, was that given to you?

25 A Yes, it was.

1 Q So you wrote down what was given to you?

2 A Yes, sir.

3 Q In order to get cooperation?

4 A Yes, sir.

5 Q And a recommendation to the judge?

6 A Yes, sir.

7 Q Now, was there anything made about any type of
8 cooperation to get any type of sentence?

9 A I'm sorry?

10 Q Was there any discussion about any type of sentence
11 or any effect it would have on your sentencing if
12 you cooperated?

13 A No, sir.

14 MR. CHEATHAM: That's all I have, Your Honor.

15 THE COURT: Thank you, Mr. Cheatham.

16 Solicitor.

17 CROSS EXAMINATION

18 BY MS. HEATH:

19 Q Mr. Day, what grade did you go through in school?

20 A I believe I dropped out in the ninth grade.

21 Q Were any threats made to you to make this
22 statement?

23 A No, ma'am.

24 Q Were you denied any food?

25 A No, ma'am.

MICHAEL DAY -- CROSS -- MS. HEATH

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- 1 Q Or water?
- 2 A No, ma'am.
- 3 Q Or rest room breaks?
- 4 A No, ma'am.
- 5 Q You were able to talk to your wife?
- 6 A Yes, ma'am, after everything had been said and
- 7 done.
- 8 Q Is this your handwriting?
- 9 A Yes, ma'am, that is my handwriting.
- 10 Q And these are your initials?
- 11 A Yes, ma'am.
- 12 Q This is your initial right here that says: I have
- 13 the right to remain silent and not make any
- 14 statement at all?
- 15 A Yes, ma'am.
- 16 Q That's your initials?
- 17 A Yes, ma'am.
- 18 Q Number two, that any statement I do make can be
- 19 used against me in court. And you initialed that?
- 20 A Yes, ma'am.
- 21 Q Number three, that I have the right to have an
- 22 attorney present at any time during questioning.
- 23 And you initialed that?
- 24 A Yes, ma'am.
- 25 Q Number four: That if I cannot afford an attorney,

1 I can apply to the Court to have one appointed at
2 no cost to me. And you initialed that?

3 A Yes, ma'am.

4 Q And number five: That if I decide to talk to an
5 officer without an attorney present, I may stop at
6 any time and request an attorney be present for
7 further questioning. And you initialed number
8 five?

9 A Yes, ma'am.

10 Q Is this your signature --

11 A Yes, ma'am.

12 Q -- at the bottom of the statement? You said in
13 talking with Mr. Cheatham that Detective Russell
14 didn't say anything or talk to you about the
15 allegations or the crime?

16 A He didn't name the crime that I was being
17 interrogated on.

18 Q This is your statement in your own handwriting?

19 A Yes, ma'am.

20 Q Can you read that?

21 A Barely. I do have bad vision.

22 Q If I bring it up there, can you read it?

23 A It says: Yes, I, Michael Day, did call Dusty into
24 the bathroom and put my penis in his mouth. Then
25 someone came in a minute later and I took it out,

MICHAEL DAY -- REDIRECT -- MR. CHEATHAM

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1 and that was the end of it. I did not ejaculate.
2 It being my penis was initially crossed out by me
3 with any initials. And when? In the summer of
4 2001.

5 Q Did Detective Russell make you write this
6 statement?

7 A He couldn't make me write it.

8 Q So you wrote it on your own will?

9 A I did write it on my own will.

10 MS. HEATH: Beg the Court's indulgence.

11 (Pause).

12 MS. HEATH: No further questions, Your Honor.

13 THE COURT: Anything on redirect,

14 Mr. Cheatham?

15 MR. CHEATHAM: Just briefly.

16 REDIRECT EXAMINATION

17 BY MR. CHEATHAM:

18 Q Michael, if you had not had Mr. Russell in the room
19 with you, would you have been able to write this in
20 your statement?

21 A No, sir.

22 Q And when somebody said or asked you were you
23 threatened, you said -- it sounded like you had
24 some reservation. What were you saying there?

25 A No, sir, Detective Russell did not threaten me.

1 Q He didn't bang on the table or anything?

2 A No, sir. I told him that I did not do it. I said
3 it more than once that I did not do it, and he
4 proceeded with his, I guess, standard police
5 procedure and kept egging it on that I did do it.

6 Q And that egging, repeated egging, on is why you
7 finally gave the statement?

8 A Yes, sir.

9 MR. CHEATHAM: Nothing further.

10 THE COURT: Anything on recross, Solicitor?

11 MS. HEATH: Nothing, Your Honor.

12 THE COURT: Thank you, Mr. Day. You may step
13 down.

14 Any other witnesses on this issue,
15 Mr. Cheatham?

16 MR. CHEATHAM: No, sir, Your Honor.

17 THE COURT: Solicitor, do you have anything in
18 reply?

19 MS. HEATH: No, sir.

20 THE COURT: Mr. Cheatham, I would be glad to
21 hear from you.

22 MR. CHEATHAM: Your Honor, it's our position
23 that in this particular situation the leniency was, in
24 fact, inferred from the statement, that all of the
25 details of the statement were provided by the State, and

1 therefore the statement should not be admissible.

2 It was a situation where, as Michael has said,
3 he could not have written the statement on his own
4 because of the fact he didn't have the information. All
5 the information was provided by the detective.

6 He went down there thinking that he was going
7 to give a statement for his sister's case, and then all
8 of a sudden they spring this on him. So you have a
9 situation where we don't feel like, given the totality
10 of the circumstances, that it was freely and voluntarily
11 made, that he was intimidated into making the statement.

12 THE COURT: Thank you, Mr. Cheatham.
13 Solicitor.

14 MS. HEATH: Thank you, Your Honor. When
15 Mr. Day was up on the stand, he testified when I asked
16 him, he said Detective Russell did not threaten him.
17 Detective Russell was on the stand, and he didn't say
18 anything about promising the Defendant any leniency.

19 The confession was completely voluntarily.
20 Clearly Miranda was given. He initialed each letter,
21 each line with his signature. The statement is in his
22 own handwriting. He didn't have any handcuffs on. It
23 was only Detective Russell in the interview room with
24 him in his plain clothes.

25 He was able to talk with his wife when he

1 requested. There were no denials of any requests that
2 the Defendant asked for. There were no promises and
3 there were no threats made, Your Honor, and we feel the
4 confession should be admitted into evidence.

5 THE COURT: Thank you, Solicitor. Anything
6 further for the record, Mr. Cheatham?

7 MR. CHEATHAM: No, sir, Your Honor.

8 THE COURT: All right. I would find under
9 Jackson versus Denno that based on the totality of the
10 circumstances, including the Defendant's background,
11 experience, and his conduct, Detective Russell's
12 testimony and the Defendant's testimony, that he went to
13 the police department or the Sheriff's Department
14 voluntarily.

15 Prior to any questioning, even if he was in
16 custody, he was given his Miranda rights. He initialed
17 those rights, indicating he understood those rights.
18 Thereafter, he gave a written statement in his own
19 handwriting.

20 He clearly stated he wrote it of his own. He
21 said: I wrote it of my own will. There were no
22 threats, no force or no intimidation. I find that the
23 statement was given voluntarily and that he was fully
24 given his Miranda warnings and waived those warnings.

25 THE COURT: Any other motions, Mr. Cheatham?

1 MR. CHEATHAM: Not that I'm aware of, Your
2 Honor. I don't know what they are going to offer next.
3 So it would depend on what they offer.

4 THE COURT: There was a motion, a motion in
5 limine, concerning the rape shield statute? I'm
6 assuming now that is not an issue; is that correct? Is
7 that correct, Solicitor?

8 MS. HEATH: That's correct.

9 THE COURT: Correct, Mr. Cheatham?

10 MR. CHEATHAM: Yes, sir.

11 THE COURT: I didn't really hear that
12 testimony and that wouldn't be offered. Any other
13 motions, Solicitor?

14 MS. HEATH: No further motions, Your Honor.

15 THE COURT: You may call your first witness.

16 MS. HEATH: The State calls [REDACTED] [REDACTED]

17 CLERK: Is he still under oath, Your Honor?

18 THE COURT: [REDACTED] remember you are still
19 under oath. Do you know what that means?

20 THE WITNESS: No, sir.

21 THE COURT: Sir?

22 THE DEFENDANT: No, sir.

23 THE COURT: Madame Clerk, would you place
24 [REDACTED] under oath again, please.

25 CLERK: Yes, sir.

██████ -- DIRECT -- MS. HEATH

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1 THE COURT: Would you step back down for me,
2 please.

3 THE WITNESS: Yes, sir.

4 ████████ being
5 first duly sworn, testified as follows:

6 THE COURT: Mr. Cheatham, do you want to move
7 around?

8 MR. CHEATHAM: Yes, sir.

9 THE COURT: ████████ if you will try to keep
10 your voice up a little bit so that Ms. Heath can hear
11 you and I can hear you and Mr. Cheatham can hear you;
12 okay?

13 THE WITNESS: Yes, sir.

14 THE COURT: Thank you. Solicitor.

15 DIRECT EXAMINATION

16 BY MS. HEATH:

17 Q Hey, ████████ How old are you?

18 A Ten.

19 Q When is your birthday?

20 A ██████████

21 Q Where do you go to school?

22 A Newberry Elementary.

23 Q What grade are you in?

24 A Fifth.

25 Q Who are your teachers?

███ -- DIRECT -- MS. HEATH

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- 1 A Ms. Moore, Ms. Monts, and Ms. Kyzer.
- 2 Q How are your grades?
- 3 A Pretty good.
- 4 Q Where do you live?
- 5 A In Newberry.
- 6 Q When you just held your hand up on the Bible, what
- 7 does that mean?
- 8 A That if I tell a lie, I don't believe in God.
- 9 Q Are you going to tell the truth today?
- 10 A Yes, ma'am.
- 11 Q I am going to ask you about the Christmas break of
- 12 2000. Do you remember what you were doing that
- 13 Christmas break?
- 14 A Yes, ma'am.
- 15 Q Did something bad happen to you during that time?
- 16 A Yes, ma'am.
- 17 Q Can you tell me about that.
- 18 A I was made to put Michael Day's penis in my mouth.
- 19 Q Where did you live during this time?
- 20 A On ███ Road.
- 21 Q Who did you live with?
- 22 A My mom and my daddy and my two brothers.
- 23 Q Is that in Lexington?
- 24 A No.
- 25 Q Is it in Leesville?

- 1 A Leesville.
- 2 Q Was your mom there with y'all that Christmas?
- 3 A No, ma'am.
- 4 Q Where was your mom?
- 5 A She was in the hospital.
- 6 Q Did Michael live with y'all?
- 7 A No.
- 8 Q How did you know Michael?
- 9 A Just somebody that lived near us, and he was a
- 10 friend of my momma's.
- 11 Q Did he stay at your house?
- 12 A Occasionally.
- 13 Q And when he told you to put his penis in your
- 14 mouth, where were you?
- 15 A In the bathroom, in the small bathroom near my
- 16 room, my bathroom.
- 17 Q And how did that happen?
- 18 A Because I was in the bathroom and then he came in.
- 19 Q When he came in there, what did he say?
- 20 A He told me to put his penis in my mouth.
- 21 Q What did he do?
- 22 A What do you mean?
- 23 Q When he told you to do that, what did he do?
- 24 A He pulled down his pants partially.
- 25 Q What about his underwear?

[REDACTED] [REDACTED] -- DIRECT -- MS. HEATH

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- 1 A His pants and his underwear were pulled down about
2 the same length.
- 3 Q Was his penis in or out?
- 4 A Out.
- 5 Q Was he standing or sitting?
- 6 A Standing.
- 7 Q What were you doing?
- 8 A Sitting.
- 9 Q Did you have your clothes on?
- 10 A Yes, ma'am.
- 11 Q After he pulled his penis out, what did you do?
- 12 A I had to put it in my mouth.
- 13 Q Once it was in your mouth, what did you do?
- 14 A He told me don't stop until he says to.
- 15 Q Then what happened?
- 16 A My dad was outside with my two brothers, and it was
17 about lunch time, and he walked in to come fix
18 lunch. He told me to stop.
- 19 Q Who told you to stop?
- 20 A Michael Day. Then he jumped in the shower and I
21 used the bathroom. Then I went out and I went to
22 my room.
- 23 Q Did your dad come in the bathroom?
- 24 A No, ma'am.
- 25 Q Did he stick his head in the bathroom?

[REDACTED] -- DIRECT -- MS. HEATH

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1 A No, ma'am.

2 Q Did anything come out of his penis?

3 A No, ma'am.

4 Q Did you tell anybody about this happening?

5 A Yes, ma'am.

6 Q Who is the first person that you told?

7 A Miss Melanie.

8 Q Did you go into an interview about this?

9 A Yes, ma'am.

10 Q Do you remember where you went?

11 A To the A.R.C. resource center.

12 Q Did you talk with Miss Melanie about this?

13 A Yes, ma'am.

14 Q Did you know you were being videotaped?

15 A Yes, ma'am.

16 Q Do you see Michael in the courtroom today?

17 A Yes, ma'am.

18 Q Can you point to him?

19 A (Indicating).

20 MS. HEATH: Beg the Court's indulgence. Your
21 Honor. Your Honor, let the record reflect that [REDACTED]
22 pointed to the Defendant. No further questions.

23 THE COURT: Thank you, Solicitor,
24 Mr. Cheatham.

25 MR. CHEATHAM: May it please the Court.

-- CROSS -- MR.. CHEATHAM

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CROSS EXAMINATION

BY MR. CHEATHAM:

Q [REDACTED] in reference to the incident, were you sitting or standing or what?

A If you want to, you can call it kneeling. I was on my knees.

Q So you were on your knees?

A Yes, sir.

Q And he was standing up?

A Yes, sir.

Q And you were four years old?

A Yes, sir.

Q You wouldn't remember how tall you were then, would you?

A No, sir.

Q But you have grown a lot since then?

A Yes, sir.

Q So you are a lot taller now?

A Yes, sir.

Q You said that after this incident, you went to your bedroom and Michael went to his bedroom; is that correct?

A Yes, sir.

Q How long were you totally in the bathroom together?

A Ten or 20 minutes maybe.

- 1 Q Ten or 20 minutes?
- 2 A Twenty minutes at the most.
- 3 Q What?
- 4 A Twenty minutes at the most.
- 5 Q Twenty minutes at the most?
- 6 A Yes, sir.
- 7 Q And about what time -- you said it was around
- 8 lunchtime?
- 9 A Yes, sir.
- 10 Q What time would that have made it?
- 11 A 11:55 probably.
- 12 Q 11:55?
- 13 A Yes, sir.
- 14 Q Do y'all eat lunch about the same time every day?
- 15 A Yes, sir.
- 16 Q Did your dad fix lunch every day?
- 17 A Yes, sir.
- 18 Q So he didn't work?
- 19 A No, sir, he had to stay home and watch us.
- 20 Q So he was the one that was staying home and being
- 21 in charge of y'all?
- 22 A Yes, sir.
- 23 Q Now, immediately before this were you outside with
- 24 your brothers?
- 25 A No, sir.

--- CROSS --- MR. CHEATHAM

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- 1 Q You had been in the house all morning?
- 2 A Yes, sir.
- 3 Q Had Michael been in the house all morning?
- 4 A I don't remember.
- 5 Q You don't remember. Do you have any idea at all
- 6 when he got there? Had he been staying there like
- 7 a week or two?
- 8 A No, sir.
- 9 Q Just been staying there a few days?
- 10 A Yes, sir.
- 11 Q You had indicated, I think before, that Michael was
- 12 baby-sitting you, but really your dad was
- 13 baby-sitting you; wasn't he?
- 14 A Yes, sir.
- 15 Q So the statement that Michael was baby-sitting you
- 16 was incorrect?
- 17 A Yes, sir.
- 18 Q Now, Michael's bedroom, I think you testified, was
- 19 directly across from the bathroom; is that correct?
- 20 A No, sir.
- 21 Q Where was it?
- 22 A You walk in the trailer, you are in the living
- 23 room. You walk back, you walk back and you turn,
- 24 and there is my room. If you walk a little bit
- 25 further back, there is a wall where you can't see

1 Michael's room. So you come out of the bathroom,
2 if you turn, then you find his room, turn left.

3 Q Could you draw me a little diagram of that?

4 A Yes, sir. (Witness complies).

5 Q Okay.

6 MR. CHEATHAM: Can you mark this for
7 identification, please.

8 (Defendant's Exhibit Number 1 is marked for
9 identification).

10 BY MR. CHEATHAM:

11 Q [REDACTED] you have drawn a living room, and I am
12 assuming this (indicating) is the hallway, and the
13 bathroom is at the end of the hallway; is that
14 correct?

15 A Yes, sir.

16 Q And then right outside of the first room, if you
17 come out of the bathroom, on the left-hand side
18 would be Michael's room?

19 A Yes, sir.

20 Q And then the second room would be yours?

21 A Yes, sir.

22 Q Okay. Are there other bedrooms in the house?

23 A Yes, sir.

24 Q Where would they be?

25 A Here (indicating).

[REDACTED] -- CROSS -- MR. CHEATHAM

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- 1 Q They would be?
- 2 A Right here.
- 3 Q Just draw them.
- 4 A (Witness complies). All this would be the living
- 5 room. This (indicating) would be my momma and
- 6 daddy's room. It has a bathroom in it.
- 7 Q Just put mom and dad on there if you would be so
- 8 kind.
- 9 A (Witness complies).
- 10 Q Mom is okay.
- 11 A Then there is the bathroom.
- 12 Q Okay. Now then, the living room would be where the
- 13 T.V. was?
- 14 A Yes, sir.
- 15 Q Where would the kitchen be?
- 16 A You walk into the living room and turn this way
- 17 (indicating), and you've got the kitchen.
- 18 Q Could you just draw the kitchen on there for us so
- 19 we have some idea.
- 20 A (Witness complies).
- 21 Q And can you put a K. in there so we will know it's
- 22 the kitchen.
- 23 A (Witness complies).
- 24 Q So when you went in the bathroom and then Michael
- 25 came in the bathroom, were y'all both in the living

- 1 room beforehand?
- 2 A No, I was in my room watching a movie.
- 3 Q You were in your room watching a movie?
- 4 A Yes, sir.
- 5 Q Where was Michael?
- 6 A I don't remember where he came from.
- 7 Q Okay. So the only thing you know is you were in
- 8 there watching a movie, and then you went to the
- 9 bathroom and he was in the bathroom, came in
- 10 afterwards?
- 11 A Yes, sir.
- 12 Q Now, you said you did know Troy and Dale when they
- 13 came over sometimes; is that correct?
- 14 A Yes, sir.
- 15 Q But you are saying that neither one of them ever
- 16 spent the night there?
- 17 A No, sir.
- 18 Q Do you remember when your dad and your brothers
- 19 went outside to play?
- 20 A Yes, sir.
- 21 Q Was that a yes or no? I'm sorry. I didn't hear
- 22 you.
- 23 A That was a yes.
- 24 Q What time did they go outside?
- 25 A They went outside a little -- they were outside

-- CROSS -- MR. CHEATHAM

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1 about an hour before my dad come in to fix lunch.

2 Q Do you remember whether it was hot or cold that
3 day?

4 A It was not cold but -- it wasn't cold, but it was
5 cold enough to wear a jacket. It wasn't freezing
6 outside, but it was cold enough to wear a jacket.

7 Q So your two brothers were outside with jackets on,
8 and your dad had a jacket on while they were
9 playing?

10 A Yes, sir.

11 Q Do you happen to recall what day of the week this
12 was?

13 A No, sir.

14 Q Do you happen to recall whether it was during the
15 week or on the weekend?

16 A No, sir.

17 Q The only thing we know for sure it was before
18 Christmas?

19 A Yes, sir.

20 Q You were in here when we played the videotape?
21 Were you in here?

22 A Yes, sir.

23 Q There wasn't any mention of Christmas 2000 in the
24 videotape, was there?

25 A No, sir.

1 Q But you told her about Christmas of 2000 then?

2 A Yes, sir.

3 Q Then you went and told the sheriff and the
4 Solicitor's Office within five days that it
5 happened in Christmas of 2000?

6 A No, sir, I never talked to the sheriff.

7 Q You just talked with the Solicitor's Office?

8 A Yes, sir.

9 Q And you told them it happened at Christmas of 2000?

10 A Yes, sir.

11 MR. CHEATHAM: That's all, Your Honor -- one
12 minute.

13 (Pause).

14 MR. CHEATHAM: That's all I have.

15 THE COURT: Thank you, Mr. Cheatham. Anything
16 in redirect, Solicitor?

17 MS. HEATH: Nothing, Your Honor.

18 THE COURT: [REDACTED] you may step down. As far
19 as this case is concerned, we will start back at 9:30 in
20 the morning. Is Mr. Day in jail?

21 MS. HEATH: Yes, Your Honor.

22 THE COURT: Do you have anything further
23 before we break this case for the afternoon,
24 Mr. Cheatham?

25 MR. CHEATHAM: I just have one thing, Your

1 Honor.

2 THE COURT: All right.

3 MR. CHEATHAM: Apparently we miscommunicated
4 and I apologize. What I was doing was not saying that
5 you were correct in ruling. I was withdrawing my
6 proffer of the testimony. I wasn't trying to continue
7 to argue, and I thought you got the impression that I
8 was doing that.

9 THE COURT: Yes, sir. No apology is needed.
10 If you think so, it's certainly accepted, Mr. Cheatham.
11 I appreciate it.

12 MR. CHEATHAM: Thank you, Your Honor.

13 THE COURT: Anything further, Solicitor?

14 MS. HEATH: Nothing further, Your Honor.

15 THE COURT: This case will be in recess until
16 9:30 in the morning.

17 (Whereupon the proceedings were concluded for
18 November 6, 2006).

19 (The follow proceedings were reported on
20 November 7, 2006).

21 THE COURT: Solicitor, do you have anything
22 before you call your next witness?

23 MS. HEATH: No, Your Honor.

24 THE COURT: Mr. Cheatham?

25 MR. CHEATHAM: No, sir, Your Honor. Excuse

1 me. There is one thing I would like to give you.

2 (Hands to Court).

3 THE COURT: All right, sir.

4 MR. CHEATHAM: Your Honor, what I have handed
5 up is a South Carolina Lawyer article citing the
6 Crawford test. On page 3 about halfway down, it refers
7 to procedural rules that regulate the manner in
8 determining the Defendant's culpability. It would not
9 be applied retroactively.

10 The opinion of the Attorney General, 06-161,
11 issued September 6, 2006, does an extensive history and
12 research and opinion, while realizing it's not binding
13 on the Court, but it says that the statute they are
14 citing to introduce the evidence is not applied
15 retroactively.

16 THE COURT: Show me where you are referring to
17 in Mr. Cook's opinion.

18 MR. CHEATHAM: In what opinion, sir?

19 THE COURT: In Mr. Cook's opinion, the A.G.'s
20 opinion? Where specifically in this document are you
21 referring to, Mr. Cheatham?

22 MR. CHEATHAM: The conclusion.

23 (Pause).

24 THE COURT: I will be glad to look at these in
25 more detail. I would point out -- and obviously you can

1 place whatever you think you need to place in the record
2 to preserve any rights that you may have or any of your
3 rights you may have on appeal should Mr. Day be
4 convicted -- however, I don't think I can go back and
5 change my ruling.

6 I ruled on what y'all presented to me at the
7 time. That being said, again, I have no objections to
8 you placing whatever you may want to place in the record
9 to preserve any rights to appeal, again, if Mr. Day
10 would be convicted.

11 However, I will look at these documents in
12 greater detail and perhaps comment on my understanding
13 of these documents. My position yesterday was the
14 saving clause goes to the substance of the statute
15 itself.

16 So the conduct that was criminal before is
17 also conduct that is criminal after, and there is no
18 time gap in there. My second position concerning ex
19 post facto goes to the issue of punishment. It does not
20 go to any issue in regards to the presentation of
21 evidence.

22 Then the last part of the conclusion in
23 Mr. Cook's opinion is concerning the part of the
24 substantive statute that has been referred to as the
25 Romeo provision that would not apply in this case.

1 However, I will look at these in greater detail,
2 Mr. Cheatham, if you want to make these a part of the
3 record --

4 MR. CHEATHAM: Yes, sir.

5 THE COURT: -- you can certainly do so. I
6 will also look at your article on Crawford. I
7 understood Crawford to be an issue on trustworthiness of
8 hearsay testimony with an unavailable declarant.
9 However, I will look in greater detail at that issue.

10 MR. CHEATHAM: We would like to make those
11 part of the record.

12 THE COURT: Would you please mark those. Do
13 you have a copy you can have the court reporter to mark,
14 Ms. Pantsari?

15 MR. CHEATHAM: Yes, sir.

16 (Court's Exhibit Number 1 is marked for
17 purposes of the record).

18 THE COURT: Thank you for this reading
19 material, Mr. Cheatham. Anything further before the
20 State calls their next witness, Mr. Cheatham?

21 MR. CHEATHAM: Nothing.

22 THE COURT: Solicitor.

23 MS. HEATH: Thank you, Your Honor. The State
24 calls Melanie Trimble.

25 MELANIE TRIMBLE, being

1 first duly sworn, testified as follows:

2 MR. CHEATHAM: Your Honor?

3 THE COURT: Yes, sir.

4 MR. CHEATHAM: We do have a matter in
5 reference to this witness.

6 THE COURT: All right, sir.

7 MR. CHEATHAM: We had moved that the witnesses
8 be sequestered. This witness was in the courtroom while
9 [REDACTED] was testifying. Therefore, we feel like any
10 further testimony from her should be excluded.

11 THE COURT: Was she in the courtroom -- can
12 you tell me when she was in the courtroom during his
13 testimony as you recall, Mr. Cheatham.

14 MR. CHEATHAM: As best I recall, Your Honor,
15 she testified and then [REDACTED] was called to testify; and
16 she was sitting there on the first bench while [REDACTED]
17 was testifying.

18 THE COURT: All right.

19 MR. CHEATHAM: Exactly whether she was there
20 all the time or just part of the time, I just noticed
21 she was there in between testimony.

22 THE COURT: Thank you. Yes, Solicitor.

23 MS. HEATH: Your Honor, this was in the
24 pretrial motion for the admission of the videotape.
25 Ms. Trimble had already testified. [REDACTED] then took the

1 stand.

2 I saw that she was back there, and I asked her
3 to leave. She was not in here more than five minutes,
4 and she was not in here when he testified the second
5 time yesterday. She is an expert witness. She is not
6 testifying on the facts of the case.

7 THE COURT: There is a case on this out of
8 Charleston County. I can't remember the name of it. I
9 will find it. I will allow her to testify provided,
10 Solicitor, her testimony would not include any
11 information that she may have heard during that -- would
12 you agree it's approximately five minutes or do you
13 know?

14 MS. HEATH: I don't know for sure, but it was
15 approximately five minutes.

16 THE COURT: And it was after her pretrial
17 testimony at the beginning of [REDACTED] testimony;
18 is that correct?

19 MS. HEATH: That's correct, Your Honor.

20 THE COURT: In other words, what I am trying
21 to say, Solicitor, is she can't testify to any
22 information that she may have heard or learned during
23 the testimony pretrial of [REDACTED]

24 MR. CHEATHAM: Your Honor, may I ask the
25 witness exactly how long she was here.

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1 THE COURT: I do not mind. I don't mind if
2 you or the solicitor want to, if you want to lay a
3 foundation for that. I assume she would give both of
4 you the same answer, but I don't mind if you want to do
5 it.

6 MR. CHEATHAM: Mine just goes to how long she
7 was here and what she heard.

8 THE COURT: I have no objection to that. Do
9 you, Solicitor?

10 MS. HEATH: No, Your Honor.

11 THE COURT: Yes, sir, Mr. Cheatham.

12 Do you understand what he is referring to,
13 Ms Trimble?

14 THE WITNESS: Yes, I think so.

15 THE COURT: Thank you.

16 CROSS EXAMINATION

17 BY MR. CHEATHAM:

18 Q Ms. Trimble, when you finished testifying, did you
19 sit on the first bench back here?

20 A I did, sir.

21 Q Were you there until [REDACTED] came up to the stand
22 and we took a break?

23 A Yes.

24 Q So you were here during [REDACTED] entire testimony
25 yesterday?

1 A In the pretrial motion.

2 Q In the pretrial motion.

3 MR. CHEATHAM: Your Honor, we would move that
4 that would disqualify her as to all aspects of the case
5 because of the fact that she was here. She heard
6 [REDACTED] entire testimony. There is no way to tell what
7 is tainted and what is not tainted by the testimony.

8 That's why we have rules for sequestering
9 witnesses so we that don't have to play a guessing game
10 or speculation game as to what may or may not have been
11 influenced. So I would again renew my motion that this
12 witness be excluded.

13 THE COURT: Your motion is respectfully
14 denied, Mr. Cheatham. As an initial point, Rule 615,
15 which codified the rule of sequestration of witnesses in
16 South Carolina, my understanding of its interpretation,
17 it is discretionary, within the power of the Court.

18 She is an expert witness in this regard, and
19 obviously if her testimony goes to anything she has
20 heard or did hear yesterday during the pretrial matters,
21 that would be excluded. But you are protected on the
22 record in that regard.

23 The case I was referring to was State versus
24 Fulton, 509 S.E.2d 819. It is a Charleston County case.
25 It was the Honorable Charles Whetstone. Fulton argued

1 that the judge erred in allowing testimony from two of
2 the State's witnesses, Israel and Anthony Fogle. They
3 were called on reply. He contends the witnesses
4 remained in the courtroom after their initial testimony,
5 although they had been sequestered previously.

6 The case indicates that the trial judge may
7 order the sequestration of witnesses upon the judge's
8 own motion or that of any party. A party is not
9 entitled to sequestration of witnesses as a matter of
10 right, rather the decision to sequester witnesses is
11 left to the sound discretion of the trial judge. This
12 discretion extends to the State's right to call a
13 witness in reply who is present in the courtroom during
14 a portion of the trial.

15 I would find that in my discretion there would
16 be no prejudice in her having remained yesterday. The
17 solicitor indicated that once she realized the witness
18 was present, she asked her to leave. This is also a
19 professional rather than a fact witness at the scene of
20 the alleged incident that occurred.

21 But your motion is noted and protected for the
22 record, Mr. Cheatham.

23 MR. CHEATHAM: I would just as soon it would
24 run throughout her testimony so I wouldn't have to renew
25 it each time.

1 THE COURT: You would not. Let me say this.
2 That would be my assumption. It's hard enough for me to
3 keep up with the trial court rules, much less the
4 appellate court rules for an appeal, but my assumption
5 is you would not have to continue to object, that you
6 would be protected on the record.

7 MR. CHEATHAM: Thank you.

8 THE COURT: Thank you, Mr. Cheatham.
9 Solicitor, you may proceed.

10 MS. HEATH: Thank you, Your Honor.

11 DIRECT EXAMINATION

12 BY MS. HEATH:

13 Q Ms. Trimble, where are you employed?

14 A At the Assessment and Resource Center at the
15 Department of Mental Health.

16 Q In what capacity?

17 A I am a children's therapist and forensic
18 interviewer.

19 Q What do your duties include there?

20 A They include providing treatment for children who
21 have been sexually abused or physically abused. I
22 also conduct forensic interviews along the
23 R.A.T.A.C. protocol, training personnel and
24 supervising interns, and participating in ongoing
25 research and advanced training.

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1 Q Can you tell me what type of educational background
2 you have.

3 A I have a clinical master's degree, professional. I
4 did a postgraduate year in trauma studies after my
5 degree. I have been a practicing mental health
6 clinician, psychotherapist since 1999 in a variety
7 of settings, mostly involving family and children,
8 and mostly involving trauma, the experience of
9 trauma in a variety of aspects. I've been a
10 forensic interviewer since November of 2004.

11 Q How much experience have you had conducting
12 forensic interviews with children? Approximately
13 how many interviews have you conducted?

14 A Between 80 and a hundred.

15 Q What percentage of these interviews have involved
16 possible child abuse?

17 A About 97, 98 percent of them have involved sexual
18 abuse or physical abuse, alleged, and a few have
19 involved neglect.

20 Q Have you previously testified in a court of law
21 before in the field of forensic interviewing?

22 A I have.

23 Q And how many occasions?

24 A I have been qualified on two occasions in family
25 court, Richland County Family Court and Lexington

1 County Family Court.

2 MS. HEATH: Your Honor, I would move to
3 qualify this witness as an expert in forensic
4 interviewing and child abuse.

5 THE COURT: Do you have any voir dire in that
6 regard, Mr. Cheatham?

7 MR. CHEATHAM: Yes, Your Honor, a few
8 questions.

9 VOIR DIRE EXAMINATION

10 BY MR. CHEATHAM:

11 Q In reference to your interviews, how many
12 interviews involved a span of, say, five years
13 between the alleged act and the interview?

14 A It would be hard for me to be very specific. It's
15 not at all unusual. I could give a very rough
16 estimate that probably fully half to two-thirds
17 involved delayed disclosure of at least a year or
18 more.

19 Q How many involved five years?

20 A I really couldn't be specific. It's not at all
21 unusual. It's not the vast majority, but it's at
22 least 10, 15, 20 percent probably are quite long
23 delays.

24 Q So then if we took 10 or 15 percent of the 80 to a
25 hundred interviews that you did in this specific

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1 type of case, it would be greatly reduced?

2 A Yes, the number, the flat number, would be reduced
3 if you took five-year delays or more.

4 Q Now, the interviews that you have done, how many of
5 them involved children ten years and younger?

6 A Again, I don't have statistics of my interviews
7 with me. So these are all off the top of my head.
8 The majority of our cases are ten years and under.
9 Probably 80 percent of the cases I have seen are
10 under that age.

11 Q There is a vast difference between majority and
12 80 percent?

13 A Yeah. As I say, I would have to look through. I
14 do two a week or so and I see treatment cases. So
15 it's very hard for me to sit here and count up.

16 Q Now, you mentioned, I think -- and I may be
17 mispronouncing it. If I do, I apologize -- I think
18 it's R.A.T.A.C.; is that correct?

19 A Correct.

20 Q And when were you qualified in that?

21 A In November or late October of 2004.

22 Q And you did this interview in January?

23 A January 2005.

24 Q So the vast majority of your interviews were after
25 this one?

1 A Yes.

2 Q And how many interviews had you done at the time
3 you did this one?

4 A I had observed probably 30 or 40, and I had
5 conducted six, maybe seven.

6 Q And of the six or seven that you interviewed, how
7 many of those dealt with children that were ten or
8 less?

9 A I'm not sure. I think two or three.

10 Q And would you agree with the proposition that the
11 more interviews you have done the better you become
12 at it?

13 A Of course.

14 Q And the more expertise you would develop the longer
15 you had performed them?

16 A Yes, although I have had expertise in dealing with
17 young children and developmental appropriateness of
18 questioning for quite some time.

19 MR. CHEATHAM: Your Honor, under the
20 circumstances we don't feel like she is a qualified
21 expert in the area they are offering her because of the
22 fact that she lacked the experience and expertise.

23 THE COURT: Is that in both fields that they
24 have offered her?

25 MR. CHEATHAM: Yes, sir.

1 THE COURT: I believe you have offered her in
2 forensic interviewing and child abuse; is that correct,
3 Solicitor?

4 MS. HEATH: Yes, Your Honor.

5 THE COURT: Both fields?

6 MR. CHEATHAM: She has not really testified to
7 any qualifications about child abuse at all.

8 THE COURT: Well, she has testified she has a
9 clinical master's degree and a year postgraduate. She
10 has been a psychotherapist since 1999. The majority of
11 the cases she sees are sexual abuse or physical abuse
12 for both treatment and for child therapy and such. That
13 was why I was asking if you were separating those two
14 issues.

15 MR. CHEATHAM: Well, no, sir, Your Honor,
16 because of the fact that her interviewing, as I
17 understood it, started after October of 2004.

18 THE COURT: I understood that also.

19 MR. CHEATHAM: Right.

20 THE COURT: My question was they are offering
21 her for two separate and distinct areas of expertise, as
22 I understood the solicitor.

23 MR. CHEATHAM: And we are objecting.

24 THE COURT: They are offering her as an expert
25 in the field of child abuse, and additionally they are

1 offering her as an expert for the field of forensic
2 interviewing. I want to make sure I understand your
3 objection. You are objecting to her as an expert in the
4 field of child abuse?

5 MR. CHEATHAM: Yes, sir.

6 THE COURT: You are also objecting to her as
7 an expert in the field of forensic interviewing?

8 MR. CHEATHAM: Yes, sir.

9 THE COURT: All right, sir. I would find
10 under Rule 702 of the South Carolina Rules of Evidence
11 that she does have scientific, technical or specialized
12 knowledge which would assist the trier of the fact to
13 understand the evidence and determine the facts in
14 issue. She is therefore qualified as an expert based on
15 her knowledge, skill, experience, training, and
16 education and may testify thereto.

17 I would find that under State versus Myers,
18 State versus Good, and a number of other cases that
19 whether or not to qualify an expert -- qualify a witness
20 as an expert -- is within my discretion based on
21 background, training, and experience. She is so
22 qualified, both in the area of child abuse and forensic
23 interviewing.

24 I would further find that under State versus
25 Douglas, it has been specifically indicated that

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1 forensic interviewing is an area of expertise in South
2 Carolina, that the same protocol, R.A.T.A.C., was used
3 in that particular case. In that case it was an
4 officer, law enforcement officer, who was qualified as
5 an expert.

6 So I would find that Ms. Trimble is qualified
7 as an expert in those fields. Solicitor, you may
8 proceed.

9 MS. HEATH: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MS. HEATH:

12 Q Ms. Trimble, what is a forensic interview?

13 A A forensic interview is the interview about
14 possible child abuse allegations that is conducted
15 in a child appropriate environment using a specific
16 recognized protocol and uses child appropriate and
17 developmentally appropriate language and
18 questioning.

19 Q Are there any guidelines established for the
20 interview?

21 A There are. There are guidelines that specify to
22 the setting because it's not a child friendly
23 setting. It's a child appropriate setting. It
24 should not be a setting that has toys or fantasy
25 objects or play. It should be a setting that is

1 not intimidating, of course, or felt by the child
2 to be such. That tends to affect results.

3 There is a guideline to videotaping or
4 otherwise recording the interview, and that is to
5 assure the quality of the interviewing and to make
6 sure the interviewer sticks to the forensic
7 protocol, as well as to preserve a record of the
8 emotional state, the body language, other important
9 items in the interview that can help in assessing
10 the disclosure if there is one.

11 There is a guideline about establishing rules
12 and rule setting up front. Those rules are that
13 the truth will be told, that the child will only
14 discuss facts, real and true things. The child
15 should correct the interviewer at any point if
16 anything is misunderstood or wrong, that the child
17 should not think of playing in the room. It's just
18 for talking.

19 Sometimes there are some additional ones for
20 very young children about attending and not
21 breaking things. The child is informed also of the
22 camera in the protocol. There is a guideline about
23 using appropriate language and asking appropriate
24 questions for the child's age or developmental
25 level.

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1 That is to say, you must take into account the
2 child's developmental age when asking questions or
3 you are more likely to receive inaccurate
4 information. You might get accurate information,
5 but you are more likely to receive inaccurate
6 information if you go beyond the appropriate scope
7 of the child, the age of the memory or the age of
8 the child, the time of the abuse or disclosure.

9 There is a guideline about following the
10 protocol and using anatomical dolls only
11 appropriately and only after a disclosure has been
12 made, if one is made, and very clear guidance of
13 the child that it is not a fantasy object and not
14 for play, but for a very specific purpose.

15 Q Is the child informed of these guidelines before
16 the interview begins?

17 A In the beginning of the interview, the child is
18 informed, yes.

19 Q Are the parents of the child in the room with you?

20 A No.

21 Q Why not?

22 A We contend that parents or other influential
23 parties in the child's life would bring in
24 influence or possibly coercion or give the child an
25 impression that what they saying is correct or not

1 correct or okay.

2 Also parental response to some of these
3 allegations can be quite extreme emotionally. That
4 can be disturbing to the child and shut the child
5 down. So we prefer to have no outside influence if
6 at all possible.

7 Q Where is this interview conducted?

8 A At our clinic which is on the Department of Mental
9 Health, Bull Street site, in a child appropriate
10 room with a small video camera on one side and no
11 toys.

12 Q What measures are used to assess the child's
13 competency?

14 A With children who are eight or older, competency is
15 judged through clinical judgment in the early part
16 of the interview. If the child seems to have
17 competency issues, to be discussing things that are
18 clearly fantastical or appears to have any kind of
19 mental illness that would affect credibility or
20 competency, like a psychosis or delusional
21 thinking, then the interview does not proceed
22 unless clarification can be made and assured.

23 Children eight and over are typically deemed
24 to be competent unless otherwise shown in the
25 interview, unless signs are seen in the interview

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1 that that is an issue. Child seven and under or
2 four to seven are administered a specific
3 competency assessment that is for that age group.

4 Q Before you go into the interview, do you obtain a
5 child's social or family history?

6 A I do usually. Sometimes I obtain that after the
7 interview for various reasons. One, sometimes it's
8 to take in a child who is young or nervous or upset
9 or worried and needs to go right ahead and be
10 interviewed, with a possibility of a little bit of
11 an interview after the social history is gathered
12 to clarify things. Sometimes the child is
13 interviewed after a social history is taken.

14 Q Did you do this in the case of [REDACTED]

15 A Yes.

16 Q Why might a family or a social history be important
17 in your interview?

18 A Getting a social history is important, medical
19 history, developmental history is important in
20 helping me to assess the child's abilities, range
21 of typical abilities, so that I can assess the
22 child's ability to perform in the interview.

23 It's important to gather the family history so
24 that I know what possible influences have occurred
25 on the child before they come to the interview.

1 It's important to know whether the child is taking
2 any medication or is experiencing any traumatic
3 symptoms that I might need to be aware of in going
4 in and asking difficult questions.

5 Q What type of questioning do you use in a forensic
6 interview with a child victim?

7 A The protocol calls for absolutely staying within
8 free recall questions as much as possible, which is
9 an open-ended question if a disclosure is made.
10 The protocol outlines specific questions along the
11 stages, the R.A.T.A.C. stages, which we follow.

12 Then if the child discloses anything at all to
13 questions, the interviewer is supposed to ask free
14 recall questions -- like: Tell me about that or
15 can you tell me something, what happened -- so that
16 the child is giving really only their own
17 information without any suggestibility or leading
18 questions.

19 With children that are pretty young, the
20 questions, open recall questions get the most
21 accurate, the absolutely most accurate information,
22 but they are typically not as detailed as adults
23 would like or expect. Children's accounts of
24 events are skeletal at best.

25 A very young child or a young memory is even

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1 more skeletal. So the interviewer then moves to
2 focused recall questions which are only including
3 information that has already been given or is
4 implied already in the interview, concerning
5 location. Those are the where, when, who type
6 questions.

7 Then with very young children or young
8 children, there are times when it's appropriate to
9 ask yes/no questions or multiple choice, like did
10 it happen one time or more than one time. So the
11 interview is allowed to ask those questions in
12 specific instances.

13 Q What is meant by the term delayed disclosure?

14 A Delayed disclosure is a term that was part of a
15 1983 research article by Roland Summit. He
16 described, not a diagnostic --

17 MR. CHEATHAM: I object to that as being
18 hearsay.

19 THE COURT: She is an expert witness, and she
20 is explaining information, I would take it, that is
21 relied upon by experts in her field. Is that correct,
22 Solicitor?

23 MS. HEATH: Yes, Your Honor.

24 THE COURT: I would allow it with an expert
25 witness. You may proceed, Solicitor.

1 MS. HEATH: Thank you, Your Honor.

2 A I can describe the term as generally known in the
3 field, which is that children are believed to have
4 a certain series of stages after abuse or during
5 abuse. Not all children have all those stages, but
6 most have some of those stages.

7 One of those stages is delayed disclosure or
8 minimized disclosure. That describes -- that
9 feature describes -- something that is counter
10 intuitive to the adult population. Most adults
11 expect that a child will immediately disclose
12 something unpleasant or painful in an effort to
13 seek help.

14 With sexual abuse -- particularly sexual
15 abuse -- with sexual abuse, the secrecy involved,
16 the frequency of threats, the frequency of it being
17 a relative or a very closely known individual to
18 all parties creates a dynamic that makes it very
19 difficult for children to tell right away.

20 Research suggests -- a variety of research
21 suggests -- that delayed disclosure or no
22 disclosure is actually the norm. A variety of
23 research have said that children, only in cases
24 where the abuse has been substantiated by medical
25 or D.N.A. evidence -- those are the only cases

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1 included in the research -- in those cases only 25
2 to 57 percent or so, 25 to 57 percent, excuse me,
3 don't disclose ever at all no matter what.

4 An additional 20 to 28 percent give only
5 partial disclosure of something happening that are
6 really not consistent with the findings, the
7 medical finding. So the norm is a minimum or no
8 disclosure from a child. That has to do with
9 children are frequently sexually abused by someone
10 close, someone trusted, in a home or safe
11 environment, frequently when they are young.

12 Their expectation of their rights or what is
13 okay and not okay is not already formed, as well
14 as children frequently have a fear that they are
15 in trouble for participating or that something
16 bad will happen to someone that they love if they
17 tell.

18 Also they don't know that they will be
19 believed because the person who -- many times and
20 most times, the person who abused the child is
21 someone cared about by the rest of the family.

22 Q In your training and experience, how common is it
23 for child abuse victims to have a delayed
24 disclosure?

25 A In my personal experience it's certainly the most

1 common. Children are more likely -- in my
2 experience and in the research -- more likely to
3 disclose immediately when it's a stranger or a
4 person that is outside the family, a person at
5 school or a neighborhood kid. Those are the most
6 frequent immediate disclosures.

7 There are occasionally immediate disclosures,
8 but they are usually what we call accidental
9 disclosures in which the child has told a friend
10 and the friend tells a parent, and the parent tells
11 the family or the child says something of concern
12 to the parent, not meaning to really disclose, and
13 the parent then investigates or asks questions.

14 So the actual immediate disclosure from abuse
15 by a family member is maybe in the -- I hate to
16 give exact percentages -- but it's pretty low.
17 It's probably 10 percent or so in my personal
18 experience. In the research it's certainly in the
19 teens.

20 Q Did you have an occasion to conduct a forensic
21 interview with [REDACTED]

22 A I did.

23 Q And what date did you do this?

24 A January 11, 2005.

25 Q Did [REDACTED] appear to be competent in his interview?

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1 A He did.

2 Q Did you document his disclosure in any form?

3 A I did. I wrote a report on our standard format and
4 submitted that to Officer Russell from the
5 Sheriff's Department.

6 Q During tis interview did it give you any cause or
7 concern that he had been coached?

8 A No, I had no concerns of coaching.

9 Q What, if any, recommendations did you make
10 following [REDACTED] interview?

11 A I will just refer to my report to be sure I am
12 accurate. I had some concerns that there had been
13 a lot of family reaction. The description of the
14 family reaction by [REDACTED] mother led me to
15 believe there might be some tension among the wide
16 family.

17 It was the holiday season and it had been
18 difficult. So I recommended that there was no
19 unsupervised contact between [REDACTED] and the
20 extended family members so that no one would be
21 able to pressure or try to get [REDACTED] to take the
22 allegations back.

23 There had been a history described from the
24 mom that made me concerned about that. So I put
25 that in my recommendations. I felt that he needed

1 to not be pressured to take this back. Recantation
2 is a frequent issue with kids.

3 I also felt that, just based on the mother's
4 statements in the gathering of the social history,
5 that the supervision of the children, the other two
6 children, should be reviewed.

7 I left that to the law enforcement officers
8 because I obviously didn't have contact with those
9 and couldn't do an evaluation based on anything but
10 mom's statements.

11 So I left that to the other investigative
12 professionals to investigate the home situation of
13 the other two boys. I felt that [REDACTED] and [REDACTED]
14 needed to be interviewed, and I believe they were
15 so by law enforcement, but I don't really know.

16 I also felt that there needed to be some steps
17 to see if there were -- we always recommend that
18 steps are taken if there are any potential victims
19 out there.

20 If a person named as a perpetrator in a
21 disclosure has access to other children, it's
22 usually wise just to check in with those kids and
23 see if anything has happened.

24 So I recommended interviews of any children
25 that had to come into contact with the perpetrator

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1 in this disclosure. Then I recommended therapy for
2 [REDACTED] specific to his particular counseling needs
3 and abuse and supportive theory for his mother who
4 was pretty upset by the allegations.

5 Q Ms. Trimble, I am going to show you what has been
6 marked State's Exhibit Number 4. Do you recognize
7 this videotape?

8 A Yes.

9 Q Do you know what it's of?

10 A I believe it's of [REDACTED] interview with me?

11 Q Yes.

12 MS. HEATH: Your Honor, subject to your
13 previous ruling, I will ask that the videotape be
14 presented into evidence.

15 THE COURT: All right. Mr. Cheatham.

16 MR. CHEATHAM: We would just have our same
17 argument that we made previously.

18 THE COURT: Your objection is noted for the
19 record, Mr. Cheatham, and you are protected.

20 MR. CHEATHAM: Thank you.

21 THE COURT: That is State's 4 in evidence
22 subject to objection.

23 (State's Exhibit Number 4 is received into
24 evidence).

25 THE COURT: You may proceed, Solicitor.

1 BY MS. HEATH:

2 Q Ms. Trimble, has your testimony today been based on
3 the interview that you conducted with [REDACTED] or
4 what you heard in the courtroom yesterday?

5 A No.

6 MR. CHEATHAM: Objection, that's leading.

7 THE COURT: I would overrule the objection.

8 A I'm sorry. I'm not sure I totally understood the
9 question.

10 Q Has your interview (sic) today been based on the
11 testimony that you heard in the courtroom yesterday
12 or the interview that you conducted with [REDACTED] on
13 January 11th?

14 A The interview I conducted with him on the 11th.

15 MS. HEATH: Beg the Court's indulgence.

16 (Pause).

17 BY MS. HEATH:

18 Q Ms. Trimble, when you did the interview with
19 [REDACTED] did you follow the protocol, the R.A.T.A.C.
20 protocol, and the guidelines?

21 A Yes, I did.

22 MS. HEATH: No further questions, Your Honor.

23 THE COURT: Thank you, Solicitor.

24 Mr. Cheatham.

25 MR. CHEATHAM: May it please the Court.

1 CROSS EXAMINATION

2 BY MR. CHEATHAM:

3 Q Ms. Trimble, you were obviously in the courtroom
4 during [REDACTED] testimony?

5 A The pretrial motion, yes.

6 Q And you heard him testify?

7 A Yes.

8 Q And you heard him testify that he had made then a
9 Christmas 2000 disclosure?

10 A He had made -- excuse me?

11 Q That he had given a time frame of Christmas 2000.

12 A I believe he did. I believe he said that, yes.

13 Q He also said that he told you that?

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

15 Q Okay. In your records do you have any reflection
16 that he told you that?

17 A No.

18 Q Now, you also stated previously that there would be
19 or should not be any attempt by you to try to pin
20 down any type of date; is that correct?21 A Specifically when talking about a four-year-old's
22 memory and ability to recall, timing is one of the
23 least accurate skills they have, yes.

24 Q But you didn't try to pin him down on any dates?

25 A No, I did not.

1 Q And I think you said it would be improper to try to
2 pin him down on the date?

3 A It would be improper in my role as forensic
4 interviewer because we are held by guidelines for
5 our protocol. It's possible that accurate
6 information would come out from that sort of
7 questioning, but it's also likely that that would
8 be inaccurate. A child can often attempt to answer
9 a question and give information that they think is
10 from later memories. They have difficulty
11 distinguishing.

12 Q But you would agree then with the statement as part
13 of your protocol that you should not try to pin the
14 child down on a date?

15 A In our protocol we don't try to pin four year olds
16 down on dates, no.

17 Q Now, at any point in time during the interview --
18 and I will refer you to page 7, at the bottom of the
19 page, the last paragraph. I will ask you again, at
20 any point in time during this interview, did you
21 attempt to pin [REDACTED] down to any time and date
22 concerning anything?

23 A Yes. When he was discussing things that sounded as
24 if they happened recently, yes.

25 Q But you did attempt to pin him down on a time and

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1 date?

2 A Yes, in a different circumstance.

3 Q So you violated the protocol?

4 A No, I did not. What I was asking him about when I
5 tried to pin down date and time -- or time of year
6 really is what I was trying to pin down -- was
7 something that was presented to me as likely
8 happening more recently and indeed did happen more
9 recently.

10 So the difference between a four year old's
11 ability to give a date and a six or seven year
12 old's ability to give a season or time of year is
13 really two different questions. It's appropriate
14 to ask a slightly older child very large timing
15 questions, like season or what grade they were in.

16 Q So you are now changing your testimony to say that
17 it is appropriate to try to pin down an older child
18 on a date but not a younger child?

19 A When we are dealing with a child trying to recall
20 things, we have to operate on when that recall
21 happened, what developmental skills are appropriate
22 for that age. In the testimony [REDACTED] volunteered
23 what he thought was his age at the time, and I kind
24 of went with that developmentally.

25 It was consistent with how he was presenting

1 the facts to me. In other portions, in other
2 times, when children are eight and talking about
3 something when they are six or seven, there are
4 different guidelines.

5 Because children go through developmental
6 stages and acquire different skills at different
7 times. So there is a separate category of what is
8 appropriate questioning for young children based on
9 the their age, year to year even.

10 Q When does it become appropriate then? Because you
11 said it was inappropriate to try to pin them down
12 on a date. When does it become appropriate to try
13 to pin them down on a date?

14 A A child of eight, nine, ten can give a date of
15 something that happened when they were eight, nine,
16 and ten. They have learned dates. They have often
17 learned to tell time.

18 A child of six may have learned to tell time
19 but may really not have reference during a memory
20 but can usually give -- can often give what grade
21 they were in.

22 A ten year old recalling what happened when
23 they were six can often give what grade or recall
24 what teacher they had. So the line of questioning
25 is broader.

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1 A three or four year old, even a five year
2 old, the appropriate questioning about timing
3 really is only things like: Do you remember if it
4 was daytime or nighttime?

5 Sometimes children are able to pin down where
6 they lived. That's what I attempted to do with
7 him, knowing that since very young children if they
8 moved a lot, they can sometimes describe the place
9 it happened. That can help law enforcement go to
10 corroborative witnesses and pin down the timing
11 based on where the child was living at the time.
12 So it's varying appropriateness for varying ages.

13 Q In your experience though it would be unusual for a
14 four-year-old, as a person who was eight or nine,
15 to pin down a specific time when something occurred
16 when they were four?

17 A Yeah. The only way they can pin down specific
18 times is if it falls on like their birthday or
19 something, a big event they was important in their
20 life, if someone had died, if some big event
21 happened, and they associate the memory with that
22 big event.

23 It was the week I turned four. It was, you
24 know, at the 4th of July, something like that.
25 Then a four or five year old can sometimes pin down

1 to a time of year because it's based on an event
2 they experienced, but they don't have a sense of
3 calendar dates or hours of the clock.

4 Q But when you interviewed [REDACTED] he did not make
5 any reference to Christmas?

6 A No, I didn't ask about holidays. That's my -- I
7 didn't put that question out. I didn't ask about
8 holidays.

9 Q So he made no reference to holidays and he made no
10 reference to 2000?

11 A Right.

12 Q That came up afterwards?

13 A As far as I know. It didn't come up in my
14 interview.

15 Q Now, would you agree or disagree with the statement
16 that a person trying to recall something that
17 happened when they were four and they were eight
18 could be mistaken?

19 A Sure.

20 Q And could they be mistaken as to person?

21 A Children of four are pretty accurate about things
22 that happen to their body, and people that are
23 known. They are not good at giving details like
24 color of hair or what someone was wearing.

25 They are not always the greatest at giving

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1 location and certainly not timing, as we talked
2 earlier. But they are pretty accurate reporters of
3 things that happened to their own bodies. That has
4 been borne out by a number of research studies.
5 It's a pretty heavily researched area.

6 Q But, again, if you had two people that were close
7 to the family, both of them looked about alike, it
8 could be a mixup in reference to them?

9 A I wouldn't expect it. I'd need to more about the
10 child.

11 Q Now, you were aware of the fact that [REDACTED]
12 reported that the alleged perpetrator lived in the
13 house?

14 A My recollection is the child said the person was
15 staying with them sometimes.

16 Q And that the person also had a bedroom in the
17 house?

18 A Yeah. The child said: Went into his bedroom. I
19 think that should be taken with a grain of salt for
20 a four year old. They are not always clear about
21 contextual details. They are not part of the
22 discussion about who is living where and what is
23 going on.

24 They often have a -- their perception of the
25 households arrangements can be really different. I

1 have had cases in which a child described a great
2 number of people living in their home, and it was
3 simply those people were often there when they were
4 awake and went home to their own place to sleep
5 after the child was in bed.

6 But the child's perception, a seven or eight
7 year old's perception, was that a lot of people
8 lived in their house and just sort of slept on
9 couches and things. A child can be mistaken about
10 that.

11 Q Now, if a person had a bedroom right next to the
12 child, the child would also be less likely to be
13 mistaken?

14 A If it was a bedroom and the child spent time there,
15 and it was clearly a bedroom and that lasted for a
16 while, then I think the child could be maybe most
17 clear.

18 But when you have people staying and coming
19 and going, I think it's pretty unusual to expect a
20 four year old's memory to really know the
21 logistical details of the entrances and exits into
22 their home and that kind of thing.

23 Q But if a person was staying there for an extended
24 period, then a child would most likely be aware of
25 that?

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1 A Would likely be aware of it.

2 Q Now, there has been some research about eye
3 movement during interviews. Are you aware of that?

4 A No, that's not something that we have looked into
5 at my site.

6 Q So you don't know anything about if a person looks
7 in a certain direction, they are doing recall. If
8 a person looks in another direction, they are doing
9 creation or imagination?

10 A No, I don't know of any valid research that would
11 apply to forensic interviewing in that area. I
12 would be happy to review some.

13 Q You don't use that at all?

14 A No, we don't use that at all.

15 Q Are you aware of the fact that the F.B.I. and other
16 agencies use that type of information?

17 A I'm not. There are different bodies of research to
18 do with interrogation and with interviewing of
19 children. I know that there has been some
20 presentations made in my presence by law
21 enforcement to do with interrogating witnesses.
22 That's a different -- confrontational interviews
23 are a very different animal than a forensic
24 interview.

25 Q But none of the training that you have been to

1 would affect eye movement or body language?

2 A Body language, yes. We look at body language, yes.

3 We don't look specifically at eye movement aside

4 from that which relates to emotional state.

5 Q And what notes did you make in your record as to

6 [REDACTED] eye movements?

7 A It's not necessarily something I would note. I

8 don't recall noting it. I am just looking to see

9 if I did. I typically note when a child looks down

10 because their emotional state has shifted or they

11 are having -- they appear to be having discomfort

12 or when they are distracted, that sort of thing.

13 MR. CHEATHAM: Your Honor, I would move that

14 that be not responsive --

15 THE COURT: Excuse me, I couldn't hear you.

16 MR. CHEATHAM: I said I would move that that

17 be stricken as being non responsive. I asked her what

18 she did note and not what she did not note.

19 THE COURT: If you will review your notes and

20 if you don't note anything as far as body language, you

21 can indicate and you can explain your answer.

22 THE WITNESS: (Pause). I don't see that I

23 noted body language or eye movement in the report.

24 BY MR. CHEATHAM:

25 Q And in his interview with you, he could not give

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1 the last name of the alleged perpetrator; could he?

2 A Correct.

3 MR. CHEATHAM: That's all I have, Your Honor.

4 THE COURT: Thank you, Mr. Cheatham.

5 Solicitor, anything on redirect?

6 MS. HEATH: Just briefly, Your Honor.

7 THE COURT: Yes, ma'am.

8 REDIRECT EXAMINATION

9 BY MS. HEATH:

10 Q Ms. Trimble, when Mr. Cheatham was referring to
11 your report and you asked him, [REDACTED] to pin down
12 a time frame, what perpetrator were you talking
13 with [REDACTED] about?

14 A When I asked about time frame?

15 Q Yes.

16 A His uncle, Mr. Oxner.

17 MR. CHEATHAM: Your Honor, we were not going
18 to go into actual other incidents. I didn't
19 specifically ask her if she just asked about a time
20 frame and not any other person.

21 THE COURT: I understand. I will allow it
22 under Rule 106 and State versus Jackson. It's
23 explanation on reply, on redirect, as to a particular
24 part of her report, I take it. I think you went into it
25 during cross examination.

1 BY MS. HEATH:

2 Q And did this happen later in [REDACTED] life?

3 A It did.

4 MS. HEATH: I have nothing further, Your
5 Honor.

6 THE COURT: Anything on recross, Mr. Cheatham?

7 MR. CHEATHAM: No.

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

9 THE WITNESS: Thank you.

10 THE COURT: Solicitor, you may call your next
11 witness.

12 MS. HEATH: Thank you, Your Honor. The State
13 calls Cindy Floyd.

14 MR. CHEATHAM: Your Honor, can we take about a
15 five-minute break?

16 THE COURT: All right. Court will be in
17 recess for about -- we may as well say 15 minutes.

18 MS. HEATH: Your Honor, can Ms. Trimble be
19 excused?

20 THE COURT: Do you have any objections,
21 Mr. Cheatham?

22 MR. CHEATHAM: No, sir.

23 THE COURT: All right. Yes, she may be
24 excused. Thank you.

25 (Whereupon there was a recess).

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1 (State's Exhibits Number 6-7 are marked for
2 identification).

3 THE COURT: Solicitor, you may call your next
4 witness.

5 MS. HEATH: The State calls Cindy Floyd.

6 CINDY DARLENE FLOYD, being
7 first duly sworn, testified as follows:

8 CLERK: State your full name once you have a
9 seat, please.

10 THE WITNESS: Cindy Darlene Floyd.

11 DIRECT EXAMINATION

12 BY MS. HEATH:

13 Q Ms. Floyd, where are you employed?

14 A Piggly Wiggly in Prosperity.

15 Q Are you from this area?

16 A Batesburg Leesville.

17 Q Did you go to high school here?

18 A In Batesburg.

19 Q How many children do you have?

20 A Three.

21 Q What are their names and their ages?

22 A [REDACTED] is 15, [REDACTED] is 12, and [REDACTED] is 10.

23 Q And when was [REDACTED] born?

24 A [REDACTED]

25 Q And has [REDACTED] always lived with you?

1 A Yes.

2 Q During the Christmas break of 2000, which is
3 December of 2000 to January of 2001, do you have
4 any recollection of what you were doing?

5 A I was in the hospital.

6 Q Where did you live at this time?

7 A [REDACTED] Road.

8 Q I will show you what has been marked as State's
9 Exhibits 1, 2, and 3, which Mr. Cheatham has seen.

10 (Attorneys confer).

11 MR. CHEATHAM: Your Honor, I can't hear the
12 witness. Can I move over?

13 THE COURT: Yes, sir, you may move around.

14 MR. CHEATHAM: Thank you.

15 BY MS. HEATH:

16 Q Do you recognize these pictures?

17 A Yes, I do.

18 Q What are those pictures of?

19 MR. CHEATHAM: Your Honor, we would object to
20 testimony concerning the pictures. They weren't
21 produced during discovery.

22 MS. HEATH: Your Honor, they were produced
23 during discovery. He came to my office on Friday and
24 saw the pictures.

25 MR. CHEATHAM: That's not within the ten-day

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1 time frame.

2 THE COURT: Excuse me, I can't hear you.

3 MR. CHEATHAM: That was not within the time
4 frame. The only reason that I actually saw the pictures
5 on Friday was I came over to look at her file. That's
6 when I saw the pictures. I don't think that that is
7 sufficient notice prior to trial.

8 THE COURT: May I see the photos, Ms. Floyd?
9 (Hands to Court).

10 THE COURT: Let me get the record straight on
11 this. Was there a discovery motion prepared and served
12 by the Defendant, Solicitor?

13 MS. HEATH: There was, Your Honor. That is
14 simply a picture of the location. He has known the
15 location of the incident the entire case.

16 THE COURT: I understand. I just want to make
17 sure I get this clear on the record. How did it come to
18 be last Friday that Mr. Cheatham reviewed your file,
19 Solicitor?

20 MS. HEATH: Your Honor, since the beginning
21 when I called this case since June, I told him I have an
22 open-file policy. He is able to come look at anything I
23 have in any file.

24 He did not come to my office until last
25 Friday. At that time I showed him his confession as

1 well as those photographs and said those are the two
2 things that I was going to introduce into evidence.

3 THE COURT: You had offered as early as when
4 to allow him to review your file?

5 MS. HEATH: As early as July of this year.

6 THE COURT: Under Rule 5 of the Rules of
7 Criminal Procedure (a)(1)(c), upon request of the
8 Defendant, the prosecution shall permit the Defendant to
9 inspect and copy books, papers, documents, and
10 photographs.

11 Obviously you would have had the opportunity
12 to inspect and copy those within the time frame that the
13 solicitor has stated. State's 1, 2, and 3, although
14 there has been no testimony yet, appears to be
15 photographs of a location.

16 This is a fair and accurate representation of
17 the location as it appeared in 2000, Solicitor?

18 MS. HEATH: Your Honor, it was taken this
19 year. The house hasn't moved.

20 THE COURT: It was taken this year, but it's a
21 fair and accurate depiction of how the location looked
22 in 2000 when the incident allegedly occurred?

23 MS. HEATH: Yes, Your Honor.

24 THE COURT: I would allow State's 1, 2, and 3.
25 Your discovery motion -- any other objections to the

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1 photographs beside the discovery issue, Mr. Cheatham?

2 MR. CHEATHAM: No, sir, Your Honor. I just
3 believe they have an affirmative duty to produce rather
4 than vice-versa.

5 THE COURT: I believe they have complied with
6 Rule 5, but you are protected on the record,
7 Mr. Cheatham.

8 (State's Exhibits Number 1-3 are marked for
9 identification).

10 BY MS. HEATH:

11 Q Ms. Floyd, do you recognize these photographs?

12 A I do.

13 Q And what are those photographs of?

14 A Exhibit 1 is of the home that I shared with my
15 three children. Exhibit 2 and Exhibit 3 is the
16 home of Michael Day, which is in the same yard.

17 Q What are the addresses on those houses?

18 A On the doublewide it's [REDACTED] and on the actual house
19 it's [REDACTED]

20 Q What road are those on?

21 A [REDACTED]

22 Q Is that in Lexington County?

23 A Yes, it is.

24 Q In South Carolina?

25 A Yes, it is.

1 MS. HEATH: Your Honor, I would move to
2 introduce these into evidence?

3 THE COURT: State's 1, 2, and 3 are in
4 evidence subject to the defense's objection on
5 discovery.

6 MS. HEATH: Thank you, Your Honor.

7 (State's Exhibits Number 1-3 are received into
8 evidence).

9 BY MS. HEATH:

10 Q You testified that Exhibit 1 was your house. Who
11 lived in that house with you during the Christmas
12 break of 2000?

13 A Myself, my three children, and Les Ruilova.

14 Q How old was [REDACTED] at this time?

15 A He was four.

16 Q Who is Les Ruilova?

17 A My fiancée.

18 Q When did you meet Les?

19 A I met Les in August of 2000.

20 Q When did he move in with you and your three sons?

21 A The end of November 2000.

22 Q You said you were in the hospital. Which hospital
23 were you in?

24 A Baptist.

25 Q I am going to show you what is marked as State's

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1 Exhibit 6 and 7.

2 MR. CHEATHAM: We would have no objection to,
3 assuming they are just introduced to prove she was
4 there, rather than what she was suffering from.

5 THE COURT: You have no objections?

6 MR. CHEATHAM: I have no objection as long as
7 they are introduced to show she was there, rather than
8 what she was suffering from.

9 MS. HEATH: That's the reason, Your Honor.

10 THE COURT: That's the State's 6 and 7 in
11 evidence without objection.

12 (State's Exhibits Number 6-7 received into
13 evidence).

14 THE COURT: They are in for purposes of the
15 timing of the hospitalization.

16 MS. HEATH: Thank you, Your Honor.

17 BY MS. HEATH:

18 Q Do you recognize those?

19 A Yes.

20 Q How long were you in the hospital, do those records
21 reflect?

22 A My admitted date was 12/11 of 2000. My discharge
23 date was 1/2/01.

24 Q Who kept your three sons while you were in the
25 hospital?

1 A Les.

2 Q Was anybody else at your house?

3 A Yes, Michael Day.

4 Q How did you know Michael?

5 A He is like a step cousin. He is my stepmother's
6 sister's son.

7 THE COURT: Hold up. He is what? I didn't
8 quite catch that, stepmother's?

9 THE WITNESS: He is my stepmother's sister's
10 son.

11 THE COURT: Thank you.

12 BY MS. HEATH:

13 Q Was he staying at your house during that time?

14 A Yes.

15 Q Why was he staying there?

16 A He helped out with my kids.

17 Q Where did his parents live?

18 A At [REDACTED] Road, like in my back yard.

19 Q I will show you Exhibits 2 and 3. Is this where
20 Mr. Day's parents lived?

21 A Yes, it is.

22 Q Is that behind your house?

23 A Yes.

24 Q Before you went into the hospital was Mr. Day at
25 your house?

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1 A Yes, he was.

2 Q When you came out of the hospital, was he still
3 there?

4 A Yes.

5 Q Did [REDACTED] and [REDACTED] visit you while you were in the
6 hospital?

7 A Yes, they did.

8 Q Do you remember around when that was or what they
9 came there for?

10 A It was right around Christmas. They came to bring
11 me Christmas gifts.

12 Q Under what circumstances did you find out about
13 [REDACTED] being abused?

14 A I had taken him to the A.R.C. center.

15 Q You found out at the A.R.C.?

16 A Yes.

17 Q Who told you?

18 A Ms. Melanie Trimble.

19 MR. CHEATHAM: I would object, Your Honor.

20 That would be hearsay.

21 THE COURT: I would sustain the objection.

22 BY MS. HEATH:

23 Q What did you do after you spoke with Ms. Trimble
24 about your son's abuse?

25 A I called the Lexington County Sheriff's Department

1 and spoke with Detective Russell.

2 Q When was the first time you and your son met with
3 any staff at the Solicitor's Office here?

4 A I believe it was like in May of '05.

5 MS. HEATH: Beg the Court's indulgence.

6 (Pause).

7 MS. HEATH: No further questions from
8 Ms. Floyd, Your Honor.

9 THE COURT: Thank you, Solicitor.

10 Mr. Cheatham, you may cross examine.

11 MR. CHEATHAM: May it please the Court.

12 CROSS EXAMINATION

13 BY MR. CHEATHAM:

14 Q Ms. Floyd, you are Cindy Floyd?

15 A Yes, I am.

16 MR. CHEATHAM: I am going to have this marked
17 for identification.

18 (Defendant's Exhibit Number 2 is marked for
19 identification).

20 MS. HEATH: May I see that?

21 (Pause).

22 BY MR. CHEATHAM:

23 Q Did you have a conversation with Eric Russell on or
24 about February the 16th?

25 A Yes.

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1 THE COURT: What year is that, Mr. Cheatham?

2 MR. CHEATHAM: That would be of '05, Your
3 Honor.

4 THE COURT: Thank you.

5 BY MR. CHEATHAM:

6 Q And did you relate at that time that your son was
7 eight years of age?

8 A Which son are we talking about?

9 Q [REDACTED]

10 A Yes.

11 Q And did you also relate that there had been an
12 alleged incident approximately five years ago?

13 A I don't exactly recall a definite amount of years.

14 Q If I show you Eric's report, would that help
15 refresh your memory?

16 A It may.

17 MS. HEATH: Objection, Your Honor.

18 THE COURT: What is the foundation of your
19 objection?

20 MS. HEATH: He is trying to impeach the
21 witness by using Detective Russell's incident report.

22 THE COURT: He is using his incident report to
23 refresh her memory. If it doesn't refresh her memory,
24 she can certainly say so. If it's not her statement,
25 she can certainly deny it.

1 He is not offering it. He is using the
2 officer's notes to refresh her memory is all he is doing
3 right now. If she didn't make the statement, she can
4 say she didn't make it or she doesn't remember it or it
5 doesn't refresh her memory.

6 Is that your question, Mr. Cheatham?

7 MR. CHEATHAM: Yes, Your Honor. I asked her
8 if it refreshed her memory as to what she told Officer
9 Russell.

10 A I remember speaking to Officer Russell, but I don't
11 remember exactly what I said to him, no.

12 Q So you would not at this particular point in
13 time -- and I am not trying to mislead you. I just
14 want to know what you did. Right now you are
15 saying you do not recall whether you did make the
16 statement?

17 A Correct.

18 Q Now, has there been what you call bad blood between
19 you and Michael's side of the fence?

20 A At the time of the incident, no, there was not.

21 Q So you are saying everybody got along just
22 hunky-dory?

23 A At the time of the incident, yes.

24 Q Nobody had any disputes or arguments or
25 disagreements at all?

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1 A No, not at the time of the incident.

2 Q Now, in reference -- well, let's go up to the time
3 of reporting then. Before it was reported but when
4 your child was eight, had there developed disputes
5 and disagreements between the two sides of the
6 fence?

7 A Yes, there had.

8 Q Now, did you provide Eric Russell with any
9 information that the incident could have occurred
10 between June the 1st of '01 and September the 1st
11 of '01?

12 A Not that I recall, no. I have always said that the
13 incident took place when [REDACTED] was four. I mean,
14 [REDACTED] always said the same thing.

15 MR. CHEATHAM: If you will mark this.

16 (Defendant's Exhibit Number 3 is marked for
17 identification).

18 BY MR. CHEATHAM:

19 Q I am going to show you what has been marked
20 Defendant's Exhibit 3 for I.D., which is an arrest
21 warrant and affidavit. It's dated, as best I can
22 tell, 2/23/05. It alleges an incident between
23 June the 1st of '01 --

24 MS. HEATH: Your Honor, I object.

25 THE COURT: Yes, ma'am.

1 MS. HEATH: As to hearsay. That is Detective
2 Russell's warrant.

3 THE COURT: What is your question,
4 Mr. Cheatham?

5 MR. CHEATHAM: I am asking her if she knew
6 anything about this information.

7 THE COURT: You can answer whether or not you
8 know anything about that information, Ms. Floyd.

9 A As far as the dates Detective Russell put on the
10 warrant, I'm not -- I don't know.

11 Q You don't know anything about them?

12 A No.

13 Q Do you recall discussing matters with the
14 Solicitor's Office?

15 A Excuse me?

16 Q Do you remember discussing matters with the
17 Solicitor's Office?

18 A I remember coming in to the Solicitor's Office,
19 yes.

20 Q And did they ask you about dates that certain
21 things occurred?

22 A They did.

23 Q And what did you tell them?

24 A I told them that I stuck with [REDACTED] because [REDACTED]
25 said that it happened when he was four, and I

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1 agreed with [REDACTED] that it did happen to him when
2 he was four.

3 Q And when did you first find out the time frame of
4 Christmas of 2000?

5 A That would have been shortly after the A.R.C.
6 center.

7 Q So you would have told the solicitor that?

8 A Right.

9 (Defendant's Exhibit Number 4 is marked for
10 identification).

11 MS. HEATH: Your Honor, I haven't seen that
12 document.

13 (Attorneys confer).

14 MS. HEATH: I would object, Your Honor.
15 That's an indictment that he is not even on trial for.

16 THE COURT: What is the question,
17 Mr. Cheatham?

18 MR. CHEATHAM: It goes to the credibility of
19 the witness, the date and time frame of the incident,
20 and when this time frame arose. This case has been all
21 over the time spectrum, from '99 to 2000, to 2001 to
22 2002.

23 She says that she talked to the Solicitor's
24 Office and told them Christmas of '05, and then they are
25 indicting him for a different period. So I think it

1 goes to the credibility of the witnesses.

2 THE WITNESS: Your Honor, I didn't say
3 Christmas of '05.

4 THE COURT: Ms. Floyd, this isn't like at
5 home. I get to talk.

6 THE WITNESS: Yes, sir.

7 THE COURT: I'm not fussing at you. It really
8 goes -- and I am not trying to make light of this. It's
9 a very serious thing, Mr. Cheatham -- but it goes to the
10 quality of that indictment.

11 I don't know -- she didn't prepare the
12 indictment. She has said she remembers coming to the
13 Solicitor's Office and discussing when certain things
14 occurred. It was always when [REDACTED] was four years of
15 age, and she agreed with [REDACTED]

16 MR. CHEATHAM: She also said she told them it
17 was Christmas 2000 at that time, and we have indictments
18 for different periods.

19 THE COURT: I guess my question is: How does
20 the indictment that was prepared by a solicitor or an
21 assistant solicitor go to her credibility?

22 MR. CHEATHAM: It goes to her credibility
23 because they were prepared for her to testify that it
24 occurred between these dates.

25 THE COURT: I'm just not quite connecting the

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1 dots. I will allow you to use it for identification
2 purposes only at this time, but I just don't see how the
3 preparation of an indictment by the solicitor would go
4 to a witness' credibility.

5 MR. CHEATHAM: Your Honor, may I attempt to
6 tie that in?

7 THE COURT: You can ask if that refreshes her
8 memory.

9 BY MR. CHEATHAM:

10 Q When you talked with the Solicitor's Office, did
11 they show you the indictments?

12 A I don't recall.

13 Q You don't recall ever seeing an indictment?

14 A I don't.

15 Q I will show you what has been marked as Defendant's
16 Exhibit 4. Have you ever seen that document
17 before?

18 A I have never actually seen it, no.

19 Q What do you mean you have never actually seen it?

20 A I've never held the paper --

21 MS. HEATH: Objection, Your Honor.

22 THE COURT: I will allow her to explain that
23 answer.

24 A I never held the paper in my hand and read it, no,
25 sir.

1 Q Have you ever seen it before?

2 A No.

3 Q So you never -- has anybody ever read it to you
4 before?

5 A Yes.

6 Q So that was read to you?

7 A Right.

8 Q And the time it was read to you, you didn't voice
9 any objection?

10 A I assume not, no.

11 (Defendant's Exhibit Number 5 is marked for
12 identification).

13 BY MR. CHEATHAM:

14 Q Has this ever been shown to you or read to you
15 before? This is an indictment saying that the
16 incident occurred between December 2001 and early
17 January of 2002.

18 A I do believe it's been read to me, yes, sir.

19 Q At the time it was read to you, did you voice any
20 objection?

21 A No, sir, not at the time I did not.

22 (Defendant's Exhibit Number 6 is marked for
23 identification).

24 MS. HEATH: Your Honor, I will object to this.
25 This isn't even it a true billed indictment, and

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1 Ms. Floyd has never seen that. It's never gone to the
2 grand jury.

3 THE COURT: What is the question on this one,
4 Mr. Cheatham?

5 MR. CHEATHAM: I am going to ask her if she
6 was ever made aware of this information.

7 THE COURT: May I see it?

8 MR. CHEATHAM: Yes, sir.

9 (Hands to Court).

10 THE COURT: Which one am I looking at? Am I
11 looking at just Defense Exhibit 6 for identification?

12 MR. CHEATHAM: They came to me as a package.

13 THE COURT: They are separate now.

14 MR. CHEATHAM: I know.

15 THE COURT: Are you offering them for
16 identification as a package now?

17 MR. CHEATHAM: I didn't have a chance to look
18 at it. I thought that was a duplicate, unless I am
19 incorrect. I glanced at it real quick. I thought it
20 was a duplicate. There was a letter to it also.

21 THE COURT: It does appear to be -- the second
22 page appears to be a duplicate of the first page. Would
23 you hand me Defendant's Exhibits 4 and 5 for
24 identification also.

25 (Hands to Court).

1 THE COURT: Neither 4 nor 6 has been true
2 billed.

3 MR. CHEATHAM: Yes, Your Honor, they were.

4 THE COURT: Is that correct, Solicitor? Four
5 goes from -- the only difference in any of these
6 indictments is the time, correct?

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

8 THE COURT: Four has a timing between June 1st
9 of '01 and September 1st of '01. Five has December of
10 '01 to early January of 02. Six has June 1, '01, to
11 December 31, '01.

12 Mr. Cheatham, it looks like to me this would
13 go more to the investigation by law enforcement and the
14 Solicitor's Office in preparation for trial, rather than
15 the mother of a four year old or a five year old whose
16 name is listed in each indictment rather than her
17 credibility.

18 MR. CHEATHAM: Well, Your Honor --

19 THE COURT: Because she has testified -- and
20 I'm not trying to cut you off. I am just trying to
21 think through it. She has testified that she took him
22 to the A.R.C. center, and as a result of the A.R.C.
23 center, she called Lexington Sheriff's Department and
24 Detective Russell, unless these are based on her
25 changing her statement.

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1 MR. CHEATHAM: Your Honor, she testified that
2 those were read to her, and she voiced no disagreement
3 and no objection to the language.

4 THE COURT: I'm not sure she has a duty. I
5 don't know where that goes to her credibility. Because
6 she is not even -- she is testifying as a fact witness
7 to the extent that she was in the hospital for the dates
8 that the records indicate she was in the hospital.

9 That corroborates [REDACTED] testimony that it
10 occurred when his mom was in the hospital. But beyond
11 that, she has always said or I have always heard her
12 say, I should say, that she relied on [REDACTED]

13 MR. CHEATHAM: I know. But see, up until we
14 had this last indictment that they said they were going
15 to submit --

16 THE COURT: The last indictment is what we are
17 trying?

18 MR. CHEATHAM: No, I said that they said they
19 were going to submit. It's the one that they did not
20 submit.

21 THE COURT: All right.

22 MR. CHEATHAM: Up until that time, the time
23 frame of Christmas 2000 had never been indicted, brought
24 up or anything, even though supposedly she had told the
25 Solicitor's Office, and they were using different dates

1 and reading them to her, and she said no objection.

2 THE COURT: She didn't say no objection.

3 MR. CHEATHAM: She said she did not disagree
4 with any of their statements.

5 THE COURT: I will let you ask her the
6 question on State's 6 for identification for whatever
7 weight and value it might have, Mr. Cheatham.

8 MR. CHEATHAM: Thank you, Your Honor.

9 THE COURT: Do you have others?

10 MR. CHEATHAM: I think that's it.

11 THE COURT: Solicitor, you have consistently
12 objected to 4, 5, 6, and 3.

13 MS. HEATH: Yes, Your Honor.

14 THE COURT: All right. Now we are on
15 Defendant's 6 for identification.

16 BY MR. CHEATHAM:

17 Q Do you remember the last time that you came up to
18 the Solicitor's Office to prepare for trial?

19 A Yes.

20 Q What?

21 A Yes.

22 Q The time that we did not go forward?

23 A Yes.

24 Q And it was after -- at that time that Christmas of
25 2000 came up?

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- 1 A Are you asking me a question?
- 2 Q Yes.
- 3 A Yes.
- 4 Q And it was at that time you went and got the
- 5 hospital records?
- 6 A Correct.
- 7 Q So you didn't get the hospital records until we
- 8 were getting ready to go to trial on Christmas of
- 9 '01, correct?
- 10 A Correct.
- 11 Q And you knew that in Christmas '01, we were
- 12 attempting to show that Michael Day was not here by
- 13 virtue of the fact that he was living in North
- 14 Carolina and that there were pictures to prove he
- 15 was not here at Christmas and pictures to prove he
- 16 was there at Christmas?
- 17 A According to what I was told, that is correct.
- 18 However, I still said that [REDACTED] was four years
- 19 old when this incident took place. I have said
- 20 that from day one, and I will say that until the
- 21 end.
- 22 Q I know. But you never brought up the thing of
- 23 Christmas of 2000 apparently until we got ready to
- 24 go to trial on Christmas of 2001; isn't that
- 25 correct?

- 1 A Correct.
- 2 Q Do you know Dale Hastings?
- 3 A Do I know him?
- 4 Q Yes.
- 5 A Yes, I do.
- 6 Q Has he ever lived at your house?
- 7 A No, he has not.
- 8 Q Never, ever?
- 9 A Never, ever.
- 10 Q Troy Hastings?
- 11 A No, sir, I do not know a Troy Hastings.
- 12 Q Isn't that Dale's brother?
- 13 A Dale has a brother named Troy, but his name is not
- 14 Troy Hastings, no, sir.
- 15 Q What is his last name then?
- 16 A Troy Crookshank.
- 17 Q Do you know Troy Crookshank?
- 18 A Yes, I do.
- 19 Q Has Troy Crookshank ever lived at your residence?
- 20 A No, he has not ever lived at my residence.
- 21 Q So neither one of them have ever stayed overnight?
- 22 A You asked me had they ever lived there. No, they
- 23 have never lived there. Yes, they have spent the
- 24 night there.
- 25 Q Have they spent more than three or four days at one

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- 1 time?
- 2 A No, sir.
- 3 Q So they have spent the night never more than once?
- 4 A Never more than once as in more than one day?
- 5 Q At a time.
- 6 A Right, true.
- 7 Q And did you have any type of relationship with
- 8 either of these people?
- 9 A Other than a friendship, no, sir.
- 10 Q And in reference to your home, how many bedrooms
- 11 does it have?
- 12 A Three.
- 13 Q Now, during this time -- there was a time when your
- 14 other two sons were not there. Is that this time
- 15 or was that another time?
- 16 A [REDACTED] and [REDACTED] always lived with me prior to the
- 17 time that you are referring to.
- 18 Q I was just trying to get it in my mind. Were they
- 19 there then in Christmas of 2000?
- 20 A Yes, they were.
- 21 Q Now then, you and your fiancée shared a bedroom?
- 22 A This is correct.
- 23 Q [REDACTED] -- I mean, excuse me -- [REDACTED] said he had his
- 24 bedroom.
- 25 A Yes.

- 1 Q So where did the other three people live?
- 2 A [REDACTED] and [REDACTED] always shared a room. They have
3 always shared a room, and they still to this day
4 and time still share a room. [REDACTED] being the
5 oldest, he had a room by himself. Michael, when he
6 would stay at my house, also either shared a room
7 with [REDACTED] and [REDACTED] or either would sleep on the
8 couch.
- 9 Q Okay. But he never had his own bedroom?
- 10 A Not as far as being his room exclusively by
11 himself, no.
- 12 Q Was Les Ruilova working in December of 2005?
- 13 A Yes and no. He was working putting in windows. If
14 it rained, he didn't work. If it was too cold, he
15 didn't work. But he did have a job, yes.
- 16 Q How many days a week would he average working?
- 17 A To be 100 percent honest, I would say probably two.
- 18 Q So the rest of the time he was there taking care of
19 the boys?
- 20 A Correct.
- 21 Q Now, Michael Day lived next door?
- 22 A Correct.
- 23 Q And he had his own bedroom next door?
- 24 A Yes.
- 25 Q Now, did he have clothes at your house?

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- 1 A Yes.
- 2 Q Where did he have his clothes?
- 3 A Usually in the bedroom where [REDACTED] and [REDACTED]
- 4 resided.
- 5 Q What size closet was in there?
- 6 A Excuse me?
- 7 Q What size closet was in the room?
- 8 A As far as dimensions, I can't give you an exact
- 9 size. It was an average mobile home closet.
- 10 Q Did all three people have their clothes --
- 11 A His clothes would be like folded up in a little
- 12 stack sitting in the corner on the floor.
- 13 Q Whose clothes?
- 14 A Michael's.
- 15 Q What type of clothes did he generally wear?
- 16 A Jeans and a shirt.
- 17 Q And was he working at this time?
- 18 A Not that I recall, no.
- 19 Q And do you know Barbara Day?
- 20 A I do.
- 21 Q And do you know Mary Steele?
- 22 A Who?
- 23 Q Kitty or Mary Steele?
- 24 A I know her as Kitty, but I don't. -- I just know her
- 25 by name. I don't know anything about her. I've

1 never actually been formally introduced.

2 Q During this period of time, Barbara Day lived in
3 her house on the same property?

4 A That's correct.

5 Q And she lived with her husband Dwight who is now
6 deceased?

7 A That's correct, and their daughter Alicia.

8 Q Now, I am assuming that you do not have any type of
9 criminal record.

10 A I'm sorry?

11 Q Do you have any criminal record?

12 A Do I have a criminal record?

13 Q Yes.

14 MS. HEATH: Objection, Your Honor.

15 THE COURT: Solicitor, does she have any
16 criminal record that would be subject to the rules of
17 evidence?

18 MS. HEATH: No, Your Honor. I turned over all
19 the criminal records to Mr. Cheatham.

20 THE COURT: I would take the Solicitor at her
21 word as an officer of the Court, Mr. Cheatham. I don't
22 think you can go beyond -- what is it Rule 609? If you
23 are aware of any -- yes, it is Rule 609. Unless you are
24 aware of any that would fit in there, I would take the
25 Solicitor's word as an officer of the Court that she

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1 would have no record subject to impeachment under Rule
2 609.

3 BY MR. CHEATHAM:

4 Q And have you ever been a victim of a crime?

5 A A victim of what?

6 MS. HEATH: Objection, Your Honor.

7 THE COURT: What would be the relevancy of
8 that, Mr. Cheatham?

9 MR. CHEATHAM: Well, let me rephrase that.

10 THE COURT: Thank you.

11 BY MR. CHEATHAM:

12 Q Have you ever been a victim of a crime with

13 Mr. Ruilova?

14 MS. HEATH: Objection, Your Honor.

15 THE COURT: What would be the relevance? Who
16 is Mr. Ruilova.

17 MS. HEATH: That's the other witness she is
18 living with.

19 THE COURT: Is that one name.

20 MR. CHEATHAM: It's Les Ruilova or something
21 of that nature.

22 THE COURT: What is the relevancy of that?

23 MR. CHEATHAM: To show whether or not he was
24 criminally violent or anything towards her.

25 THE COURT: What is the relevancy of that?

1 What is the relevancy of whether or not -- I am not
2 saying she is or isn't. I don't want her to answer the
3 question if it's not relevant. What is the relevance of
4 whether or not the mother of an alleged victim is an
5 individual who is in a domestic relationship in which
6 there is violence?

7 MR. CHEATHAM: I think it goes -- if there has
8 been a domestic violence type issue, then I think it
9 would go to his credibility.

10 THE COURT: Only if it would -- well, A., it's
11 got to be clear and convincing under Rule 404. It's got
12 to meet that initial threshold standard. Then B., if
13 it's a crime, it would have to meet the requirements of
14 Rule 609, if it would meet those.

15 Unless you have a proffer that you would want
16 to make under 404 or 609 -- I don't mean to keep
17 throwing these numbers out to our court reporter. If
18 there was such a thing, I would then have to do a 403
19 analysis.

20 MR. CHEATHAM: The only thing I was making
21 reference to, Your Honor.

22 THE COURT: First discuss that with the
23 Solicitor, Mr. Cheatham, perhaps.

24 (Attorneys confer).

25 (Hands to Court).

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1 THE COURT: I am glad somebody showed me this.
2 Now I know. I thought it was Lester Ray, R-A-Y, Louva.
3 Now I know it's Lester Norman R-U-I-L-O-V-A. I am sure
4 our court reporter had that absolutely correct from the
5 jump; correct?

6 COURT REPORTER: Yes, sir.

7 THE COURT: Solicitor, are any of these --
8 first, I don't see anything that could be used as far as
9 this witness is concerned. But are any of these
10 impeachable as to Mr. Ruilova when he testifies?

11 MS. HEATH: Your Honor, he has a vehicle theft
12 and a larceny from 1985 and '86.

13 THE COURT: All right.

14 MS. HEATH: But I think Mr. Cheatham was
15 referring to a harassment, which would not be
16 applicable.

17 THE COURT: May I ask a question,
18 Mr. Cheatham.

19 You testified you met Mr. Ruilova -- did I
20 pronounce that name right?

21 THE WITNESS: Ruilova.

22 THE COURT: Ruilova. I was better off when I
23 thought it was two different names. You met Mr. Ruilova
24 in August of 2000. Do you know what part of August of
25 2000, the beginning, the middle, the end? Can you give

1 me just generally?

2 THE WITNESS: I believe it was more toward the
3 end of August.

4 THE COURT: All right. This occurred 8/2 of
5 2000. It would have been prior to her relationship. I
6 assume if the relationship starts off with a harassment,
7 that would perhaps give somebody cause to have a red
8 flag and to not engage in the relationship. I would
9 sustain the Solicitor's objection on that one.

10 BY MR. CHEATHAM:

11 Q In reference to Michael Day, where did he eat his
12 meals?

13 A Where did he do what?

14 Q Eat his meals.

15 A He ate several meals at my home.

16 Q On an average week, how many meals would he eat
17 with you?

18 A Probably 15 or more.

19 Q And where did he wash his clothes?

20 A At my home.

21 Q And did he do anything to help around the house?

22 A He did.

23 Q What did he do?

24 A He vacuumed the floor, washed some dishes.

25 Q Anything else he did?

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- 1 A He would watch the kids, yeah.
- 2 Q Did Hastings or his brother ever baby-sit?
- 3 A Dale Hastings, no, he never did. Troy would
- 4 baby-sit every now and then but not on a regular
- 5 basis, no.
- 6 Q How often would you call every now and then?
- 7 A Maybe once a month if that.
- 8 Q And this was in the year 2000?
- 9 A Early 2000, yeah.
- 10 Q And did he do anything late 2000?
- 11 A No. If I remember correctly, Michael -- between
- 12 Michael and Les -- they were the ones that usually
- 13 watched them.
- 14 Q When did the other fellow -- was it Troy or I have
- 15 forgotten. You said that Troy was the one that
- 16 watched them on occasion?
- 17 A Yes.
- 18 Q When did he stop coming over there?
- 19 A He always came over. I mean, he still comes around
- 20 to this day. I mean, he always comes over.
- 21 Q How often does he come over?
- 22 A During that time frame?
- 23 Q Yes, and how often does he come over now?
- 24 A During that time frame he probably came over maybe
- 25 once a week or so. How many times he comes over

- 1 now, I don't -- I don't see what that has to do
2 with this.
- 3 Q How often does he come over there?
- 4 A It's probably been about eight months since he has
5 come to my home now because I no longer live in
6 Batesburg Leesville. I now live in Newberry.
- 7 Q Now, during this time frame were you working?
- 8 A No.
- 9 Q December of 2000 were you working?
- 10 A I was in the hospital.
- 11 Q Before you went in the hospital, were you working?
- 12 A Before, yes. Before December 11th, yes, I was.
- 13 Q Where were you working?
- 14 A B. & B. loans.
- 15 Q And how far is that away from your residence?
- 16 A It's in Edgefield. I lived in Batesburg. So I
17 would say 45 minutes.
- 18 Q Now, the layout that has been marked Defendant's
19 Exhibit 1 for I.D., is that a fairly representative
20 layout of your home at that time?
- 21 A The layout that [REDACTED] drew?
- 22 Q Yes.
- 23 A Yeah, I would say it is.
- 24 Q Now, [REDACTED] has his room as being the second
25 bedroom from the bathroom?

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1 A That would be correct.

2 Q That is correct?

3 A Yes.

4 Q That's where he and?

5 A [REDACTED]

6 Q [REDACTED] stayed?

7 A Yep.

8 Q Then you are saying [REDACTED] --

9 A Had the first room.

10 Q -- and Michael stayed in the first room?

11 A No, Michael didn't stay in the room with [REDACTED]

12 Michael stayed in the room with [REDACTED] and [REDACTED]

13 Q All right.

14 (Pause).

15 MR. CHEATHAM: That's all I have of this
16 witness, Your Honor.

17 THE COURT: Thank you, Mr. Cheatham.
18 Solicitor, do you have anything in redirect?

19 MS. HEATH: Just briefly, Your Honor.

20 REDIRECT EXAMINATION

21 BY MS. HEATH:

22 Q At the time your son was being molested, you were
23 in the hospital; correct?

24 A That's correct.

25 Q When were you in the hospital?

1 A I was admitted on December the 11th, and I was --

2 MR. CHEATHAM: I would object --

3 THE WITNESS: -- discharged on 1/2.

4 THE COURT: Just a minute, Ms. Floyd. What is
5 the basis of your objection?

6 MR. CHEATHAM: It assumes facts that are yet
7 to be proven and would also be speculative.

8 THE COURT: About the hospital?

9 MR. CHEATHAM: She said: At the time your
10 child was being molested, where were you?

11 THE COURT: All right. If you would just
12 rephrase it in that regard, Solicitor. Thank you.

13 BY MS. HEATH:

14 Q When were you in the hospital?

15 A From December the 11th of 2000 to January the 2nd
16 of 2001.

17 Q And to your knowledge did [REDACTED] ever say anyone
18 else abused him?

19 MR. CHEATHAM: Objection, Your Honor.

20 THE COURT: I would allow that. I would
21 overrule your objection.

22 MR. CHEATHAM: I didn't go into that on cross.

23 THE COURT: Well, I think the Solicitor
24 ultimately can argue the facts and the inferences
25 therefrom, as can you in your closing. I would take it,

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1 based on some of your questioning concerning other
2 individuals that may have had access to [REDACTED] that she
3 could ask that question, Mr. Cheatham.

4 MR. CHEATHAM: It would also be hearsay.

5 THE COURT: It depends on what the answer is,
6 I guess. I hate for hearsay to become dependent on the
7 answer, but I will allow that question.

8 Solicitor, you may proceed.

9 A Ask me the question again.

10 Q To your knowledge did [REDACTED] ever say anyone else
11 abused him?

12 A Not to my knowledge. He never insinuated anyone.
13 He was very specific when he said Michael Day.

14 Q To your knowledge has anyone other than Michael Day
15 confessed to abusing [REDACTED]

16 MR. CHEATHAM: Objection, Your Honor.

17 A Not to my knowledge, no.

18 THE COURT: I would sustain that objection.

19 A Not to my knowledge, no.

20 THE COURT: I move that be stricken from the
21 record. I would sustain the objection.

22 MS. HEATH: No further questions.

23 THE COURT: Any other questions? I'm sorry,
24 what did you say, Solicitor?

25 MS. HEATH: No further questions, Your Honor.

1 THE COURT: Anything in recross, Mr. Cheatham?

2 MR. CHEATHAM: No, Your Honor.

3 THE COURT: Thank you. Thank you, Ms. Floyd.

4 You may step down.

5 Solicitor, you may call your next witness.

6 MS. HEATH: The State calls Les Ruilova.

7 LESTER RUILOVA, being

8 first duly sworn, testified as follows:

9 CLERK: Have a seat up there, sir, and state
10 your full name, please.

11 THE WITNESS: My name is Lester Ruilova,
12 R-U-I-L-O-V-A.

13 DIRECT EXAMINATION

14 BY MS. HEATH:

15 Q Mr. Ruilova, where are you employed?

16 A Arrington Landscaping in Newberry, South Carolina.

17 Q How are you related to [REDACTED]

18 A I'm basically his stepfather. I've raised him for
19 the past six and a half years.

20 Q How are you related to Cindy Floyd, his mother?

21 A I am her fiancée.

22 Q What does [REDACTED] refer you to as?

23 A Daddy.

24 Q When did you meet Cindy Floyd?

25 A August of 2000.

LESTER RUILOVA -- DIRECT -- MS. HEATH

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- 1 Q When did you move in with Cindy Floyd?
- 2 A October of 2000.
- 3 Q Do you still live with Cindy Floyd and her
- 4 children?
- 5 A Yes, I do.
- 6 Q I am going to show you what has been marked as
- 7 Exhibit Number 1. Do you recognize that exhibit?
- 8 A Yes, ma'am, I do. It's Cindy's old house.
- 9 Q Is that the house that you moved in when you met
- 10 Cindy?
- 11 A Yes, ma'am.
- 12 Q Is that in Lexington County?
- 13 A Yes, ma'am.
- 14 Q Who lived there at that time during 2000 when you
- 15 met Cindy?
- 16 A Cindy, her oldest son [REDACTED] her middle son [REDACTED]
- 17 and [REDACTED] and myself.
- 18 Q And did Michael Day stay there?
- 19 A Yes, ma'am, he did.
- 20 Q How do you know Michael Day?
- 21 A I met him through Cindy's relatives in December of
- 22 2000. He was -- I never saw him before, asked who
- 23 he was, and Cindy then told me it was her cousin by
- 24 marriage. That's the first time I ever met him.
- 25 Q When was that?

- 1 A In December of 2000.
- 2 Q Did he stay at the house with you?
- 3 A Yes, he did.
- 4 Q Where was Cindy during December of 2000?
- 5 A She was in the Baptist Hospital. She had a program
- 6 she had to run through for six weeks and she had to
- 7 check herself in on December 13th of 2000.
- 8 Q How long was she in the hospital?
- 9 A Approximately four to six weeks. I can't tell you
- 10 her exact date that she got out, but she was there
- 11 approximately four to six weeks.
- 12 Q Who kept the boys --
- 13 A I did.
- 14 Q -- the three children while Cindy was in the
- 15 hospital?
- 16 A I did.
- 17 Q You said Michael Day stayed with you at this time?
- 18 A Yes, ma'am.
- 19 Q How long did he stay with you?
- 20 A Approximately ten days.
- 21 Q Do you remember when he left?
- 22 A He left right after Christmas, the day after
- 23 Christmas to be exact.
- 24 Q Did Michael Day have the opportunity to be alone
- 25 with [REDACTED] in the house at any time?

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1 MR. CHEATHAM: Objection, Your Honor,
2 speculative.

3 THE COURT: Overruled. You may answer.

4 A Yes, ma'am, he did.

5 Q Did [REDACTED] ever tell you anything during that time
6 about being abused?

7 A No, ma'am.

8 MR. CHEATHAM: Same objection, Your Honor,
9 speculative, hearsay.

10 THE COURT: Do you want me to strike that
11 answer from the record, "No, ma'am," Mr. Cheatham?

12 MR. CHEATHAM: I withdraw it.

13 THE COURT: Thank you. You may proceed,
14 Solicitor.

15 MS. HEATH: No further questions, Your Honor.

16 THE COURT: Thank you. Mr. Cheatham.

17 MR. CHEATHAM: May it please the Court.

18 CROSS EXAMINATION

19 BY MR. CHEATHAM:

20 Q It's Ruilova; is that right?

21 A Yes sir.

22 Q Mr. Ruilova, I will ask you some questions. If you
23 don't understand me, ask me to rephrase them or
24 restate them and I would be glad to.

25 A Yes, sir.

- 1 Q You said you first met Michael Day in December of
2 2000?
- 3 A Yes, sir.
- 4 Q Was this right before or after Cindy went into the
5 hospital?
- 6 A The day after.
- 7 Q The day after. So if she went in the hospital on
8 the 12th, you would have met him on the 13th?
- 9 A Yes, sir.
- 10 Q And then he moved in that day or the next day or
11 what?
- 12 A No, sir, it was the very next day.
- 13 Q So he moved in on the 14th?
- 14 A Yes, sir.
- 15 Q Okay. And what bedroom did he move into?
- 16 A The living room.
- 17 Q He moved into the living room?
- 18 A Yes, sir.
- 19 Q And that's where he slept?
- 20 A Yes, sir.
- 21 Q In the living room?
- 22 A Yes, sir.
- 23 Q The entire time?
- 24 A Yes, sir.
- 25 Q And did he keep his clothes in the living room?

LESTER RUILOVA -- CROSS -- MR. CHEATHAM

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- 1 A No, sir.
- 2 Q Where did he keep his clothes?
- 3 A At his mother's house.
- 4 Q His clothes were at his mother's house. I am
- 5 assuming then he would wash his clothes at his
- 6 mother's house?
- 7 A Yes, sir.
- 8 Q Now, did he eat meals with you?
- 9 A Every now and then, not every night.
- 10 Q During the ten days that he was there, would he
- 11 have eaten like an average of one meal a day?
- 12 A No, sir.
- 13 Q Two meals?
- 14 A No, sir.
- 15 Q Less than that?
- 16 A He ate three meals the entire time he was there.
- 17 Q Oh, okay, I'm sorry, I misunderstood. So he ate
- 18 three meals a day for these ten days?
- 19 A Yes, sir.
- 20 Q And did he do anything to help around the house?
- 21 A No, sir.
- 22 Q Didn't clean up?
- 23 A No, sir.
- 24 Q Didn't wash dishes, didn't do anything?
- 25 A No, sir.

- 1 Q Now, you said you and Cindy started living together
2 in October?
- 3 A Yes, sir.
- 4 Q Was that the first or last or middle?
- 5 A October 17th of 2000 to be exact.
- 6 Q You have a good memory.
- 7 A Yes, sir.
- 8 Q On October 17th of 2000, you moved into what has
9 been shown, I guess, by this picture?
- 10 A Yes, sir.
- 11 Q State's Exhibit 1.
- 12 A Yes, sir.
- 13 Q That's where you moved in?
- 14 A [REDACTED] Road, yes, sir.
- 15 Q Now, can you identify this? This is State's
16 Exhibit 3.
- 17 A Yes, that's Michael's mother's house, which is
18 directly behind Cindy's house.
- 19 Q So that house is Barbara Day's house?
- 20 A Yes, sir.
- 21 Q And Barbara Day is Michael's mother?
- 22 A Yes, sir.
- 23 Q From October through December the 13th, you didn't
24 see Michael?
- 25 A No, sir.

LESTER RUILOVA -- CROSS -- MR. CHEATHAM

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- 1 Q Didn't meet him, didn't run into him, didn't do
2 anything?
- 3 A No, sir.
- 4 Q He stayed with you those ten days. Then where did
5 he go?
- 6 A I have no idea.
- 7 Q You didn't see him anymore?
- 8 A No, sir. I went to work one day, came home. He
9 was gone.
- 10 Q And so you didn't see him anymore for how long?
- 11 A Until yesterday.
- 12 Q Okay. So was he -- did y'all interact with each
13 other at Christmas?
- 14 A Yes, sir.
- 15 Q Did y'all have a common celebration with Michael's
16 family and your family?
- 17 A Basically it was me and the boys and Michael.
- 18 Q You and the boys and Michael at your house?
- 19 A Yes, sir.
- 20 Q When did y'all do that?
- 21 A On the 25th.
- 22 Q Did he buy presents?
- 23 A Sir?
- 24 Q Did he buy any presents?
- 25 A No, sir.

- 1 Q Did you buy him a present?
- 2 A No, sir.
- 3 Q So what did you do to celebrate?
- 4 A Christmas is about kids, not about adults.
- 5 Q Did you buy the kids presents?
- 6 A Yes, sir.
- 7 Q Did he buy the kids presents?
- 8 A No, sir.
- 9 Q Now, I'm assuming then that he did not spend
- 10 Christmas night with you, he left then?
- 11 A No, sir, he was there.
- 12 Q When did he actually leave then?
- 13 A The very next day.
- 14 Q On the 26th?
- 15 A Yes, sir.
- 16 Q So on the 26th he disappeared, and you didn't see
- 17 him again until yesterday?
- 18 A Yes, sir.
- 19 Q You still lived at the same place?
- 20 A Yes, sir.
- 21 Q Barbara Day still lived at the same place?
- 22 A Yes, sir.
- 23 Q You still had your same work schedule of -- how
- 24 many days a week were you working during this
- 25 period?

LESTER RUILOVA -- CROSS -- MR. CHEATHAM

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- 1 A Five days a week.
- 2 Q You were working five days a week?
- 3 A Yes, sir.
- 4 Q And you would go to work at what time?
- 5 A At 6:00 o'clock in the morning.
- 6 Q And come home at what time?
- 7 A At 7:00 o'clock at night.
- 8 Q And who was keeping the children during the day?
- 9 A Cindy's stepmother.
- 10 Q Who is that?
- 11 A Louise Oxner.
- 12 Q She lives on the same property?
- 13 A Yes, sir, right next door.
- 14 Q Now, were you present with Cindy when they were
- 15 going over certain indictments with her?
- 16 A No, sir.
- 17 Q You weren't there?
- 18 A No, sir.
- 19 Q Okay. And you said she went into the hospital for
- 20 what?
- 21 A I can't say, didn't know what the term was at the
- 22 time.
- 23 Q Oh, I had written down broken ribs. Was I wrong?
- 24 A Sir?
- 25 Q I had written down broken ribs. Was I wrong?

- 1 A Broken ribs? I would say so, yes, sir.
- 2 Q What?
- 3 A Yes, sir.
- 4 Q That's right or wrong?
- 5 A That's wrong, sir.
- 6 Q Did you ever meet a fellow named Dale? Did you
- 7 ever met a person named Dale through Cindy?
- 8 A I know a lot of people named Dale.
- 9 Q Did you meet one through Cindy?
- 10 A I met three or four through Cindy.
- 11 Q Did you meet a Dale Hastings?
- 12 A I met a Dale Crookshank.
- 13 Q Dale Crookshank, I'm sorry.
- 14 A Yes, sir.
- 15 Q Is that Troy Hastings' brother?
- 16 A That's Troy Crookshank's brother.
- 17 Q Both of them are named Crookshank?
- 18 A As far as I know, yes, sir.
- 19 Q All right. I was mistaken. I take your word for
- 20 it. Did they ever stay at the residence?
- 21 A Not while I was there, no, sir.
- 22 Q They never spent the night?
- 23 A Not while I was there, no, sir.
- 24 Q And how often would they come over?
- 25 A I couldn't tell you.

LESTER RUILOVA -- CROSS -- MR. CHEATHAM

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1 Q You didn't see them?

2 A I seen Troy but he basically went to Cindy's
3 father's house. He never came over there. He
4 never stayed. They would sit outside by the burn
5 barrel and drink their moonshine, whatever country
6 folk do up here. Basically I was an outsider. I
7 didn't mingle with too many people. I basically
8 stayed with the boys, played with the boys. That's
9 it.

10 Q On your porch though you could see Barbara Day's
11 trailer?

12 A Yes, sir, standing outside, yes, sir.

13 Q So you would have a clear view of anybody coming
14 and going?

15 A Basically if I was standing there, yes, sir.

16 Q And if you were inside, you could hear a car drive
17 up and a car door slam?

18 A Basically, yes, sir.

19 Q So it's a situation where if people came and went
20 you would know?

21 A Not necessarily.

22 Q But for the most part?

23 A I can't answer that because I'm not a nosy person.

24 Q I didn't say you looked out. I said you could hear
25 the cars.

- 1 A Yes, sir, I can hear them.
- 2 Q Do you know what type of vehicle Michael drove at
3 this time?
- 4 A He didn't have a vehicle.
- 5 Q So he didn't have a vehicle at all?
- 6 A No, sir.
- 7 Q And did he drive his mother's vehicle on occasion?
- 8 A I couldn't tell you that. I never seen him.
- 9 Q Never saw him drive a vehicle?
- 10 A I never seen him drive his mother's vehicle, no,
11 sir.
- 12 Q Have you seen him drive any vehicle?
- 13 A No, sir.
- 14 Q The meals that were fixed, who fixed the meals?
- 15 A I did.
- 16 Q So during those ten days, you were home all the
17 time?
- 18 A No, sir. The only time I was home was when I
19 wasn't working.
- 20 Q How did you fix three meals a day if you were not
21 at home?
- 22 A Three meals a day? That's where you are confusing
23 me. Did I fix three meals a day? No, sir, I did
24 not. I fixed -- made sure they'd eat breakfast. I
25 went off to work, made sure they had dinner. I

LESTER RUILOVA -- CROSS -- MR. CHEATHAM

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1 imagine her mother made sure they ate lunch.

2 Q But what I'm getting at is you said you were --
3 that Michael ate three meals a day while he was
4 there.

5 A Michael did not eat three meals a day. Michael ate
6 a total of three meals in ten days.

7 Q Oh, excuse me, I apologize. I misunderstood you.
8 So he ate three meals in ten days?

9 A Yes, sir.

10 Q And those would have been meals in the evening that
11 you fixed or meals at breakfast?

12 A One lunch, two dinners.

13 Q One lunch and two dinners?

14 A Yes, sir.

15 Q To your knowledge did Michael fix any food?

16 A No, sir, not in that house.

17 Q None whatsoever?

18 A No, sir.

19 MR. CHEATHAM: Nothing further, Your Honor.

20 THE COURT: Thank you, Mr. Cheatham.

21 Solicitor, anything on redirect?

22 MS. HEATH: Nothing further, Your Honor.

23 THE COURT: Thank you. You may step down,
24 sir.

25 Solicitor, you may call your next witness.

1 I'll tell you what, I will give my court reporter about
2 a five-minute break.

3 (Whereupon there was a recess).

4 THE COURT: Solicitor.

5 MS. HEATH: The State calls Detective Eric
6 Russell.

7 ERIC REDMOND RUSSELL, being
8 first duly sworn, testified as follows:

9 CLERK: State your full name, please.

10 THE WITNESS: Eric Redmond Russell.

11 DIRECT EXAMINATION

12 BY MS. HEATH:

13 Q Detective Russell, where are you employed?

14 A Lexington County Sheriff's Office.

15 Q What do you do there?

16 A I'm a major crimes investigator.

17 Q What do those duties include?

18 A I investigate crimes against people, to include
19 assaults, sex crimes, kidnappings, murders, that
20 type of thing.

21 Q How long have you been doing that?

22 A Since September of '92 -- excuse me -- September of
23 '02.

24 Q What kind of training or educational background do
25 you have to do this?

ERIC RUSSELL -- DIRECT -- MS. HEATH

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1 A I have the basic law enforcement through the
2 criminal justice academy, as well as schools in
3 investigations through the academy, on-the-job
4 training, and I've been through child interview
5 schools, that type of thing.

6 Q What did you do before you became a detective?

7 A I was a uniformed patrol deputy for seven years
8 with the Sheriff's Office. Prior to that I was a
9 correctional officer for three years.

10 Q So how long have you worked at the Lexington County
11 Sheriff's Department in total?

12 A A little over 14 years.

13 Q How did you become involved in the case against
14 Michael Day?

15 A I received a call from Ms. Cindy Floyd after [REDACTED]
16 [REDACTED] interview, his A.R.C. interview. She
17 called me and told me that [REDACTED] had --

18 MR. CHEATHAM: I would object to whatever she
19 said.

20 THE COURT: I would sustain the objection.

21 BY MS. HEATH:

22 Q Did you receive a call from Cindy Floyd?

23 A Yes, ma'am.

24 Q As a result of that, what did you do?

25 MR. CHEATHAM: Your Honor, with this moving, I

1 can't hear anything he is saying.

2 THE COURT: Wait until that gets done.

3 (Pause).

4 THE COURT: You may proceed, Solicitor.

5 A I did receive a call from Cindy Floyd. Later I
6 made contact with Michael Day and requested that
7 he come down to the Sheriff's Office to speak with
8 me.

9 Q And through your investigation did you learn what
10 Michael Day was charged with doing?

11 A Yes, ma'am. I got a copy of the report from the
12 Assessment Resource Center where [REDACTED] had alleged
13 that Michael had molested him.

14 Q As a result of that, what --

15 MR. CHEATHAM: Your Honor, again, that would
16 be hearsay.

17 THE COURT: I would strike the part where
18 [REDACTED] alleged that Michael molested him. However, him
19 getting the report from the Assessment and Resource
20 Center, I would allow that. You may proceed, Solicitor.

21 MS. HEATH: Thank you, Your Honor.

22 BY MS. HEATH:

23 Q As a result of the report from the Assessment
24 Resource Center, what did you then do?

25 A I spoke with Michael Day.

ERIC RUSSELL -- DIRECT -- MS. HEATH

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1 Q And through your investigation did you learn where
2 Michael Day had [REDACTED] perform oral sex on him?

3 A Yes, ma'am.

4 Q Where was that?

5 MR. CHEATHAM: Again, Your Honor, that would
6 be hearsay.

7 THE COURT: What would be the basis of his
8 knowledge on that, Solicitor?

9 MS. HEATH: Through his investigation, Your
10 Honor, he would have learned the actual house where the
11 allegations took place.

12 THE COURT: Did he learn it from -- does he
13 know it of his personal knowledge from his interview
14 with the victim? Because there are some exceptions if
15 he has interviewed the victim himself. Or does he learn
16 it from a third party telling him? I'm not real clear
17 on what is the basis of his knowledge. Do you
18 understand my question?

19 MS. HEATH: Yes, Your Honor.

20 (Pause).

21 MS. HEATH: Your Honor, I wasn't asking for
22 the truth of the matter. I was asking him as a result
23 of that, did he take action.

24 THE COURT: I didn't understand that to be
25 your question. If that is your question: As a result

1 of -- I have forgotten the question, Solicitor -- but as
2 a result of whatever he learned, what action he took,
3 that is an admissible question. Am I making any sense?

4 MS. HEATH: Yes, Your Honor.

5 BY MS. HEATH:

6 Q As a result of that forensic interview, what action
7 did you take?

8 A As a result of the interview and speaking with
9 Ms. Floyd, I contacted Michael Day and requested
10 that he come down to the Sheriff's Office to talk
11 with me.

12 Q When did you do this?

13 A February of '05. I don't remember the exact date
14 that I spoke with him on the phone.

15 Q As a result of that phone conversation, did you
16 meet with Michael Day?

17 A Yes, ma'am. I believe that was on February the
18 22nd of '05 is when the actual interview took place
19 at the Sheriff's Office.

20 Q And how did the Defendant get to the Sheriff's
21 Office?

22 A He and his wife came together. One of them drove,
23 I'm assuming, but they came to the Sheriff's
24 Office, just them two.

25 Q Once they were there, what did you do?

ERIC RUSSELL -- DIRECT -- MS. HEATH

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- 1 A Michael's wife stayed in the lobby area of the
2 Sheriff's Department while I escorted Michael back
3 to an interview room and spoke with him there.
- 4 Q And what type of room is the interview room?
- 5 A It's approximately ten by twelve. It's got a door
6 and a couple of windows, a chair and table.
- 7 Q Who was present in that interview room?
- 8 A Just myself and Michael.
- 9 Q Was the Defendant under arrest at this time?
- 10 A No, ma'am, he was not.
- 11 Q Did you eventually read the Defendant his Miranda
12 rights?
- 13 A Yes, ma'am, I did.
- 14 Q Could the Defendant read?
- 15 A Yes, ma'am.
- 16 Q Could the Defendant write?
- 17 A Yes, ma'am.
- 18 Q I am going to show you what has been marked as
19 State's Exhibit Number 5. Do you recognize this
20 form?
- 21 A Yes, ma'am. That's the statement form I used to
22 advise Michael of his Miranda rights, as well as
23 what he wrote his statement on.
- 24 Q What is this on the top here?
- 25 A The top portion of that form has just general

1 information, the date of the interview, where it
2 took place, the time it started, the person that
3 you are interviewing, their general information --
4 name, date of birth, address, et cetera. That's
5 followed by the Miranda warning, all five Miranda
6 warnings, followed by the narrative of his
7 statement.

8 Q What time did this interview start?

9 A 21:30 hours, 9:30 in the evening.

10 Q How long had the Defendant been in the interview
11 room at the Sheriff's Department?

12 A Approximately 30 minutes by that time.

13 Q Did you read the Defendant each one of those
14 rights?

15 A Yes, ma'am.

16 Q Did he initial each one of those rights?

17 A Yes, ma'am.

18 Q Did he indicate he understood each one of those
19 rights?

20 A Yes, ma'am.

21 Q How did he do that?

22 A By initialing that I read them, he understood them,
23 and then giving the statement below.

24 Q Did he waive these rights?

25 A Yes, ma'am.

ERIC RUSSELL -- DIRECT -- MS. HEATH

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1 Q How did he do this?

2 A He never requested for an attorney. He never
3 requested for the interview to stop. He agreed to
4 talk to me.

5 Q Did the Defendant appear to be under the influence
6 of drugs and/or alcohol?

7 A No, ma'am.

8 Q Did he ever indicate that he felt ill?

9 A No, ma'am.

10 Q Did he ever indicate that he needed to use the rest
11 room?

12 A No, ma'am.

13 Q Did he ever indicate that he needed a drink of
14 water?

15 A No, ma'am.

16 Q Did he ever ask you to stop questioning him?

17 A No, ma'am.

18 Q What were you wearing at this time, Detective
19 Russell?

20 A Something similar to what I have on today, just
21 street clothes.

22 Q Did he make any other requests of you when you were
23 interviewing him?

24 A After it was all said and done, he asked to talk
25 with his wife. Let me rephrase that. I told him

1 after obtaining that written statement that I was
2 going to have to place him under arrest.

3 We knew that his wife was in the lobby. I
4 asked him if he wanted me to tell her what was
5 going on or if he would prefer to tell her. He
6 requested that he be allowed to tell her.

7 So I went to lobby and got his wife and
8 brought her back to the interview rooms and let
9 them have a chance to talk before he was taken back
10 to the jail.

11 Q Did Michael Day appear to understand what was going
12 on at this time?

13 A Yes, ma'am, he did. He was upset when speaking
14 with his wife. He was upset and crying that this
15 had happened.

16 Q Did you make any promises to Michael Day in
17 exchange for this written statement?

18 A No, ma'am.

19 Q Were any threats made to Michael Day?

20 A No, ma'am.

21 Q Was any coercion used to get the Defendant to write
22 this written statement?

23 A No, ma'am.

24 Q And what did the Defendant tell you regarding these
25 allegations?

ERIC RUSSELL -- DIRECT -- MS. HEATH

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1 A He told me that he -- do you want me to read the
2 statement? He told me that, yes, he had had [REDACTED]
3 perform oral sex on him.

4 Q And did he write that down?

5 A Yes, ma'am.

6 Q And is this his statement?

7 A Yes, ma'am.

8 Q Can you read this, please, Detective.

9 A Yes, ma'am. Yes, I, Michael Day, did call Dusty
10 into the bathroom and put my penis in his mouth.
11 Then someone came in a minute later, and I took it
12 out, and that was the end of it, did not ejaculate,
13 it being my penis, which is scratched out with his
14 initials over it. And then when? Summer of 2001,
15 I think.

16 Q And at the bottom of this, Detective Russell, is
17 that your signature?

18 A Yes, ma'am.

19 Q Is that the signature of the Defendant?

20 A Yes, ma'am.

21 MS. HEATH: Your Honor, I would move to
22 introduce this into evidence.

23 THE COURT: Mr. Cheatham.

24 MR. CHEATHAM: We have our same objections
25 that you had previously overruled.

1 THE COURT: State's 5 is in evidence subject
2 to previous defense objections.

3 (State's Exhibit Number 5 is received into
4 evidence).

5 BY MS. HEATH:

6 Q Detective Russell, do you see Michael Day in the
7 courtroom today?

8 A Yes, ma'am, sitting beside Mr. Cheatham in the blue
9 shirt.

10 MS. HEATH: Your Honor, let the record reflect
11 that Detective Russell pointed to the Defendant.

12 THE COURT: So reflected.

13 BY MS. HEATH:

14 Q Do you know where these allegations took place?

15 A Where the incident took place?

16 MR. CHEATHAM: Your Honor, I object to that.
17 There is no proper foundation.

18 THE COURT: Again, what would be the basis of
19 his knowledge?

20 MS. HEATH: I can rephrase the question.

21 THE COURT: Thank you, Solicitor.

22 BY MS. HEATH:

23 Q Through the course of your investigation on this
24 case, did you learn where Michael Day had [REDACTED]
25 perform oral sex on him?

ERIC RUSSELL -- DIRECT -- MS. HEATH

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1 A Yes, ma'am.

2 MR. CHEATHAM: Same objection, Your Honor,
3 proper foundation and hearsay.

4 THE COURT: Again, Solicitor, what would be
5 the basis of the officer's knowledge?

6 MS. HEATH: Can I rephrase the question again,
7 Your Honor?

8 THE COURT: Certainly, yes, ma'am.

9 BY MS. HEATH:

10 Q During your conversation with Michael at the
11 Sheriff's Department that day, did he reveal to you
12 where what is in the statement happened?

13 A He didn't write it down. But, yeah, he did say it
14 happened at the house where [REDACTED] was living at
15 the time. My investigation shown that to [REDACTED]
16 [REDACTED] highway.

17 Q Is that in Lexington County?

18 A Yes ma'am.

19 Q South Carolina?

20 A Yes, ma'am.

21 MS. HEATH: No further questions, Your Honor.

22 THE COURT: Thank you, Solicitor.

23 Mr. Cheatham.

24 MR. CHEATHAM: May it please the Court.

25 THE COURT: Yes, sir.

1 CROSS EXAMINATION

2 BY MR. CHEATHAM:

3 Q In reference to the location that you just said was
4 given to you, did you write that down?5 A Did I write it down somewhere? I probably wrote it
6 down in my notes somewhere.

7 Q Where would your notes be?

8 A I'm sorry, I couldn't hear you.

9 Q Where would your notes be?

10 A Back in the office maybe. I don't have anything
11 here with me.

12 Q So you came to court without bringing your notes?

13 A I don't have a notebook, no, sir.

14 Q But you have notes at the office that you are
15 trying to recall?

16 A Yes, sir.

17 Q And it would be better if you had your notes here
18 so you could look at them, wouldn't it?

19 A Yes, sir, but I don't have them with me.

20 Q He gave you an address of what?

21 A He didn't give me an address. He said it was where
22 [REDACTED] and them were living at that time.

23 Q Okay.

24 A I got the address from speaking with Ms. Floyd,
25 learning that it was [REDACTED] Highway.

ERIC RUSSELL -- CROSS -- MR. CHEATHAM

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1 MR. CHEATHAM: Your Honor, we had previously
2 marked this. I am referring to Defendant's Exhibit 3
3 for I.D.

4 THE COURT: That's the affidavit on the
5 warrant?

6 MR. CHEATHAM: Yes, sir.

7 THE COURT: All right, sir.

8 BY MR. CHEATHAM:

9 Q You said you had talked with Cindy Floyd?

10 A That's correct.

11 Q Before you signed this affidavit?

12 A Yes, sir.

13 Q And the dates on here are June the 1st of '01
14 through September the 1st of '01?

15 A That's correct.

16 Q So she was aware that you were putting these dates
17 in the affidavit?

18 A I don't know that she was aware that I put those
19 dates in there, no, sir.

20 Q And where did you get the dates from?

21 A The dates came from, I think, summer of 2001 off of
22 Michael's statement.

23 Q So September is in the summer?

24 A Yes, sir.

25 Q September is in the summer?

- 1 A It's hot, yes, sir. I don't know if it's
2 actually -- I would have to sit down and think.
- 3 Q Give us what you think the months of summer are.
- 4 A Let's see, summer starts in June, June through
5 September, I believe.
- 6 Q That's the summer to you?
- 7 A Yes, sir.
- 8 Q When does winter start?
- 9 A I'm sorry?
- 10 Q When does winter start?
- 11 A Actual winter doesn't start until
12 December sometime.
- 13 Q When does fall start?
- 14 A Between winter and summer, September sometime.
- 15 Q Between when?
- 16 A After summer and before winter.
- 17 Q So that would be September through November?
18 That's fall?
- 19 A End of September, October, November, yes, sir.
- 20 Q When children get out for summer vacation, are they
21 out in September?
- 22 A I think they get out the end of May, first of June,
23 go back probably some time in August.
- 24 Q So their summer vacation is not in September, is
25 it?

ERIC RUSSELL -- CROSS -- MR. CHEATHAM

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1 A No.

2 Q And when you first talked with Michael Day, you
3 talked with him about another incident, and you
4 switched over to this one?

5 A Correct.

6 Q Did he appear scared?

7 A After we were all said and done, I would say yeah,
8 he was concerned.

9 Q Did he appear scared was my question?

10 A Not at that time, no, sir. He was scared about
11 going to jail after it was all over with, yeah.

12 Q When you first started talking with him, you are
13 saying he didn't appear scared and he didn't appear
14 frightened?

15 A No, sir.

16 Q He was just as nonchalant as he could be?

17 A Yes, sir.

18 Q Did he tell you that he was not guilty of these
19 charges?

20 A I think he probably did to start with, yes, sir.

21 Q Now, I am assuming your involvement with the case
22 ended with the arrest warrant?

23 A I mean, I didn't do any further investigating, no,
24 sir.

25 MR. CHEATHAM: That's all I have.

1 THE COURT: Thank you, Mr. Cheatham.

2 Solicitor, do you have anything in redirect?

3 MS. HEATH: Nothing, Your Honor.

4 THE COURT: Thank you, Detective Russell. You
5 may step down.

6 Solicitor, you may call your next witness.

7 MS. HEATH: Your Honor, that's all the State's
8 witnesses. The video is in evidence. If Your Honor
9 would like to view that again, I can get the T.V. hooked
10 up.

11 THE COURT: All right. Unless y'all require
12 me to view it at this stage again, either the State or
13 the defense, I don't think I need to at this time.
14 Mr. Cheatham?

15 MR. CHEATHAM: Give me one second.

16 THE COURT: All right, sir. That is, of
17 course, not to say that I won't look at it again. I am
18 saying I am not going to look at it right now.

19 (Pause).

20 MR. CHEATHAM: No, sir, Your Honor, we don't
21 require it.

22 THE COURT: Thank you. It is in evidence
23 subject to previous objections.

24 MR. CHEATHAM: And just to note, I handed up
25 my material --

1 THE COURT: Yes, sir.

2 MR. CHEATHAM: -- before they introduced the
3 video.

4 THE COURT: Yes, sir, I understand that. I,
5 of course, had made my ruling before I got your
6 material, Mr. Cheatham. I will note that for the
7 report.

8 MR. CHEATHAM: Technically we made that
9 argument before they introduced that is what I'm trying
10 to point out.

11 THE COURT: All right, sir. The State rests
12 Solicitor?

13 MS. HEATH: Yes, Your Honor. The State rests.

14 THE COURT: Thank you. Mr. Cheatham, do you
15 have any motions?

16 MR. CHEATHAM: Yes, sir, we would move for a
17 directed verdict of innocent, as the evidence taken as a
18 whole just leads to the conclusion that the State has
19 not proven the guilt of Michael Day as required by law.

20 THE COURT: All right. I think at this stage
21 with the standard I must apply on a directed verdict
22 motion, I would respectfully deny your motion. Do you
23 have witnesses, Mr. Cheatham?

24 MR. CHEATHAM: Yes, sir.

25 THE COURT: You may call your first witness.

1 MR. CHEATHAM: We would call Barbara Day.

2 BARBARA DAY, being
3 first duly sworn, testified as follows:

4 CLERK: State your full name on the record
5 once you have a seat.

6 THE WITNESS: Barbara Day.

7 DIRECT EXAMINATION

8 BY MR. CHEATHAM:

9 Q Ms. Day, where do you live or reside?

10 A Currently right now I live in West Columbia.

11 Q And in the year 2000, where did you live or reside?

12 A [REDACTED] Road in Leesville.

13 Q And who lived there with you?

14 A Myself, my son, my husband, and my daughter.

15 Q Now, your husband Dwight has passed away?

16 A Yes, sir, he passed away this past July?

17 THE COURT: What was his name again,
18 Mr. Cheatham?

19 MR. CHEATHAM: Dwight. I don't know his full
20 name.

21 THE WITNESS: Wyman Dwight Day. Wyman is his
22 first name.

23 THE COURT: Thank you.

24 BY MR. CHEATHAM:

25 Q I always knew him by Dwight. The situation is that

BARBARA DAY -- DIRECT -- MR. CHEATHAM

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- 1 you were living there?
- 2 A Yes, sir.
- 3 Q Now, was Cindy living there?
- 4 A She was living in a trailer.
- 5 Q But she was on basically the same property?
- 6 A Yes, sir.
- 7 Q There was Leo and Louise?
- 8 A Yes.
- 9 Q Oxner?
- 10 A Yes.
- 11 Q They lived there?
- 12 A Uh-huh. (Indicating affirmative response).
- 13 Q Then there was your family?
- 14 A Yes.
- 15 Q And Cindy. And who was living with Cindy?
- 16 A Cindy and her three boys.
- 17 Q Was anyone else living there with Cindy in
- 18 December of 2000?
- 19 A Troy Hastings was there because that was her
- 20 baby-sitter.
- 21 Q Troy Hastings?
- 22 A Uh-huh. (Indicating affirmative response).
- 23 Q What did Troy Hastings -- who did he look like or
- 24 what did he look like?
- 25 A A little bit taller than Michael, a little husky.

- 1 He was heavier built than Michael, red hair.
- 2 Q And do you know about when he started living there?
- 3 A He was there -- I don't know exactly when he moved
- 4 in, but he was there in December.
- 5 Q All of December?
- 6 A Yes, sir.
- 7 Q And where was Michael living in December?
- 8 A With me, with his family. His mom, dad, and
- 9 sister.
- 10 Q Did he have his own bedroom?
- 11 A Yes, he did.
- 12 Q Did he keep his clothes in his house?
- 13 A He kept his clothes in his bedroom.
- 14 Q Did he wash his clothes at your house?
- 15 A I washed his clothes.
- 16 Q Did he eat his meals at your house?
- 17 A Yes.
- 18 Q So if we look at the period from December the
- 19 13th through December the 26th, was Michael Day
- 20 living at your house?
- 21 A Yes.
- 22 Q Eating at your house?
- 23 A Yes.
- 24 Q Washing his clothes -- well, you were washing his
- 25 clothes?

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1 A Yeah.

2 Q At his house?

3 A Yeah.

4 Q I know it's been a while back. Do you remember
5 whether or not he was working?

6 A He was but I cannot remember where. I want to say
7 he was working at Bojangle's right up here on
8 Number 6. He didn't work there long because two
9 weeks before his birthday in January, he left and
10 went to North Carolina. That's where he stayed.
11 He lived in North Carolina until the middle of
12 2002.

13 Q We understand that time frame, but they have
14 switched the things so we have to go back to the
15 2000 time frame.

16 A He was home with his mom and dad.

17 Q Did he to your knowledge ever go baby-sit Cindy's
18 children?

19 A No.

20 Q Never, ever?

21 A No.

22 Q To your knowledge did he ever clean up anything
23 over there?

24 A No.

25 Q To your knowledge did he hang out over there?

- 1 A Huh-uh. (Indicating negative response). Not to my
2 knowledge, no, sir.
- 3 Q During this period of time were you working?
- 4 A Yes, sir.
- 5 Q Where were you working?
- 6 A I was working at Pantry Express convenience store.
- 7 Q What hours were you working?
- 8 A They varied. I would work from six to two some
9 days, two to ten other days.
- 10 Q But sometimes you would be home in the morning?
- 11 A Yes.
- 12 Q And sometimes you would be home in the evening?
- 13 A Uh-huh. (Indicating affirmative response).
- 14 Q When you were there, was Michael ever working or at
15 home?
- 16 A Yes. He was either at his job at Bojangle's or he
17 was at home with us.
- 18 Q During any of this time frame from December the
19 13th of 2000, through December the 26th of 2000,
20 did Michael Day spend the night at any place other
21 than your residence?
- 22 A No, sir.
- 23 Q During this particular point in time, what was your
24 relationship with the Floyd family?
- 25 A We pretty much stayed to ourselves.

BARBARA DAY -- DIRECT -- MR. CHEATHAM

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1 Q Did you interact a lot?

2 A No.

3 Q Did you celebrate Christmas together?

4 A No. We went over to -- the only other person that
5 we celebrated Christmas with was Mary Steele. We'd
6 go over to her house about 7:00 o'clock, and then
7 we'd come back home. We opened up our gifts. The
8 kids went to bed because Santa Clause came the next
9 morning.

10 Q In December of 2000 was -- that entire day was
11 Michael with you?

12 A Yes.

13 Q No doubt about that?

14 A Huh-uh. (Indicating negative response). If
15 Michael wasn't at work, Michael was with me and his
16 daddy.

17 Q As far as being strong willed or weak willed, would
18 you say Michael was strong willed or weak willed?

19 A Kind of in between.

20 Q Pushed around easy?

21 A He's easy to convince of something.

22 Q Easy to intimidate?

23 A Yes, very easy, very easy.

24 Q To your knowledge has he been into any type of
25 trouble before?

- 1 A No.
- 2 Q Has he been in any type of trouble since?
- 3 A No, other than the typical trouble that most kids
4 give their parents, you know, but nothing as far as
5 ever having to involve the law, no.
- 6 Q Now, during this time frame, had you ever had words
7 with any of the Floyd children?
- 8 A No. I mean, typical kids. They'd get into trouble
9 if they were over at the house playing, doing
10 something that they wasn't supposed to do. I'd
11 say: All right. You know better. That would be
12 the end of it.
- 13 Q So you would watch the children --
- 14 A Yes.
- 15 Q -- on occasion --
- 16 A Yes.
- 17 Q -- for Cindy?
- 18 A Uh-huh. (Indicating affirmative response).
- 19 Q But Michael --
- 20 A She wouldn't ask me. They would come over, "Aunt
21 Barbara, can I stay with you for a little while?"
22 Sure, I don't care.
- 23 Q But did you have words with one that caused a
24 problem between you and Cindy?
- 25 A Not to my knowledge I did not, no.

BARBARA DAY -- DIRECT -- MR. CHEATHAM

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1 Q But in December of 2005, did you buy Michael a
2 present?

3 A 2005?

4 Q I mean, 2000, excuse me. December 25, 2000, did
5 you buy Michael a Christmas present?

6 A Yes, sir.

7 Q Did he buy you a Christmas present?

8 A Yes, sir.

9 Q Did y'all exchange presents that day?

10 A Yes, sir.

11 Q Did you go to Mary Steel's that day?

12 A We went to Mary Steel's before we opened our gifts
13 at home.

14 Q So you went there in the morning?

15 A We went there about 7:00 o'clock that afternoon.
16 We probably got home about 9:00 o'clock that
17 afternoon. That's when we opened ours. By 11, no
18 later than 12, I made the kids go to bed because
19 like I said, Santa Clause came the next morning.

20 Q But on the 25th, Christmas Day, he was with you the
21 entire day?

22 A Yes, sir.

23 Q So he was with you on the 24th and the 25th, no
24 doubt about that?

25 A No, sir.

1 (Pause).

2 MR. CHEATHAM: That's all we have, Your Honor.

3 THE COURT: Thank you, Mr. Cheatham.

4 Solicitor.

5 MS. HEATH: Thank you, Your Honor.

6 CROSS EXAMINATION

7 BY MS. HEATH:

8 Q Ms. Day, was your son with you at all times during
9 2000, that Christmas break?

10 A Yes, ma'am.

11 Q He was with you when you were at work?

12 A No, not when I was at work. He was at home with
13 his daddy.

14 Q So it's possible that he could have gone to Cindy's
15 without you knowing it while you were at work?

16 A Yes, ma'am.

17 MS. HEATH: No further questions, Your Honor.

18 THE COURT: Anything in redirect,

19 Mr. Cheatham?

20 MR. CHEATHAM: No, sir, Your Honor.

21 THE COURT: Thank you, Ms. Day. You may step
22 down. You may call your next witness.

23 MR. CHEATHAM: Mary Steele, also known as
24 Kitty.

25 MARY S. STEELE, being

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1 first duly sworn, testified as follows:

2 CLERK: One you have a seat, state your full
3 name, please.

4 THE WITNESS: Mary S. Steele.

5 MR. CHEATHAM: May it please the Court.

6 THE COURT: Yes, sir.

7 DIRECT EXAMINATION

8 BY MR. CHEATHAM:

9 Q Ms. Steele, where do you live or reside?

10 A I live at [REDACTED], Gilbert, South
11 Carolina.

12 Q And have you lived in Lexington County all your
13 life?

14 A Not all my life, about 40 years.

15 Q The last 40 years you lived in Lexington County?

16 A Yes, sir.

17 Q How long have you known Barbara Day?

18 A About 25 years approximately.

19 Q And did you come to meet Michael?

20 A How did I become to meet him? Him and his
21 mother -- his mother and dad stayed with me when he
22 was born. So I been knowing Michael for all his
23 life.

24 Q And are you sort of like a second mother to
25 Michael?

- 1 A Yes, sir.
- 2 Q And if he had any problems or anything, he would
- 3 come talk to you?
- 4 A Yes, sir.
- 5 Q And did Michael to your knowledge have just sort of
- 6 a normal upbringing?
- 7 A Yes, sir.
- 8 Q Not in any trouble?
- 9 A No, sir.
- 10 Q Did you engage in family holidays with them?
- 11 A Yes, sir, every Christmas they came to my house for
- 12 Christmas Eve.
- 13 Q When you say Christmas Eve, that would be the 24th?
- 14 A Yes, sir.
- 15 Q And they would come to your house about what time?
- 16 A About 6:00 o'clock. We'd have supper and open up
- 17 Christmas gifts and sit around and talk, visit.
- 18 Q Prior to that did you see Michael any from, say,
- 19 December 13th to the 25th?
- 20 A Yes, sir.
- 21 Q And how often did you see him?
- 22 A I saw Michael quite a bit. I want to say, if I'm
- 23 not mistaken, he was working with me at a
- 24 convenience store. He worked with me up there on
- 25 second shift. I would see him every day.

MARY STEELE -- DIRECT -- MR. CHEATHAM

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1 Q And the 2nd shift would have been from what time?

2 A Two to ten.

3 Q I know it's hard to remember. He worked various
4 times at the convenience store; is that correct?

5 A Yes, sir.

6 Q How did he get there? Did he drive?

7 A Sometime he would drive and sometimes his mother or
8 his dad would bring him.

9 Q But you did see him some while he was working
10 there?

11 A I saw him every day he did work, yes, sir. I was
12 his manager.

13 Q So every day he worked, you would see him?

14 A Yes, sir. I take that back. Sometimes he worked
15 on the weekends, and maybe I didn't see him on the
16 weekends because that would be my days off. I
17 forgot about that.

18 Q But the days that you worked and he worked, you
19 would know that he worked?

20 A Yes, sir.

21 Q Now on the 24th did you notice anything unusual
22 about Michael?

23 A No, sir.

24 Q He wasn't upset? He wasn't concerned about
25 anything?

1 A No, sir.

2 Q And y'all exchanged presents just like you always
3 did?

4 A Yes, sir.

5 Q And they probably left at what time?

6 A I would say approximately between 8:30 and 9.

7 Q During that previous time had you been over to
8 Barbara Day's house any?

9 A On different occasions, yes, I would.

10 Q And when you were there, was Michael there?

11 A Yes, sir.

12 Q Was he living there?

13 A Yes, sir.

14 Q You saw his clothes there?

15 A Yes, sir.

16 Q He wasn't living anywhere else to your knowledge?

17 A Not to my knowledge. He was with his mother all
18 the time, his parents.

19 Q To your knowledge he never did baby-sit or care for
20 Cindy Floyd's children, did he?

21 A Not to my knowledge.

22 MR. CHEATHAM: That's all I have, Your Honor.

23 THE COURT: Thank you, Mr. Cheatham.

24 Solicitor, you may cross.

25 MS. HEATH: Thank you, Your Honor.

MARY STEELE -- CROSS -- MS. HEATH

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CROSS EXAMINATION

1

2 BY MS. HEATH:

3 Q Ms. Steele, in December of 2001, you weren't with
4 Michael Day every single day; were you?

5 A December?

6 Q During December of 2001, were you with Michael Day
7 at all times?

8 A Michael wasn't in the State in 2001.

9 Q I'm sorry, during December of 2000, you were not
10 with Michael Day every single day?

11 A On weekends I may not have been with him, but he
12 worked with me, like I said, and he was at work.
13 Yeah, I saw him then. He worked for me for several
14 months, not long. I can't exactly say how long he
15 worked for me.

16 Q Were you with him every single day of December of
17 2000?

18 A Not every single day, no.

19 Q So you don't know what he did every single day?

20 A What you mean done every day?

21 Q You don't know what Michael Day did when he was not
22 with you, do you?

23 A No.

24 MS. HEATH: Thank you, Your Honor. No further
25 questions?

1 THE COURT: Redirect?

2 MR. CHEATHAM: Briefly.

3 REDIRECT EXAMINATION

4 BY MR. CHEATHAM:

5 Q She brought up the fact of Michael in Christmas of
6 2001 which reminded me. Did Michael leave the
7 state in January of '01?

8 A Yes, sir.

9 Q Did he stay out of the state until January of '02?

10 A Was he out of the state in 2002?

11 Q At least until January of 2002.

12 A Yes, until 2002 he was out of State.

13 Q And that would have been in the State of North
14 Carolina?

15 A Yes, sir.

16 Q So he wasn't here at all during Christmas of
17 December of 2001?

18 A No, sir.

19 Q Thank you.

20 THE COURT: Recross, Solicitor?

21 MS. HEATH: Nothing further, Your Honor.

22 THE COURT: Thank you. Thank you, Ms. Steele.
23 You may step down. How long will your next witness be,
24 Mr. Cheatham?

25 MR. CHEATHAM: Your Honor, with the Court's

1 indulgence, I have only have one more witness. That
2 would be the Defendant, and I would like to have at
3 least a few minutes to discuss some matters with him.

4 THE COURT: All right.

5 MR. CHEATHAM: I will be glad to do it during
6 the lunch break.

7 THE COURT: Do you want me to question him
8 concerning his right to testify, Mr. Cheatham?

9 MR. CHEATHAM: I would, but I want to discuss
10 that with him first, Your Honor.

11 THE COURT: Why don't we break now for an
12 hour. In other words, at 14:05, 2:05, we will start
13 back. Thank you very much.

14 MR. CHEATHAM: Thank you.

15 THE COURT: Have a pleasant lunch.

16 (Whereupon there was a luncheon recess).

17 THE COURT: I apologize for being late. It
18 was my fault. Yes, sir, Mr. Hendrix -- excuse me --
19 yes, sir, Mr. Cheatham. I apologize. I was thinking of
20 one of the jurors.

21 MR. CHEATHAM: I have been accused of being
22 Mr. Hendricks before. So it doesn't bother me.

23 THE COURT: I need to go get my eyes checked.

24 MR. CHEATHAM: Could we approach?

25 THE COURT: Yes, sir.

1 MS. HEATH: Your Honor, before we get started,
2 I just wanted to make sure that it was okay that Les
3 Ruilova is in the courtroom now that the State has
4 rested.

5 THE COURT: Yes, ma'am.

6 MR. CHEATHAM: As long as he is not going to
7 be recalled.

8 THE COURT: Well, that's always been a very
9 interesting issue under our law, Mr. Cheatham. She
10 can't anticipate new matter. So generally they are
11 allowed to be recalled. Approach the bench and let's
12 deal with this other issue also.

13 (Whereupon there was a bench conference off
14 the record).

15 THE COURT: Mr. Day, would you please stand.
16 Madame Clerk, would you place the Defendant
17 under oath, please.

18 CLERK: Raise your right hand, please.

19 MICHAEL DWIGHT DAY is first
20 duly sworn.

21 THE COURT: Mr. Day, I need to go over some
22 things with you. I have to do this with everyone who is
23 on trial, and I need your responses to be under oath.
24 That's why I had the clerk to place you under oath.

25 We have reached the stage of the trial where

1 the State has rested, and your side has begun presenting
2 evidence and testimony and witnesses. Do you understand
3 where we are at in the trial, Mr. Day?

4 THE DEFENDANT: Yes, sir.

5 THE COURT: In that regard you, through your
6 attorney, have already called two witnesses to testify
7 on your behalf. You also may testify. Do you
8 understand that, Mr. Day?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: No one can force you to testify.
11 You have an absolute right to remain silent. If you
12 choose not to testify, I will apply the law in this case
13 as the fact finder, and I will not consider in any way
14 your failure to testify in reaching my verdict in this
15 case. Do you understand?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: That will be no part of my
18 consideration and my evaluation of the evidence and the
19 testimony in this case. Do you understand that?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: If you were to testify and you
22 have a prior record that would be subject to
23 impeachment, the solicitor would be allowed to cross
24 examine you fully and completely on any prior criminal
25 record that you have.

1 Solicitor, does Mr. Day have a prior criminal
2 history?

3 MS. HEATH: He does not, Your Honor.

4 THE COURT: All right. Then that would not be
5 a consideration that you would have to be concerned
6 with. The decision about whether you testify or not is
7 your decision to make and yours alone.

8 We broke for lunch about five minutes after
9 1:00 o'clock and it's now about 2:25. At the time we
10 broke, your attorney wanted the opportunity to talk with
11 you more about your right to testify or not to testify.
12 Did you have an opportunity over the break to discuss
13 that with your attorney, Mr. Cheatham?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: I also noticed when I walked out
16 of the courtroom before the break or as we were
17 breaking that I believe your mother was sitting on the
18 bench behind where you are now standing; is that
19 correct?

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Was your mother, Ms. Day, part of
22 that conversation?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Did you understand the
25 conversation about your right to testify that you had

1 with your attorney?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Did you also have the opportunity
4 to talk with or have your mother present during that
5 conversation you had with your attorney about your right
6 to testify?

7 THE DEFENDANT: I don't fully understand, sir.

8 THE COURT: Was your mother also present
9 during the conversation that you had with your attorney
10 about your right to testify?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you understand whether or not
13 you testify is entirely your call, it's entirely your
14 decision? Do you understand that, Mr. Day?

15 THE DEFENDANT: Yes, sir.

16 THE COURT: Has anyone exercised any undue
17 influence over you to get you to choose to testify or
18 not to testify?

19 THE DEFENDANT: No, sir.

20 THE COURT: Today are you under the influence
21 of any drugs, medication, alcohol or anything that
22 affects your thinking?

23 THE DEFENDANT: No, sir.

24 THE COURT: Do you suffer from any physical or
25 mental problems that affect your thinking today?

1 THE DEFENDANT: No, sir.

2 THE COURT: Whatever decision you have made
3 about whether to testify or not to testify, is it your
4 decision, Mr. Day?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Is it made of your own free will
7 and accord?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: No one has intimidated you into
10 making whatever decision you have made; is that correct?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Do you need anymore time to talk
13 with your attorney about whether or not you wish to
14 testify?

15 THE DEFENDANT: No, sir.

16 THE COURT: What is your decision? Are you
17 going to testify?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Do you have any questions that you
20 would like to ask me about that, Mr. Day?

21 THE DEFENDANT: No, sir.

22 THE COURT: Thank you, sir. You may be
23 seated.

24 MR. CHEATHAM: Your Honor, just out of an
25 abundance of caution, could I ask you to inquire of the

1 witness as to whether we had discussed this testifying
2 or not testifying before today.

3 THE COURT: Certainly. Mr. Day, if you would
4 stand up for me again. Prior to the break today when
5 you had an opportunity to talk with your attorney, had
6 you had other conversations with your attorney about
7 your right to testify?

8 THE DEFENDANT: No, sir.

9 THE COURT: You have not, prior to today?

10 THE DEFENDANT: He has informed me of my
11 rights but not before we broke for lunch.

12 THE COURT: So you were aware of your right to
13 testify or not to testify before today?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: But you had not made your decision
16 before today; is that correct?

17 THE DEFENDANT: I had planned on testifying,
18 Your Honor.

19 THE COURT: You made that decision in your own
20 mind?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: Not based on consultations with
23 your attorney?

24 THE DEFENDANT: No, sir.

25 THE COURT: After consulting with your

1 attorney, that is still your opinion and your decision
2 to testify; is that correct?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you need anymore time to talk
5 with your attorney about the decision you made
6 concerning testifying in this court?

7 THE DEFENDANT: No, sir.

8 THE COURT: Anything further, Mr. Cheatham?

9 MR. CHEATHAM: No, sir, Your Honor.

10 THE COURT: Thank you. You may be seated,
11 Mr. Day.

12 In an abundance of precaution, I am going to
13 ask the last witness -- not the last witness who
14 testified, not Detective Russell -- but, Mr. Ruilova,
15 and I apologize, I never get pronunciations right. I am
16 going to enforce the sequestration rule during his
17 testimony. You will have to ask him to step out of the
18 courtroom. Thank you, sir.

19 Anything further before you call your witness,
20 Mr. Cheatham?

21 MR. CHEATHAM: Yes, sir, Your Honor. We have
22 certain documents that we have marked for
23 identification, and we would move to introduce them.

24 THE COURT: Let's take them one a time.
25 Defense 1 was the diagram by [REDACTED] Do you have any

1 objection, Solicitor?

2 MS. HEATH: No objection to that, Your Honor.

3 THE COURT: I do not remember Defense 2, what
4 it was. I remember 3 through 6.

5 MR. CHEATHAM: Let me hand them up. The
6 reporter tells me they are in order.

7 THE COURT: Defendant's 1 for identification
8 is now in evidence.

9 (Defendant's Exhibit Number 1 is received into
10 evidence).

11 THE COURT: Defendant's 2 is an incident
12 report entitled child molesting with the name of the
13 victim. Solicitor, do you have any objections to
14 Defendant's Exhibit 2?

15 MS. HEATH: No objection, Your Honor.

16 (Defendant's Exhibit Number 2 is received into
17 evidence).

18 THE COURT: Defendant's 3 is an arrest
19 warrant. There is a case out there somewhere that says
20 affidavits and arrest warrants are not admissible. Do
21 you have a position on Defendant's 3? It really went to
22 the issue of the cross examination of Detective Russell
23 and Ms. Floyd concerning the dates.

24 MS. HEATH: Your Honor, I don't think it's
25 relevant. So I would object.

1 THE COURT: I will look that case up. I think
2 it's State versus Atkins. However, the substance of the
3 testimony is certainly already in evidence through both
4 Ms. Floyd and Detective Russell. Let me look that case
5 up at a break before I rule on that one.

6 Defendant's 4 is an indictment with the date
7 June 1st, 2001, through September 1st, 2001.

8 MS. HEATH: Your Honor, I would object to
9 that, with the exception -- he tried to introduce it
10 through Ms. Floyd -- with the exception of her saying it
11 had been read to her at one point, there was actually no
12 foundation laid for it. It's not the indictment he is
13 being tried on today, and I don't think that it's
14 relevant.

15 THE COURT: Mr. Cheatham.

16 MR. CHEATHAM: Again, Your Honor, it goes to
17 show the question of the time frame. We are offering it
18 solely for the purpose of showing the time frame of the
19 different times he was charged with having committed
20 this crime.

21 THE COURT: I am going to consider that. I
22 have made notes as to what 4, 5, and 6 were as far as
23 the time frames are concerned, Mr. Cheatham. I have the
24 dates indicated.

25 If that is the purpose of 4, 5, and 6, there

1 was substantive testimony as to those. I will consider
2 the time frame and give it whatever weight and value I
3 decide as the fact finder it should have.

4 However, I am going to -- is that your same
5 objection as to 5 and 6, Solicitor?

6 MS. HEATH: It is, Your Honor.

7 THE COURT: Would that be your same argument
8 as to 5 and 6?

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

10 THE COURT: Again, Mr. Cheatham, I am going to
11 consider the time frame of the indictments. So I will
12 leave 4, 5, and 6 for identification only. I will look
13 up that case. I'm sure my law clerk is diligently
14 trying to find it even as I speak. Anything further?

15 MR. CHEATHAM: Yes, sir, we have another
16 exhibit that we just discussed.

17 THE COURT: What is that?

18 MR. CHEATHAM: It's a letter.

19 THE COURT: I will allow Defense 7 in evidence
20 subject to your objection, Solicitor. If you want to
21 put something on the record, I think perhaps we were at
22 the bench when you made those arguments.

23 MS. HEATH: I do object to Defense Number 7 as
24 being irrelevant.

25 THE COURT: Thank you, Solicitor. It's in

1 evidence over objection.

2 (Defendant's Exhibit Number 7 is received into
3 evidence).

4 THE COURT: Anything further, Mr. Cheatham?

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

6 THE COURT: You may call your witness.

7 MICHAEL DWIGHT DAY, being
8 first duly sworn, testified as follows:

9 CLERK: State your full name.

10 THE WITNESS: Michael Dwight Day.

11 MR. CHEATHAM: May it please the Court.

12 THE COURT: Yes, sir.

13 DIRECT EXAMINATION

14 BY MR. CHEATHAM:

15 Q Michael, in going back the best you can to
16 Christmas of 2001, where were you at that time?

17 A With my mother and father.

18 Q In 2001?

19 A 2001, I was in North Carolina.

20 Q And were you in North Carolina the entire month of
21 December in 2001?

22 A Yes, sir, I was.

23 Q Now, where were you born?

24 A Lexington County.

25 Q Where were you raised?

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- 1 A Lexington County.
- 2 Q Where were you educated?
- 3 A Lexington County.
- 4 Q What level of education do you have?
- 5 A Less than a high school diploma.
- 6 Q Did you go into the 12th grade?
- 7 A No, sir.
- 8 Q Did you go into the 11th grade?
- 9 A No, sir.
- 10 Q Did you go into the tenth grade?
- 11 A No, sir.
- 12 Q Did you go into the ninth grade?
- 13 A Yes, sir.
- 14 Q Did you finish the ninth grade?
- 15 A No, sir.
- 16 Q What is your date of birth?
- 17 A [REDACTED]
- 18 Q How old would have you been in 2000, December?
- 19 A Seventeen.
- 20 Q You would have been 17 years of age?
- 21 A Yes, sir.
- 22 Q If it happened in December of '99, you would have
- 23 been 16?
- 24 A That's correct.
- 25 Q Now, going to -- let's just say in December. In

1 all of December of 2000, where were you living?

2 A With my mother and father.

3 Q And what location is that?

4 A [REDACTED] Road.

5 Q And that is in Lexington, South Carolina?

6 A Yes, sir.

7 Q Lexington County, South Carolina?

8 A (Witness nods). (Indicating affirmative response).

9 Q In December of 2000, were you employed?

10 A Yes, sir.

11 Q Did you have a vehicle?

12 A Yes, sir, I do recall having a vehicle.

13 Q What vehicle did you have?

14 A I recall having a 1983 Honda Accord hatchback.

15 Q And did you use this vehicle to get back and forth
16 to work?

17 A Yes, sir, I did.

18 Q And it would then have been in front of Barbara
19 Day's house when you were there?

20 MS. HEATH: Objection, Your Honor.

21 THE COURT: What is your objection, Solicitor?

22 MS. HEATH: Leading.

23 THE COURT: Just ask him where it would have
24 been.

25 MR. CHEATHAM: Yes, sir.

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1 BY MR. CHEATHAM:

2 Q Where did you park the car when you were living
3 with Barbara Day?

4 A It was parked beside my father's truck on the far
5 end of the porch closest to my sister's room.

6 Q Now, these are marked State's 2 and 3. Can you
7 identify that?

8 A Yes, sir, that was the house we stayed in.

9 Q And in reference to the house, this picture shows
10 someone pretty much standing looking at the front
11 porch; correct?

12 A Correct.

13 Q Where would you have parked in reference to that?

14 A Right here (indicating).

15 Q So you would have been parked a little bit to the
16 left of the front porch if I was standing and
17 looking at the house?

18 A Yes, sir.

19 THE COURT: What number is that, Mr. Cheatham?

20 MR. CHEATHAM: Number 3.

21 THE COURT: State's 3.

22 BY MR. CHEATHAM:

23 Q On State's Exhibit 2, does it show the same general
24 location?

25 A Minus the part where I would have parked my car.

- 1 Q But whose property is this?
- 2 A That would be part of Ms. Floyd's or part of the
3 property with the trailer.
- 4 Q That would be a part of Cindy Floyd's property?
- 5 A Yes, sir.
- 6 Q So the cars over here (indicating), do you know
7 whose cars those are?
- 8 A Not offhand I don't.
- 9 Q Was there a common driveway to get to the place?
- 10 A Yes, sir, it's where these cars are parked. It
11 goes straight back.
- 12 Q Would you have to travel past these cars to get to
13 your place?
- 14 A Yes, sir.
- 15 Q So if these cars were parked there, you couldn't
16 get by?
- 17 A No, sir.
- 18 Q How far off the road is the house, just roughly?
19 Is it like a football field or a city block?
- 20 A It's maybe 20-yards, if that.
- 21 Q And what shift were you working?
- 22 A Second, which is two to ten.
- 23 Q That would be 2:00 o'clock in the afternoon until
24 10:00 o'clock at night?
- 25 A That's correct.

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1 Q And how many days a week were you working?

2 A Between five and seven.

3 Q And this would have been during this period of time
4 in December of 2000?

5 A Yes, sir.

6 Q Now, at any point in time in December, did you
7 spend the night or live anywhere, other than with
8 your parents?

9 A No, sir.

10 Q Nowhere? No other place whatsoever?

11 A No, sir.

12 Q Did you have a bedroom there?

13 A Where?

14 Q At your parent's house?

15 A Yes, sir, I did.

16 Q Did you have a computer there?

17 A Yes, sir, I had access to a computer.

18 Q And did you use the computer on a regular
19 reoccurring basis?

20 A Yes, sir, I did.

21 Q What did you do when you came home from work at
22 10:00 o'clock?

23 A Usually I'd take me a shower and associate with my
24 family until they went to bed. Then I would get on
25 the computer and talk with a friend of mine.

1 Q Was this a regular, reoccurring lifestyle that you
2 did?

3 A Yes, sir, it was.

4 Q Were you dating anybody at this time?

5 A No, sir, I wasn't.

6 Q The person that you were communicating with, did
7 you later meet them?

8 A Yes, sir, I did.

9 Q Is this when you went to North Carolina?

10 A Yes, sir, it is.

11 Q And you went to North Carolina when?

12 A The beginning of January.

13 Q Of?

14 A 2001.

15 Q And did you return from North Carolina after
16 January of '02?

17 A It was later that year of '02.

18 Q Yeah, I'm saying after January.

19 A Yes, sir.

20 Q So for the month of December of '01, you were in
21 North Carolina; correct?

22 A Yes, sir.

23 MS. HEATH: Objection, Your Honor.

24 THE COURT: What is your objection, Solicitor?

25 MS. HEATH: He is leading the witness.

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1 THE COURT: Just ask him his time frame,
2 Mr. Cheatham.

3 BY MR. CHEATHAM:

4 Q In December of 2001, '01, where were you?

5 A In '01 I was residing in North Carolina.

6 Q In December of 2000 where were you?

7 A I was residing in Lexington County.

8 Q With whom?

9 A With my mother and father.

10 Q Now, I am going to show you what has been marked
11 State's Exhibit 5, which was introduced over
12 objection. In reference to that document, is that,
13 in fact, your handwriting?

14 A Yes, sir, that is my handwriting.

15 Q Did you in fact do that act?

16 A No, sir, I did not.

17 Q Have you had any type of sexual contact with [REDACTED]

18 [REDACTED]

19 A No, sir.

20 Q None whatsoever?

21 A None.

22 Q Why did you write the statement?

23 A I was scared. To put it honestly, I was scared.

24 Q What were you scared about?

25 A I was under pressure. It hit me all at once. It

- 1 come out of nowhere.
- 2 Q When you went down there, you went down there with
- 3 the intention of talking about what?
- 4 A My sister's case.
- 5 Q And this just then --
- 6 A It come out of nowhere.
- 7 Q Just tell us how you felt.
- 8 A Honestly the same way I feel right now, scared, as
- 9 if nowhere to turn.
- 10 Q Did you in fact state whether or not at first you
- 11 were guilty or not guilty?
- 12 A I stated that I did not do it and that I was not
- 13 guilty.
- 14 Q And then after awhile did you sign that?
- 15 A After -- it was more toward the end of mine and
- 16 Detective Russell's talk, I guess you could say it
- 17 was, but it was not immediate.
- 18 Q But after being there awhile, you did sign the
- 19 statement?
- 20 A Yes, sir.
- 21 Q Now, the information, did Detective Russell give
- 22 you that information?
- 23 A That was what I was told.
- 24 Q That's what you were told by Detective Russell?
- 25 A Yes, sir, me and him were the only two in the room..

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- 1 Q So you didn't have any of this knowledge before you
2 went into that room?
- 3 A No, sir.
- 4 Q None whatsoever?
- 5 A None.
- 6 Q Do you realize that by testifying you are going to
7 be cross examined about that statement?
- 8 A Yes, sir.
- 9 Q And, again, I ask you the question: Have you ever
10 had any type of sexual contact with [REDACTED]
- 11 A No, sir.
- 12 Q Have you ever lived at [REDACTED] residence?
- 13 A No, sir.
- 14 Q Did you ever spend the night at [REDACTED] residence?
- 15 A No, sir.
- 16 Q Now, do you know who was living at [REDACTED]
17 residence in 2000?
- 18 A I recall his mother and his three brothers staying
19 there.
- 20 Q Anybody else?
- 21 A I had not had contact with Mr. Ruilova. At least
22 to my knowledge, I do not remember it.
- 23 Q So you don't remember meeting him?
- 24 A No, sir, I do not.
- 25 Q In December at all?

1 A Not to my knowledge. I do not recall meeting him.

2 Q Did you meet him in January before you left?

3 A It's possible. It's possible I may have run across
4 him in December, but I do not recall it.

5 Q Did you ever have an extended conversation with
6 him?

7 A No, sir.

8 Q Celebrate Christmas with him?

9 A No, sir.

10 Q Did you ever go into the Floyd household for an
11 extended period of time?

12 A During the time frame of?

13 Q Yes, December the 13th through December 26th.

14 A No, sir.

15 Q Were you in the household at all during that period
16 of time?

17 A No, sir, I was not.

18 MR. CHEATHAM: That's all.

19 THE COURT: Thank you, Mr. Cheatham.

20 Solicitor.

21 MS. HEATH: Thank you, Your Honor.

22 CROSS EXAMINATION

23 BY MS. HEATH:

24 Q Mr. Day, where did you say you were living in
25 December of 2000?

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- 1 A With my mother and father.
- 2 Q If you look at State's Exhibit 2 and 3 and State's
3 Exhibit Number 1, are State's Exhibit 2 and 3 where
4 you were living?
- 5 A Yes, ma'am.
- 6 Q And how close was State's Exhibit Number 1,
7 [REDACTED] house, to the house you were living in?
- 8 A Less than -- it was less than 10-, 15-yards.
- 9 Q So you could have easily walked to Cindy's house?
- 10 A Of course.
- 11 Q Did you go to Cindy's house during that time?
- 12 A Not that I recall.
- 13 Q How do you remember exactly who lived with her in
14 December of 2000 as you just testified?
- 15 A I've always known the boys would be around the
16 house or around this location.
- 17 Q What grade did you go through in school?
- 18 A I finished the eighth and on my own I decided to
19 quit the ninth.
- 20 Q But you learned how to read?
- 21 A Yes, ma'am.
- 22 Q And you learned how to write in school?
- 23 A Yes, ma'am.
- 24 Q And you were 17 when this happened; is that right?
- 25 A Yes, ma'am.

1 Q You were about to turn 18?

2 A Yes, ma'am.

3 Q So you were old enough to know the difference
4 between wrong and right, wouldn't you agree?

5 A Yes, ma'am.

6 Q Where did you say that you worked during
7 December of 2000?

8 A I worked one or two places. It was for a short
9 period of time. It was either the Pantry Express
10 on Number 6 here or it was the Bojangle's right
11 beside it.

12 Q And you had that same night shift, either at the
13 Pantry Express or at Bojangle's?

14 A Yes, ma'am.

15 Q The same hours for both jobs?

16 A Yes, ma'am.

17 Q Did you get paychecks and pay stubs from that job?

18 A Yes, ma'am.

19 Q Do you have them with you today?

20 A No, ma'am.

21 Q Let's talk about the day you went to the Sheriff's
22 Department to give this statement. What did you go
23 there for?

24 A I went there to talk to Detective Russell about my
25 sister's statement.

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- 1 Q Did you go there voluntarily? Did you have to go
2 there or did you get in the car and go there
3 yourself?
- 4 A I agreed to meet with Detective Russell on that
5 situation.
- 6 Q Did you drive there?
- 7 A Yes, ma'am.
- 8 Q Who was with you?
- 9 A My wife.
- 10 Q And then y'all went in the interview room, right?
- 11 A Just me and Detective Russell did.
- 12 Q Right. Were any promises made to you to write this
13 statement?
- 14 A The only thing that was said was that Detective
15 Russell would talk to the judge if I cooperated.
- 16 Q Did he say what he would talk to the judge about?
- 17 A No, ma'am.
- 18 Q Did he coerce you to write this statement?
- 19 A No, ma'am.
- 20 Q While you were in that interview room, did you ask
21 for any food?
- 22 A No, ma'am.
- 23 Q Did you need any water?
- 24 A No, ma'am.
- 25 Q Did you have to go to the bathroom?

1 A No, ma'am.

2 Q And, in fact, he let you talk to your wife;
3 correct?

4 A Yes, ma'am, he did.

5 Q When you went into that room, Detective Russell
6 read you each one of these statements; right?

7 A That's correct.

8 Q If we can just go over them. Number one: That I
9 have the right to remain silent and not make any
10 statement at all. Right there (indicating) M.D.,
11 are those your initials?

12 A Yes, ma'am.

13 Q You initialed that?

14 A It was later during -- I want to say after
15 everything was said and done, that all was
16 initialed.

17 Q So you are saying before -- you wrote down this
18 statement, and then you went back and initialed
19 those things?

20 A If memory serves me correct, that is right.

21 Q Then did he go over number two: That any statement
22 I do make can be used against me in court. You
23 initialed that, correct?

24 A Yes, ma'am.

25 Q Number three: That I have the right to have an

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1 attorney present at any time during questioning.

2 And M.D., you initialed that; correct?

3 A Yes, ma'am.

4 Q Number four: That if I cannot afford an attorney,
5 I can apply to the Court to have one appointed at
6 no cost to me. M.D., those are your initials;
7 correct?

8 A Yes, ma'am.

9 Q Number five: That if I decide to talk to an
10 officer without an attorney present, I may stop at
11 any time and request an attorney be present for
12 further questioning. M.D., those are your
13 initials; correct?

14 A Yes, ma'am.

15 Q And would you agree with me that that is your
16 handwriting?

17 A Yes, ma'am.

18 Q And is that your signature?

19 A Yes, ma'am, it is.

20 Q Can you read this statement or do you want me to
21 bring it to you?

22 MR. CHEATHAM: Your Honor, based upon his
23 testimony, we would move that it be excluded because he
24 said he was Mirandized after he wrote the statement.

25 THE COURT: Your objection is noted for the

1 record, Mr. Cheatham.

2 BY MS. HEATH:

3 Q Mr. Day, can you read that statement, please.

4 A This says: Yes, I, Michael Day, did call Dusty
5 into the bathroom and put my penis in his mouth.
6 Then someone come in a minute later, and I took it
7 out, and that was the end of it. I did not
8 ejaculate, it being my penis. Then the words being
9 scratched out with my initials. When? Summer of
10 2001, I think.

11 Q And did Detective Russell make you write this down?

12 A No, he did not make me.

13 Q You wrote it down voluntarily, correct?

14 A Yes, ma'am.

15 Q And you have been here through your whole trial.

16 You heard [REDACTED] testify yesterday, didn't you?

17 A Yes, ma'am.

18 MR. CHEATHAM: Objection, Your Honor. That's
19 pitting one witness against another.

20 THE COURT: It's not pitting yet because all
21 she said is: You heard [REDACTED] testify. You cannot pit
22 under State versus Battle. You may proceed, Solicitor.

23 BY MS. HEATH:

24 Q Did you hear [REDACTED] testify yesterday?

25 A Yes, ma'am.

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1 Q With the exception of the dates and this statement,
2 wouldn't you agree that the facts are pretty much
3 similar?

4 MR. CHEATHAM: Again, objection.

5 THE COURT: I would sustain the objection.

6 BY MS. HEATH:

7 Q So what you are saying today is this statement
8 isn't true?

9 A That's correct.

10 Q And you were lying when you gave this statement?

11 A Yes, ma'am.

12 MS. HEATH: Beg the Court's indulgence.

13 THE COURT: Yes, ma'am.

14 (Pause).

15 BY MS. HEATH:

16 Q You agree that in this statement this happened in
17 the bathroom at [REDACTED] house?

18 A That's what I agreed to in the statement or that's
19 what I wrote down on the statement.

20 MR. CHEATHAM: Your Honor, I am assuming my
21 objection is continuing all through this so I won't be
22 up and down.

23 THE COURT: Yes, sir. You may proceed,
24 Solicitor.

25 MS. HEATH: Thank you, Your Honor.

1 BY MS. HEATH:

2 Q In this statement he put his mouth on your penis?

3 A That's what the statement does say.

4 Q That you did not ejaculate?

5 A It says that as well.

6 Q And that someone came in?

7 A It does say that.

8 MS. HEATH: No further questions, Your Honor.

9 THE COURT: Thank you, Solicitor.

10 Mr. Cheatham, anything in redirect, sir?

11 MR. CHEATHAM: No, sir.

12 THE COURT: Mr. Day, you may step down.

13 Mr. Cheatham, you may call your next witness.

14 MR. CHEATHAM: We don't have any further
15 witnesses, Your Honor.

16 THE COURT: All right, sir. do you have any
17 motions?

18 MR. CHEATHAM: Yes, Your Honor. We would
19 again renew our motion for a directed verdict. I think
20 it's Rule 19 that says unless the State has established
21 a case in accordance with the requirements of the law,
22 the Defendant is entitled to a directed verdict.

23 THE COURT: Your motion is noted for the
24 record and respectfully denied.

25 Solicitor, do you have any witnesses in reply?

1 MS. HEATH: No, Your Honor.

2 THE COURT: You told me earlier about five
3 minutes to close, Solicitor; is that correct?

4 MS. HEATH: That's correct, Your Honor.

5 THE COURT: Are you going to waive opening?

6 MS. HEATH: Yes.

7 THE COURT: And you had told me about 15
8 minutes, Mr. Cheatham?

9 MR. CHEATHAM: No more than that, Your Honor.
10 Could you indulge me and let me take a bathroom break?

11 THE COURT: Yes, sir. I will check and see
12 what the status is of the next trial. So I would give
13 you until ten after three. That's about 12 minutes.

14 (Whereupon there was a recess).

15 THE COURT: I need to rule on Defense 3.
16 There are several cases, State versus Stewart and State
17 versus Alexander, citing back to a case called State
18 versus Latham.

19 All of them indicate: It is well settled in
20 South Carolina that affidavits are not admissible in
21 search or arrest warrants. It is well settled in this
22 jurisdiction that affidavits are inadmissible in
23 criminal cases.

24 These cases are like all other criminal cases.
25 They come up in the context of an individual who has

1 been convicted of a crime and that individual is
2 appealing, and he is claiming there is some type of
3 prejudice by the admission of an affidavit in the arrest
4 warrant, in the arrest warrant or the search warrant.

5 With that appearing to be the black letter
6 law, what is your position, Mr. Cheatham, as far as
7 Defense 3?

8 MR. CHEATHAM: Well, Your Honor, we are not
9 introducing it as an affidavit but only to show evidence
10 of a time frame.

11 THE COURT: Well, if that's the case -- would
12 you hand me I.D. 3, please. With that being said, I
13 will take into account the testimony of Detective
14 Russell where he testified concerning what the summer
15 was -- June, July and August -- and that this warrant
16 goes from July-- excuse me -- from June 1st of '01, the
17 timing in this warrant, from June 1st of '01 till
18 September 1st of '01.

19 There is other information in the arrest
20 warrant that, quite frankly, I think would be
21 prejudicial to the Defendant.

22 MR. CHEATHAM: The only thing we are trying to
23 introduce is the time frame. That's all we want.

24 THE COURT: I will take into account the time
25 frame. That would remain I.D. You can argue the time

1 frame in your closing. I am not going to allow the
2 affidavit itself, but I will take into account the time
3 frame and give it whatever weight and value I decide as
4 the fact finder it should have.

5 I think that takes care of all the evidentiary
6 matters, Mr. Cheatham. I would be glad to hear from
7 you, sir.

8 MR. CHEATHAM: All right, sir. May it please
9 the Court.

10 THE COURT: Yes, sir.

11 CLOSING ARGUMENT

12 MR. CHEATHAM: Your Honor, in addressing the
13 Court in a criminal matter, this is a first for me. But
14 the argument that I would make is basically on the facts
15 of the situation.

16 If someone came up and said to me: Where were
17 you in 2002? I would have a very difficult time trying
18 to discern where I was and what I was doing, much less
19 if it was '01, 2000, 1999, whatever.

20 So trying to disprove something puts a
21 defendant at a disadvantage. Because that's basically
22 what you have to do is if you are accused of something,
23 then you have to present evidence to show what went on,
24 what didn't go on, how things happened, what didn't
25 happen, et cetera.

1 You had a very intimidateable (sic) 17 year
2 old who was called down to the Sheriff's Department to
3 give a statement concerning his sister's case. Then all
4 of a sudden, wham, this was dropped on him. He said he
5 wasn't guilty, and you know the rest of the
6 circumstances of the affidavit as well as I do.

7 But what was consistent in Michael's testimony
8 was he didn't have those facts. Those facts were given
9 to him. What has happened here in my opinion is just a
10 convolution of testimony that doesn't quite lead to a
11 pathway of truth.

12 What I mean by that is this. You have the
13 question of the time frame. The time frame, until we
14 got into October of this year, had varied from '99
15 through 2002. His Honor is well aware of the different
16 variations.

17 It wasn't until -- I mean, on October 12th, as
18 per the letter from the solicitor, we were still working
19 with the '01 time frame. Then on October the 18th, I
20 think it was, but let me check -- on October the 16th of
21 2006 was when the magical Christmas of 2000 appeared.

22 We tried to discern where it appeared from.
23 [REDACTED] said he told the Solicitor's Office in January.
24 The mother said that she always believed [REDACTED] story.
25 But yet it wasn't until after the case had been

1 scheduled for trial in October that this switch back a
2 year occurred.

3 We had a situation where in '01, as the
4 uncontradicted testimony established, he was not in this
5 State during December of '01. So when we were able to
6 establish that, then it got pushed back a year.

7 Well, they could have pushed it back another
8 year or another year. So you have a situation where you
9 look at the details to determine the credibility. The
10 mother testified as to Michael staying there, what he
11 did, and what he ate and he washed his clothes, et
12 cetera.

13 This was contradicted by their own witness Les
14 Ruilova -- or something close to that -- who said he had
15 three meals there and he lived there, but he always
16 stayed in the living room.

17 This is again the interaction between the two
18 of [REDACTED] said Michael had his own bedroom. Nobody else
19 testified that Michael had his own bedroom. As a matter
20 of fact, Cindy is the only one that ever testified that
21 he stayed in the bedroom.

22 Barbara Day and Mary Steele said no, he was
23 with us. He was working from 2:00 o'clock until
24 10:00 o'clock. There was conflicting testimony between
25 Cindy and Les as to when Les was there. Was he working?

1 How many days a week was he working? And who else was
2 there?

3 Barbara Day testified that a person named Troy
4 was there helping baby-sit. And most likely if
5 something occurred in 2000, he was the person that it
6 occurred with, and Michael got caught up in the mistake.

7 The child could not remember at the interview
8 with Trimble what Michael's last name was. So it would
9 seem to me that the fact that he was able to come into
10 today and say: Oh, yes, da-da-da and describe it in
11 different terms, I think to me indicates that he had
12 been given or at least seen the statement that was
13 allegedly freely and voluntarily signed by Michael.

14 So in my opinion you have continued cross
15 contamination of things that get in the way of trying to
16 seek the truth in this matter. Michael said he never
17 spent the night there. His mother said he was always
18 with her and her husband. Mary said that she saw him
19 every day or just about every day.

20 So you have a person that was working. They
21 were going about their own business. They were minding
22 their own business. They were not staying in Cindy
23 Floyd's house. They were not helping baby-sit. So who
24 was helping baby-sit? Well, it was Les and Troy in my
25 opinion according to our testimony.

1 If, in fact, you have a mistake in
2 identification, then the Court should consider that.
3 Because you are taking a child who is four and
4 interviewing him when he is eight. The mother initially
5 said he was three years old when it occurred, but later
6 said: No, I agree with him. He was four years old when
7 it occurred.

8 So when the mother was reporting it to the
9 police, she did not give a correct time table. She was
10 going to make the child three years old, but yet she
11 comes in here and says: Oh, no, I've never said it was
12 anything but four.

13 But then when she had the 2000 statement, that
14 would be a little different -- 2001 statement -- excuse
15 me. It's just that we feel like the 17 year old was
16 basically a helpless pawn at the hands of a skilled
17 investigator.

18 He went in and knew what questions to ask,
19 what buttons to push. Unfortunately Michael was scared,
20 he was afraid, and he signed the statement that was
21 written out by writing down what the officer told him to
22 write.

23 It would have been very easy to have tape
24 recorded or videotaped this interrogation, and therefore
25 we wouldn't have any question whatsoever about what was

1 said, what was done, how it was said or how it was done.
2 But that was not done in this case.

3 We also have Michael's testimony that the
4 Miranda warnings were not given until after he had
5 written out the statement. So I think that's something
6 that the Court should consider.

7 If you go back and look at the testimony, the
8 testimony was that the other people did visit there.
9 They admitted that, Les and Cindy. Barbara Day
10 testified they lived there.

11 Of course, if they were living there, one or
12 more of them, Troy at least, it would have been
13 impossible for Michael to have any place to stay. So he
14 could not have been staying there.

15 He was not staying there as he stated. He had
16 his own bedroom in his own place. I mean, something as
17 simple as where you eat and where you sleep are very
18 germane to the case because the minor identified the
19 perpetrator as someone who lived there and had a bedroom
20 there, which is in direct contradiction of Michael
21 staying there.

22 Because if someone was living there and
23 staying there, it had to be someone other than he. As
24 far as Troy being there, Ms. Day testified to that. No
25 one was called to contradict that statement.

1 So you come to the realization that the 2000
2 Christmas was brought into play sometime after October
3 the 12th of 2006. This case has been pending for some
4 time.

5 The mother admitted she had met with the
6 solicitor on several occasions, that the solicitor had
7 read the indictments and the times of the indictment.
8 She had no objection to those.

9 But yet she testified that her son told her
10 Christmas 2000, and she knew that all along. There was
11 no mention of Christmas 2000 in any documentation that I
12 received until we had the indictment that was changed
13 right as we were getting ready to try it on a 2001
14 charge.

15 That was created when the mother -- I got the
16 call and they said it wasn't going to be tried. The
17 mother is going to go get some hospital records to prove
18 she was in the hospital.

19 But yet the victim, up until then, the victim
20 and the family were prepared to testify that everything
21 happened in 2001. The problem was in 2001, we had what
22 we consider a slam dunk of him being in North Carolina
23 for the entire month of December.

24 So that's why it had to be changed. Now,
25 whether it was unintentional, whether it was

1 intentional, I don't know. Nobody seemed to know where
2 the time came from. It just came.

3 Maybe it's just a little ironic or ridiculous
4 to argue, but when you are arguing for somebody's
5 liberty, you want to bring out the inconsistencies. I
6 think most people can agree that September is not
7 summer.

8 But even we got into an argument with the
9 police officer on summer stretching up until September,
10 again, he is trying to make all the pieces fit inside of
11 the frame, and they won't stay in there.

12 As someone once said the devil is in the
13 details. The details of this again just continue to
14 contradict: Who was in the bathroom first? What
15 happened? Could a four-year-old boy kneeling reach a
16 grown man's manhood? To me that is an impossibility,
17 but I will leave that obviously to the Court's finding.

18 Again, to just reiterate, I am not going to
19 argue the law because His Honor is well versed in the
20 law and knows more about it than I do. But the only
21 thing that I would say in closing is that a case against
22 someone who is going to take their liberty away for
23 years should be established beyond a reasonable doubt.

24 The conflicts in this case of the testimony,
25 of what was done and how it was done and when it was

1 done, prevent a finding of beyond a reasonable doubt.

2 Thank you, Your Honor.

3 THE COURT: Thank you, Mr. Cheatham.

4 Solicitor.

5 MS. HEATH: Thank you, Your Honor. May it
6 please the Court.

7 THE COURT: Yes, ma'am.

8 CLOSING ARGUMENT

9 MS. HEATH: This is a case about Michael Day
10 preying on the innocence of [REDACTED] [REDACTED] He took his
11 child and he replaced it with scenes from a world that
12 no four-year-old boy should have to suffer through.

13 We heard [REDACTED] testify in explicit detail
14 about something that happened to him six years ago in
15 December of 2000. He remembers. He was in the bathroom
16 with Michael Day. Michael Day asked him to perform oral
17 sex on him after he took down his pants, and [REDACTED] did
18 this. He testified in detail to that today or
19 yesterday.

20 We also saw the video of the forensic
21 interview when he first disclosed this to Ms. Trimble at
22 the A.R.C. Your Honor, between his testimony and the
23 video, there are just very few inconsistencies.

24 The fact that Michael Day took out his penis
25 and put it in four-year-old [REDACTED] mouth and had him

1 perform oral sex is unwavering. It didn't change
2 between his testimony and his video and the Defendant's
3 confession.

4 The defense wants you to think that possibly
5 [REDACTED] got Michael confused with Troy Hastings or his
6 brother Dale. [REDACTED] was on that stand and clearly
7 identified Michael Day as the perpetrator, clearly
8 identified him as the one that was staying with them
9 over Christmas break of 2000.

10 We heard from Melanie Trimble at the A.R.C.
11 She told Your Honor about this delayed disclosure. It's
12 not uncommon for a four year old, a young child, to
13 delay disclosure in a sexual abuse case because they are
14 scared, especially if it's a family member, and in this
15 case Michael Day was distantly related to [REDACTED]

16 Your Honor, he was four years old. She said
17 in her guidelines that she did not want to pin down a
18 date because no four year old will have the ability to
19 recollect a time frame.

20 That's why she didn't pin down Christmas of
21 2000, Christmas of 2001. She pinned down no date. The
22 only thing she got from that interview was the fact that
23 [REDACTED] was four years old.

24 She did say that young children remember big
25 events. I submit to you, Your Honor, [REDACTED] did

1 remember that big event. He remembered the day that
2 Michael did that. He remembered his mother was in the
3 hospital. He remembered that it was during Christmas
4 break.

5 She did say that a four year old knows what
6 happens with their own body. He did, Your Honor. He
7 testified in explicit detail about the sexual act that
8 Michael Day made him perform.

9 We heard from Cindy. She said all along that
10 she agreed with [REDACTED] It happened when he was four
11 years old. She was in the hospital during 2000. Les
12 Ruilova also testified he moved in in October of 2000.

13 The Defendant came in December of 2000. That
14 was the only time that him and the Defendant were in the
15 house together on Christmas. The day after Christmas,
16 December 26th of 2000, Les said he left.

17 According to State versus Wingo and other
18 cases, time is not even an essential element that has to
19 be proven in a criminal sexual conduct case. I think
20 that even though we don't have to prove it, we have
21 proven beyond a reasonable doubt that this event
22 happened when Cindy was in the hospital.

23 We have her medical records. It happened
24 Christmas break of 2000, December of 2000 to January of
25 2001. If that's not enough, we have the confession.

1 Michael Day was on the stand and clearly testified it
2 was voluntary.

3 He came to the station by himself on his own
4 will. He was 21 at the time, Your Honor, not 17, when
5 the confession was taken. Your Honor, what grown man
6 would put that in his own handwriting if it was not the
7 absolute truth?

8 Detective Russell didn't provide Michael Day
9 with the details of that confession. He put those
10 details in the confession himself, and they corroborate
11 perfectly with the details that [REDACTED] testified to:
12 They were in their house, he took his penis out, he did
13 not ejaculate, and someone was coming in. All of those
14 details match.

15 As to the Defendant's witnesses, they
16 testified that he was at work sometimes. They were
17 not -- Ms. Day nor Ms. Steele were with him the whole
18 time. He could have had many chances to go to Cindy's
19 house and stay with them.

20 I submit to you, Your Honor, that the
21 Defendant is guilty beyond a reasonable doubt of
22 criminal sexual conduct with a minor.

23 THE COURT: Thank you, Solicitor.

24 MS. HEATH: Thank you, Your Honor.

25 THE COURT: If y'all would please check the

1 exhibits and make sure only the exhibits that have been
2 introduced into evidence are turned over to me. Also,
3 Solicitor, can I use that T.V. in my office?

4 MS. HEATH: Certainly, Your Honor.

5 THE COURT: Was there any particular areas of
6 the law, besides what I would typically charge a jury on
7 criminal sexual conduct with a minor in the first
8 degree, are there any other particular areas of the law
9 y'all want me to consider beyond what my standard charge
10 would be to a jury if the jury were the fact finder?

11 MR. CHEATHAM: No, sir.

12 MS. HEATH: None, other than the cases I
13 stated in my closing, Your Honor.

14 (Pause).

15 THE COURT: I would probably not make a
16 decision this evening.

17 MR. CHEATHAM: Yes, sir.

18 THE COURT: And I will be starting another
19 trial at 9:30 in the morning. So it may be Thursday.
20 I'm not saying it would be Thursday. But if it's before
21 then, I will call you. If it is then, I will have
22 either Mr. Carson or Madame Clerk give you both a call.

23 MS. HEATH: Thank you, Your Honor.

24 THE COURT: Anything further?

25 MR. CHEATHAM: No, sir, Your Honor. Thank

1 you.

2 THE COURT: Sheriff, you can take Mr. Day back
3 into custody, please. Court will be in recess until
4 9:30 in the morning.

5 (Whereupon the proceedings were concluded for
6 November 7, 2006).

7 (The following proceedings were reported on
8 November 9, 2006).

9 THE COURT: Mr. Michael Dwight Day and
10 Mr. Cheatham.

11 MR. CHEATHAM: Yes, Your Honor.

12 THE COURT: Madame Clerk, would you publish
13 our verdict, please.

14 (Whereupon the verdict of the jury is
15 published as follows).

16 CLERK: Indictment 2006-GS-32-3249, the State
17 versus Michael Dwight Day, charged with criminal sexual
18 conduct with a minor first degree, the verdict is
19 guilty.

20 THE COURT: Publish who the verdict is signed
21 by.

22 CLERK: Signed by Judge Knox McMahon, Circuit
23 Court for the Eleventh Judicial Circuit.

24 THE COURT: And today's date?

25 CLERK: Which is November 9, 2006.

1 THE COURT: Thank you, Madame Clerk. Mr. Day,
2 you may be seated.

3 Mr. Cheatham, do you have any motions?

4 MR. CHEATHAM: Yes, sir, we would again renew
5 our previous motions, and we would also submit that the
6 trial taken as a whole, the rulings that the Court made,
7 deprived my client of due process and a fair and
8 impartial trial. We feel like that under those
9 circumstances the verdict should be set aside.

10 THE COURT: Thank you, Mr. Cheatham. Your
11 motion is noted for the record and respectfully denied.

12 Solicitor, Mr. Cheatham, any reason in law why
13 sentence should not be imposed at this time?

14 MS. HEATH: No, Your Honor.

15 THE COURT: Mr. Cheatham?

16 MR. CHEATHAM: No, sir, Your Honor.

17 THE COURT: Solicitor, do you have any victim
18 impact or any additional information you would want to
19 provide prior to sentencing?

20 MS. HEATH: Yes, Your Honor. I do have a
21 sentencing sheet that I will pass up.

22 THE COURT: Yes, ma'am.

23 (Hands to Court).

24 THE COURT: Thank you.

25 MS. HEATH: Your Honor, aside from committing

1 the crime of murder, the crime of criminal sexual
2 conduct with a minor in the first degree is one of the
3 worst, most heinous crimes that a defendant could
4 commit.

5 In my discussions with [REDACTED] when I was
6 talking about the possible penalties that his crime
7 carried, [REDACTED] told me that he wished that Mr. Day
8 could get the death penalty.

9 Basically [REDACTED] is already serving a life
10 sentence because every day that he wakes up, he will
11 remember what happened to him in the bathroom that day.
12 Your Honor, on behalf of [REDACTED] and the State, we think
13 that the maximum sentence should be imposed.

14 We would respectfully ask Your Honor for a
15 30-year sentence. I do have Ms. Floyd, the victim's
16 mother, here who would you also like to address Your
17 Honor.

18 THE COURT: She may come around. Yes, ma'am,
19 I would be happy to hear from you.

20 MS. FLOYD: On behalf of my son [REDACTED] I
21 would just like to say that I never doubted my son. No
22 amount of time that you give Mr. Day will compensate for
23 the hurt and anger that we have shared.

24 The innocence that [REDACTED] was stripped of can
25 never be replaced. However, I am asking and pleading

1 that you sentence Michael Day to the maximum sentence
2 set forth in this type of crime.

3 THE COURT: Thank you, Ms. Floyd.

4 MS. FLOYD: Thank you.

5 THE COURT: You may be seated. Anything
6 further, Solicitor?

7 MS. HEATH: Nothing further, Your Honor.

8 THE COURT: Mr. Cheatham.

9 MR. CHEATHAM: Yes, Your Honor. We have his
10 mother.

11 THE COURT: Certainly, yes, sir. I would be
12 glad to hear from whoever you want me to hear from,
13 Mr. Cheatham.

14 You can come stand at the podium, Ms. Day. I
15 recall your name is Barbara Day. I would be glad to
16 hear from you Ms. Day.

17 MS. DAY: Your Honor, I just went through the
18 tragedy of losing my husband. Now I'm facing losing my
19 son, too. How much more can a person take? My son was
20 not here. He did not do this.

21 I know what happened to [REDACTED] is tragic
22 because it happened to me, too. It has happened to me
23 before, and it is heinous. I agree with Cindy, the
24 person that done it should be punished to the max, but
25 my son is not the one done it. He did not stay with

1 her. I am pleading with you to please go easy on him.
2 I don't know what else to say.

3 THE COURT: I understand, Ms. Day. Thank you
4 for being here. Yes, ma'am.

5 MS. DAY: Thank you.

6 THE COURT: Mr. Cheatham, would Mr. Day like
7 to address the Court prior to sentencing?

8 MR. CHEATHAM: Your Honor, I think Mr. Day is
9 basically too devastated and too upset to really say
10 anything at this time.

11 THE COURT: Anything you would like to say,
12 Mr. Cheatham?

13 MR. CHEATHAM: With the Court's indulgence.
14 Your Honor, I think you would have to agree that -- and
15 I am accepting your verdict and not arguing with it.
16 But the circumstances do leave some considerable
17 questions, at least in my mind.

18 Michael Day has never been in trouble before.
19 This is the first allegation that anyone has made
20 concerning him. It was what we would call a heinous
21 crime. We would hope it would not happen to any child
22 of ours.

23 But you do have a situation where we think
24 leniency is required under the circumstances. There was
25 no violent force. The child was not physically injured.

1 It was a situation where, according to [REDACTED]
2 interview and my client's testimony, it only happened
3 for a brief minute.

4 So we feel like that under those circumstances
5 that the Court should consider leniency and that the
6 Court should show mercy and not take away 30 years of
7 this young man's life.

8 It's a situation where, as Your Honor knows,
9 he would have to serve 85 percent of whatever sentence
10 you give him. He knows that. He knew that coming into
11 the trial.

12 So under those circumstances we just feel like
13 that a sentence in the range of 10 to 15 years would be
14 more than sufficient. Obviously we would like less, but
15 I, just under the circumstance, feel like the Court
16 would not indulge less. We just feel like that would be
17 more than sufficient for the situation and the
18 circumstances and the crime he is charged with.

19 THE COURT: Thank you, Mr. Cheatham.

20 MR. CHEATHAM: Thank you, Your Honor.

21 THE COURT: Yes, sir. I would state for the
22 record, Mr. Cheatham, you have done an admirable job of
23 representing your client.

24 In looking at the facts of the case, however,
25 I cannot be blinded to the fact that the victim in the

1 case was four years old at the time the offense was
2 committed.

3 Although, as you point out, there was no
4 physical injury, some scars go deeper that cannot be
5 seen and really in effect have sentenced [REDACTED] to a
6 life sentence.

7 Based on the totality of the circumstances and
8 the crime involved, on Indictment 2006-GS-32-3249, the
9 State versus Michael Day, criminal sexual conduct with a
10 minor in the first degree, the Defendant having been
11 found guilty of that offense on 9 November, 2006, the
12 Defendant is committed to the State Department of
13 Corrections for a determinate term of 30 years.

14 Good luck to you, Mr. Day.

15 MS. HEATH: Thank you, Your Honor.

16 THE COURT: Thank you, Solicitor. Thank you,
17 Mr. Cheatham.

18 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
19
20
21
22
23
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25

C E R T I F I C A T E

I, the undersigned L. Coconut Pantsari, Official Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal, in the Criminal Court for Lexington County, South Carolina on the 6th, 7th, and 9th days of November, 2006.

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

March 31, 2007

L Coconut Pantsari

Court Reporter

FORM 5

A TRUE COPY

STATE OF SOUTH CAROLINA

COUNTY OF Lexington

Michael Dwight Day #318413 2010 MAY 19 P 4:25
 Full name and prison number (if any) of Applicant.

FILED IN THE COURT OF COMMON PLEAS

BETH A. CARRIGG
 CLERK OF COURT
 LEXINGTON SC

v.

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

2010CP3202119

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 Leiber Correctional Institution
2. Name and location of Court which imposed sentence Lexington County Judicial Center
3. Name(s) of co-defendant(s) (if any) N/A 205 East Main St, Lexington, SC 29072
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2006-GS-32-3249
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 11-9-2006 (30 years)
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES BETH A. CARRIGG
LEXINGTON SC
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. Court of Direct Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. May 18, 2009
- 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) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

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- (a) Ineffective Assistance of Trial Counsel
- (b) Multiply violations of Due Process
- (c) Trial Counsel's Failure to Challenge Hearsay Testimony

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

- (a) Trial counsel neglected to investigate and present DNA Issues.
- (b) Sufficiency of Evidence through ineffectiveness of counsel
- (c) Trial counsel failed to address certain issues during the course of Trial.

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

- (a) any petition in a State Court under South Carolina Law? YES
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. Direct Appeal
- ii. Brief for Rehearing
- iii. Writ of Certiorary
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. Court of Direct Appeals
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. Denied
- ii. Denied
- iii. Denied

BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

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iv. _____

(d) the date of each such disposition:

i. May 18, 2009

ii. August 24, 2009

iii. April 8, 2010

iv. _____

2010CP3202119

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. N/A

iii. N/A

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. 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

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2010 MAY 19 P 4:25
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CLERK OF COURT
LEXINGTON SC

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) Ineffective Assistance of Counsel

(b) Multiple Violations of Due Process

(c) Trial Counsel's Failure to Challenge Hearsay Testimony

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? YES
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

2010CP3202119

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. John Cheatham P.A. - Po Box 1345
Lexington, SC 29072
 - ii. Elmer Duffy Cleary - SC Comm. on Indigent Defense
Division of Appellate Defense
 - iii. Wanda H. Carter - Po Box 11589
Columbia, SC 29211
- (b) the proceedings at which each such attorney represented you:
- i. Trial/Sentencing
 - ii. Direct Appeal
 - iii. Direct Appeal

BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

2010 MAY 19 P 4:25

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19. State clearly the relief you seek in filing this application:

New Trial

20. Are you now under sentence from any other court that you have not challenged?

NO

2010CP3202119

ORIGINAL

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Lexington)
Michael

I, Da Y, 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.

Michael Deys

SWORN to and subscribed before me this 14th
day of May, 2010

Sylvia Jones (L.S.)
Notary Public

My Commission Expires: 1/24/2018

FILED
2010 MAY 19 P 4:25
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

ORIGINAL

2010CP3202119

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, ^{Michael} ~~Day~~, 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.

Michael Day
Applicant

SWORN or affirmed to and subscribed before me this

14th day of May, 2010.

Sylvia Jones
Notary Public

My Commission Expires: 1/24/2018

FILED
2010 MAY 19 2 4:25
BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

pending CA file #2006 0340
no previous PCC/SVP file

ATTORNEY GENERAL'S OFFICE

289

RECEIVED 06/08/2010

ADMINISTRATIVE - 1000000000

_____ FID

_____ VALUE

_____ ROUTE TO

_____ ORDER _____

_____ PEN RECORDS _____ CLEAR RECORDS

_____ OTHER _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No.: 2010-CP-32-2119
COUNTY OF LEXINGTON	)	
Michael Dwight Day, # 318713,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the application for post conviction relief (PCR) filed May 19, 2010, 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 Clerk of Court for Lexington County. The Applicant was indicted at the October 2006 term of the Lexington County Grand Jury for Criminal Sexual Conduct with a Minor (2006-GS-32-3249). He was represented by John Cheatham, Esquire. On November 6-9, 2006, the Applicant underwent trial, pursuant to which he was found guilty as charged. He was sentenced by the Honorable R. Knox McMahon to confinement for a period of thirty (30) years.

A timely notice of appeal was filed and an Anders brief was submitted on the Applicant's behalf. The South Carolina Court of Appeals subsequently denied the Applicant's appeal by decision dated May 18, 2009.

Attached herewith and incorporated herein by reference are the records of the Lexington County Clerk of Court regarding the subject convictions; and the Applicant's records from the South Carolina Department of Corrections.

II.

In his current application, the Applicant alleges he is currently being held in custody unlawfully based on the following grounds:

1. Ineffective Assistance of Counsel
 - a. "Trial Counsel's failure to challenge hearsay testimony"
 - b. "Trial Counsel neglected to investigate and present DNA issues"
 - c. "Sufficiency of evidence through ineffectiveness of counsel"
 - d. "Trial Counsel failed to address certain issues during the course of trial"
2. Multiple Violations of Due Process

III.

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

The proper measure of performance "is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland.

Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Nevertheless, the allegation of ineffective assistance of counsel probably raises a question of fact which cannot be conclusively refuted by the record and, therefore, requires that an evidentiary hearing be held. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983); Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

IV.

Respondent submits that the Applicant's second allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss this allegation.

V.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VI.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

Respectfully submitted,

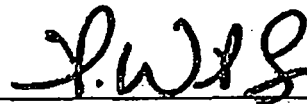
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By:



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September 2, 2010.

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON) COURT OF GENERAL SESSIONS

Michael D. Day,)
)
) PCR HEARING
 PLAINTIFF,) 2010-CP-32-02119
)
 -VS-)
)
 State of South Carolina,)
)
 DEFENDANT.)
_____)

BEFORE THE HONORABLE WILLIAM P. KEESLEY, JUDGE

MAY 18, 2011

LEXINGTON, SOUTH CAROLINA

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

Aaron J. Kozloski, Esq.
For the Plaintiff

David Spencer, Esq.
For the State

REMA K. GANTT THOMAS
CIRCUIT COURT REPORTER

I N D E X

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E X H I B I T S

THERE WERE NO EXHIBITS WERE INTRODUCED AT THIS HEARING.

4

1 (The defendant, together
2 with counsel, was personally present in the
3 courtroom.)

4 THE COURT: All right, which one is next?

5 MR. SPENCER: We're going to call Michael
6 Day. Your Honor, let me know whenever you're ready

7 THE COURT: I'm ready.

8 MR. SPENCER: All right, Your Honor. This
9 next case is Michael Day versus the State of South
10 Carolina. For the record, my name is David Spencer
11 with the Attorney General's Office. We're playing a
12 little bit of ping-pong going back between different
13 attorneys today.

14 Mr. Day filed this application on May
15 19, 2010. He's currently housed in the Department
16 of Corrections. He was indicted for criminal sexual
17 conduct with a minor. He was represented by John
18 Cheatham -- I hope I'm saying that right -- who's
19 hear today.

20 He went to trial in November of 2006,
21 and he was found guilty as charged. This was a
22 bench trial, Your Honor. It wasn't a jury trial.
23 He was sentenced to 30 years by Judge McMahon.

24 An appeal was filed. The return
25 reflects there was an Anders brief, I think. My

1 recollection actually is that it was a merits brief.
2 But, regardless, the conviction was affirmed.

3 Mr. Day is represented here today by
4 Mr. Kozloski, and I would just ask that Mr. Kozloski
5 set out his allegations for the record.

6 THE COURT: Yes, sir?

7 MR. KOZLOSKI: Thank you. Good morning,
8 Your Honor, if it please the Court. In this post-
9 conviction relief action, my client, Mr. Day,
10 alleges ineffective assistance of counsel.
11 Specifically, the meat and potatoes are failure to
12 challenge hearsay testimony, neglected to
13 investigate and present DNA evidence issues.

14 And there is some other general
15 failure to address issues. But the focus, the crux
16 of the case basically, would be hearsay testimony
17 and the possibility that DNA evidence may have made
18 a difference in the outcome.

19 THE COURT: Call your first witness.

20 MR. KOZLOSKI: Thank you very much, Your
21 Honor. I would like to call Mr. Day first, if I
22 may.

23 THE COURT: Yes, sir.

24 Mr. Day, you need to come up here
25 toward me. The Clerk will swear you in.

1 (The witness was sworn.)

2 CLERK OF COURT: Please be seated and
3 state your name for the record.

4 THE COURT: Over here, Mr. Day.

5 MR. DAY: Michael Day.

6 MICHAEL D. DAY, having first been
7 duly sworn, testified as follows:

8 DIRECT EXAMINATION

9 BY MR. KOZLOSKI:

10 Q Michael, how old are you today?

11 A Twenty-eight.

12 Q Twenty-eight. This event -- offense --
13 allegedly occurred in 2000. How old were you then?

14 A Seventeen.

15 Q Seventeen -- almost eighteen, but still
16 seventeen. How much education do you have?

17 A I've got my GED.

18 Q Okay. When did you get that GED?

19 A 2006.

20 Q Okay. In 2000, how much education did you
21 have at that time?

22 A Ninth, tenth grade education.

23 Q Ninth or tenth. Do you recall being
24 interviewed by a Detective Russell in connection
25 with this case?

1 A I do.

2 Q Okay. How old were you then -- 22, 23?

3 A Yes, 22, 23.

4 Q Twenty-two, twenty-three, okay. Now, you
5 -- according to the trial transcript, you waived
6 your right to a jury trial. Why did you do that?

7 A It was like a 20/20 chance either way it
8 went.

9 Q Okay. So you didn't feel like you'd
10 benefit from a jury?

11 A Not till after it was over.

12 Q When did you start to feel like you might
13 have benefited from a jury trial?

14 A Probably the last day of the trial.

15 Q Okay. Did you discuss that at all with
16 your attorney?

17 A No, I did not.

18 Q All right. Now, Michael, we've gone over
19 your application for post-conviction relief
20 together. And one of the allegations in this
21 application is that trial counsel neglected to
22 investigate and present DNA issues. Would you just
23 kind of tell us in your own words what you mean by
24 that?

25 A From my understanding and what little bit

1 of research I do have available to me, in a case
2 such as this you've got to be able to prove that I
3 done this within a reasonable doubt. You can't
4 prove I done it other than somebody said I done it.
5 There is nothing whatsoever to prove that, "Yes, I
6 am 100 percent positive he done this."

7 Q Okay. Well, what you're saying in your
8 application here is that if there had been some DNA
9 evidence, that would have exonerated you. Is that
10 what you're saying?

11 A If there had been DNA evidence to prove
12 that I done it, then I wouldn't have -- I'm not
13 exactly sure what you're --

14 Q Okay. Now, I understand that you're not a
15 DNA expert or anything like that. Where do you
16 think that kind of evidence might have come from?

17 A I have no idea.

18 Q Was that ever discussed between you and
19 your attorney?

20 A No, sir.

21 Q Okay. How about other types of
22 corroborating evidence? What you're saying, if I
23 understand, is that someone's testimony alone is not
24 enough to convict, that there's got to be more.

25 A Exactly.

1 Q Okay. Did you have any discussion with
2 your attorney about other corroborating -- and you
3 know what "corroborating" means, right? Okay. Did
4 you discuss possible other corroborating evidence
5 with your attorney, ever?

6 A We spoke about the fact that there was no
7 -- the supposed statement that I gave, there was
8 nothing to prove that that was voluntary or
9 unvoluntary [sic]. There was no videotape, no
10 audio. It was my word versus the detective's word.
11 That was really the only thing that the State had
12 against me.

13 Q Okay. Now, are you referring to a written
14 statement that you gave to Lt. Russell -- Detective
15 Russell?

16 A That is correct.

17 Q Okay. Are you now saying that that was
18 not voluntary?

19 A I said in my transcript or at the trial
20 also that it was not voluntary.

21 Q Okay. Why was it not voluntary?

22 A Why would I voluntarily give a statement
23 to somebody new?

24 Q Well, that's the question, sir. But
25 that's the question we're asking you. Why would

1 you?

2 A I wouldn't.

3 Q Then why did you do it?

4 A I was pressured into giving that
5 statement --

6 Q Okay.

7 A -- knowingly. I can't prove that. No, I
8 didn't state that in my trial, which I should have.
9 There's a lot of things I should have done
10 differently in my trial. But there's -- I was
11 pressured into giving that statement.

12 Q Describe the pressure that you felt.

13 A I was physically -- no, not physically.
14 But the detective physically or -- let me get this
15 right. The detective told me that if I did not give
16 him the statement that he wanted or that would get
17 me under -- put me under arrest, I would lose
18 everything. I would be sent to prison for as much
19 time as they could give me, and I would lose my
20 family. He proved true on his word.

21 Q Was he a big guy?

22 A Fairly -- I mean, bigger than me at the
23 time.

24 Q Did you ask for a lawyer?

25 A No, I did not.

1 Q Okay. At what point did you feel like you
2 needed an attorney in this case, because obviously
3 you had one?

4 A Yes. Well, the minute that he put the
5 handcuffs on me and put me in jail that night, I
6 knew I was going to need a lawyer.

7 Q Okay. Now, another point that you make in
8 your PCR application was that trial counsel had
9 failure to challenge hearsay testimony. Was there
10 some particular testimony that you think was hearsay
11 that you wanted to tell us about today?

12 A All the testimony given by any of the
13 witnesses was hearsay, because nobody seen anything.
14 Nobody witnessed any act ever happen.

15 Q All right.

16 A All they can go by is what was told to
17 them.

18 Q Okay. Do you know what the term "hearsay"
19 means?

20 A From one to another.

21 Q Okay. Say that again?

22 A What one person says to somebody else.

23 Q So one person says it to somebody else?

24 A Without there being proof that it actually
25 happened.

12

1 Q Okay. So you're saying basically that it
2 was all second-hand testimony?

3 A Yes, sir.

4 Q Okay. Did you raise these concerns to
5 your attorney?

6 A I already knew about them, but I guess I
7 was wrong, or if he did --

8 Q Okay. Well, I'm just going to go very
9 quickly through who the witnesses were in the case
10 and ask you which ones you felt delivered hearsay
11 testimony. Now, according to the trial transcript,
12 the first witness was a Melanie Trimble..

13 A That was the --

14 Q Do you remember her?

15 A Yes, she was a forensic -- she worked with
16 children. That's all I can basically remember about
17 her..

18 Q Okay. She conducted an interview on --

19 A Yes, sir.

20 MR. SPENCER: I object. I mean, I
21 understand Mr. Day apparently thinks is hearsay is
22 anybody who -- other than a victim. But, I mean, he
23 can just go through the transcript and say the whole
24 transcript is hearsay.

25 I mean, if there's a specific place.

1 in the testimony where an objection needed to be
2 given, I'd like to just have that identified and we
3 can deal with it. But if it's just going to be, you
4 know -- just kind of going through the whole
5 transcript, I object to that. That's just --

6 MR. KOZLOSKI: I understand.

7 MR. SPENCER: -- confusing and not
8 relevant.

9 MR. KOZLOSKI: I understand my colleague's
10 objection, Your Honor. I'm not going to go through
11 the whole transcript. If we find one witness in
12 here that he wants to talk about, then I'd like to
13 present that.

14 THE COURT: The objection is overruled.
15 Go ahead.

16 MR. KOZLOSKI: Okay.

17 Q So Melanie Trimble, was there something of
18 particular concern there?

19 A I cannot object to what she -- I can't
20 rule against what she was saying because she was
21 coming off of a scientific standpoint.

22 Q Okay. Now, Detective Russell, how about
23 him?

24 A Not necessarily, because he was just doing
25 his job.

14

1 Q Okay. [REDACTED] he was the victim in
2 this case. Was there any hearsay testimony you
3 remember from him? Okay, how about --

4 THE COURT: Did you answer?

5 A No, that's --

6 Q Oh, I thought he shook his head no.

7 A No.

8 THE COURT: He can't shake his head. He's
9 got to speak his answers. Did you answer the
10 question?

11 MR. DAY: Yes, sir, I did.

12 THE COURT: What was your answer?

13 MR. DAY: No.

14 THE COURT: Thank you.

15 Q Cindy Darlene Floyd?

16 A She was one of them.

17 Q Okay. What did she say you thought was
18 testimony?

19 A She was not even present. She was not
20 even on the property at the time of the alleged
21 incident.

22 Q Okay. So, then, basically anything she
23 said would have been less than credible?

24 A Yes, sir.

25 Q Okay. Lester Rialoba, that was Cindy's

1 boyfriend.

2 A I'd say yes, but that's only because he
3 said he wasn't in the house. But I can't -- I'm not
4 even -- there's nothing I can do to avoid that one.

5 Q Okay. And the last two are Barbara Day,
6 that was your mom, and Mary Steele.

7 A Neither one of them.

8 Q Okay. Is there anything that I have
9 failed to ask you about? Is there something you
10 feel you need to tell the Court that I have
11 neglected to cover here?

12 A No, you raised the issues that I sent to
13 you.

14 Q Okay. Did you have any concerns or
15 questions with the sentencing portion of the trial?

16 A Well, as far as the sentencing goes, I
17 feel it was a little harsh for somebody who had
18 never been in any kind of trouble, never had
19 anything on his record before.

20 Q Okay. But what I'm asking you --

21 A And the fact that --

22 Q -- is whether there was anything that was
23 said or any evidence introduced during the
24 sentencing phase that you felt was inappropriate?

25 A The comment that was made at the end was a

1 little harsh.

2 Q Okay. What comment would that be?

3 A The comment made by the Solicitor where,
4 if I'm not mistaken, it was said that the alleged
5 victim said that I -- that they wished I could get
6 the death penalty.

7 MR. KOZLOSKI: If the Court will bear with
8 me just a minute, I'm going to try and find that in
9 the transcript.

10 THE COURT: Yes, sir. Okay, I believe
11 I've found it.

12 And, Mr. Attorney General, we're
13 looking at page 276, and we're looking at lines five
14 through eight.

15 MR. KOZLOSKI: Your Honor, may I approach
16 the witness?

17 THE COURT: Yes, sir.

18 Q And, Michael, this is a copy of your
19 transcript trial. What's that page number at the
20 top there?

21 A Two seventy-six.

22 Q Okay. Now, go down to line five.

23 A Uh-huh.

24 Q Read that paragraph to yourself and then
25 tell me if that's the one you're talking about.

1 A That's the one I'm talking about.

2 Q Okay. Would you read that out loud for
3 us, please?

4 A "My discussions with [REDACTED] when I was
5 talking about the possible penalty that his crime
6 carried, [REDACTED] told me that he wished that Mr. Day
7 would get the death penalty."

8 Q Okay. Now, who is it that was saying
9 that?

10 A That was the alleged victim that said
11 that.

12 Q No, that wasn't the question.

13 A Oh, that was the Solicitor that said that.

14 Q Okay, all right. And so that's the one
15 that you felt was inappropriate?

16 A That's correct.

17 Q Okay, thank you. Anything else? Anything
18 else I've missed?

19 A No, sir.

20 MR. KOZLOSKI: Thank you, Your Honor.

21 THE COURT: Cross?

22 MR. SPENCER: And, Your Honor, before I
23 cross, I want to make a motion to strike the hearsay
24 allegation. I mean, just to cast a wide net like
25 has been done to say everything this witness or

1 everything that witness said was hearsay because
2 they weren't there, first of all, that's just not
3 the law.

4 Second of all, I don't want to be
5 stuck in a situation if I'm facing appeal where
6 appellate defense is raising an issue of some
7 obscure piece of testimony that I -- that has not
8 been identified at this point and say there's no
9 testimony listed for Mr. Cheatham because, you know,
10 I don't have memorized every possible piece of
11 testimony in this transcript.

12 So for that reason, I would move to
13 strike the hearsay allegation. I want to make sure,
14 you know, I'm not faced with defending something on
15 appeal that I didn't get a fair chance to defend
16 today.

17 THE COURT: I can't speak as to what might
18 happen in the future or how I'm going to rule. The
19 applicant has the burden of proof. The applicant
20 has to put the proof up.

21 If the applicant doesn't put the
22 proof up, I just think it's unlikely you're going to
23 be facing that down the road. The objection is
24 overruled. Go ahead.

25 MR. SPENCER: And I appreciate your

1 indulgence, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. SPENCER:

4 Q Mr. Day, I wanted to ask you first -- I'm
5 going to ask you about your first issue concerning
6 the waiver of a jury trial. You're saying you had
7 no discussion with Mr. Cheatham beforehand?

8 A I waived my rights. We had a discussion
9 on --

10 Q Okay.

11 A I mean, we discussed that. But it wasn't
12 till later till I realized that I had probably made
13 a mistake doing so.

14 Q Was that when you got convicted?

15 A Probably right before.

16 Q So you're saying in hindsight?

17 A No.

18 Q But you discussed the possibility of
19 having a jury trial versus a bench trial, and your
20 attorney --

21 A Yes, sir, we had that discussion.

22 Q And you decided to --

23 A I decided to go --

24 A -- follow your attorney's advice.

25 Q -- with a bench trial.

1 Q And do you recall why your attorney
2 suggested the bench trial?

3 A It was actually my idea.

4 Q You're saying it was your idea?

5 A I'm the one told him I wanted a bench
6 trial.

7 Q Okay. You knew what a bench trial was?

8 A Yes, sir. I went straight before the
9 Judge. The Judge decided everything instead of 12
10 different people.

11 Q In considering the DNA issue, you're --
12 what are you saying that your attorney should have
13 done concerning the DNA issue?

14 A My whole point of people bringing that up
15 was the fact that how else you going to prove I done
16 this?

17 Q All right, sir.

18 A All you've got is somebody saying I done
19 it.

20 Q You just didn't feel that was sufficient
21 proof to have --

22 A It's not.

23 Q -- the victim testify that you did it?

24 And that's just your personal opinion?

25 A I've read that in a crime of this matter,

1 THE COURT: Yes, sir.

2 Q Okay. Now, there was a written statement,
3 is that correct?

4 A That's correct.

5 Q You wrote that out yourself, isn't that
6 right? And do you recall telling the Solicitor when
7 you were being cross-examined pre-trial that you
8 wrote it of your own will?

9 A I do believe that I did state that, even
10 though -- it didn't come out the way I wanted it to.
11 And once it was said, it was too late to retract it.

12 Q All right. But you agree with me you said
13 you did write the statement of your own will?

14 A I did say that, even though it wasn't --
15 even though it didn't come out right.

16 Q And then you had said Detective Russell
17 couldn't make you write it. Do you recall that?

18 A No, actually, I don't.

19 Q All right.

20 MR. SPENCER: And, Your Honor, rather than
21 belabor the point further, that portion of the
22 testimony is on page 85 of the transcript. Your
23 Honor, I don't have any further questions.

24 THE COURT: Redirect?

25 MR. KOZLOSKI: Thank you, Your Honor.

1 REDIRECT EXAMINATION

2 BY MR. KOZLOSKI:

3 Q Michael, when you waived your right to a
4 jury trial, did your attorney advise you in any way
5 on that? Did he try to talk you out of it, tell you
6 it was a good idea, anything?

7 A He told me, you know, what I was -- as far
8 as the possibilities of it could go either way
9 regardless of what I decided. He advised on one,
10 and then he advised on the other, as well. He
11 basically left the ultimate choice up to me. It was
12 up to me.

13 Q Okay. Now, one final question here. You
14 did say at the trial that Detective Russell couldn't
15 make you write that statement, and you did say that
16 "I did write it own my own will." Now, let's get at
17 what you meant by that when you said that at that
18 time.

19 A Well, it's like I told the gentleman here,
20 it didn't come out right. When I was talking to the
21 Solicitor and she was crossing me, what I told her
22 -- what I meant to tell her was what I told you,
23 that Detective Russell couldn't make me do that of
24 my own freewill.

25 Q Couldn't grab your hand and hold it and

1 make you move the pen?

2 A Yes.

3 Q But --

4 A But I was coerced into giving that
5 statement.

6 Q Okay, thank you.

7 MR. KOZLOSKI: Nothing further, Your
8 Honor, thank you.

9 THE COURT: Recross?

10 MR. SPENCER: Thank you, Your Honor.

11 RECROSS EXAMINATION

12 BY MR. SPENCER:

13 Q Just briefly, Judge McMahon also advised
14 you of your right to have a jury trial versus a
15 bench trial, is that correct?

16 A That's correct.

17 MR. SPENCER: Thank you. I have no
18 further questions.

19 THE COURT: Thank you, sir. You may step
20 down.

21 Any other witnesses for the
22 applicant?

23 MR. KOZLOSKI: Yes, Your Honor. I'd like
24 to ask that Mr. Cheatham, who represented Mr. Day at
25 trial, be called, please.

1 THE COURT: Come around, please, sir.

2 (The witness was sworn.)

3 CLERK OF COURT: Please be seated and
4 state your name for the record.

5 MR. CHEATHAM: John Cheatham.

6 THE COURT: All right, you may continue.

7 MR. KOZLOSKI: Thank you, Your Honor.

8 JOHN CHEATHAM, having first been duly
9 sworn, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. KOZLOSKI:

12 Q Good morning, Mr. Cheatham. My name is
13 Aaron Kozloski, and I represent Michael Day in this
14 post-conviction relief action. We have not had the
15 pleasure of meeting before, I don't think.

16 A Not that I recall.

17 Q Have you had a chance to review Michael's
18 PCR application? Are you familiar with it?

19 A I have reviewed it, yes.

20 Q Okay. He's made several complaints in
21 here, and I'd like to focus on one or two of them
22 initially. Michael states that trial counsel
23 neglected to investigate and present DNA issues.

24 He states in his application that there
25 needed to be some sort of corroborating evidence

1 other than the victim's testimony. Was DNA
2 something that you and he ever discussed during the
3 course of your representation?

4 A No. There were several years between the
5 alleged conduct and the trial.

6 Q Uh-huh.

7 A And to my knowledge, there was no DNA
8 involved in this case whatsoever. So if there is,
9 the State never produced anything about it, and I
10 never knew anything about it.

11 Q Okay. There were several points raised by
12 Michael during his testimony and in the application.
13 He waived his right to a jury trial. Do you recall
14 him doing that and why he did that?

15 A That was a tough decision. When we went
16 through the list of jurors, there were a lot of
17 jurors on there that had contact with young
18 children. And we felt like that if we got two or
19 three there on the jury that it would end up being,
20 so to speak, an automatic conviction.

21 I discussed it with another attorney who
22 was here and what he thought about it. And he said
23 if it was him, he would do that. So we discussed it
24 with Michael, and I told him absolutely, positively
25 it was his decision.

1 I wasn't making a recommendation one way
2 or the other, but that there were a lot of people on
3 the prospective list that were teachers, Highway
4 Patrol, things of that nature -- I think there was a
5 preacher -- that would be very lenient and would
6 lean more towards the believability of the child
7 than him.

8 Q Yes, sir.

9 A And we did discuss that in great detail,
10 and he did go through questioning by Judge McMahon
11 about whether he freely and voluntarily made that of
12 his own volition without relying on any
13 recommendation from me.

14 Q Yes, sir.

15 A And he said he did.

16 Q And I understand what you're saying. But,
17 still, he would have had ten strikes, is that
18 correct?

19 A That's correct.

20 Q He could have chosen ten jurors.
21 Michael's other chief complaint was that, aside from
22 sufficiency of evidence, in his words, trial
23 counsel's failure to challenge hearsay testimony.
24 Specifically, we focused on two witnesses during his
25 questioning.

1 One would have been Cindy Floyd, who was
2 [REDACTED] [REDACTED] mother, and the other, Lester
3 Rialoba, the boyfriend of Cindy Floyd. He claims
4 all their testimony was hearsay because they weren't
5 even home, they weren't even in the house, that they
6 weren't around at the time this incident allegedly
7 occurred in 2000. And he claims you failed to
8 object to any of their testimony. Do you recall
9 these two witnesses?

10 A I recall the two witnesses. The mother
11 was basically verifying that she was in the hospital
12 and that the -- that sort of went along with the
13 timeline that they were trying to establish. They
14 had several timelines which we argued about but lost
15 on.

16 The timeline that they finally came up
17 with was Christmas of 2000, and she was in the
18 hospital about that time. And they -- the two of
19 them gave varying stories about where Michael lived,
20 where he stayed, and what occurred. But they didn't
21 get into the actual details of anything other than
22 what they personally observed.

23 Q Yes, sir. And that's interesting. A
24 difficulty with this case was establishing the time
25 and the timeline that this offense was supposed to

1 have occurred.

2 A Yes.

3 Q And I think it's been narrowed down --
4 well, what the Form 217 says here, the indictment,
5 date of offense, it says December 2000-January 2001.

6 A There were several other indictments and
7 things before that, and that was one of the reasons
8 that we were arguing that certain evidence should
9 not come in because of the fact that he kept
10 changing the time frame.

11 We had witnesses that would have been more
12 beneficial to Michael if the original time frame had
13 been used. But they just kept doing it. And, of
14 course, they have a right to do it, so they kept
15 doing it.

16 Q So during this timeline that was finally
17 established sometime during December or maybe
18 January, Michael, according to his testimony and his
19 birthday on the documents here, would have been 17
20 years old --

21 A Correct.

22 Q -- if this happened in December?

23 A Correct.

24 Q He would have been 18 years old if it
25 happened in January?

1 A Correct.

2 Q Well, late January. His birthday is
3 January 25th, do you agree with that? Okay. Would
4 it have made any difference whether he was 17 or 18
5 when it happened in light of the nature of the
6 offense or the sentencing?

7 A It could have. But, generally speaking,
8 if you're 17 years old, you're treated as an adult
9 in this state.

10 Q Okay. I didn't see that discussed in the
11 transcript anywhere. Do you recall if that was ever
12 a topic of discussion between you and Michael?

13 A That he was 17 or 18?

14 Q Whether he was 17 or 18 when it happened,
15 yes, sir.

16 A No, he just said he was 17 when it
17 happened.

18 Q Okay. Do you have a copy of the
19 transcript up there with you, sir?

20 A I do.

21 Q Okay. May I invite you to page 276,
22 please.

23 A Yes.

24 Q Okay, 276. I'd ask you, sir, if you'd go
25 down to line five --

1 A Yes.

2 Q -- and read to yourself lines five through
3 eight for a moment.

4 A I would just call your attention that this
5 is after conviction discussions.

6 Q Yes, sir, this is the sentencing phase.
7 It is. Have you had a chance to review that?

8 A Yes.

9 Q Okay. This comment by the Solicitor that
10 she says the victim told her she wished that Mr. Day
11 could get the death penalty, this is the sentencing
12 phase. Did you find that to be inflammatory in any
13 way or improper?

14 A Not at the time, because obviously he
15 couldn't get the death penalty.

16 Q But obviously, it's -- well, the Solicitor
17 is not testifying.

18 A Right.

19 Q Obviously relaying comments from the
20 witness. Did you find that to be inappropriate at
21 all?

22 A It possibly could have been objected to.
23 But, again, in the sentencing phase, they usually
24 allow a little leniency.

25 Q Thank you, sir.

1 MR. KOZLOSKI: A moment, Your Honor,
2 please.

3 THE COURT: Yes, sir.

4 MR. KOZLOSKI: Thank you, Your Honor.

5 THE COURT: Questions of the witness?

6 MR. SPENCER: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. SPENCER:

9 Q I was going to pick up where direct kind
10 of left off concerning the statement. Is it your
11 opinion that basically what the Solicitor was saying
12 is that he wanted -- is that the victim was asking
13 for the defendant to be severely punished?

14 A Well, death would be a severe punishment,
15 yes.

16 Q The Solicitor wasn't advocating a death
17 penalty a death penalty or anything like that
18 obviously?

19 A Well, obviously, the death penalty wasn't
20 on the table.

21 Q I wanted to go over with you and I wanted
22 to make sure I got good notes on the issue of the
23 jury trial. If you could explain your reasoning
24 again about why you elected to go with the bench
25 trial.

1 A Well, it was a tough decision, but there
2 were a lot of people there that particular day that
3 would have been very receptive or very lenient
4 towards a child's testimony -- teachers, things of
5 that nature. There was I think an ex-Highway
6 Patrolman, if I recall correctly.

7 And so while you have ten strikes, you may
8 end up with one or two or three people like of that
9 nature. And then I discussed it with another
10 attorney because he approached me about it. And he
11 said, "You sure you're going to try this before a
12 jury?"

13 And I said, "Well, yes, I think so." He
14 said, "Well, you might be better off thinking about
15 a Judge." And I said, "Well, I thought about that,
16 and I'm going to discuss it with my client and see
17 what he says."

18 Q And were you familiar with Judge McMahon
19 at all at that point?

20 A Vaguely.

21 Q Were you aware he was a former Solicitor,
22 a former Assistant Solicitor?

23 A Yes. He was in Lexington and Richland
24 County.

25 Q And how did that weigh into your

1 reasoning?

2 A Well, I thought he might, you know, hold
3 the prosecutor to a higher standard maybe since he
4 was prosecuting and knew what needed to be proven,
5 with probably a little bit more expertise than an
6 average Judge would.

7 Q All right. How long have you been a
8 practicing attorney?

9 A Since 1970.

10 Q Okay. And how much trial work -- jury
11 trial work -- have you done over the years?

12 A I really couldn't tell you.

13 Q Is it fair to say a substantial amount?

14 A Pretty fair amount, but most of it was
15 civil.

16 Q Okay. But that included pulling juries in
17 civil work?

18 A Yes.

19 Q All right. And so you've had a lot of
20 experience trying to select the best possible jury?

21 A Yes.

22 Q And is it fair to say in your professional
23 experience when you were looking at the jury pull
24 that day that you felt it wasn't -- that your
25 chances of getting a favorable jury were not good?

1 A That was my opinion and the other attorney
2 I talked with.

3 Q I wanted to revisit the time frame issue
4 that kind of came up on direct. Was this set for
5 trial one time before it was called for trial this
6 time?

7 A It had been set for trial previously.
8 When we showed up, they changed the date, so they
9 gave me a continuance.

10 Q And that was from December 2001 to
11 December 2000?

12 A Correct, if my memory serves me right.

13 Q Okay. So they were basically a year off
14 on their incident date for the indictment?

15 A Well, I think they gave a spread, if I
16 recall correctly, of about three or four months. It
17 wasn't a specific time until we got to there.
18 Before, it would have been like a three- or four-
19 month period, like I think from June to September,
20 and then they changed it to something else.

21 But it was always a window there. But
22 when they got to calling the trial, then they said,
23 "Yes, we're going with Christmas of 2000." Then
24 that was the most specific time that they come up
25 with.

1 Q And do you recall using the first
2 indictment, the indictment that was a year late --
3 had a date that was a year later? Do you recall
4 using that indictment to cross-examine the mother?

5 A Yes, and we handed it up to the Judge.
6 And we also had some arrest warrants that we had the
7 Judge consider that were different dates, also.

8 Q And you were able to do that even over the
9 State's objection?

10 A Yes, the Judge said he would consider the
11 dates only, he would not consider anything else,
12 because all we were trying to show is that they were
13 flip-flopping around on the date of occurrence,
14 which made it most difficult for us.

15 MR. SPENCER: Your Honor, I have no
16 further questions.

17 THE COURT: Thank you.

18 Redirect?

19 MR. KOZLOSKI: I have nothing, Your Honor.

20 THE COURT: Thank you, sir. You may step
21 down.

22 MR. CHEATHAM: Thank you, Your Honor.

23 THE COURT: Any further witnesses for the
24 applicant?

25 MR. KOZLOSKI: No, Your Honor.

1 THE COURT: Anything further from the
2 State?

3 MR. SPENCER: No, Your Honor.

4 THE COURT: Do you all wish to make any
5 closing arguments?

6 MR. SPENCER: Just briefly, Your Honor.

7 THE COURT: The applicant goes first.

8 MR. KOZLOSKI: I have no closing argument,
9 Your Honor.

10 THE COURT: The State?

11 MR. SPENCER: Your Honor, just based on
12 that, I'll be brief. But I think, you know, in
13 hindsight maybe there's a regret as to requesting a
14 jury trial or not requesting a jury trial on the
15 applicant's part.

16 But I think that was a well-reasoned
17 decision, and I don't know if a jury trial would
18 have been much better, quite frankly. But that's
19 trial strategy.

20 The DNA issue is I think there was no
21 DNA to be had. This is way before a new case, and I
22 think obviously that his legal position is not the
23 law. Obviously, just the victim's testimony is
24 enough to convict.

25 I've stated my problems with the

1 hearsay, that the applicant has not met his burden
2 on that allegation to even consider it. Obviously,
3 the death penalty statement was not the Solicitor
4 trying to get the death penalty.

5 But he was trying to show that the
6 victim was really calling for a harsh sentence in
7 this case as a result of the seriousness of the
8 crime that was perpetrated against him. As to the
9 voluntariness of the statement, Your Honor, I think
10 I pointed out the last page of cross-examination
11 from the Solicitor.

12 You know, that basically went -- the
13 voluntariness went to the weight on admissibility.
14 And quite frankly, the weight was very heavy that
15 this was just a voluntary statement. And on this
16 allegation, really there's nothing more that counsel
17 could have done on that point.

18 The applicant had the chance to
19 explain why he didn't think it was voluntary. Your
20 Honor, I'd ask that this application be denied.
21 Thank you, Your Honor.

22 THE COURT: All right, I'm going to issue
23 in writing my order. The written application
24 asserts ineffective assistance of counsel, wrongful
25 violation of due process, trial counsel's failure to

1 challenge hearsay testimony.

2 It states on the written application,
3 "Trial counsel neglected to investigate DNA issues,
4 sufficiency of the evidence, the ineffectiveness of
5 counsel. Trial counsel failed to address certain
6 issues during the course of the trial."

7 Today the petition was somewhat
8 clarified. The application was somewhat clarified
9 in that the focus of -- and I'm not saying it's
10 limited to this, but the focus was to hearsay and
11 the DNA. Normally, I don't announce my ruling from
12 the bench.

13 But Mr. Day's just mistaken. He's
14 just mistaken on the law. Section 16-3-657 of the
15 specific statute provides that in criminal sexual
16 conduct cases, testimony of the victim does not have
17 to be corroborated. It doesn't really have to be
18 really corroborated in any case.

19 But the legislature has put in a
20 specific statute to make that abundantly clear. So
21 his belief that the testimony of the victim alone is
22 not sufficient is just erroneous. He's just
23 mistaken about that. The testimony of the victim is
24 sufficient.

25 With regard to the DNA, there is no

1 evidence presented that there was any DNA to be
2 obtained. My reading of the transcript when the
3 victim testified, he testified to the defendant
4 requiring him to perform -- the victim to perform --
5 oral sex on the defendant and said that that was
6 interrupted by his father coming home and that the
7 defendant did not ejaculate.

8 So I don't know where there'd be any
9 DNA anyway. If there were, it was reported so much
10 later I don't know how it could possibly be
11 presented. This is a question of what the attorney
12 could have done, and there just wasn't anything Mr.
13 Cheatham could do to try to develop DNA evidence
14 that didn't exist.

15 With regard to the hearsay, the only
16 specific person that I heard him identify was Cindy
17 Floyd. He said all of what she said was hearsay.
18 Well, he's mistaken about what hearsay is.

19 I'm not being critical here. He
20 doesn't have legal training, but saying where
21 somebody lives and things like that, those are not
22 hearsay. That's not trying to repeat what someone
23 else said.

24 And then when Ms. Floyd did attempt
25 to get into hearsay, in the one part where she did

1 from my reading of the testimony, Mr. Cheatham
2 objected, and the objection was sustained. So he
3 did object to the one time that she attempted to get
4 into hearsay testimony.

5 I don't know what his assertions
6 about due process violations are because he didn't
7 specify any. And so he's utterly failed to prove
8 those. And with regard to the statement being
9 coerced, the transcript refutes his assertions
10 today.

11 And the rules related to how these
12 officers can question witnesses, they allow a whole
13 lot more than what this indicates was done. Now, he
14 may have felt under a great deal of pressure. And
15 if I was in his position and I was in prison, I'd be
16 trying to get out, too.

17 But there's nothing in this record to
18 support the officer had improperly coerced. And
19 they had the hearing, and all the lawyer can do is
20 put up the evidence, and then the Judge makes the
21 call.

22 But the attorney can't be the Judge.
23 And basically, you hit the nail on the head, Mr.
24 Attorney General, about the jury question. This
25 witness' testimony, the applicant's testimony, was

1 it was his decision to have a bench trial.

2 He suggested it. . And then, toward
3 the end of the trial, it wasn't going his way, and
4 he decided that wasn't a good call. Well, he
5 doesn't know how it would have gone with a jury
6 either. That's pure speculation, number one. And
7 it's nothing more than Monday morning
8 quarterbacking.

9 It's just not established. He's
10 utterly failed to produce any grounds for post-
11 conviction relief. The application is going to be
12 denied.

STATE OF SOUTH CAROLINA)

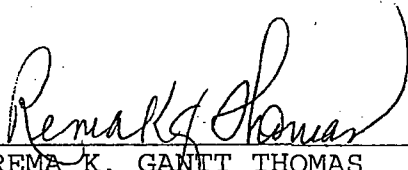
COUNTY OF LEXINGTON)

COURT REPORTER'S CERTIFICATION

I, REMA K. GANTT, OFFICIAL COURT REPORTER, AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE ABOVE-CAPTIONED CASE ON MAY 18, 2011, IN LEXINGTON, SOUTH CAROLINA.

I FURTHER CERTIFY THAT I AM NEITHER OF COUNSEL NOR KIN TO ANY OF THE PARTIES TO THIS CAUSE OF ACTION, NOR AM I INTERESTED IN ANY MANNER IN ITS OUTCOME.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND SEAL AT LEXINGTON, SOUTH CAROLINA, THIS THE TWELFTH DAY OF JANUARY 2012.


REMA K. GANTT THOMAS
OFFICIAL COURT REPORTER
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 11/21/2013

ORIGINAL

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	C.A. NO. 10-CP-32-2119
COUNTY OF LEXINGTON	)	
	)	
Michael D. Day,	)	
S.C.D.C. No. 318413,	)	
	)	
Applicant,	)	ORDER OF DISMISSAL
	)	
VS.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Case #1
This matter is before this Court by way of an application for post-conviction relief (PCR) filed May 19, 2010. The State made its return on September 2, 2010. A hearing on the matter was convened at the Lexington County Courthouse on May 18, 2011. Applicant was present and represented by Aaron J. Kozloski, Esquire. The State was represented by David Spencer of the South Carolina Office of the Attorney General.

Applicant testified on his own behalf. His *trial* counsel, John Cheatham, Esquire, also testified. Additionally, this Court had before it the trial transcript, the Clerk of Court's *records* *live* regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the PCR application, and the State's return.

PROCEDURAL HISTORY

Applicant is presently incarcerated with the South Carolina Department of Corrections. Applicant was indicted at the October 2006 term of the Lexington County Grand Jury for Criminal Sexual Conduct with a Minor (2006-GS-32-3249). He was represented by John Cheatham, Esquire. Applicant and his counsel elected to waive a jury trial and proceed to trial before the Honorable R.

Knox McMahon on November 6, 7, and 9, 2006. Judge McMahon found Applicant guilty as charged and sentenced Applicant to thirty years imprisonment. Applicant appealed and the conviction and sentence ^{WERE} ~~was~~ affirmed by decision dated May 18, 2009.

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 presented 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 (2003).

Ineffective Assistance of Counsel and Involuntary Plea

Wade #2 Applicant makes various allegations of ineffective assistance of counsel. The burden of proof is on the applicant in a PCR proceeding to prove the allegations in his application. Bell v. State, 321 S.C. 238, 467 S.E.2d 926 (1996); Rule 71.1(e), SCRCP.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Judge v. State, 321 S.C. 554, 471 S.E.2d 146 (1996). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective

assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

This Court will now address each allegation of ineffective assistance of trial counsel below:

Impermissible hearsay

Applicant claims counsel failed to object to impermissible hearsay. This Court finds the claim unsupported. First, Applicant has a fundamental misunderstanding as to what hearsay is. Applicant testified he believes a witness must have been present during the commission of the alleged crime and if not, all the witness's testimony will be hearsay. Applicant fails to grasp that hearsay is basically testimony by a witness as to what another person said out of court. Applicant was unable to make any specific cites to alleged impermissible hearsay. Applicant alleged Cindy Floyd's testimony was impermissible hearsay, but in reviewing the record, this Court did not find any objectionable hearsay elicited from Floyd, except one instance where counsel did object and his objection was sustained. Applicant has failed to meet his burden of showing counsel's performance was deficient and further, Applicant failed to prove prejudice. This allegation is denied.

Failure to investigate, lack of evidence

Applicant alleges counsel was deficient for failing to investigate and produce evidence, such as DNA evidence. Applicant seems to also be arguing that evidence was insufficient to convict him. Applicant believes an accused cannot be convicted of a crime based solely on the testimony of the purported victim. As to that belief, he is mistaken. Specifically, S. C. Code Ann. § 16-3-657 declares that a victim's testimony need not be corroborated.

Further, no evidence was presented that DNA evidence could be obtained. As is often the case in prosecutions involving sexual abuse of a child, the incident was not reported by the victim

until several years later. Further, the victim testified Applicant's sexual abuse was interrupted when victim's father entered the dwelling. Victim testified Applicant did not ejaculate. This Court notes Applicant gave a statement to law enforcement admitting to the incident, and other corroborating evidence was provided at trial. Applicant failed to provide any evidence to suggest that counsel failed to properly investigate the case or develop favorable evidence.

Accordingly, this Court finds Applicant failed to prove counsel's performance was deficient or that Applicant was prejudiced by any such deficiency. This Allegation is denied.

Coerced statement

Applicant alleges he was coerced into giving a statement. The trial transcript refutes that claim and contains testimony from Applicant himself to the contrary. Applicant now says he did not mean that testimony in the way it was ^{STRICK} read and he felt coerced because law enforcement told him he had to give the statement or he would have everything taken away from him. This Court finds that Applicant's testimony at the hearing does not support a claim that his statement was coerced by law enforcement, nor would the testimony have resulted in his statement being suppressed at trial. Further, this Court does not find Applicant's testimony to be credible regarding his claim of coercion. During the trial, he testified he gave the statement of his own will and he was not threatened and could not have been made to provide a statement. This Court finds Applicant failed to meet his burden of proving either prong of Strickland.

Sentencing hearing

Applicant testified in the PCR hearing about a comment by the Solicitor that the victim stated he wished Applicant had received the death penalty. Since the death penalty was not applicable, as known by everyone present, the only reasonable conclusion was that the statement was hyperbolic and

meant to express that the victim wanted Applicant to receive the maximum sentence. Applicant fails to show that this statement was objectionable or that Applicant was prejudiced by the Statement. He has therefore failed to meet his burden of proving counsel ineffective.

Bench trial

WJL
#5

Applicant testified about the decision to have a bench trial instead of a jury trial. No evidence was presented that counsel's performance was deficient in this regard. First, Applicant testified in the PCR hearing that the bench trial was his suggestion. Second, the trial attorney stated a strategic decision was made by the client, after consultation, based on the fact they perceived the jury pool to be unfavorable to their claim. The client and the attorney thought that they would have a better chance with a bench trial. The trial judge properly asked Applicant about his decision to waive a jury trial. His decision to do so was free and voluntary. Basically, it appears to this Court that Applicant is stating in hindsight he would have been better off with a jury trial, but this is pure speculation and not a proper ground for granting post-conviction relief. This Court finds Applicant has failed to prove either prong of Strickland.

Any other allegations

As to any other issues that may not be specifically addressed in the PCR hearing, they are deemed abandoned by Applicant and not proven. Applicant was given numerous opportunities to fully state his claims. His testimony was extremely non-specific and generalized. Applicant failed to produce any witnesses or offer any other evidence from which the Court could conclude that the outcome of the case would likely have been different, had that evidence been developed.

CONCLUSION

Based on 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.

~~CAUTIONS~~ ~~ADA~~
This Court ~~advises~~ the parties that in order to secure the appropriate appellate review, notice of appeal must be served and filed within thirty (30) days after receipt by counsel of notice of entry of this order. See Rules 203 and 243 of the South Carolina Appellate Court Rules. This Court notes that post-conviction relief counsel must advise an applicant of the right to seek appellate review of a post-conviction relief order. State v. Bray, 366 S.C. 137, 620 S.E.2d 743 (2005). Also, pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a notice of appeal on an applicant's behalf.

#6
IT IS THEREFORE ORDERED:

1. The application for Post-Conviction Relief is denied with prejudice;
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 12th day of Sept., 2011.


William P. Keesley
Presiding Judge
11th Judicial Circuit

Lexington, South Carolina

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Michael D. Day, Appellant.

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Unpublished Opinion No. 2009-UP-205
Heard February 3, 2009 – Filed May 18, 2009

AFFIRMED

Appellate Defender Wanda H. Carter, of
Columbia, for Appellant.

Attorney General Henry Dargan McMaster,
Deputy Attorney General John W. McIntosh,
Deputy Attorney General Salley W. Elliott,
Assistant Attorney General William M. Blitch, Jr.,
all of Columbia; and Solicitor Donald V. Myers, of
Lexington, for Respondent.

PER CURIAM: Michael D. Day appeals his conviction for first degree criminal sexual conduct with a minor. He contends section 17-23-175 of the South Carolina Code (Supp. 2008), which provides for the admission of videotaped interviews of child sexual abuse victims under certain circumstances, was erroneously applied to his case in contradiction to the savings clause included in the enacting legislation. Day further contends the application of the statute constitutes an ex post facto violation. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: State v. Bryant, Op. No. 4522 (S.C. Ct. App. Filed Mar. 25, 2009) (Shearouse Adv. Sh. No. 15 at 39, 43) (holding the savings clause accompanying the enacting legislation did not preclude application of section 17-23-175 to cases tried after the date of its enactment because section 17-23-175 did not repeal or amend any existing law); Id. at 45 (finding the application of section 17-23-175 does not constitute an ex post facto violation

because the statute deals with evidentiary matters, which are not penal in nature); Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not address additional issues if the resolution of another issue is dispositive).

AFFIRMED.

HUFF, WILLIAMS, and KONDUROS, JJ., concur.

WITNESSES

LCSD
Russell, Eric

DOCKET NO. 2006 GS-32- 3249

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

October TERM 2006

THE STATE

vs.

Michael Dwight Day
AKA Brian Jones Day

A-2005-32-00883

3/16/2005 12:03 PM

ARREST WARRANT NUMBER

STRAIGHT INDICTMENT

TRUE BILL

ACTION OF GRAND JURY

Bong A Lucas
Foreperson of Grand Jury
Date: *16 Oct 06*

VERDICT

Guilty

Chas M. Malone
Foreperson of Petit Jury

Date: *9 Nov 06*

CDR# 0385

Indictment for

Criminal Sexual Conduct With A Minor
1st Degree

§16-3-655(1)

DONALD V. MYERS, SOLICITOR

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

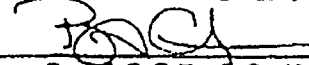
INDICTMENT FOR
Criminal Sexual Conduct With A Minor
1st Degree

§16-3-655(1)

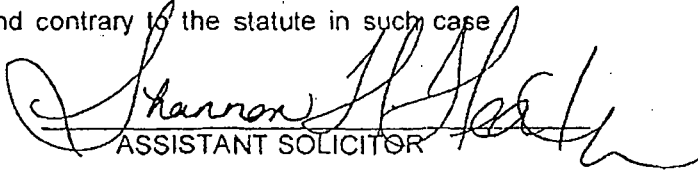
At a Court of General Sessions, convened on October, 2006, the Grand Jurors of Lexington County present upon their oath:

That Michael Dwight Day did in Lexington County on or about or between December 1, 2000 and January 31, 2001, knowingly and willfully commit a sexual battery on and with the body of [REDACTED] approximately age 4, a child under the age of eleven years, to wit: coerce the victim into performing oral sex on him, in violation of § 16-3-655(1) of the Code of Laws of South Carolina, 1976, as amended.

A TRUE COPY


Lex. Co. C.C.C.P., G.S. & F.C.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA

A TRUE COPY IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATE

Lexington

VS.

Lex. Co. C.C.C.P.

INDICTMENT/CASE#:

GS- 32

3249

AKA:

Race:

Sex: m

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

A/W#:

Date of Offense:

S.C. Code §:

CDR Code #:

☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS

TO:

in violation of § 16-3-655 of the S.C. Code of Laws, bearing CDR Code # 0131815

☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☒ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: ☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%) \$ §14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00§14-1-211(A)(2) (DUI Surcharge) \$100 \$ §56-5-2995 (DUI Assessment) \$12 \$ § 35.13 (Public Def/Prob) \$500 \$ §73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00§33.7, 1B TP (Drug Court Surcharge) \$100 \$ §50-21-114(BUI Breath Test Fee) \$50 \$ §56-5-2942(J) (Vehicle Assessment) \$40/ea \$ 3% to County (if paid in installments) \$ TOTAL \$

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning\$ paid to Public Defender FundOther:

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Court Reporter:

CMTI330D

SCDC OFFENDER MANAGEMENT SYSTEM

07/06/10

OMCOMITA

RELEASE DATE SCREEN

C048593

SCDC# > 9318713

LOC: LIEBER

DAY, MICHAEL -

SCDC CLASSIFICATION... VIOLENT

OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE

SEXUAL REGISTRY...: Y

SEXUAL PREDATOR...: PENDING

DNA STATUS...: COMPLETED

GPS REQUIREMENT...: N

PREA DECISION...:

CURRENT SENTENCE: 030-00-000

CONSECUTIVE SENTENCE ...: N

030-00-000

CURRENT SENT START DATE: 06/07/2006

PROJECTED COMPLETION DATES

MAXOUT DATE: 11/30/2031

CURRENT EWC ..: 3 F 5

YOA SIX YEAR DATE: / /

CURRENT EEC ..: NOT CURRENTLY EARNING EEC

INITIAL PAROLE DATE: 00/00/0000

NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED: 000000

LABOR CREW/WORK PROG DATE: 99/99/9999

TOTAL EARNED WORK CREDITS ...: 000349

LABOR CREW DISO REASON:

TOTAL EDUCATION CREDITS: 000000

CURRENT OR PRIOR SEX CONDUCT CONVICT

TOTAL EXTRA EARNED CREDITS ..: 000

TOTAL SERVICE TIME EARNED ...: 001469

PFKEYS:

S: HISTORY OF DATE CHANGES

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
RECORD SUMMARY REPORT DATED 07/06/10

C0485

DAY, MICHAEL - FRI # 641025HC3 SID# SC01620546 SCDC # 318713

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION .: LIEBER CORRECTIONAL INST.

SECURITY/CUST.: 3 MINIMUM IN

CURR INCARC SENT...: 30 YRS 0 MOS 0 DYS

CENTRAL MONITORING.: YES

SOCIAL SECURITY #... [REDACTED]

DORM.....: WD0274R

RACE...: W SEX...: M

PROJ MAXOUT DATE: 11/30/2031

PROJ PAROLE DATE: 00/00/0000

EWC JOB...: WARDKEEPER ASSISTANT

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 3F5 EEC LEVEL:

ASSIGNMENT...: WARD HELPER WARD #5

CURRENT PROGRAM...: NO CURRENT PROGRAM

AGE...: 27 DATE OF BIRTH...: [REDACTED]

PREVIOUS NUMBERS:

** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE				SENTENCE		
	YRS	MOS	DYS	COUNTY	START	U/NU	CATEGORY
CRIM SEX COND. W/MINOR(1S	30	0	0	LEXINGTON	6/ 7/20	6 U	5

PRIOR COMMITMENTS OVER 90 DAYS:

MISSING PRIORS DATA

DETAINERS (HOLD, WANTED, NOTIFY):

CRIMINAL SEX CNDCY 1ST DE

NOTIFY

OPEN ARREST NOTIFICATION CATEG: 5

NO DETAINERS

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

8/22/ 8 POSSESSION OF A WEAPON DROPPED CHARG

NON-ASSAULTIVE DISCIPLINARIES:

2/10/10 USE POSS NARC, MARIJ, UNAU CONVICTED MAJOR

HISTORY OF MOVEMENTS:

DATE	LOCATION	STATUS	REASON
6/24/10	LIEBER	INCARCERATED	ADMINISTRATIVE
6/24/10	RICHLAND CO	AUTH ABSENCE (AWL)	MEDICAL
6/17/10	LIEBER	INCARCERATED	ADMINISTRATIVE
6/17/10	PALMETTO RCHLAN	AUTH ABSENCE (AWL)	MEDICAL
4/20/10	LIEBER	INCARCERATED	MEDICAL
4/20/10	TRIDENT REGIONA	AUTH ABSENCE (AWL)	MEDICAL
4/ 7/10	LIEBER	INCARCERATED	ADMINISTRATIVE
11/17/ 9	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
11/17/ 9	KIRKLAND	INCARCERATED	MEDICAL
6/15/ 9	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
6/15/ 9	KIRKLAND	INCARCERATED	MEDICAL
5/ 5/ 9	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
5/ 5/ 9	KIRKLAND	INCARCERATED	MEDICAL
3/17/ 9	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
3/17/ 9	KIRKLAND	INCARCERATED	MEDICAL
2/17/ 9	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
2/17/ 9	KIRKLAND	INCARCERATED	MEDICAL
1/15/ 8	BROAD RIVER	INCARCERATED	ADMINISTRATIVE
12/ 6/ 6	LIEBER	INCARCERATED	ADMINISTRATIVE
11/15/ 6	KIRKLAND	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
WARDKEEPER ASSISTANT	04/09/10	0/ 0/ 0		3F5
FOOD SERVICE AIDE	06/06/08	4/ 7/10	INSTIT TRANSFER	3F5
STOREKEEPER	04/16/08	6/ 5/ 8	LATERAL TRANSFER	3F7
FOOD SERVICE AIDE	02/12/08	4/15/ 8	LATERAL TRANSFER	3F5
MECHANIC HELPER	06/21/07	1/15/ 8	INSTIT TRANSFER	3F5

DAY, MICHAEL - FBI # 641025HC3 SID# SC01620546 SCDC # 318713 (CONTINUED)

HISTORY OF EARNED EDUCATION CREDITS:

EEC	START	END	TERMINATION
DESCRIPTION	DATE	DATE	REASON
BONUS 4-7 HRS/WK	11/19/07	1/15/ 8	INSTIT TRANSFER
LVL 3 - FULL TIME(NO EWC)	01/24/07	6/20/ 7	INMATE REQUEST

***** END OF REPORT *****