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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of General Sessions
G. Thomas Cooper, Jr., Circuit Court Judge
Case No. 2008-GS-40-07372

Opinion No. 5046 S.C. Ct. Appeals November 14, 2012

State of South Carolina.....Respondent,

vs.

Kendra Samuel.....Petitioner.

APPENDIX

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

Appellant/Respondent,

vs.

KENDRA SAMUEL,

Respondent/Appellant.

RECORD ON APPEAL

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State of South Carolina	)	
	)	
Plaintiff,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
Kendra Patricia Samuel	)	
	)	
Defendant	)	

November 29 & 30, 2010
Columbia, South Carolina

BEFORE:

Honorable G. Thomas Cooper, Jr., Judge
And a jury

APPEARANCES:

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Dolly Justice-Fairfield, Asst. Solicitor
Dan Goldberg, Asst. Solicitor
Attorneys for the State

Dick Harpootlian, Esq.
Graham Newman, Esq.
Attorneys for the Defendant

KAREN AMBROZIAK
Official Court Reporter

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CERTIFICATE OF REPORTER

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1 THE COURT: Is the State ready to proceed?

2 MS. CAMPBELL: Yes, sir, Your Honor.

3 THE COURT: Is the defense ready to proceed?

4 MR. HARPOOTLIAN: Yes, Your Honor.

5 THE COURT: All right. Call your case.

6 MS. CAMPBELL: The State calls the State vs. Kendra
7 Samuel. She is charged with one count of homicide by child
8 abuse, Your Honor.

9 THE COURT: All right.

10 MS. CAMPBELL: And we're getting the witness list
11 right now. Just a minute, it will be coming back.

12 THE COURT: All right. Any requested voir dire on
13 behalf of the State?

14 MS. CAMPBELL: I have not received any from the
15 defense yet, so I do not know.

16 THE COURT: Any requests from the defendant?

17 MS. CAMPBELL: There will be once I see his. I
18 haven't seen his.

19 MR. HARPOOTLIAN: Your Honor, I also have a list of
20 potential witnesses that I'll hand up to the Court, and
21 give a copy to the State. And, Your Honor, we'd request
22 that should you publish the witness list to this jury that
23 you not delineate between prosecution and the defense,
24 so that they're not --

25 THE COURT: Never do.

1 I guess the other thing I'm going to ask you to do,
2 just have a pleasant evening, relax. See you at
3 eleven o'clock in the morning, and I hope we'll be on time
4 and be ready to start at that time. So thank you very
5 much. Have a pleasant evening.

6 THE BAILIFF: Follow me, please.

7 THE JUROR: Thank you, Jesus.

8 (WHEREUPON, the jury left open court at approximately
9 two o'clock.

10 THE COURT: All right. Counsel, are there going to
11 be motions? Can somebody give me a list of motions?

12 MR. HARPOOTLIAN: The only motion we made to be heard
13 pretrial would be the Jackson V. Denno motion to
14 suppress --

15 THE COURT: All right.

16 MR. HARPOOTLIAN: -- the statement.

17 THE COURT: And the State is prepared to go forward
18 on that?

19 MS. CAMPBELL: Yes, sir.

20 THE COURT: All right. Any motions from the State?
21 I'm not going to take them up right this minute.

22 MS. CAMPBELL: The only other thing we have, Your
23 Honor, if he plans to try suppress testimony pursuant to
24 a Council issue, we would want them taken up pretrial.

25 THE COURT: All right. Tell me -- I'm just trying

1 to be thinking about that. What...

2 MS. CAMPBELL: This is only based on what he
3 represented in chambers the other day.

4 THE COURT: I understand. What determines when it's
5 taken up? I understand what your request is, but I can't
6 find any case law that says it should be taken up pretrial
7 or when the witness is called.

8 MS. CAMPBELL: I think the reason he would not -- he
9 wants the jury sworn before you make a decision. Your
10 Honor, we may -- it may be dispositive. It may be
11 something that would be appealable for us based on your
12 decision. That's the reason we would ask for it to be
13 done in pretrial.

14 THE COURT: Okay, so if I were to exclude your
15 A-Number-One witness --

16 MS. CAMPBELL: With your --
17 (Talking over each other.)

18 THE COURT: -- and you're saying you can't go forward
19 with that? It's grounds for appeal?

20 MS. CAMPBELL: Yes, sir. That would be the reason
21 we would be requesting it.

22 MR. HARPOOTLIAN: Well, Your Honor, there is no case
23 law indicating we have to make it pretrial. We don't know
24 whether -- we believe there may be a Council issue.

25 We don't know -- again, we still don't have his

1 notes. We don't know what his testimony is going to be.
2 They have seen fit not to give them to us pretrial.

3 We have not -- I have tried to talk to him. He won't
4 talk to me. There are other witnesses that are not
5 available to talk to me, so for me to make a Council motion
6 without understanding the context -- you know, what would
7 normally happen in any expert, you don't do
8 it -- necessarily do it pretrial.

9 I attempted to do that. They don't have him here
10 ready. I'm not about to go forward with my Council motion
11 without their witness that he -- I assume Clay Nichols
12 will be here at some point.

13 MS. CAMPBELL: Your Honor, his whole theory is it
14 attaches to the witness. The Council motion is whether
15 or not the testimony in general is -- the science is such
16 that it should be allowed to come before this jury. It
17 doesn't attach to a certain witness.

18 THE COURT: I understand that.

19 MR. HARPOOTLIAN: I'm not prepared to go forward with
20 a Council motion.

21 THE COURT: Let me --

22 MR. HARPOOTLIAN: I'm sorry. I'm sorry. I
23 apologize.

24 THE COURT: I mean, at any point during the trial,
25 if a witness were disqualified, a jeopardy has already

1 attached.

2 MS. CAMPBELL: That's the problem.

3 MR. HARPOOTLIAN: Your Honor, I propose --

4 MS. CAMPBELL: Apparently, if this is going to be an
5 issue that we anticipate, it would be easier to take it
6 up pretrial. We could take it up first thing in the
7 morning.

8 THE COURT: All right. What about these notes?

9 Mr. Harpootlian, are you familiar with --

10 MS. JUSTICE-GARFIELD: I never even saw them in our
11 trial, Your Honor. It it's my understanding, it's his
12 notes he makes, then he compiles for court his notes.

13 THE COURT: All right. That's fine.

14 MS. JUSTICE-GARFIELD: I'll be happy to call over
15 lunch and get a copy of them. It's nothing his office
16 has ever provided the State in the past.

17 THE COURT: That's fine, if you can get them. All
18 right. I think we're going to have to take up...

19 What? Mr. Hollis has got something urgent he wants
20 to talk to me about.

21 Mr. Hollis is hungry. When he does that --

22 MR. HARPOOTLIAN: He looks a little faint, Judge. If
23 you don't feed him, he like collapses.

24 THE COURT: Yes. Well, we're going to have to -- what
25 about witness number two and witness number three and

1 witness number four, or is Council only applicable to Dr.
2 Nichols?

3 MS. CAMPBELL: No, sir. The Council issue -- I think
4 it's whether or not the -- Council talks about whether
5 or not the testimony itself, not the testimony of a
6 particular person, as to in this case abusive head trauma
7 or Shaken Baby Syndrome should come in. That's my
8 understanding of what he's going to attempt to exclude.

9 That would be the limits within we would work as far
10 as whether we have any kind of Council hearing as to
11 whether or not that testimony comes in. It would not just
12 be to one witness.

13 THE COURT: I see what you're saying.

14 MS. CAMPBELL: I'm just trying to distinguish, it
15 doesn't attach just to Clay Nichols. I mean, it attaches
16 to any expert --

17 THE COURT: I mean, how can we deal with it in the
18 abstract if we don't have a witness who can --

19 MS. CAMPBELL: I can have a witness that can come in
20 and talk about the science itself, whether or not it's
21 recognized and whether it's been published and all the
22 different Council factors.

23 THE COURT: Well, does every witness say the same
24 thing?

25 MS. CAMPBELL: As far as what Shaken Baby Syndrome

1 is?

2 THE COURT: Yes.

3 MS. CAMPBELL: Yes, sir. I mean, it's abusive -- it's
4 called Abusive Head Trauma now.

5 THE COURT: I know.

6 MS. CAMPBELL: It's Shaken Baby Syndrome, and I don't
7 want to make it -- belittle it as far as the words go.
8 Actually, there's extensive case law on it where it's been
9 admitted in the past.

10 THE COURT: I've read some case law.

11 MR. HARPOOTLIAN: Your Honor, I think --

12 THE COURT: And other cases.

13 MR. HARPOOTLIAN: I think there's a misapprehension
14 here. We're not necessarily challenging the basis of the
15 science. We're challenging the basis of the ability of
16 a specific witness to testify.

17 THE COURT: Well, in that case --

18 MR. HARPOOTLIAN: And we'd like to deal with that
19 when that witness is available to examine in-camera before
20 they testify.

21 THE COURT: I understand that.

22 MR. HARPOOTLIAN: Which we do on Daubert and we do
23 in Counsel.

24 THE COURT: Well, you can -- you can question any
25 witness when he or she is called as to the extent of his

1 or her expertise under 702, but what Ms. Campbell is
2 saying, as I understand it, is that she wants the Court
3 to rule on whether or not the specific syndrome that she
4 is referring to is admissible in terms of the scientific
5 or medical literature.

6 MR. HARPOOTLIAN: Well, that's not our motion.
7 That's not our motion. So we haven't made a motion to
8 do that. If -- our motion goes specifically to the
9 witnesses and you --

10 THE COURT: Well, you don't need to -- you don't
11 challenge that as a scientific theory or a medical theory?

12 MR. HARPOOTLIAN: Shaken Baby Syndrome?

13 THE COURT: Yes.

14 MR. HARPOOTLIAN: We will challenge with a specific
15 witness how they applied it. I mean, Shaken Baby Syndrome
16 has a number of different interpretations, but we'll deal
17 with -- we're ready to deal with a specific witnesses,
18 not is there a Shaken Baby Syndrome. Oh, there's 5,000
19 pieces of literature on Shaken Baby Syndrome.

20 Certainly, there's a diagnosis that can be made, even
21 though the American Pediatrics Association rejected it
22 within the last year. That's not something that even needs
23 to be discussed prior to the trial.

24 MS. CAMPBELL: It has not been rejected by the
25 American Academy of Pediatrics.

1 MR. HARPOOTLIAN: Well, Your Honor --

2 THE COURT: Well --

3 MR. HARPOOTLIAN: -- we can nanny-nanny-boo-boo all
4 afternoon, but I think it's something we need to deal with
5 during trial.

6 THE COURT: Well, I mean, that seems logical. I
7 understand your -- I don't understand what the State
8 proposes to offer. If we're not -- as you say, it's not
9 witness specific.

10 MS. CAMPBELL: If he is stipulating that Shaken Baby
11 Syndrome or Abusive Head Trauma is an accepted scientific
12 theory that would assist this jury in trying this and that
13 any qualified person should be able to do that, such as
14 any medical doctor or anything like that, we are -- we
15 don't have any reason for that.

16 MR. HARPOOTLIAN: We're not stipulating to anything.
17 What we're saying --

18 THE COURT: I understand that, but I mean, I think
19 that's where we are that -- and I don't know how you make
20 this a part of the record that there is -- I think I've
21 got to have something on the record to say that there is
22 an accepted, although challenged, theory or diagnosis of
23 Shaken Baby Syndrome or Acute Head Trauma.

24 Once that is done, then you can -- as each witness
25 is called, you can disprove that as you see fit from that

1 witness, but there's got to be something on this record
2 so we don't have to do it anew with each witness.

3 MR. HARPOOTLIAN: Well, Your Honor, if they want to
4 call witnesses to make a motion in limine to have it
5 admissible before we start the trial, that's their
6 business.

7 I'm not moving in limine to suppress or -- or to
8 somehow exclude testimony at this point. I mean, we've
9 not interviewed one witness. This isn't a civil case
10 where I've been able to do depositions.

11 THE COURT: I understand.

12 MR. HARPOOTLIAN: I'm here waiting to see what they
13 throw up on the stand to see if it sticks to the wall,
14 so I'm not in position to challenge.

15 All I know is his notes say Shaken Baby. The two other
16 experts they have mentioned we attempted to talk to.
17 They've given a number of different diagnoses in other
18 cases we'd like to discuss with them, but I'm not telling
19 you there's not a Shaken Baby Syndrome diagnosis.

20 THE COURT: How do you wish to proceed, Ms. Campbell?
21 I mean, it seems to me that each witness has got to make
22 his or her own evaluation of whether or not that is the
23 cause of death.

24 MS. CAMPBELL: Yes, sir. I agree with that. My
25 understanding --

1 THE COURT: Whether there's a syndrome or not, I mean,
2 we're dealing with a child who is deceased, and the cause
3 of death is the primary --

4 MS. CAMPBELL: The manner of death, yes.

5 THE COURT: -- issue. How that came about may or may
6 not adversely affect the defendant. Am I clear?

7 MS. CAMPBELL: All -- no, I'm sorry. I don't -- I
8 don't understand.

9 THE COURT: All right. There's no motion on the
10 floor.

11 MS. CAMPBELL: There's no motion from the defense on
12 the floor?

13 THE COURT: Right.

14 MR. HARPOOTLIAN: Except the Jackson v. Denno.

15 THE COURT: Well, I understand, with regard to this
16 issue.

17 MS. CAMPBELL: We are proceeding with this case.
18 The diagnosis from several different experts is going to
19 be that this baby died as a result of trauma to the head
20 that was inflicted by what's now called Abusive Head
21 Trauma, which is called Shaken Baby Syndrome.

22 THE COURT: Well, just tell me, is it just the -- what
23 factors, retinal hemorrhaging?

24 MS. CAMPBELL: No, sir.

25 THE COURT: And --

1 MS. CAMPBELL: Subdural hemorrhaging.

2 THE COURT: Subdural hematoma. Anything else?

3 MS. CAMPBELL: And subarachnoid hemorrhaging.

4 THE COURT: Sub--- okay.

5 MS. CAMPBELL: Subdural and subarachnoid

6 hemorrhaging.

7 THE COURT: Those two. Anything else? In other

8 words --

9 MS. CAMPBELL: There was edema in the brain, as well,

10 Your Honor.

11 THE COURT: Any broken bones? Any other trauma to

12 the child?

13 MS. CAMPBELL: There was bruising to the -- to certain

14 extremities on the child.

15 THE COURT: All right.

16 MS. CAMPBELL: To the face, to the arm.

17 THE COURT: So you do --

18 MS. CAMPBELL: To the back, I believe.

19 THE COURT: All right. So there's other evidence

20 out -- other than those two --

21 MS. CAMPBELL: There was cut on the lip, yes, sir.

22 THE COURT: A what?

23 MS. CAMPBELL: There's a cut on the lip.

24 THE COURT: Okay.

25 MS. CAMPBELL: I believe there's bruising on the

1 face.

2 THE COURT: All right. That's --

3 MS. CAMPBELL: Back of the head and on his back, excuse
4 me.

5 THE COURT: All right. That's -- okay. Well, then
6 I think everybody knows what the playing field is. We'll
7 take it up with each witness as they testify.

8 MS. CAMPBELL: And it's my understanding they are not
9 challenging the admissibility of the actual syndrome
10 itself. Otherwise, I would like to put up a witness in
11 the morning to -- to have you make a ruling.

12 MR. HARPOOTLIAN: Well, I don't know what I'm going
13 to challenge, Judge. I have no idea. I've never heard
14 these witnesses.

15 THE COURT: Well, you can challenge -- I assume you're
16 going to challenge them.

17 MR. HARPOOTLIAN: I'm challenging -- everything they
18 put up, I'll challenge.

19 THE COURT: No problem. I assume that.

20 MR. HARPOOTLIAN: That's what I'm supposed to do.

21 THE COURT: All right. Do you wish to proffer
22 witnesses at this stage of the trial?

23 MS. CAMPBELL: Well, I mean, this --

24 THE COURT: That will be subject to
25 cross-examination?

1 MS. CAMPBELL: Yes, sir, as far as --

2 THE COURT: To establish --

3 MS. CAMPBELL: The scientific theory of Shaken Baby
4 Syndrome and/or Abusive Head Trauma.

5 THE COURT: Well, if that's what the State wants to
6 do, that's what the State will -- you're certainly
7 entitled to do that. That solves the issue. All right.
8 We'll take up Jackson v. Denno around three o'clock.

9 MS. CAMPBELL: Okay.

10 THE COURT: 3:15.

11 (WHEREUPON, a lunch break was taken.)

12 THE COURT: Mr. Harpootlian?

13 MR. HARPOOTLIAN: May it please the Court, Your
14 Honor. We would move for the purpose of this hearing and
15 throughout the trial to sequester the witnesses, the
16 State's witnesses, and we'll do the same with our witnesses
17 in this case.

18 I discussed this with the Solicitor, and she has
19 indicated two things to me: One is that the victim has
20 a right to be here.

21 THE COURT: Right.

22 MR. HARPOOTLIAN: We would argue with that, but more
23 importantly, the Victim's Bill of Rights does not define
24 anybody other than the victim. In this case, the child's
25 mother, the grandmother, the aunt, those are not victims

1 under the Victim's Bill of Rights.

2 THE COURT: Well, are they testifying witnesses?

3 MR. HARPOOTLIAN: Yes, and critical testifying
4 witnesses.

5 THE COURT: All right. I just asked the question.

6 MR. HARPOOTLIAN: I'm sorry.

7 THE COURT: Don't get offended.

8 MR. HARPOOTLIAN: Sorry I got cranky. I ate late.

9 So other than -- I mean, the mother -- obviously,
10 we believe that to the due process, right of
11 confrontation, right of the defendant, and the so-called
12 victim's constitutional -- state constitutional Victim's
13 Bill of Rights, but even under that, the only person that
14 can stay in here would be the mother, not all the other
15 relatives.

16 THE COURT: And the investigating officers.

17 MR. HARPOOTLIAN: Well, Your Honor, why are they
18 entitled to -- my understanding of the law here is the
19 chief investigating officer can stay in the courtroom,
20 not chief investigating officers. I mean, there are how
21 many chiefs are there? There are no Indians.

22 THE COURT: All right.

23 MS. CAMPBELL: You're so funny.

24 THE COURT: I don't know who is on first, but at
25 the -- Solicitor's table, but I -- I think the -- I'm going

1 to call it the primary -- I don't know who is responsible
2 for what.

3 How about it, Ms. Campbell?

4 MS. CAMPBELL: Your Honor, all the State would request
5 is that the investigating -- two primary investigating
6 officers be allowed to remain in. The victim's mother and
7 father would stay in the courtroom, but we would sequester
8 the rest of the witnesses.

9 MR. HARPOOTLIAN: The victim's mother and father,
10 okay.

11 MS. CAMPBELL: I think that would be --

12 MR. HARPOOTLIAN: We would object to that under the
13 confrontation clause and the United States Supreme Court
14 case on the right to confront witnesses.

15 We understand sequestration is within your
16 discretion. However, their ability to hear each
17 other -- the other witness's testimony as with the
18 officers -- who are the two chief investigating officers?

19 MS. CAMPBELL: Investigators Thomas and Reese.

20 MR. HARPOOTLIAN: Are they both involved in the
21 confession?

22 THE COURT: Is it Reese and Thomas?

23 MS. CAMPBELL: Yes, sir.

24 THE COURT: All right. Reese and Thomas, the mother
25 and father.

1 MS. CAMPBELL: And at this time, they are the first
2 witnesses, so we'd ask these two to leave.

3 MR. NEWMAN: That would be great.

4 MS. CAMPBELL: Also, is Angela Youngblood in the
5 courtroom? That is the first witness on the list.

6 We would just ask that any of their witnesses be
7 sequestered, as well.

8 THE COURT: How is she -- is she related to somebody?

9 MR. HARPOOTLIAN: She is the mother of the defendant.

10 THE COURT: Okay.

11 MR. HARPOOTLIAN: But not protected by the Victim's
12 Bill of Rights.

13 THE COURT: Okay.

14 MR. HARPOOTLIAN: And Your Honor, I would ask,
15 especially in light of the sequestration, that means not
16 only can they not be in here, but they should not discuss
17 what happens in here with witnesses outside.

18 THE COURT: That's correct.

19 MR. HARPOOTLIAN: Do they understand that?

20 MS. CAMPBELL: I'll be glad to explain that.

21 MR. HARPOOTLIAN: Please.

22 (Pause)

23 THE COURT: All right. As to the Jackson v. Denno,
24 what is your motion?

25 MR. HARPOOTLIAN: My motion is to suppress any and

1 all statements made by the defendant to law enforcement
2 officers.

3 THE COURT: Your grounds?

4 MR. HARPOOTLIAN: That she was not properly advised
5 of her rights.

6 THE COURT: Voluntariness.

7 MR. HARPOOTLIAN: The voluntariness.

8 THE COURT: Okay.

9 MR. HARPOOTLIAN: And, Your Honor, that the -- there
10 is a tape recording which is turned on and off, so the
11 tape recording, we would object. Even if the statements
12 come in, the tape recording should be excluded.

13 We have a line of cases on that. I'll be happy to
14 hand up to the court once we find out how many times they
15 turned it on and off.

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

17 MR. GOLDBERG: Investigator Joe Gray.

18 THE COURT: I'm sorry, was there anything before we
19 call the first witness?

20 MS. JUSTICE-GARFIELD: Your Honor, I just want to let
21 you know, I had contact with Dr. Nichols. He informs me
22 the notes that are in that bound book are notes that he
23 uses to make a report. It is considered work product.
24 They do not routinely turn that over to the prosecution.
25 However, he is having a colleague make a copy of that

1 currently. I'll have an investigator pick that up. I'll
2 be happy to turn it over as soon as I has possession.

3 MR. HARPOOTLIAN: Thank you, Your Honor.

4 JOE GRAY, JR.,

5 after being duly sworn, testified as follows:

6 THE CLERK: Thank you. Have a seat in the witness
7 stand.

8 THE BAILIFF: Watch your step for me, please, and
9 speak into the microphone.

10 THE CLERK: State your name for the record.

11 THE WITNESS: Joe Robert Gray, Jr.

12 MR. GOLDBERG: I just need something marked for I.D.

13 (WHEREUPON, State's Exhibit No. 1 was marked for
14 identification only.)

15 DIRECT EXAMINATION:

16 BY MR. GOLDBERG:

17 Q Investigator Gray, where are you employed?

18 A Columbia Police Department.

19 Q How long have you been with C.P.D.?

20 A I actually retired in 2009 and have worked a part-time
21 status since that time. So a total of about 27 years.

22 Q And can you describe your duties with the department
23 over the years and what they are now, as well?

24 A I began in 1984 as a uniformed police officer. I did
25 that for about three years, was on a task force team for

1 a couple years, promoted to an investigator in 1989,
2 remained in the rank of investigator up until my
3 retirement in 2009.

4 During that course of time, I was trained as a polygraph
5 examiner, as well, from 2003 up until my present position.

6 Q Currently, that is your position now?

7 A Yes.

8 Q Back on August 6th of 2008, did you have an opportunity
9 to come in contact with the defendant, Kendra Samuel, in
10 this case?

11 A Yes, I did.

12 Q And what was the nature of that contact that you had
13 with her?

14 A The investigators in the case, Reese and Thomas, had
15 asked me to administer a polygraph examination on her in
16 relation to this investigation on the child's death,
17 Aiden.

18 Q And that was on August 6th, 2008?

19 A Yes, it was.

20 Q I'm going to show you what's been marked as State's
21 No. 1 for I.D. at this time. Do you recognize this, sir?

22 A Yes, sir.

23 Q And what is that item?

24 A This is an interrogation, advice of rights form.

25 Q Can you tell the Court a little bit about you -- your

1 conversation with Ms. Samuel and how it began and how it
2 led into the review of that document, as well?

3 A Well, she was advised that she was in the office there
4 for a polygraph examination, and I spoke with her for a
5 few minutes about that and just went through the different
6 steps of the examination.

7 During that review of the process, I advised her there
8 was some forms, one was which -- the interrogation of
9 rights form. After I talked with her about that, we went
10 and the room where the polygraph is administered. I
11 introduced this form to her.

12 Q And can you explain to the court how you went over
13 that form with her?

14 A Yes. I filled in the top portion, which is the
15 location where she was advised of the rights, the date
16 and the time that I began reading the rights. I just began
17 reading the form to her. On the top portion, I marked
18 off the statement as I completed it.

19 Q And what was the location date and time put on the
20 form?

21 A This is 1 Justice Square, the 8th or -- or the 6th
22 of August, 2008 at 10:30 a.m.

23 Q And you said you read each line to her?

24 A Yes, I did, the top.

25 Q Can you read those to the Court, please?

1 A Yes. "Before we ask you any questions, you must
2 understand your rights. You have the right to remain
3 silent. Anything you say can be used against you in
4 court. You have the right to talk to a lawyer for advice
5 before we ask you any questions and to have him with you
6 during questioning. If you cannot afford a lawyer, one
7 will be appointed for you before any questioning, if you
8 wish.

9 "If you decide to answer questions now without a
10 lawyer present, you will still have the right to stop
11 answering at any time.

12 "You also have the right to stop answering at any
13 time until you talk to a lawyer."

14 Q Did Ms. Samuel appear to understand those rights?

15 A Yes.

16 Q And did you note that on the form in some manner?

17 A I did not note that on the form. I did ask her if
18 she understood those rights, and then I went right into
19 the waiver of rights.

20 Q Were there some check marks placed on the form, as
21 well?

22 A Yes.

23 Q What were those there for?

24 A I just did that to make sure I didn't skip any of
25 those advisements.

1 Q And can you then move on to the portion under those
2 rights that were advised?

3 A The portion under those rights says waiver of
4 rights. That says, "I have read this statement of my rights,
5 and I understand what my right are. I am willing to make
6 a statement and answer questions.

7 "I do not want a lawyer at this time. I understand
8 and know what I am doing. No promises or threats have
9 been made to me and no pressure or coercion of any kind
10 has been used against me."

11 Q Did Ms. Samuel appear to understand the waiver of her
12 rights?

13 A Actually, I asked her to read that portion out loud.
14 She did so and acknowledged that she understood her
15 rights.

16 Q And did she acknowledge in written form, as well?

17 A Yes.

18 Q And how did she do that?

19 A She signed the form.

20 Q At any time during your advisement of her rights, did
21 you make any promises to her in any way --

22 A No, sir.

23 Q -- in order to get her to waive those rights?

24 A No, sir.

25 Q Did you threaten her in any way?

1 A No, sir.

2 Q Any offers of leniency?

3 A No, sir.

4 Q Was she denied water, bathroom, anything of that
5 nature while she was with you?

6 A No, sir, not at all.

7 Q And ultimately after she was advised, what did you
8 do next with her?

9 A After she was advised, I signed the form, noted the
10 time that we finished, completed the form, which was 10:31.
11 Then I moved on to the next form, which was the consent
12 to interview by polygraph.

13 Q And did she consent to that, as well?

14 A She did.

15 Q Okay. Tell the judge a little bit about how the
16 process works from this point forward in your questioning
17 of her.

18 A The process continued. The next form I used was a
19 background information form. There are several purposes
20 of that form. It's basically personal information, name,
21 address, height, weight.

22 There is a portion that's referred to as medical
23 history, and I advised -- I asked certain questions about
24 the examinee's medical history just to ensure that they
25 are suitable for polygraph testing.

1 MR. HARPOOTLIAN: If it please the Court, Your Honor,
2 so there is no -- I would -- there is no waiver. We would
3 object to any mention of a polygraph before the jury. I
4 understand we're not before the jury. I don't want anyone
5 to interpret that as a waiver on my part.

6 THE COURT: Thank you.

7 MR. HARPOOTLIAN: So when he is testifying before the
8 jury, he would never say it was polygraph, I understand.

9 THE COURT: I understand.

10 BY MR. GOLDBERG:

11 Q Go ahead.

12 A So the medical history form is various questions about
13 a person's condition and health, and then she was asked
14 whether or not she has ever taken an examination. She
15 indicated no.

16 Then the next portion is basically just questions
17 I asked to build a little rapport with her, to learn a
18 little information about her background.

19 Q Actually, if I could stop you for a second.

20 A Sure.

21 Q About the medical history, did she indicate to you
22 any signs of drug or alcohol abuse in the examination?

23 A One of the questions I asked was, "In the last 24
24 hours, have you taken any medication?" She said, "No."

25 "Have you been prescribed any medication that you

1 should be taking?" She said, "No."

2 As far as alcohol, she said she had not used alcohol
3 in the last 24 hours.

4 Q All right. Thank you. And you can go forward with
5 your next line of questions.

6 A So the next portion was information regarding family
7 background, and then on the reverse of the form, the
8 information about any relationship. She indicated she
9 was in a relationship with a Jamal Wiggins.

10 Then I moved on and asked questions about education.
11 She indicated she graduated from A.C. Flora High School
12 in 2005, and that she attended Midlands Tech working on
13 an Associate in science degree.

14 Then I questioned her a little bit about her
15 background as far as employment. She indicated that she
16 had worked at Palmetto Richland, and I've got a note here
17 three weeks ago.

18 I'm not sure as far as -- that may have been when
19 she last worked there, and that she was an environmental
20 service tech and she worked in the Children's Hospital
21 with infants from ten to 16 years old -- years of age and
22 that she was a volunteer at Pineview Learning Center for
23 about 40 hours. She did student work at Midlands Tech,
24 worked with her mom at McDonald's.

25 Then on into a little more background. Ballroom

1 dancing, she enjoyed video games, bowling; that she was
2 on the tap dance team in high school, fashion club, Who's
3 Who for two years, Science Club, and I think it was
4 environmental music, and I think --

5 Q At the conclusion of all of these questions --

6 A -- that's all it was.

7 Q -- did you have any questions about her understanding
8 of the process of what she was doing with you at that
9 time?

10 A Not at all.

11 Q At any point, did she say that she did not want to
12 speak to you any further or that she wanted to speak to
13 an attorney?

14 A No.

15 Q Once you were finished with this personal
16 history -- approximately how long did that take?

17 A This form was maybe 15, 20 -- 20 minutes.

18 Q And what is your procedure once you're done with the
19 personal history?

20 A After the personal history, I speak to her about the
21 polygraph, explain the polygraph process. Then I ask -- we
22 talk about the incident, and I just discussed basically
23 what she had listed about the incident on her statement
24 with her.

25 Then I went into formulating questions for the

1 examination. Every question was reviewed with her, was
2 read to her. We discussed the questions, and then we moved,
3 took a break.

4 After that, I asked -- told her where the bathroom
5 was, asked her to wash her hands. She went in the bathroom
6 and came back, and we started the testing phase.

7 Q And tell the Court a little bit about the testing phase
8 and how that took place.

9 A Well, there were actually two types of tests. One
10 was an acquaintance test, and it's --

11 MR. HARPOOTLIAN: May it please the Court, Your
12 Honor. We have would object to the testimony concerning
13 polygraphs. They are inadmissible. It would prejudice
14 the Court, and we see no reason for this -- for that testimony
15 to be entered in the record at all.

16 Our Supreme Court has been very, very strict on the
17 admissibility or testimony concerning the use of
18 polygraph.

19 THE COURT: What's the purpose?

20 MR. GOLDBERG: Your Honor, if the purpose of the
21 Jackson vs. Denno hearing was to showing the Court statement
22 was voluntarily, intelligently made, we're just trying
23 to --

24 THE COURT: What statement?

25 MR. GOLDBERG: We're getting to that.

1 THE COURT: The statement made on the polygraph?

2 MR. GOLDBERG: Yes, sir. She -- yes, sir. Just for
3 the Court's background information, the incident happened
4 on July 31st, 2008. Later that morning --

5 THE COURT: 7/31.

6 MR. GOLDBERG: -- later in the night. It was late
7 in the night on 7/30, almost midnight, when the child was
8 taken to the hospital.

9 A few hours later on the first, that same night,
10 different date, Ms. Samuel came in to C.P.D. and provided
11 a written statement to law enforcement.

12 At that point, she was not a suspect. No one was a
13 suspect. They didn't know. They were just gathering
14 information. She provided a written statement with her
15 account of what happened, not in custody, just a witness
16 statement.

17 As the investigation continues over the next
18 several days, Investigators Reese and Thomas asked both
19 the mother of the child, Ms. Jessica Davis, as well as
20 Kendra Samuel, the defendant, to come back in to give
21 additional statements, which they did on the August 6th
22 which is the date that we're talking about here now.

23 And --

24 THE COURT: That is Investigator Thomas and Reese?

25 MR. GOLDBERG: Sir?

1 THE COURT: Statements given to Thomas and Reese.

2 MR. GOLDBERG: The first one?

3 THE COURT: The second one.

4 MR. GOLDBERG: Okay. When she comes in on the 6th --

5 THE COURT: Right.

6 MR. GOLDBERG: Okay. The first thing that happens
7 is what you're hearing about now.

8 THE COURT: Oh, I thought you said they asked her to
9 come in.

10 MR. GOLDBERG: They did. They made contact with her,
11 I believe, on August 4th, didn't take an additional
12 statement or anything from her, just asked her to come
13 back down on the morning of the 6th.

14 THE COURT: And she did.

15 MR. GOLDBERG: She agreed -- when she arrived on the
16 morning of the 6th.

17 THE COURT: She didn't see them.

18 MR. GOLDBERG: She met with him first.

19 THE COURT: Mr. Gray?

20 MR. GOLDBERG: Mr. Gray, yes, sir.

21 THE COURT: All right.

22 MR. GOLDBERG: Going through this process -- during
23 this process during the polygraph, as you will find out
24 through the course of this testimony, deception is
25 indicated on the polygraph.

1 MR. HARPOOTLIAN: Your Honor, this is exactly the
2 testimony we object to.

3 MR. GOLDBERG: The --

4 THE COURT: All right. Let me hear about it. Let
5 me hear it.

6 MR. HARPOOTLIAN: Hear it.

7 THE COURT: The lawyer.

8 MR. HARPOOTLIAN: Yes, sir.

9 MR. GOLDBERG: Deception was indicated on the
10 polygraph. As a result, Mr. Gray asked some follow-up
11 questions, not as part of a polygraph examination, but
12 as an investigator with the sheriff's department speaking
13 to this witness, asked some follow-up questions. She --

14 THE COURT: Same place?

15 MR. GOLDBERG: The same location.

16 THE COURT: The same time?

17 MR. GOLDBERG: Yes, sir. We're about to get into all
18 of that timeframe of when this all happened, but
19 it -- needless to say, it was within the next hour, I guess,
20 that he has this conversation.

21 THE COURT: She has been.

22 MR. GOLDBERG: She has been Mirandized and done the
23 polygraph.

24 THE COURT: Done the polygraph.

25 MR. GOLDBERG: After the polygraph is over --

1 THE COURT: And told she is being deceptive.

2 MR. GOLDBERG: He left to speak with her.

3 THE COURT: Well --

4 MR. GOLDBERG: I believe he did confront her with
5 that, yes.

6 THE COURT: Okay.

7 MR. GOLDBERG: She then provides another statement
8 to him with a different version of the events than were
9 provided on August 1st, different story was provided.

10 So Mr. Gray documents that in his own file, notifies
11 the lead investigators in the case of what's happened
12 here, and it's a substantial change in the statement from
13 the first to what she has now told him when confronted
14 with this issue of being deceptive. It's a much different
15 story. So...

16 THE COURT: Not surprisingly.

17 MR. GOLDBERG: He notifies the lead investigator on
18 the case, tells them what he has learned. At that point,
19 he's out of the picture and Investigator Thomas, as well
20 as Investigator Shockley from S.L.E.D., take a statement
21 from her.

22 I believe that ends up being -- it's the same day.
23 It ends up being approximately 1:30 in the afternoon.
24 1:27 p.m. is when it begins. There's an audio recording
25 of this interview with Thomas and Shockley and the

1 defendant, Ms. Samuel.

2 This would have been, we submit, and Investigator
3 Gray can go into this further, about 30 minutes or so after
4 he is done with her that that statement begins.

5 At that point, there is a recorded statement that
6 we have a copy of and a transcript, as well, in which she
7 gives the account of what happened that day.

8 This account is largely consistent with the statement
9 that she gave Mr. Gray, which again, is inconsistent with
10 the initial statement she gave back on the 1st.

11 THE COURT: Okay.

12 MR. HARPOOTLIAN: May it please the Court, Your Honor.

13 Have you given us a summary of that oral statement
14 that she gave to Mr. Gray? Have we got it?

15 MR. GOLDBERG: Yes, yes.

16 MR. HARPOOTLIAN: Where?

17 MR. GOLDBERG: We do.

18 MR. HARPOOTLIAN: I'm sorry, show me. Is it his
19 notes?

20 MR. GOLDBERG: It was made as part of the discovery
21 in connection with all of the polygraph materials.

22 (Pause)

23 (Counsel conferring)

24 MR. HARPOOTLIAN: Okay. Again, I'm familiar with
25 this. I'm sorry.

1 MR. GOLDBERG: So Investigator Thomas, Investigator
2 Shockley conduct a recorded interview with the defendant.
3 It lasts for approximately...

4 THE COURT: Last?

5 MR. GOLDBERG: Sir.

6 THE COURT: Thirty minutes after --

7 MR. GOLDBERG: Thereabouts.

8 THE COURT: -- Gray is finished.

9 MR. GOLDBERG: Thereabouts, yes, sir. Don't hold me
10 to 30 minutes, but approximately, yes, sir.

11 THE COURT: The same day?

12 MR. GOLDBERG: Yes, sir.

13 And it -- that's reported. As I stated, it said that
14 it's being recorded at the beginning of the recording;
15 The time is now 1:27 p.m. This is Investigator Thomas,
16 et cetera, et cetera, and they go through a question-and
17 -answer session with the defendant.

18 This lasts for about ten minutes, at which point there
19 is a malfunction with the recorder. You'll hear this on
20 the tape where they say, "We're having a problem. We need
21 to stop the tape for a minute, hang on," and they stop
22 the tape.

23 Once the tape comes back on, there is a 20-minute
24 and change interview from that point forward that is also
25 recorded, a question-and-answer session where basically

1 they're trying to elicit her version of the events of
2 what happened.

3 Once this interview has concluded with Thomas and
4 Shockley, they provide Ms. Samuel an opportunity to put
5 pen to paper on the story she has just told them in her
6 own way.

7 She writes out a three-page statement in her
8 handwriting of what she just talked to them about and what
9 was recorded on the interview.

10 They go back and ask her follow-up questions after
11 she is done writing her three-page account of this, and
12 it's approximately three pages of question and answer.
13 I believe it's in Thomas' handwriting for the questions
14 and her handwriting for the answers.

15 A break is then taken.

16 THE COURT: Slow down.

17 MR. GOLDBERG: Yes, sir.

18 THE COURT: Thomas writes out the questions.

19 MR. GOLDBERG: This would be after the --

20 THE COURT: After her three-page statement.

21 MR. GOLDBERG: Correct, after her three pages, there
22 are three more pages of question and answer between
23 Thomas and the defendant where he writes the questions,
24 she writes the answers.

25 THE COURT: Okay.

1 MR. GOLDBERG: At the completion of that, a break is
2 taken and questioning -- keep in mind that the time on
3 the statement, the beginning of the statement that was
4 just given, the three pages of her handwriting, three pages
5 of question and answer, the time at the beginning of it
6 is 2:10 p.m., which would be consistent, pretty much, with
7 the length of the recordings of the previous conversation.
8 It takes a good deal of time for her to write it out.

9 MR. HARPOOTLIAN: May it please the Court, Your Honor.
10 Are we going to hear testimony or...

11 THE COURT: Mr. Harpootlian, I'm trying to find out
12 what went on.

13 MR. HARPOOTLIAN: I --

14 THE COURT: As soon as I, do I'll listen to your
15 objections.

16 MR. HARPOOTLIAN: If it please the Court, Your Honor.
17 Now, this witness has testified. There are other
18 witnesses sitting here, and he is describing to them what
19 they ought to testify to. I object to that.

20 THE COURT: Overruled.

21 MR. HARPOOTLIAN: Your Honor, for the record, I would
22 note that Mr. Goldberg is going through a series of events
23 in a very summary court fashion, and I would object unless
24 I have an oppor-- well, never mind. I object to that.

25 MR. GOLDBERG: He's objecting to me summarizing and

1 being too detailed.

2 THE COURT: All right. Please sit down.

3 MR. HARPOOTLIAN: Yes, sir.

4 THE COURT: Let me find out what's been going on. You
5 people have been with this case a long time. I've been
6 with this case about 30 minutes.

7 All right. You have got another break. Then what
8 happens, allegedly.

9 MR. GOLDBERG: I just want to point out that the
10 statement began at 2:10. It took some time, obviously,
11 for all of that to happen, the writing of her statement,
12 the question and answer. The next recording begins at
13 3:58 p.m.

14 That's documented on the recording where he says,
15 "I'm Investigator Reese. The time is 3:58", et cetera,
16 et cetera.

17 Present in the room at that time, I believe, are mainly
18 Investigator Reese, agent Sarah Hurt from S.L.E.D.,
19 Investigator Thomas comes in, as well, at some point. At
20 which point, they conduct this recorded interview,
21 continuation, question and answer session with the
22 defendant. That lasts from 3:58 p.m. until 5:17 p.m. I
23 believe that time is denoted on the transcript and on the
24 recording as being the end of the interview.

25 Following the completion of this recorded version,

1 they go back to the written statement that had been
2 provided that day and add two more pages of questions and
3 answers, pages seven and pages eight where in the
4 investigator's handwriting, the questions are written out,
5 the answers are written out by Ms. Samuel for two more
6 pages that were follow-ups.

7 The reason being, we would argue, that the account
8 provided by the defendant during this recorded session
9 from 3:58 p.m. to 5:17 p.m. is again different and
10 inconsistent from her previous accounts, yet another
11 version of the events, which is what necessitated the
12 follow-up questions to be documented.

13 So this brings us back to the original question that
14 was posed about the mention of the polygraph and the
15 purposes of this hearing.

16 If counsel is going to argue at some point that this
17 statement was not made freely and voluntarily, the burden
18 is on us to obviously show that it is, and I feel it's
19 important for the Court to understand the entire process
20 she has gone through, the nature of the questions she was
21 asked, her comfort, everything that goes with the Jackson
22 v. Denno. I think that's extremely relevant here so that
23 the Court understands what exactly went on.

24 THE COURT: All right. What -- what time did
25 Mr. Gray start his -- when did she come in to Mr. Gray's

1 office?

2 MR. GOLDBERG: The advice of rights says 10:30.

3 THE COURT: A.M.?

4 MR. GOLDBERG: Yes, sir. I believe he may have spent
5 a couple -- he testified he spent a couple of moments with
6 her prior to filling out that form.

7 THE COURT: So when did all of this back and forth,
8 back and forth -- when did it end?

9 MR. GOLDBERG: In the neighborhood of 5:30 p.m. would
10 be my estimate in that the recorded --

11 (Talking over each other.)

12 -- the recording ends at 5:17.

13 (Talking over each other.)

14 THE COURT: I thought you said she went back and --

15 (Talking over each other.)

16 MR. GOLDBERG: -- they did, they did, they did. I
17 don't know if it's --

18 THE COURT: It's not recorded, is it?

19 MR. GOLDBERG: It's not documented, no, sir, but I
20 can tell you that page seven and page eight are -- consists
21 of four, six, eight questions.

22 THE COURT: So conservatively, she is there for seven
23 hours?

24 MR. GOLDBERG: Yes, sir. And I would point out, and
25 it will come out during the testimony, that during this

1 second recorded period, the 3:58 to 5:17 period, you can,
2 in fact, hear on the recording where she is essentially
3 re-advised of her rights, as well.

4 There is no written form to that effect. However,
5 it is --

6 THE COURT: So Thomas and Shockley --

7 MR. GOLDBERG: No, sir.

8 THE COURT: -- started the recorded statement 30
9 minutes after Mr. Gray. There is no advice of rights?

10 MR. GOLDBERG: Not at that time, no, sir, but there
11 is at 3:58 when Mr. Reese and Investigator Hurt began
12 their question and answer.

13 MR. HARPOOTLIAN: I'm sorry, did you -- did the
14 Solicitor just say she was advised of her rights? I don't
15 believe she was.

16 THE COURT: At 3:58.

17 MR. HARPOOTLIAN: Well, not -- she was asked, "Do you
18 understand your rights?" That was it. There was no
19 re-re-advice of rights, correct?

20 MR. GOLDBERG: She was asked if she was advised of
21 her rights earlier today. Is that --

22 MR. HARPOOTLIAN: Right.

23 MR. GOLDBERG: Yes. You --

24 MR. HARPOOTLIAN: Show the --

25 (Talking over each other.)

1 MR. GOLDBERG: "Is there anything you want to change
2 about it? Do you want to continue talking with us?"

3 "Yes."

4 MR. HARPOOTLIAN: Okay.

5 MR. GOLDBERG: "Are you okay? Do you need a break?"

6 "No."

7 "Are you sure?"

8 "Yes."

9 MR. HARPOOTLIAN: But there was no advice of rights.

10 MR. GOLDBERG: The topic of the advice of rights was
11 addressed again; however, there was not a specific form
12 that had been gone through line by line as it had already
13 been done that day, no.

14 THE COURT: All right. Mr. Harpootlian?

15 MR. HARPOOTLIAN: Yes, sir.

16 THE COURT: What are your objections?

17 MR. HARPOOTLIAN: Well, first of all, I object to the
18 rendition of the facts because they're not true, not
19 accurate. They're his spin on the facts.

20 Secondly, the use of the term polygraph, whether it's
21 before you or anyone else, the results thereof, are
22 inappropriate. The fact polygraph examinations cannot
23 be used, even by stipulation in South Carolina, is
24 important.

25 Third, and more importantly, there are severe

1 breaks. He says due to a malfunction. We don't know that.
2 There's not some technical person that's going to come
3 testify here.

4 He keeps using the word "tape". We've been told 20
5 times there is no tape. There is some sort of digital
6 recording. He says "tape" and I would have to object to
7 the use of that because there is no such thing.

8 We've been told there is no way to go back and
9 reconstruct it because it was downloaded to a computer.
10 The device that it was recorded on does not have it. It's
11 not like we take a cassette tape out.

12 It was recorded on a digital recorder that was then
13 downloaded to a computer. So to characterize it as
14 malfunctioning as opposed to -- and by the way, she is
15 with them, she you just pointed out, with them seven hours.
16 Two-hours-and-45 minutes of that is taped. The rest of
17 it there is no tape. It's begun, stopped, begun, stopped.
18 We think that's critical.

19 We think there are cases that indicate that if there
20 is evidence that they intentionally stopped talking to
21 her to do something off tape so when it comes back on tape,
22 it's more coherent, more consistent for their theory. We
23 think that's important.

24 THE COURT: Well, I can hear it from her.

25 MR. HARPOOTLIAN: Sir?

1 THE COURT: I said I'll be glad to hear from your
2 client on that issue.

3 MR. HARPOOTLIAN: Well, Your Honor, the burden is on
4 the State. They have the burden at this point to show
5 that it was free and voluntary.

6 THE COURT: I know.

7 MR. HARPOOTLIAN: The only person that has testified
8 so far --

9 THE COURT: By a preponderance.

10 MR. HARPOOTLIAN: Sir? By a preponderance.

11 The only person who has testified so far is the
12 Solicitor and this gentleman for about two seconds.

13 THE COURT: Well -- all right. I'm going to hear his
14 testimony.

15 MR. HARPOOTLIAN: Thank you.

16 THE COURT: Go ahead.

17 BY MR. GOLDBERG:

18 Q Thank you.

19 I believe you were about to tell the Court a little
20 bit about your procedure once you have gone through your
21 personal history with her and what you did with her after
22 that.

23 A After I went through the personal history --

24 Q Yes.

25 A -- I spoke with her a few minutes about the polygraph

1 and explained the polygraph and the components and the
2 purpose of the components. Then we talked a little bit
3 about the incident, reviewed her statement.

4 I asked her if she wanted to make any changes. There's
5 no changes made to her statement. Then we went directly
6 into the test question review.

7 I reviewed the questions. I asked her during the
8 examination one at a time very thoroughly, and then we
9 took a break.

10 I escorted her to the ladies room and asked her to
11 wash her hands so I could get good contact with my -- the
12 components on her fingers. She did so. She went to the
13 bathroom.

14 We came back and I started the test, which consisted
15 of an acquaintance test and then three charts of
16 questioning relevant to this issue.

17 After the test was over, I removed the components
18 from her. She sat in a padded chair. I left the room,
19 took the charts to another room, evaluated the charts.
20 That was about 12:16. I evaluated the charts.

21 Q I'm sorry. You left the room with your charts to
22 conduct --

23 A Well --

24 Q -- to conduct your analysis?

25 A -- let me -- the room is set up -- it's -- there's

1 an office area and then the polygraph room. They're
2 separated by a door. I left her in the polygraph room
3 in the chair with nothing attached. I went to my desk,
4 evaluated the charts.

5 Q And what time was that?

6 A That was about 12:16. Then that took probably about
7 15 minutes to go over the charts. Then I went back into
8 the room and confronted her with the test results.

9 Q Which was what?

10 A Deception indicated.

11 THE COURT: Sir, I can't hear you.

12 THE WITNESS: I'm sorry. Deception indicated.

13 THE COURT: That's what you told her?

14 THE WITNESS: Yes, sir.

15 BY MR. GOLDBERG:

16 Q What were the questions that were asked of her that
17 led to that indication?

18 A There were three types of questions. I'll just read
19 the list. During the test, she was told to remain still;
20 the test is about to begin. One of questions --

21 MR. HARPOOTLIAN: I'm sorry, I can't hear the witness.

22 THE COURT: All right.

23 THE WITNESS: I'm sorry.

24 THE COURT: I can't hear him either.

25 THE WITNESS: She was asked is -- during the test,

1 "Is your name Kendra Samuel?"

2 The next question was, "Regarding whether or not you
3 hurt that child, do you intend to answer each question
4 truthfully?"

5 The next question was, "Before July, did you ever
6 say anything to hurt someone's feelings?"

7 She was asked after that, "Do you know how that child
8 was hurt?"

9 The next question was, "Before last month" --

10 THE COURT: What were the answers?

11 THE WITNESS: I'm sorry.

12 "Is your name Kendra Samuel?"

13 She answered, "Yes."

14 "Regarding whether or not you hurt that child, do
15 you intend to answer each question truthfully?" She
16 answered, "Yes."

17 "Before July, did you ever say anything to hurt
18 someone's feelings?" She answered, "No."

19 "Do you know how that child was hurt?" She said, "No."

20 "Before last month, did you ever hurt anyone?" She
21 said, "No."

22 "Did you do anything to hurt that child?" She said,
23 "No."

24 "Prior to July 2008, did you ever hurt someone because
25 you were angry?" She said, "No."

1 "Do you know who hurt that child?" She said, "No."

2 "Before July, did you ever hurt someone you cared
3 for?" She said, "No."

4 Then there were two other questions that I reviewed
5 with her, and I had to look at the charts to see if I asked
6 those, but they were: "Are you now in South Carolina,
7 and is this the month of August?"

8 BY MR. GOLDBERG:

9 Q And when you indicated a moment ago that she indicated
10 deception, that was in regards to which questions?

11 A To the relevant questions on the exam, which were,
12 "Do you know how that child was hurt?"

13 "Did you do anything to hurt that child?"

14 "Do you know who hurt that child?"

15 Q So after reaching that conclusion in your analysis,
16 you -- I believe you were starting to testify you were
17 back in the room with her; is that correct?

18 A That's correct.

19 Q What did you when you entered back into the room?

20 A I confronted her with the test results, told her there
21 were some problems on the examination which indicated
22 deception.

23 Q Upon doing so, what happened after that?

24 A After that I sat -- I pulled my chair up in front of
25 her. She was still seated in the chair unrestrained, and

1 I began just talking to her.

2 I don't remember specifically what I said, but she
3 initially said that -- after a few minutes, she initially
4 said the child had -- accidentally hit the child's head
5 on a car seat safety bar as she tried to remove the child
6 from the seat.

7 Then after additional questions, she admitted she
8 had accidentally dropped the child from a standing
9 position as she removed the child from the seat which was
10 on the floor in Jessica's room.

11 She was asked what part of that child's body hit the
12 floor, and she pointed with her hand to the back of her
13 head and began crying.

14 These are some notes I made after the test was
15 completed. She said the child gasped when she picked him
16 up, and he was unresponsive, though his eyes were open.

17 She said she held him in her lap and shook his arms.
18 She may have grabbed his torso and shook him in an attempt
19 to revive him.

20 He said the child was then unconscious. She was
21 asked why she left the apartment. Ms. Samuels said she
22 didn't know what to.

23 She said she was afraid Jessica would be mad at her,
24 and she would lose her friendship if she told her she
25 dropped the baby.

1 I then asked her why she had clutched the baby to
2 her chest when she entered the apartment after the park
3 walk and she said she did that so no one would see the
4 baby.

5 It was at that point I contacted Investigator Reese
6 and advised him of the statement she made.

7 Q And why did you do that, sir?

8 A He was the chief investigator. He and Thomas were
9 much more familiar with the case than I was. I thought
10 it was proper they continue the interrogation because,
11 obviously, they may have had some more information about
12 some other facts that I may not have access to.

13 Q Do you recall approximately what time this was when
14 you finished with her?

15 A Probably right around one o'clock.

16 Q And then did you have any additional contact her after
17 that?

18 A No, sir.

19 Q And again, during your time with her, did she ever
20 ask you to stop questioning her or ask for a lawyer or
21 anything of that nature?

22 A No, sir.

23 MR. GOLDBERG: Beg the Court's indulgence.

24 (Pause)

25 That's all my questions for Investigator Gray.

1 CROSS-EXAMINATION:
2 BY MR. HARPOOTLIAN:
3 Q Now, Investigator Gray, before you started
4 questioning her, did she know -- did you tell her you were
5 going to give her a lie detector?
6 A I did not say lie detector. I told her the
7 investigators had asked her -- had asked me to administer
8 a polygraph examination.
9 Q So you said polygraph?
10 A Yes, sir.
11 Q Did she know what that was?
12 A I don't know what she knew at the time, but at one
13 point during the examination, I explained the process to
14 her.
15 Q You're going to have to speak up a little bit louder.
16 I don't think the judge can hear you. I can barely hear
17 you here.
18 A No, sir.
19 Q Do those microphones work?
20 MS. CAMPBELL: No, they don't work.
21 MR. HARPOOTLIAN: They are not working --
22 MS. CAMPBELL: They're not --
23 (Talking over each other.)
24 MR. HARPOOTLIAN: Okay. Well, you're going to have
25 to speak up --

1 THE WITNESS: Yes, sir.

2 MR. HARPOOTLIAN: You know, sort of like when you're
3 yelling at somebody in the polygraph room. Go ahead.

4 THE COURT: All right. Just...

5 MR. HARPOOTLIAN: Yes, sir.

6 BY MR. HARPOOTLIAN:

7 Q Let me stand back over here. If I stand back over
8 here, I know the judge will hear you.

9 When she came in, do you know what time she got there
10 that day?

11 A I'm not sure when she arrived in the investigative
12 office. She came into my office a little bit before
13 10:30.

14 Q Was she already in the office and then you came in,
15 or were you there first?

16 A I was working that day when she came to police
17 headquarters. We're located on the second floor, and I'm
18 not sure how I initially met her.

19 She may have been introduced to me by one of the
20 investigators. She may have been sitting there in the
21 waiting area. I just don't recall.

22 Q Now, when you advised her of her rights, tell me
23 again -- do you have that advice of rights form there?

24 A Yes, sir.

25 Q Who filled it out?

1 A I filled out the top portion where it indicates the
2 place, the date and the time.

3 Q And then she signed the bottom?

4 A After it was reviewed with her, yes, sir.

5 Q And it's your testimony under oath that this is all
6 your handwriting?

7 A Yes, sir.

8 Q You filled it out yourself?

9 A Yes, sir.

10 Q There's no question in your mind about that?

11 A No, sir.

12 Q Okay. And after you advised her of her rights,
13 she -- you went through this polygraph test with her; is
14 that correct?

15 A Yes, sir.

16 Q And that polygraph test you said -- did you ever
17 identify the child by name or did you say that child, the
18 child?

19 A Oh no. When we went over her statement, we discussed
20 the child's name quite a few times.

21 Q No. I'm talking about when you gave her the
22 polygraph.

23 A When I advised her -- during test question review?

24 Q Yeah.

25 A Yes, certainly I did.

1 Q No, no. I mean the question you read out a moment
2 ago, read the question to me about the -- about the child.
3 A Well, there were three questions I asked --
4 Q Okay.
5 A -- about the child.
6 Q Go ahead.
7 A Prior to --
8 Q No, no, the questions you --
9 A The questions I asked her during the exam after we
10 thoroughly reviewed the questions were, "Do you know how
11 that child was hurt?"
12 Q That child?
13 A That child.
14 Q Okay. Next one?
15 A And, "Did you do anything to hurt that child?"
16 Q That child?
17 A That's correct. And "Do you know who hurt that
18 child?"
19 Q That child. Why didn't you use the child's name?
20 A That's the proper procedure in this type of question.
21 Q To not make it specific?
22 A Yes, sir.
23 Q Just generally, that child?
24 A No, sir.
25 Q Is that right?

1 A No, sir.

2 Q I'm sorry?

3 A No, sir.

4 Q No? You're not supposed to be specific?

5 A The specific -- the questions were thoroughly reviewed

6 with her prior to the examination. During the test

7 question review, each time I read a question to her, I

8 went through the question. So in the question review,

9 I told her, "When I say 'that child,' I'm not taking about

10 any other child other than Aiden," and then when I

11 reviewed --

12 Q You said --

13 (Talking over each other.)

14 A -- the questions with her -- when I reviewed the

15 questions with her prior to the test, I told her, "When

16 I ask that question during the test, I'm talking about

17 Aiden and no one else. When I say 'that child,' that's

18 only about Aiden and no other child."

19 Q Now, do you have notes with you from this other than

20 the typed up things?

21 A The --

22 Q Do you have handwritten notes?

23 A I do. I have a couple of notes here.

24 Q Can I see those?

25 A Yes, sir.

1 Q What else is in that file there?
2 A This is the --
3 Q No. This one over here.
4 A These are the items you asked me to bring with me --
5 Q Okay.
6 A -- on your subpoena.
7 Q Could I have them? All of them?
8 A Except for this notebook.
9 Q What's the notebook?
10 A This is a terminology notebook that I reviewed.
11 Q Okay.
12 A I apologize.
13 Do you want these files?
14 Q I want everything. Thank you.
15 A Sure.
16 Q Now, you indicate that she gave you -- type-wrote a
17 statement up in this document right here. Did you make
18 notes, handwritten notes?
19 A No, sir, I did not.
20 Q So all of this was done by memory?
21 A Yes, sir.
22 Q I mean, as she is talking to you, you're not writing
23 anything down?
24 A No, sir, I did not.
25 Q And how long after the interview with her did you

1 type this up?

2 A I ended the interview around one and escorted her
3 around to a waiting area for the investigators, and I went
4 back in immediately and typed it up.

5 Q How long after the polygraph examination?

6 A After the exam -- well, after the last part of the
7 exam, which was a post-test where she made the statements,
8 it was probably 15 or 20 minutes to complete the form.

9 Q So you went back around and immediately typed it; is
10 that right?

11 A Yes, sir.

12 Q But are you trained to take notes while people are
13 taking to you?

14 A Occasionally, in some circumstances.

15 Q But not in this circumstance?

16 A Yes, sir.

17 Q So there is no written -- this is your recollection
18 of what she told you, not based on any contemporaneous
19 notes made?

20 A No, sir. That's my recollection of what she told
21 me.

22 Q And no contemporaneous notes?

23 A No.

24 Q Now, did you tell her she failed the polygraph?

25 A I told her she had some problems on the examination,

1 and that the examination results were deception
2 indicated.

3 Q Tell me what this is.

4 A Those are some handwritten notes that I wrote as
5 Investigator Reese was telling me a little about the case
6 prior to the polygraph exam.

7 Q So when Investigator Reese was talking to you, you
8 took notes.

9 A Yes, sir.

10 Q But when she is talking to you, you don't?

11 A Yes, sir.

12 Q Okay. And tell me what this says. This is
13 now -- point out Investigator Reese for us here.

14 A He is on the right in the brown suit --

15 Q Okay.

16 A -- seated next to Mr. Goldberg.

17 Q And is he the one that asked you to conduct a polygraph
18 of Kendra?

19 A Yes, he did.

20 Q Okay. And tell me what this these notes say.

21 A "Thirty-one, Jessica, mother, Kendra."

22 Q Thirty-one means what?

23 A I'm not -- I'm not sure. I don't remember.

24 Q Okay. Jessica mother.

25 A "Jessica mother; Kendra babysitter; 1130 full rigor;

1 six to seven rigor; Jamal, Kendra's boyfriend; autopsy,
2 hemorrhage; precious couple of hours before -- a couple
3 of hours death, before death.

4 "Type of injury, shaking, drop, question marks.
5 Four -- the numbers four to seven. That's the time period.
6 I think the time period that Kendra may have been with
7 the child; subdural, older injury; 4:38, child picked
8 up."

9 Q What does that mean?

10 A I think that's when the child was picked up.

11 Q Subdural, older injury. What does that mean?

12 A Oh, I'm not a physician.

13 Q No, no. I mean, when he told that to you, what was
14 he telling you?

15 A I don't know. I just made a note of it.

16 Q Okay. Subdural, older injury. What else?

17 A "4:38, child picked up; child okay at day care;
18 Jessica home; home, child -- at home child was normal;
19 4:55, child was normal until mother left with
20 grandmother. Kendra receives baby, baby was very active
21 prior to Kendra.

22 "Then I have a time, 5:30 and 5:30 to seven, which,
23 I think, was when Kendra was with the child and alone with
24 the baby.

25 "Mother arrived home, 6:50. Kendra and child not home,

1 five to ten minutes later, Jamal was looking for Kendra;
2 Kendra arrived, held baby close to body. Kendra said baby
3 asleep.

4 "Aiden drew -- Aiden dressed when they left. Upon
5 arrival, child is in diaper; no movement or injury of baby
6 upon arrival. Baby was sweating, six -- baby was
7 sweating; six mother -- Kendra, six being time.

8 "Kendra last -- or Kendra took baby to bedroom and
9 said she would come back. Jamal picked up Kendra from
10 park, no movement; officers saw Kendra in park holding
11 baby.

12 "Security guard, child" something "hanging and then
13 did Kendra come back," question.

14 "Kendra left; Jamal came back with food. Goes into
15 room with Jamal; Kendra comes out two hours later. Jamal
16 said Kendra only stayed in bedroom for the minute -- for
17 ten minutes, then she left and talked with the mother.

18 "Nursery, baby two to three hours is fed -- or nursing
19 baby, two to three hours, is fed. After Kendra and Jamal
20 left, mother checked baby, called Kendra then called 911."

21 Q What's the last thing?

22 A The last thing is "Kendra took child out of air
23 conditioning apartment to 95 degree outside
24 temperature."

25 Q Okay. And that's what you knew before you started

1 the polygraph?

2 A Yes, sir.

3 MR. HARPOOTLIAN: Could I have these marked, please,
4 just for this hearing?

5 (WHEREUPON, Defendant's Exhibit No. 1 was marked for
6 identification only.)

7 (Pause)

8 BY MR. HARPOOTLIAN:

9 Q How long before the polygraph -- before you met with
10 Kendra, did you meet with the investigator who told you
11 all of this?

12 A Maybe five or ten minutes.

13 Q Okay. Okay. Now, when you left your -- where did
14 you leave Kendra, in your office?

15 A When I evaluated the charts, I -- there's --

16 Q I mean, after you got this oral statement, where did
17 you go?

18 A I called Investigator Reese on the telephone.
19 Ms. Samuels was waiting in the polygraph suite.

20 Q The polygraph suite?

21 A There's two offices, as I stated, an actual office
22 area and then another separate room with the polygraph
23 and the computer and the table --

24 Q Okay. And she --

25 A -- and a couple of chairs.

1 Q Is she in a separate office area?
2 A She was in that area.
3 Q And -- I mean, that's just a windowless room?
4 A Yes, sir.
5 Q And when you left, did you tell her she could leave,
6 or did you tell her to stay? Was she free to leave?
7 A She was free to leave. The door was not locked. I
8 told her I was going to contact the investigator, and he
9 may want to speak with her. I called the investigator.
10 Q But she, at that point, was not in custody?
11 A No, sir.
12 Q When you gave her her the advice of rights, she was
13 not in custody?
14 A No, sir.
15 Q She could leave at any time she wanted to?
16 A If she told me she wanted to leave, I couldn't stop
17 her.
18 Q Okay. So it's noncustodial at that point and you
19 leave, and you never see her again?
20 A I escorted her from our office on the second floor
21 to a waiting area by the secretary on the second floor,
22 and I went back to my office.
23 Q And when you got -- when you -- who do you turn her
24 over to?
25 A I think I was advised to the investigator just to

1 have her wait in that area. They were busy doing something
2 else, as I recall.

3 Q Okay. And at that point, you know she has admitted
4 to dropping the child, right?

5 A Yes, sir.

6 Q And you left and went back and typed it up?

7 A Yes, sir.

8 Q Now, what did you advise and who did you talk to up
9 in investigation?

10 A I'm sorry?

11 Q Who did you -- when you called and said, you know,
12 "I gave her the polygraph," who did you talk to?

13 A I spoke with Investigator Reese.

14 Q Okay. And what did you tell him?

15 A I told him what she had told me.

16 Q Which is just this statement?

17 A Yes, sir.

18 Q And what did he say to do?

19 A He asked me to put her in the waiting area.

20 Q Okay. Now, the waiting area, could she have gotten
21 up, walked out --

22 A Yes, sir.

23 Q -- and gone home?

24 A It's right by the elevator.

25 Q Nothing prevented her from going?

1 A She was unrestricted.

2 Q Nothing prevented her from going home?

3 A That's correct.

4 Q Wasn't handcuffed?

5 A No, sir.

6 Q You didn't tell her not to leave?

7 A No, sir.

8 Q So clearly, she is not up in -- she is not in custody.

9 She is not -- she is free to leave up until the point you

10 turn her over to Investigator Reese; is that correct?

11 A Yes, sir.

12 Q Okay. Now, the rest of this material that's in your

13 file here, did you have all of this material before you

14 polygraphed her and took her statement?

15 A I had the notes I made from Investigator Reese. I

16 had --

17 Q Did you have any of this?

18 A I had the report and the statement.

19 Q The report being this incident report?

20 A Yes, sir.

21 Q And it says, "Reporting officer is dispatched to

22 Richland Memorial Hospital, P.O.D. 3 Pediatrics

23 Emergency Room to meet with the Richland County coroner

24 representative in reference to the death of the listed

25 victim.

1 "Reporting officer initially made contact with Toni
2 Hicks, R.N. who led reporting officer to the victim's room.
3 Nurse Hicks, who stated she had observed and then showed
4 the reporting officer the following injuries on the victim:
5 Two bite marks on upper left arm, one each bruise on right
6 side lower rib area, two additional bite marks," right?

7 A I believe that's what's on the report, yes, sir.

8 Q Do you have that in your possession?

9 A Yes, sir.

10 Q Did you ask her about bite marks?

11 A No, sir.

12 Q Why not?

13 A As I recall, the investigators had determined that
14 they were old bite marks, and I think done by another
15 child.

16 Q So the bite marks were on there prior to -- at this
17 point in time, they had concluded on the sixth that those
18 bite marks had occurred prior to the child --

19 A You'll have to ask them about that. I don't know what
20 they concluded.

21 Q Okay. And you had her previous statement?

22 A Yes, sir.

23 Q But you would agree with me most of what you knew came
24 from what you were told by Investigator Reese?

25 A That's correct.

1 THE COURT: Is that a previous statement?

2 MR. HARPOOTLIAN: Well, it's a statement, which they
3 haven't offered, but a statement given on the 1st.

4 THE COURT: Okay. Okay. You're right.

5 MR. HARPOOTLIAN: The day afterwards she gave the
6 statement.

7 Beg the Court's indulgence for a moment.

8 (Pause)

9 No further questions.

10 MR. GOLDBERG: May it please the Court.

11 THE COURT: Mr. Goldberg?

12 MR. GOLDBERG: Just briefly.

13 REDIRECT EXAMINATION:

14 BY MR. GOLDBERG:

15 Q I believe he asked you about -- on the advice of rights
16 form.

17 A Yes, sir.

18 Q That everything that was written on there was written
19 by you?

20 A With the exception of Ms. Samuel's signature.

21 MR. GOLDBERG: Right. Thank you.

22 MR. HARPOOTLIAN: Nothing further.

23 THE COURT: All right. You may come down.

24 MR. HARPOOTLIAN: Your Honor, may we take a two-minute
25 recess?

1 THE COURT: Go ahead.

2 MR. HARPOOTLIAN: Thank you.

3 (Pause.)

4 MS. CAMPBELL: The State would call Investigator
5 Thomas.

6 Your Honor, I could make -- in order to expedite matters,
7 the next statements were recorded, there's also written
8 statements, in addition.

9 We wouldn't be offering any -- just to expedite things
10 somehow with the Court, if I can make copies of the actual
11 transcripts, as well as the tape recordings themselves,
12 which have been provided to the defense and then hand them
13 up to the Court, it might expedite things.

14 A.L. THOMAS,

15 after being duly sworn, testified as follows:

16 MR. GOLDBERG: May Investigator Gray be excused?

17 MR. HARPOOTLIAN: No objection.

18 THE COURT: Thank you.

19 (WHEREUPON, Court's Exhibits Nos. 1 - 4 were marked
20 for identification only.)

21 MS. CAMPBELL: Your Honor, for the record, we mark
22 the discs as Court's 1 and then the three transcripts as
23 2 through 4.

24 DIRECT EXAMINATION:

25 BY MS. CAMPBELL:

1 Q Investigator Thomas, where are you employed?
2 A The City of Columbia Police Department.
3 Q What do you do there, sir?
4 A I'm a homicide investigator.
5 Q I want to turn your attention back to August 6th,
6 2008. Were you one of the lead investigators involving
7 the death of a child, Aiden, in this case?
8 A Yes, I was.
9 Q And who was also the other lead investigator in this
10 case?
11 A Kevin Reese.
12 Q And prior to August 6th, had you set up some times
13 for certain people to come in and y'all to follow-up on
14 some additional interviews?
15 A That's correct.
16 Q And were two of those people actually Jessica Davis,
17 the natural mother of the child, as well as Kendra Samuel?
18 A That's correct.
19 Q What was the purpose in y'all having them come and
20 talk to you on that day?
21 A We had received information in the investigations
22 since our first interview with the individuals and we
23 wanted to provide the polygraph examination, offer them
24 that and re-interview to compare it to the information
25 we received from the coroner's office and so forth.

1 Q And when they came in that day, did you actually go
2 pick them up or how did they actually get to headquarters?

3 A I can't recall exactly. I think we went by the house
4 on one of them, and I think the other came on their own --

5 Q Okay.

6 A -- after I think about it.

7 Q You didn't transport Ms. Kendra Samuel to the --

8 A No.

9 Q Did she come with her mother that day?

10 A No. I know one -- one came on their own, caught a
11 ride. I think Ms. Samuel.

12 Q Okay. And that morning, were you aware that
13 Ms. Kendra Samuel initially made contact with
14 Investigator Gray?

15 A Right.

16 Q And during the -- the purpose of that was to offer
17 her a polygraph?

18 A That's correct.

19 Q And you weren't present for that period of time, were
20 you?

21 A No, I was not.

22 Q Later that afternoon, did you make contact with Kendra
23 Samuel sometime after one o'clock?

24 A Correct.

25 Q And tell the judge how that happened.

- 1 A There was indications from Investigator Gray to
2 Investigator Reese that Kendra's statement had changed
3 from the initial statement she gave Investigator Bob
4 Benson and that that statement changed quite differently
5 from what was given. It indicated injuries to the child,
6 and so we set up for the interview.
- 7 Q Okay. And who was actually assisting you that
8 afternoon once you made contact with Kendra Samuel?
- 9 A It was Agent Shockley with S.L.E.D.
- 10 Q That would be Greg Shockley with S.L.E.D.?
- 11 A That's correct.
- 12 Q And he's part of their Child Fatality Task Force, I
13 believe?
- 14 A That's correct.
- 15 Q Where did you initially contact Ms. Samuel?
- 16 A She was in the -- they had her in the lobby area.
- 17 Q Okay.
- 18 A I located an available interview room.
- 19 Q Uh-huh.
- 20 A And then once I had an available interview room, I
21 came to the lobby area, escorted her back to the interview
22 room.
- 23 Q Okay. And at that point, was she in handcuffs or in
24 any way restrained?
- 25 A No. At that point, she was not in custody.

1 Q Once you escorted her back to the interview room, who
2 all was present in the interview room?

3 A When we went back to the interview room, it was myself
4 and Agent Shockley.

5 Q And where were you trying to follow-up on information
6 that she had provided to Investigator Gray that you were
7 going to actually record this information, I believe?

8 A That's correct.

9 Q And had you been made aware that she had been advised
10 of her rights that day?

11 A That is correct.

12 Q Even though she wasn't in custody?

13 A That is correct.

14 Q Once you got back in the interview room, what did you
15 proceed to do?

16 A Once we got to the interview room, we set up to do
17 another statement with Ms. Samuel, and we got the
18 recording devices ready. And then we started the actual
19 interview.

20 Q And who was asking the questions that day?

21 A Myself and Shockley.

22 Q And who was actually providing the information that
23 was recorded?

24 A Ms. Kendra Samuel.

25 Q And on the discs that have been provided to the judge,

1 as well as the transcript, is that the information that
2 was recorded that day from Ms. Kendra Samuel?

3 A That's correct.

4 Q And I noticed there are two discs in the interview
5 you made; is that correct?

6 A That's correct.

7 Q And explain to the judge what happened?

8 A During the course of the interview, a beeping noise
9 kept chiming off my recorder. I had a number of
10 interviews on that recorder, apparently, and my memory
11 got full.

12 It warns you on the time that you have left that the
13 recorder will actually continue to be activated, and then
14 it will cut off. So the chimes start -- the beeps
15 constantly beep to remind me that the recorder is about
16 to shut off.

17 At that point, I made mention on the recording device
18 that we would terminate at this point to correct the
19 device, and we did so. I tried to delete some files off
20 of it that I knew I didn't need to get more memory.

21 THE COURT: It's hand held?

22 THE WITNESS: Yes. It's exactly -- almost exactly
23 like the one used there.

24 BY MS. CAMPBELL:

25 Q That the court reporter has?

1 A That the court reporter has right there.

2 Q And that she is recording what's going on here?

3 A Correct.

4 Q Once you cleared up the problem, did you continue to

5 question her about the matter at hand?

6 A No.

7 Q During that time period?

8 A We tried to rectify the memory issue, and then once

9 that was rectified, we started the recording and then I

10 make notations that the recording will continue.

11 Q Okay. And that was -- what is actually the second

12 part of the transcript that has been provided to the judge;

13 is that correct?

14 A That's correct.

15 Q And was the entire conversation that you had with her

16 recorded that day, or was some towards the end not

17 recorded?

18 A Toward the end, we ran into the a similar problem.

19 The recorder apparently ran out of memory. I think she

20 had finished giving a statement and was answering a

21 question and the actual recorder cuts off, but it wasn't

22 due to myself or Shockley actually cutting it off.

23 We didn't even know that it did not catch that portion

24 at that time.

25 Q And do you know approximately how much of the actual

1 interview was not recorded at that point?

2 A Approximately maybe five to six minutes at best.

3 Q At best?

4 A Yeah.

5 Q After the recording was done and everything, did you
6 make any attempts to further memorialize her statement
7 as Ms. Samuel gave to it you that afternoon?

8 A I did.

9 Q And I'm going to show you what -- I haven't marked
10 it yet, but will mark as State's Exhibit 2.

11 (Pause)

12 (WHEREUPON, State's Exhibit No. 2 was marked for
13 identification only.)

14 BY MS. CAMPBELL:

15 Q I'm going to hand up the actual -- there are two
16 duplicates here, the statements that you and Investigator
17 Shockley -- whose handwriting is it on the first three
18 pages of the statement, State's Exhibit 2?

19 A I gave Kendra an opportunity to write out her own
20 statement, so the first three pages is the defendant's
21 statement.

22 Q And is that substantially the same as what she had
23 told you during the recorded interview?

24 A Yes. It's a summary of exactly what she said.

25 Q And that's actually her handwriting there in the

1 first three pages?

2 A That's correct.

3 Q And did that -- what time was that statement initiated
4 that day?

5 A At 14:10 hours.

6 Q So that would be 2:10 in the afternoon?

7 A That's correct.

8 Q And once you gave her the opportunity, did it take
9 her a period of time to be able to write out those three
10 pages?

11 A Correct.

12 Q After she was able to write out in her own
13 handwriting, her statement that she wished to give to you
14 at that point, did you go back and ask some follow-up
15 questions?

16 A I did.

17 Q And are these reflected on pages three through six?

18 A That's correct.

19 Q And I'll get to seven and eight later, but in those
20 cases, whose handwriting are the questions in?

21 A The handwriting of the questions themselves is in
22 my handwriting, and then the answers are all in the
23 defendant's handwriting.

24 Q So she actually did that -- y'all did it in a
25 question/answer form at that point?

1 A That's correct.

2 Q And were you following up on pertinent information
3 that you felt the report was to clarify --

4 MR. HARPOOTLIAN: Your Honor, I haven't objected --

5 THE WITNESS: That's correct.

6 MR. HARPOOTLIAN: -- to her --

7 THE WITNESS: That's correct --

8 MR. HARPOOTLIAN: -- repeating the question, but I
9 object to the leading. It's her witness.

10 MS. CAMPBELL: It's pretrial.

11 THE COURT: Well, we're not in front of a jury.

12 MS. CAMPBELL: Thank you, Your Honor.

13 THE COURT: You can cross-examine him. You can
14 cross-examine him.

15 BY MS. CAMPBELL:

16 Q Are those issues you wanted to clarify at that point?

17 A Correct.

18 Q That's approximately three pages' worth of questions
19 and answers?

20 A Approximately three pages, yes.

21 Q After all that was memorialized, did the defendant
22 have an opportunity to review the statement as she had
23 given it to you?

24 A Yes.

25 Q And at that point, did she go ahead and sign off on

1 it?

2 A Yes, she did.

3 Q And is that her signature at the bottom?

4 A This is her signature, yes.

5 Q And who is actually the witness on that?

6 A On this one, it's -- let's see. That was maybe
7 Pegram's.

8 Q Pegram. You were there, however, and witnessed this
9 yourself?

10 A Correct.

11 Q Was she given an opportunity to make any changes that
12 she felt was appropriate?

13 A Yes.

14 Q And did she make any that you're aware of?

15 A No. She didn't make any changes. Not at that point,
16 no.

17 Q Not at that point?

18 A Correct.

19 Q Once she was given an opportunity to review it and
20 signed off on each and every page of that six-page
21 statement at that point, did you then continue to talk
22 to her or did you terminate the interview at that point
23 and go consult with someone else?

24 A Yes. Once we finished the written portion of it, I
25 left the room and met with Shockley, Kevin and the other

1 S.L.E.D. agent.

2 Q The other S.L.E.D. agent.

3 A Uh-huh.

4 Q I believe that's Agent Hurt from S.L.E.D. also?

5 A Hurt, that's correct.

6 Q And at that point, were you getting together to

7 basically review whatever additional information you had

8 gotten that day?

9 A Correct. The mother was interviewed by Investigator

10 Hartley and Investigator Reese.

11 Q Yes.

12 A So we got together to see what the two parties were

13 saying.

14 Q At this point, where is the defendant?

15 A She is in one of the interview rooms.

16 Q She is in one of the interview rooms?

17 A Uh-huh.

18 Q Is she handcuffed at this point?

19 A No.

20 Q Has she been placed under arrest?

21 A No.

22 Q Once you conferred with the other investigators,

23 including the ones from S.L.E.D., did y'all make the

24 determination that you wanted to ask some further

25 questions?

1 A Yes, we did.

2 Q And who actually participated in this last
3 interview?

4 A Investigator Reese had received some information from
5 the mother and had the actual autopsy examination that
6 he had studied.

7 Her statement wasn't being corroborated by some of
8 the facts he had gotten. So he, I and Hartley went back
9 in and spoke to Kendra further.

10 Q In your review, you were present during most of -- the
11 third -- the last interview?

12 A Yes.

13 Q I guess it would be the third one that day.

14 A The third one, yes.

15 Q But Investigator Reese was actually conducting that
16 interview, for the most part?

17 A Correct.

18 Q And do you know approximately what time it was when
19 that one started?

20 A Approximately three -- I think it was -- give me a
21 second. I'll check my notes. I want to say about 3:45
22 or so I think is when...

23 In my notes it has 3:58 p.m.

24 Q 3:58 p.m.?

25 A Uh-huh.

- 1 Q And that statement, was that also recorded?
- 2 A Yes, it was.
- 3 Q And do you know approximately how long that statement
- 4 lasted?
- 5 A That statement took about -- about an hour or so, a
- 6 little more than an hour.
- 7 Q And that was also recorded?
- 8 A Yes.
- 9 Q At the end of that statement, did anyone go back and
- 10 further clarify what's been marked as State's Exhibit No.
- 11 2 and then ask some follow-up questions to the written
- 12 statement?
- 13 A Yes. We asked approximately eight or more questions,
- 14 approximately two more pages' worth of questions after
- 15 the second interview to clear up.
- 16 Q And again, whose handwriting is that on seven and
- 17 eight?
- 18 A On seven and eight, that's my handwriting along with
- 19 the defendant's.
- 20 Q And the defendant's would be in the answer form, and
- 21 yours would be in the question?
- 22 A That's correct.
- 23 Q And those were her answers to your questions?
- 24 A That's correct.
- 25 Q Did she have an opportunity to review that?

1 A Yes, she did.

2 Q And did she indicate whether or not she wanted to
3 change anything, or did she sign off on it?

4 A No. There was no indication of any changes. She
5 signed off on it. There was no rush.

6 Q During the time period when you were with her that
7 afternoon, sometime after one p.m. through the course of
8 the afternoon into sometime after five p.m. did she ever
9 ask you for a lawyer?

10 A No.

11 Q Were you ever aware of her asking anyone for a lawyer?

12 A No, she didn't. She was very cooperative.

13 Q Did she ever tell you -- she was very cooperative?

14 A Yeah.

15 Q Did she ever tell you she didn't want to talk anymore?

16 A No.

17 Q Did you ever threaten her in any way?

18 A No.

19 Q Use any coercion?

20 A No.

21 Q Deprive her of any creature comforts?

22 A No.

23 Q And in your --

24 A In fact, we asked her did she have to use restroom,
25 need water, want something to eat. That's also on the

1 tape, I believe.

2 Q It's on the tape.

3 A Yeah, during the third interview.

4 Q So at the beginning of the third interview?

5 A Uh-huh.

6 Q And that's all memorialized?

7 A Yes.

8 Q And at any point, did she indicate she didn't want
9 to talk to you anymore?

10 A No.

11 Q And did anyone threaten her to make her talk?

12 A No.

13 Q Promise her anything?

14 A No.

15 Q Offer her any leniency?

16 A No.

17 Q During the time period when she was with you up until
18 the conclusion of her statement, was she actually free
19 to go?

20 A Yeah.

21 Q At the beginning of the third statement, was there
22 a part where Investigator Reese actually reminded her
23 about her rights and whether or not she wanted to continue
24 to talk?

25 A Correct.

1 MS. CAMPBELL: Thank you, sir. I don't have anything
2 else.

3 CROSS-EXAMINATION:

4 BY MR. HARPOOTLIAN:

5 Q When you spoke to Investigator Gray, you gave her the
6 polygraph? Did you speak to --

7 A Investigator Reese, I believe, spoke to Investigator
8 Gray.

9 Q Okay. And when you told -- did she fail the polygraph?

10 A I believe -- the way he worded it, similar to the way
11 he worded it on the stand, deception was indicated or what
12 have you.

13 Q Deception would be failing the polygraph.

14 A As he --

15 Q Isn't that what we said?

16 A That's fine.

17 Q Okay. And you knew that she had, according to Gray,
18 admitted to dropping the child, right?

19 A Correct, at that point, yes.

20 Q And she had admitted to Investigator Gray that she
21 had not only dropped the child, but there were questions
22 about whether the child was alive or not when she brought
23 it back, correct?

24 A That's correct.

25 Q And so at that point, she had admitted that she had

1 dropped the child, admitted that the child -- she had
2 questions about whether the child was alive or not before
3 you and Investigator Reese ever saw her; is that
4 correct?

5 A To my best recollection that's --

6 Q I'm sorry?

7 A To the best of my recollection, yes.

8 Q Okay. Do you have any handwritten notes with you?

9 A No, just the typed notes you were provided.

10 Q Just the typed notes we've seen?

11 A Uh-huh.

12 Q So about -- let me make sure I get the time right.
13 He brought her up to a reception area. Did you actually
14 accompany her back to the reception area?

15 A Yes.

16 Q From back to the interview room?

17 A Right. I located the interview where we could
18 interview her.

19 Q Okay. And did you tell her she is free to go?

20 A Did I tell her she was free to go?

21 Q Yeah.

22 A No, I did not.

23 Q And I mean, she is back inside the bowels of the City
24 police department, right?

25 A She is in my office. I wouldn't call it the bowels.

1 Q Well, is that area freely accessible to the public?

2 A Freely --

3 Q I can walk in to your office right now, in your office?

4 A Oh, no. You can't walk into my office, no, sir.

5 Q Right. So to get to your office, you have to go
6 through security.

7 A No. To get to my office, you just have to have law
8 enforcement escort you.

9 Q Right. So what I'm saying is -- when I say "security",
10 I mean law enforcement has to bring you back to your
11 office?

12 A Right.

13 Q Correct?

14 A Right.

15 Q And do you all have security doors? You have to punch
16 numbers or any --

17 A Yeah. We have secure doors, yes.

18 Q Right. Secure doors to get in and out?

19 A Right. But you can exit without the security doors
20 by the elevator.

21 Q By the elevator, okay. Now, when she was in -- clearly,
22 when she was next to that elevator when you went to get
23 her to take her back to the office, she wasn't handcuffed.
24 She wasn't in custody. She was free to leave?

25 A She was free to leave, but she was very cooperative.

1 Q Very cooperative.

2 A Uh-huh.

3 Q Okay. When she came back to your office and you began
4 this interview of her at -- let me make sure I get this
5 time right. Okay. Apparently, the audio recording began
6 at 1:27 p.m.; is that right, the first one?

7 A Oh yes, of our interview?

8 Q Right.

9 A Okay. Hold on a second.

10 (Pause)

11 Yeah, that's correct.

12 Q Now, is it your testimony that she was still free to
13 leave or -- I mean, she had admitted to hurting this baby,
14 right?

15 A Correct.

16 Q And you're going to just let her walk out the door?

17 A If she chose to leave at that point, yes, she could
18 have left.

19 Q And when was she not free to leave?

20 A At 5:40 or whatever -- whatever the time we placed
21 her into custody.

22 Q Now, you left her alone in a room. Was that room
23 locked or unlocked?

24 A She was left in one of the interview rooms. I can't
25 remember if they were locked or not.

- 1 Q Those rooms are locked, are they not?
- 2 A It's -- it has a lock mechanism, yes.
- 3 Q But it was locked. She was locked in?
- 4 A I can't remember if we locked it every time or not.
- 5 I can't remember.
- 6 Q But she was locked in at least for part of the time?
- 7 A It's capable of being locked.
- 8 Q Well, was it locked or not locked?
- 9 A I just answered your question, counselor.
- 10 Q Okay.
- 11 A It's capable of being locked. I can't tell you if
- 12 I locked it every time I stepped out or not.
- 13 Q You began interviewing her at 1:27.
- 14 A Uh-huh.
- 15 Q For about 11 minutes.
- 16 A Right.
- 17 Q Ten minutes, 49 seconds. You stopped, right?
- 18 A Yes.
- 19 Q How long was it stopped?
- 20 A You're talking about the recording itself?
- 21 Q Yes.
- 22 A Until I could rectify getting some memory on the
- 23 recording device.
- 24 Q And what did you delete?
- 25 A An old interview or something of that nature. I had

1 to listen to what I had in some of my older interviews,
2 whether it was a witness statement or what have you, I
3 deleted some files, which gave me more memory.

4 Q Okay. So then you do another 20 minutes of
5 interviewing?

6 A Okay, yes.

7 Q Right, twenty minutes, 32 seconds?

8 A Uh-huh.

9 Q Then at 2:10 p.m. you give -- she gives a written
10 statement, right?

11 A That's correct.

12 Q Part of this written statement?

13 A Correct.

14 Q And then you -- so from approximately 2:10 to
15 four o'clock, there is no tape to 3:58 p.m.?

16 A That's correct.

17 Q And at that point, y'all were continuing to interview
18 her, correct?

19 A No.

20 Q Well, you're getting a written statement.

21 A She is writing a statement of --

22 Q Yeah --

23 A -- of what she --

24 (Talking over each other.)

25 Q -- there's Q and A.

1 A -- of what has already been recorded.
2 Q Right?
3 A Okay. That's correct.
4 Q You're writing questions. She is answering.
5 A Correct, which is on the statement.
6 Q And that stops sometime prior to 3:58.
7 A Correct.
8 Q Then you start recording again?
9 A Correct.
10 Q And then that goes on for an hour and 18 minutes; is
11 that correct?
12 A That's approximately correct.
13 Q And during that process, people are raising their
14 voices with her, correct?
15 A No, not raising their voices.
16 Q Have you listened to the tape right here?
17 A Yeah, I've listened to it.
18 Q You've listened to it recently?
19 A Yeah.
20 Q And nobody is yelling at her? Nobody is making her
21 cry?
22 A She makes a comment that she felt like somebody is
23 yelling at her but no.
24 Q Okay. Now, she is in a room -- are y'all with her
25 that entire time, or are you leaving her alone from time

1 to time?

2 A No. I stepped out. Again, Investigator Reese was
3 interviewing the mother. We got together after finishing
4 up this portion of the written statement.

5 Q Right.

6 A I came out along with Investigator Shockley, and we
7 got together in Investigator Babin's office to talk about
8 what both parties had stated.

9 Q Now, when -- when was that? Was that before or after
10 the 2:10 written statement?

11 A That's after the written statement.

12 Q Okay.

13 A Uh-huh.

14 Q So -- and that's before the additions to that --

15 A That's correct.

16 Q -- that were made after five o'clock?

17 A That's correct.

18 Q So at what point was she left alone in this room?

19 A As I just stated, after we finished the 2:10
20 statement.

21 Q Right?

22 A And she finished writing her statement, answering the
23 questions and so forth, she was left alone in the room.

24 Q But between the time you finished with the 1:27, the
25 interview began at 1:27, went for ten minutes, 49 seconds,

1 stopped.

2 A Uh-huh.

3 Q Went for another 20 minutes, 32 seconds. Was she left
4 alone prior to that? Prior to 2:10, was she left alone
5 in the room?

6 A No, no, no. Prior to 2:10?

7 Q Yeah.

8 A No, no. Everything -- everything to that point, I
9 believe was...

10 Q What about prior to 1:27, prior to beginning the audio
11 recording, was she alone in the room?

12 A 1:27 is when we started the audio recording.

13 Q The interview but --

14 A Right.

15 Q -- when you put her in the room and then get everybody
16 and the tape recorder -- and the digital recorder?

17 A Probably so, yes.

18 Q So she is in a room alone?

19 A Uh-huh.

20 Q Okay. Now, let me -- let me understand this advice
21 of rights. Nowhere in this transcript right here do I
22 see you or anybody advising her of her Miranda warnings;
23 is that correct?

24 A That's --

25 Q No one tells her she has the right --

1 A Investigator --
2 (Talking over each other.)
3 Q -- to remain silent --
4 A -- Investigator --
5 COURT REPORTER: I'm sorry. You guys can't talk at
6 the same time.
7 THE COURT: Sir --
8 COURT REPORTER: I cannot make a record.
9 THE WITNESS: I apologize.
10 COURT REPORTER: Thank you.
11 BY MR. HARPOOTLIAN:
12 Q Let me rephrase that.
13 A Go ahead.
14 Q We have a form up here that you heard Investigator
15 Gray talk about --
16 A Uh-huh.
17 Q -- which is State's Exhibit Number 1 for
18 identification. Do you recognize those rights?
19 A Right. This is what we use for our advisement of
20 rights form.
21 Q Did anyone have her sign a new advice of rights form?
22 A No, this is the one we interviewed her on.
23 Q Okay. Did you have that with you?
24 A Yeah.
25 Q Okay. Did you read this to her again?

1 A No, I did not.

2 Q I mean, there is nothing on that recording. All you
3 just said was you've been advised of your rights, right?

4 A Well....

5 Q You never asked her if she wanted a lawyer. You never
6 asked her if --

7 A She --

8 Q -- she wanted to remain silent.

9 A She had an opportunity at this point right here to
10 ask for a lawyer. She -- she did not choose to do so.
11 She --

12 Q Listen to --

13 A There was about --

14 Q -- my question, please. My question is --

15 A I answered your question.

16 Q -- did you, did you -- did you ask her.

17 A I answered your question.

18 Q No. I asked you did you --

19 (Talking over each other.)

20 A No, sir. You --

21 Q -- advise her of --

22 A It's --

23 THE COURT: All right. Just listen --

24 THE WITNESS: I answered his question. No.

25 THE COURT: Sir --

1 THE WITNESS: I answered --

2 THE COURT: -- Mr. Thomas.

3 THE WITNESS: Yes, sir.

4 THE COURT: One at a time.

5 THE WITNESS: Yes, sir.

6 THE COURT: One at a time or we'll just end this hearing,
7 because the court reporter cannot take down the two of
8 you talking at the same time. I mean --

9 THE WITNESS: Sorry, Your Honor.

10 THE COURT: -- regardless of what he says, you can't
11 say it at the same time. You can say --

12 THE WITNESS: I see.

13 THE COURT: -- what you want.

14 MR. HARPOOTLIAN: May it please the Court, Your
15 Honor.

16 THE COURT: But not at the same time.

17 You may continue.

18 BY MR. HARPOOTLIAN:

19 Q Did you say, "You have a right to remain silent"?

20 A I did not advise her of those rights.

21 Q Did you say, "Anything you say can be used against
22 you in court"?

23 A I did not advise her of those rights.

24 Q Did you say, "You have the right to talk to a lawyer
25 for advice before we ask you any questions and to have

1 him with you during questioning"?

2 A Nope.

3 Q Did you say, "If you decide to answer questions now
4 without a lawyer present, you will still have the right
5 to stop answering at any time. You also have the right
6 to stop answering at any time until you talk to a lawyer."
7 Did you tell her that?

8 A I did not.

9 Q You did say, or Mr. Reese said at some point, "You've
10 been advised of your rights"?

11 A Correct.

12 Q That's it?

13 A Correct.

14 Q Now, it's your testimony before this Court she could
15 have walked out of there, stopped this interview at any
16 point, just got up and walked out of the room?

17 A At no point until the end of our interview until she
18 was placed into official custody was she in custody. She
19 was not --

20 Q I'm not --

21 (Talking over each other.)

22 A So yes, sir.

23 Q Well, I'm not talking about official custody.

24 A Right.

25 Q She could have just said, "Bye. I gotta go." She

1 would have got up and left --

2 A Correct --

3 Q -- that's your testimony.

4 And you cannot say the door wasn't locked, can you?

5 A No. I can't say if it was locked or not, to be honest
6 with you.

7 Q And if it was locked, she would not have been able
8 to leave, correct?

9 A She wouldn't have been able to leave that moment, no,
10 but if I entered and she said, "I'm ready to go," she could
11 have left, yes.

12 Q Did she ever say, "I'm ready to go"?

13 A No.

14 Q Did you ever tell her she was free to leave?

15 A Again, no.

16 Q And clearly -- I want to make sure I understand this.
17 This last set of questions about -- that are entered and
18 the part where you're talking about shaking the baby and
19 all of that, that's done in terms of written, not on tape,
20 correct, not recorded?

21 A None of the written was done on tape.

22 Q Pardon me?

23 A None of the written portion was done on tape.

24 Q Why?

25 A Because it had already been covered on tape prior to

1 her writing it.

2 Q But is -- you're writing down questions, and she is

3 answering them and writing.

4 A Right. She had already answered them on the recorded

5 tape.

6 Q Did she ever answer them wrong when you wrote a

7 question, or she just wrote down whatever she wanted?

8 A She wrote her answers. She read over her answers,

9 and she signed the form.

10 Q But you never disagreed with her answers?

11 A No.

12 Q You never said, "You are lying." You never said,

13 "You're making that up." You never said, "That's

14 inconsistent"?

15 A Nothing on the written statement was inconsistent

16 with what she told me on the recorded statement.

17 Q Yet you went out and then came back and got the written

18 statement; is that correct? You left and came back and

19 got a written statement?

20 A I don't recall it that way. I may have.

21 Q Did you just turn off the recorder and start with a

22 written statement?

23 A That's how I recall it. I may have stepped out, but

24 I don't recall stepping out.

25 Q Were you talking to the coroner or was anybody talking

1 to Dr. Nichols or anybody talking to the coroner's office
2 or talking to the medical examiner?

3 A Investigator Reese was in another area. I don't know
4 exactly what they have been -- they were doing prior to
5 this part of the statement. We didn't -- we didn't get
6 together and speak on anything until after her statement
7 was done.

8 MR. HARPOOTLIAN: Okay. Thank you.

9 THE COURT: Anything?

10 MS. CAMPBELL: Just a couple of questions. For the
11 record, let me mark these as State's Exhibits 3, make it
12 5, too.

13 (WHEREUPON, State's Exhibits Nos. 3 - 5 were marked
14 for identification only.)

15 REDIRECT EXAMINATION:

16 BY MS. CAMPBELL:

17 Q Just for the record, I'm showing you what's been
18 marked State's Exhibit 3 and 4 --

19 A Uh-huh.

20 Q -- which I believe are the -- have you had the
21 opportunity to review those?

22 A Yes, I have.

23 Q And do those accurately reflect the recorded
24 conversations?

25 A They do.

1 Q Okay. He also asked you specifically about not being
2 advised of her rights again. At the beginning of the
3 statement, Investigator Reese, I believe, was talking to
4 her in that last statement; is that correct?

5 MR. HARPOOTLIAN: I can't hear a word she is saying.

6 THE WITNESS: That's correct.

7 MR. HARPOOTLIAN: I apologize. She was talking
8 quickly into the wall.

9 THE COURT: Stand down.

10 BY MS. CAMPBELL:

11 Q And in that -- does it reflect that Investigator Reese
12 asked her about her rights?

13 A Yes, he did ask her about her rights.

14 Q Specifically, what's -- what was on the tape?

15 A "Today's date is August 6th, 2008. The time is
16 3:58 p.m. in the afternoon. We are at Number 1 Justice
17 Square, Columbia, which is Columbia Police Department.

18 "I am investigator K.E. Reese. Also, we have in the
19 room Investigator A.L. Thomas. Both of us are Columbia
20 police officers. Ms. Hunt, who is with the S.L.E.D. Child
21 Fatality Unit is also in the room."

22 Let's see. "And we are here to interview Kendra
23 Samuel, and this is the continuation of the interview from
24 earlier today that was conducted by Lieutenant Shockley
25 with S.L.E.D., the Child Fatality Unit, and A.L. Thomas.

1 "Kendra, would you mind bringing your chair closer,
2 a little closer for me? Pull up a little closer."

3 Kendra answers, "Okay."

4 "I'm going to ask you, you are here -- you have been
5 advised of your rights earlier today; is that correct?"

6 Kendra's answer is, "Yes, sir."

7 Investigator Reese: "Okay. Is there anything you
8 want to change about those rights? Do you want to continue
9 talking with us?"

10 Answer from Kendra is, "Yes, sir."

11 "Okay. Let me ask you at this time, are you okay?
12 Do you need a break to go to the restroom or some food,
13 some water or soda or anything?"

14 Kendra's answer is, "No, sir."

15 Reese: "Are you sure?"

16 Kendra: "Yes, sir" -- Ms. Samuel, "Yes, sir."

17 Q And when you spoke to her that day, both the first
18 time and the second time, you were aware that she had been
19 advised of her rights by Investigator Gray that morning?

20 A That's correct.

21 Q And that's shown on State's Exhibit Number 1?

22 A That's correct.

23 MS. CAMPBELL: Thank you. I don't have anything
24 further.

25 THE COURT: Anything further?

1 MR. HARPOOTLIAN: Nothing further.

2 THE COURT: You may come down, sir.

3 THE WITNESS: Thank you, sir.

4 THE COURT: Next witness?

5 MS. CAMPBELL: The State would call Investigator
6 Kevin Reese.

7 THE BAILIFF: Place your left hand on the Bible, raise
8 your right hand, face the clerk.

9 KEVIN REESE,

10 after being duly sworn, testified as follows:

11 THE CLERK: Thank you. Have a seat in the witness
12 stand, please.

13 DIRECT EXAMINATION:

14 BY MS. CAMPBELL:

15 Q Investigator Reese, where are you employed?

16 A Columbia Police Department.

17 Q And what do you do there, sir?

18 A I'm a homicide and violent crimes investigator.

19 Q Okay. You're going to have to talk up a little bit
20 because the microphones don't work, which I hope we get
21 fixed tomorrow.

22 As part -- were you one of the lead investigators
23 involving State vs. Kendra Samuel?

24 A Yes, ma'am.

25 Q And you were looking into the death in Aiden Harling,

1 a nine -- about a ten-week-old child?

2 A That's right.

3 Q At some point during the week of -- the first week
4 in August, did you set up times for both the child's
5 mother and Kendra Samuel to come in so you could follow
6 up on some interviews?

7 A Yes, ma'am, I did.

8 Q And was that specifically set up for the morning of
9 August 6th?

10 A Yes, ma'am.

11 Q And did both Ms. Samuel and Jessica Davis come to
12 headquarters that morning?

13 A Yes, ma'am.

14 Q Do you know how they got there? Did you go to get
15 them?

16 A We picked up Ms. Davis.

17 Q You picked up Ms. Davis, the child's mother?

18 A That's right.

19 Q And did Ms. Samuel meet you at headquarters?

20 A Somebody else brought her there.

21 Q Okay. It wasn't the police?

22 A No. It wasn't the police.

23 Q That morning, did you then start interviewing
24 Jessica Davis?

25 A Yes, ma'am, I did.

1 Q During the course of the afternoon, did you become
2 aware that Ms. Samuel's story had changed?

3 A Yes, ma'am.

4 Q The defendant's?

5 A Yes, ma'am.

6 Q And at some point that afternoon after talking to the
7 child's mother and getting more information from her, did
8 you then meet up with Investigator Thomas, as well as
9 other investigators from S.L.E.D.?

10 A Yes, I did.

11 Q After meeting with them and basically exchanging
12 information, did you then go in and have a talk with
13 Ms. Samuel herself?

14 A That's right, I did.

15 Q And where did that take place, sir?

16 A At the police department, Columbia Police Department.

17 Q In one of the interview rooms, I believe, on the second
18 floor?

19 A That's right.

20 Q And who all was present when you actually interviewed
21 the defendant?

22 A It would have been myself, Investigator Thomas, and
23 Agent Sarah Hurt from S.L.E.D., Child Fatality Unit.

24 Q I'm going to show you what's been marked as State's
25 Exhibit No. 5. Was that interview actually recorded?

1 A Yes, it was.

2 Q You've had an opportunity to review this. Is that
3 reflected in State's Exhibit 5?

4 A That's right.

5 Q During the course of talking to her, as you have heard
6 testimony today without belaboring the point, did you
7 remind her that she had been advised of her rights?

8 A I did.

9 Q And did you also offer her food or drink, if she wanted
10 to, or a break if she needed one?

11 A Absolutely I did.

12 Q Did she -- what was her demeanor that day with you?
13 Was she cooperative? How would you describe her?

14 A I thought she was very calm and -- cool, calm, and
15 she cooperated with me during that time.

16 Q And did you record that statement that you took from
17 her?

18 A I did.

19 Q At the end of that statement, was there some follow
20 up that was done in addition to a six-page statement she
21 had provided, a written statement that she provided
22 earlier?

23 A Yes. What we did, I requested Investigator Thomas
24 to just -- based on the interview that we had just had
25 with her, I requested Investigator Thomas to do follow

1 up, written statement, Q and A, question and answer form.
2 Q That was an additional two pages?
3 A That would be correct.
4 Q And were you aware that day that she had been advised
5 of her rights that morning by Investigator Gray?
6 A Yes, I was.
7 Q Those were the rights you reminded her of at the
8 beginning of the interview?
9 A Yes, it was.
10 Q During the entire period you were with her -- at any
11 time, did she ask for a lawyer?
12 A No, she didn't.
13 Q Did she invoke any of her rights?
14 A No, she didn't.
15 Q Did she appear coherent?
16 A Yes, she did.
17 Q Was she responsive to your questions?
18 A That's right.
19 Q Did you promise her anything to make her talk to you?
20 A No, I didn't.
21 Q Did you threaten her in any way?
22 A No, ma'am.
23 Q In your opinion, was she cooperating voluntarily in
24 speaking with you?
25 A Absolutely.

1 MS. CAMPBELL: That's all I have.

2 CROSS-EXAMINATION:

3 BY MR. HARPOOTLIAN:

4 Q Is your cell phone number 413-8227?

5 A That's right.

6 Q Now, Kendra called you from that locked room on your
7 cell phone to ask you to come let her out to go get a glass
8 of water, did she not?

9 A Absolutely not.

10 Q Never?

11 A Never. That's the first time I heard of that.

12 Q So you're denying that there was a phone call made
13 on August 6th from 269 -- let me make sure I'm getting
14 this number right. Is that your phone number?

15 A 413-8227.

16 Q Uh-huh. So if there are cell phone records showing
17 she called you, you have no recollection of that
18 whatsoever?

19 A I don't remember her calling me, but if she did call
20 me, it definitely wasn't for -- to let her out of the room
21 so she could get some water. That definitely would have
22 been addressed.

23 Q Okay. Well, the door --

24 A I don't remember her calling --

25 Q -- was locked she couldn't get out, right?

1 A I don't know, because I didn't leave her in the room
2 so I can't --

3 Q Who did?

4 A -- attest to that.

5 The last time she was in the room that I know of was
6 with Investigator Thomas and Investigator -- Agent
7 Shockley.

8 Q Agent Shockley, and so as -- from 1:57 forward -- I'm
9 sorry. Yeah, 1:57 forward when you were there with her,
10 did you tell her that she could leave?

11 A From 1:57 forward?

12 Q Whenever the recording started, did you tell her she
13 could leave?

14 A No, I didn't tell her.

15 Q Did -- when you left the room -- did you leave the
16 room when the tape recorder, the digital recorder,
17 malfunctioned after ten minutes?

18 A No. I wasn't in there when that happened.

19 Q You were not in there when -- you were not in there
20 when they initiated the phone -- the recording that was
21 with Thomas and Shockley at 1:27? You didn't come in
22 until -- well, you came in after that.

23 A I -- I -- in my notes, sir, I have that I started
24 interviewing her at 3:58. I think that's the first time
25 I had contact with her at all that day.

1 Q So you were not in there prior to 3:58?

2 A No, sir.

3 Q So you were only there for -- you were there after

4 the initial written statement was taken?

5 A Yeah, that's right.

6 Q And you don't know whether she was, prior to that,

7 locked in the room or not locked in the room?

8 A No. I have no knowledge about that.

9 Q You don't know whether she was free to leave or not

10 free to leave?

11 A I don't -- I'm not sure whether that ever came up,

12 but to my knowledge, she would have been free to leave

13 because she was not --

14 Q She could have walked out of there anytime, second

15 floor inside the interview room at the police department?

16 A I'm not sure whether you're asking me were we holding

17 her there or if she got up --

18 Q Well, what I'm asking is could she have just gotten

19 up and said, "Bye, guys," gotten up and left?

20 A I don't think we would have been able to stop her if --

21 Q I mean, if you think -- I mean, if she said, "Hey,

22 Officer Reese, kiss my rear end. Bye. I'm going home,"

23 walks out the door, gets on the elevator and goes home,

24 could she have done that?

25 A Up until a certain point --

1 Q Well --

2 A -- if she had done that, I would have -- I'm answering
3 your question.

4 Q Right. I'm sorry, go ahead.

5 A Up until a certain point, if she had done that, I would
6 have just told her "bye."

7 Q Okay. At what point did that stop?

8 A The point where she gave me the confession.

9 Q And where was that?

10 A Sometime after 3:58.

11 Q Okay. But before 5:17?

12 A Before 5:17?

13 Q Right.

14 A Anytime between 3:58 and -- I don't know where you're
15 getting 5:17 from.

16 Q Well, what's the date -- where's the time on the end
17 of the written statement? Where is that written
18 statement? Did you already introduce it?

19 MS. CAMPBELL: I didn't introduce the transcript, no,
20 sir.

21 BY MR. HARPOOTLIAN:

22 Q No, no. I'm talking about the written statement.

23 Well, maybe it is in the transcript. Hold on one
24 second.

25 (Pause)

1 Okay. This State's Exhibit No. 2 begins at 14:10;
2 is that right?

3 A That's what it looks like.

4 Q Okay. And then I think we indicated that it stops
5 on page three, and then there's a Q and A. Were you present
6 for this Q and A or not?

7 A I think I left by that time. That's -- that's the
8 last two pages?

9 Q No. The last two pages, I mean, you're swearing to
10 it here. You're the -- aren't you Kevin Reese?

11 A Well, I just notarized it. I would have come back
12 in there, but I think at that time, Thomas was doing the
13 Q and A on her after I interviewed her, and then he did
14 the Q and A. I left them and then I came back once it
15 was -- the Q and A was complete.

16 Q So when did she confess to you?

17 A Somewhere between 3:58 when I sat down and started
18 talking with her and just prior to Thomas taking this last
19 two-page question and answer.

20 Q So at that point, she was not free to leave?

21 A Once she gave me a statement saying what she did, it
22 wouldn't have been advisable that she was free to leave.

23 Q Okay. I guess -- so prior to Thomas taking the last
24 two pages, she was not free to leave because I think what
25 you just said is when she gave you the statement -- you

1 weren't even there for Thomas.

2 A I --

3 Q You came back in and notarized the signature.

4 A That's right. While he was writing down the -- doing
5 the Q and A from the last interview, which would have been
6 the interview with myself --

7 Q Right.

8 A -- him and Agent Hurt.

9 Q Right.

10 A I left out of the room.

11 Q Well, here is the last page of the transcript, and
12 Kendra says, "I'm sorry I didn't tell you guys at the
13 beginning. I was just too scared to say anything."

14 You say -- Investigator Reese: "Okay. I understand.
15 We'll end the interview with Jessica now, and the time
16 is 5:17"?

17 A Okay.

18 Q At that point, she is not free to leave because at
19 that point, she has confessed to you, correct?

20 A That would be right.

21 Q I'm sorry?

22 A That's right.

23 Q Okay. And then after that, there are -- and prior
24 to that then, how much all of this written statement was
25 taken prior to that 5:17 and how much was taken after

1 5:17?

2 And maybe I can help you. The first three pages -- now,
3 who is that? Investigator who?

4 A Pegram.

5 Q Okay. And he is taking a statement, right?

6 A No. He just notarized it.

7 Q Just notarized it. No. He -- it says from
8 Investigator Pegram here.

9 A No. That means -- what this -- his name down here
10 means that --

11 Q Okay. So Investigator Thomas took this one?

12 A That's right.

13 Q Okay. And then after that, there is a series of
14 questions. Who is doing these questions, do you know?

15 A That would have been Thomas. It looked like his
16 writing.

17 Q Okay. And was that done prior to 5:17 or after 5:17?

18 A This was prior to.

19 Q Okay. And then I believe we -- the pages seven and
20 eight of this statement would have been taken after 5:17
21 is what we're saying now?

22 A That would be right.

23 Q I'm sorry. That's right?

24 A Yes.

25 Q Okay. So at this point, she clearly, in your opinion,

1 has confessed, and she is not free to leave. She is in
2 custody.

3 A That's right.

4 Q Okay. Now, you would agree with me if somebody had
5 locked the door prior to that, prior to any of this and
6 she had tried get out, she was not free to leave; isn't
7 that correct?

8 A I wouldn't necessarily agree with you on that. If
9 she just knocked on the door, at that point if she was
10 still free to leave, they would have let her go. But again,
11 I can't address whether the door was locked or not. I
12 wasn't around there.

13 Q And you deny receiving a cell phone call from her that
14 afternoon?

15 A No. I deny remembering that, but I can tell you this:
16 She did not call me and ask to let her out for some water.
17 If she had done that, it definitely would have happened,
18 but I don't recall that happening.

19 Q You don't recall getting a phone call from her at all?

20 A No, sir.

21 Q Okay. But if she testified that she called you to
22 let her out of the room for water or whatever, would you
23 agree she did that, if the door was locked and she wanted
24 somebody to let her out?

25 A If you have phone records that show her phone called

1 mine, that's the only thing I could say. I'd have to agree
2 with that, but what I'm telling you is I do not recall
3 her calling me.

4 Q Okay.

5 A She could have called my cell phone. I just don't
6 know what the reason would have been and what it was, how
7 it was handled. I don't recall that.

8 Q Okay. Beg the Court's indulgence.

9 (Pause)

10 Okay. Now, the doors to that interview room, they're
11 keyed on both sides, aren't they?

12 A I'd have to see what you're about to show me.

13 Q I'm going to show you a picture of the inside of the
14 door.

15 A I would say that that looks like a key from the inside,
16 yeah, it's possible.

17 Q Well, I mean, when y'all are interviewing people, do
18 you have any way to secure them in there?

19 A I -- you know, I think there's been certain times
20 when they moved offices from one place to another, and
21 they would have changed locks. I think on that, they may
22 have changed the locks at -- from inside to out. I don't
23 recall what the situation was when she was in there. I
24 can't remember that.

25 Q Officer Reese, let me -- you're not listening to my

1 question.

2 A I'm listening to your questions.

3 Q In your interview rooms -- well, listen to me. In
4 your interview rooms, do you not have any way to secure
5 somebody in one of those rooms while they're being
6 interviewed?

7 A Well, I -- are you talking about all the interview
8 rooms, or are you just talking about that one right there?

9 Q Well, let's talk about all of them. Are there ways
10 to secure people?

11 A I think in all except one of them.

12 Q How do you secure them?

13 A We just don't use it for anybody that's going to be
14 incarcerated.

15 Q No, no. I'm asking you on the ones where you are
16 going to be interviewing somebody that's going to be
17 incarcerated, how do you secure the room?

18 A I think on all of that, you -- there is a lock on the
19 outside.

20 Q You lock the door?

21 A Uh-huh.

22 Q Correct?

23 A Yeah.

24 Q And in this room, you can lock the door, correct?

25 A In that room she was in, you would be right.

1 Q And you have no recollection of locking the doors,
2 but you would say honestly, it could have been locked?

3 A It could have been, absolutely.

4 Q And you would agree with me, somebody that is in a
5 locked room is not free to go, or at least their perception
6 would be they're not free to go?

7 A No. I'm not going to agree with you on that. I can't
8 tell you what their perception would be. I can tell you
9 just what I just told you, Counselor. If they knocked
10 on the door and they were free to go, we would let them
11 out and let them go.

12 MR. HARPOOTLIAN: Okay. No further questions.

13 MS. CAMPBELL: I have nothing further, Your Honor.

14 THE COURT: All right, sir. You may come down.

15 Anything further?

16 MS. CAMPBELL: No, sir.

17 MR. HARPOOTLIAN: Agent Shockley, please.

18 GREG SHOCKLEY,

19 after being duly sworn, testified as follows:

20 DIRECT EXAMINATION:

21 BY MR. HARPOOTLIAN:

22 Q Agent Shockley.

23 A Yes, sir.

24 Q You're going to have to speak a little bit louder,
25 because apparently, the microphones are not working

1 today.

2 A Okay.

3 Q Horrible timing here. So you're with S.L.E.D.?

4 A Yes, sir.

5 Q And how did you come to be involved in this case?

6 When did you get involved? Early on or not until the 6th?

7 A I would probably have to say not until the 6th, and
8 I'll clarify that by saying that at this time, I was one
9 of the supervisors in the Special Victim's Unit.

10 Q Right.

11 A And so I didn't necessarily work cases, but as cases
12 were worked by agents, sometimes I'd read them, check
13 them, go over them, something of that nature.

14 In this particular case, Agent Hurt was the case
15 agent, and when she was notified to go downtown to Columbia,
16 I was just asked by the captain to go down with her. So
17 if that will help clarify how I ended up down there that
18 day...

19 Q But we know at some point on the afternoon of the 6th,
20 you ended up in a room with Kendra Samuel; is that
21 right?

22 A That's correct.

23 Q And who was with you in that room?

24 A Investigator Thomas from the City of Columbia.

25 Q Okay. And do you remember about what time that was?

1 A 1:30, 1:20, somewhere in that neighborhood.

2 Q And y'all recorded an interview with her; is that
3 right?

4 A That's correct. Investigator Thomas had the
5 recorded interview.

6 Q Okay. Now prior to going into that room, had y'all
7 been advised as to what she had said to -- earlier to
8 Mr. Gray?

9 A As I recall -- I don't recall exactly what was said,
10 but there was something there that he discovered that
11 felt like we needed -- or she needed to be interviewed
12 beyond what was asked of her during the polygraph.

13 Q Right.

14 A So therefore, that was the reason we went in to do
15 the interview.

16 Q And when you went in to do the interview, apparently,
17 the tape was stopped after about ten minutes. Do you
18 remember that?

19 A I remember at some point in time hearing the tape
20 beep because I asked Investigator Thomas, you know, did
21 the machine beep, what's going on.

22 He indicated he had flipped the tape or did something
23 to it to make it continue to work. There was something
24 there, yes, sir.

25 Q Okay. And then y'all started back again after he did

1 something to the tape recorder?

2 A That's correct.

3 Q Did he tell you he had to delete some files?

4 A No, sir. The only thing I know is I remember hearing
5 it beep and asking him something like was that the machine?
6 Did it beep, I asked something to that effect. He said
7 yes, he had some time left on it. I'm not sure if he just
8 flipped over the tape or what he -- I just don't remember.

9 Q Would it surprise you to know it was a digital tape
10 recorder? There was no tape.

11 A No. That wouldn't surprise me. Like I said, I never
12 handled the tape recorder, so I don't know what he did
13 to it.

14 Q Okay. And then you all did about another 20 minutes
15 of -- after starting back up which was taped, right?

16 A Yes, sir.

17 Q Now, were you present when she gave a written
18 statement?

19 A I don't recall being present when she gave a
20 written statement. I may have been but I...

21 Q Do you remember this written statement? Were you
22 present for that?

23 A Well, let me hold it.

24 (Pause)

25 No, I don't recall being present for the written

1 statement. I know I was in there for the oral interview
2 with Investigator Thomas.

3 Q Right.

4 A But I can't sit here with 100 percent certainty and
5 say that I was sitting there when she gave the written
6 statement or not. I mean, I may have been but...

7 Q And you were --

8 A I know I was in there when we were tape recording,
9 did that first interview.

10 Q Were you present for the 3:58 interview with her?

11 A No, sir. That would have been -- I think that was
12 Investigator Reese, Agent Hurt or maybe Investigator
13 Thomas.

14 Q Right.

15 A Those three. I wasn't present during that time.

16 Q And you were in this room with -- I mean, what -- do
17 you remember when you left and why you left? Would they
18 have stopped interviewing at that point?

19 A At the time, Investigator Thomas and I stopped
20 interviewing her. I don't recall exactly why, but we did
21 stop. We then went into an adjoining room and met with
22 Investigator Reese and Hurt who had been off
23 interviewing someone else.

24 Q Right.

25 A We discussed what -- you know, our interview. They

1 were discussing their interview. At that time, they felt
2 like they needed to go back and go and talk with Ms. Samuel
3 again.

4 When they went in to go do it, there were three of
5 them. Since I just came down with Agent Hurt that day --

6 Q Right.

7 A -- I didn't feel like I needed to be another party
8 in there, so I didn't go.

9 Q But in that interview with you, the recorded
10 interview before they went back in, she admitted to you
11 that -- that she had lied in her previous statement, did
12 she not; that she had actually dropped the baby, isn't
13 that what you said?

14 A She -- what she told us was that when she went to pick
15 the child up, that she forgot to put the handrail down.
16 It hit its head on there and she had the baby in her hands.
17 It slipped and it fell and hit the floor --

18 Q Right.

19 A -- is what she told us. Then she talked about, you
20 know, being worried about the baby. She shook the baby
21 on a couple of different occasions there when she took
22 him for a walk in the park. She shook it again to try
23 to revive it. She couldn't get a response out of it.

24 She took the child back home where the grandmother
25 and some other family members were there, indicating

1 with them that they thought the baby was asleep. She may
2 have thought it was, so she put him in the crib, but she
3 didn't let any of them see or touch the child at the time.
4 Q But she left?
5 A And then she left with her boyfriend to go get some
6 hotdogs. Then she came back --
7 Q Wait a minute. She left the baby alone with momma,
8 grandma, and cousin while she went with the boyfriend to
9 go get a hotdog; is that right?
10 A Right. She had put the baby in a crib.
11 Q Right.
12 A Put a blanket on it. She went and got a hotdog and
13 then she came back.
14 Q But she was gone 30, 45 minutes?
15 A At least. I'd say somewhere in that area.
16 Q Okay. Now, when y'all were interviewing her, y'all
17 were on the second floor of the police department?
18 A Yes, sir.
19 Q In a room with no windows?
20 A (There was no response.)
21 Q I mean, again --
22 A Yeah. Yeah. There were no windows in --
23 Q -- you've been in a million interview rooms, right?
24 A Right. There weren't any windows in that room.
25 Q Have you ever been in an interview room with windows?

1 A No, not an outside window.

2 Q Not an outside window, that's right.

3 Some of them have one-way windows, but none with
4 outside windows, and when y'all left, I think we heard
5 some testimony the door was locked when she -- when she
6 was left in there alone?

7 A I don't know. I mean, I didn't lock the door. Now,
8 if it was locked, I wouldn't have been the one to lock
9 it. I remember leaving the room, but I -- I can't tell
10 you --

11 Q Was she free to leave? Was she free to get up and
12 walk out the door and go home?

13 A I think she could have if she wasn't under arrest at
14 that time.

15 Q Okay. Well, was she in custody? Was her movement
16 restricted in any way? Did anyone say to her, "You can
17 go home"?

18 A Nobody told her she could go home. Nobody told her
19 she couldn't go home. I remember we just took a break.
20 She had been offered some, you know, drink. We checked
21 on her, told her we would be back with her in a little
22 while.

23 Q But she admitted lying on her previous statement.
24 Her previous statement didn't mention anything about
25 dropping the baby. Her previous statement hadn't

1 mentioned anything about shaking the baby.

2 A When I was in there with her, I don't recall talking
3 about lying in a previous statement. The only thing she
4 talked about was one other time when the child had fallen
5 down off of a chair and fell on an air mattress, something
6 she immediately called the mom to let her know about it.

7 In this instance, you know, when it happened, she
8 kind of kept it away from the mom, but I don't recall her
9 saying that -- where she lied in a previous statement to
10 us.

11 Q But --

12 A I mean, it's in -- it's recorded. If it's there, it
13 is, but I just don't recall her saying she was lying about
14 something to us earlier.

15 Q But she indicated the child had stopped breathing,
16 right?

17 A She indicated she knew something was wrong with that
18 child, yes --

19 Q Right --

20 A -- while she was walking with her --

21 Q She was --

22 (Talking over each other.)

23 -- a suspect in causing the death of the child, right?

24 A At that point, I guess you could say that.

25 Q She is the only one who admitted having the child.

1 The only one who said the baby had hit his head, the only
2 one who -- indicated the baby had stopped breathing, and
3 actually, I think you had indicated she actually felt a
4 heartbeat, and she indicated not; isn't that correct?

5 A Right.

6 Q So you have her saying no heartbeat, no breathing.
7 And so, at that point, maybe she's a suspect, is she not?
8 She is somebody that you knew, somebody you believe had
9 caused or participated in causing that child's death;
10 isn't that right?

11 A At that point, she would have -- you know, she would
12 have been there because, obviously, she was the last one
13 with the child.

14 Q But she has admitted to you after that --

15 A Right.

16 Q -- that she has caused the death of that child. You
17 thought that at that point, right?

18 A She -- yes. She had done something to injure that
19 child, yes.

20 Q Right. So she wasn't free to leave. She couldn't
21 get up and walk out. I mean, that wasn't your case, but
22 your view was she was the person that caused the death
23 of the child when you interviewed her, correct?

24 A Yeah. That's what I was thinking at that point in
25 time --

1 Q Yeah.

2 A -- she did.

3 Q And that's what you conveyed to Reese when you met
4 with him after that. You conveyed to Officer Reese, "I
5 think she killed the baby"?

6 A Yeah, that's what we told him; that she did -- that
7 something occurred with her that caused the death of that
8 child, whether it was --

9 Q She told you what had --

10 A Yeah.

11 Q -- she dropped the baby, hit its head, and then didn't
12 render assistance to it, at a minimum, correct?

13 A That's right.

14 Q That's a crime, isn't it?

15 A Yes, sir.

16 Q So at that point when you say she is free to leave,
17 y'all knew she had committed a crime. You weren't going
18 to let her walk out the door were you? I mean, seriously?

19 A No. I don't think they would have if she would
20 have -- you know --

21 Q Yeah --

22 A -- because she admitted --

23 Q (Unintelligible) --

24 (Talking over each other.)

25 A -- at that point to something, yes.

1 Q So she was not free to leave. She was a -- she had
2 confessed to a crime, and she was not free to leave; isn't
3 that correct?

4 A You could interpret it as that, yes, sir.

5 Q You and I agree on that, do we not?

6 A Yes, sir.

7 Q Sir?

8 A Yes, sir.

9 MR. HARPOOTLIAN: Okay. Beg the Court's indulgence.

10 (Pause)

11 Thank you. I don't have any further questions.

12 CROSS-EXAMINATION:

13 BY MS. CAMPBELL:

14 Q Just for the record, whose case was this? Was it your
15 case?

16 A No, sir. It would have been the City of Columbia.

17 Q And who made the decisions in this case?

18 A Investigator Reese and Thomas.

19 MS. CAMPBELL: Thank you, sir. I don't have
20 anything further.

21 THE COURT: All right. You may come down. Thank you
22 very much.

23 THE BAILIFF: Watch your step.

24 MR. HARPOOTLIAN: Nothing further from the defendant,
25 Your Honor.

1 THE COURT: All right.

2 THE COURT: Any argument?

3 MR. HARPOOTLIAN: Yes, sir, Your Honor. First of all,
4 I want to make sure I understand which statements they're
5 intending to introduce, those taken on the 6th as I
6 understand it, correct?

7 MS. CAMPBELL: Your Honor, there is an additional
8 statement she made on the first day when the baby was found
9 dead, I believe on the 1st of August. It's noncustodial.
10 I don't think that's at dispute here.

11 There is a statement to a reporting officer, as well
12 as a written statement to Investigator Benson.

13 MR. HARPOOTLIAN: We object to that. We -- this is
14 a Jackson v. Denno hearing to determine whether it was
15 custodial, to determine whether it was voluntary. So we
16 object to that coming in unless they're going to go ahead
17 and complete that today.

18 MS. CAMPBELL: I believe the testimony was that she
19 drove herself to the police station on this date, so I
20 don't think she could have been in custody and had that
21 done.

22 THE COURT: Well, is Mr. Benson going to testify?

23 MS. CAMPBELL: Your Honor, we'll have the additional
24 witnesses here in the morning --

25 THE COURT: That would be fine.

1 MS. CAMPBELL: -- for those purposes.

2 THE COURT: That would be fine.

3 MR. HARPOOTLIAN: So are we going to do additional
4 statements in the morning, Your Honor?

5 THE COURT: I guess so.

6 MR. HARPOOTLIAN: Well, then I'll save my argument,
7 if that's okay.

8 THE COURT: Save it?

9 MR. HARPOOTLIAN: Yes, sir. Just do it all at once.

10 THE COURT: Think about it overnight.

11 MR. HARPOOTLIAN: It would help if I had more time.
12 More importantly, it would help if Mr. Newman had more
13 time to work on this tonight.

14 THE COURT: All right. Let's -- let's do try to
15 identify what the State plans to offer. You say the
16 statement in front of...

17 MS. CAMPBELL: The initial statement she made was to
18 the responding officer --

19 THE COURT: Was that the written?

20 MS. CAMPBELL: -- Investigator Walsh, Walsh.

21 THE COURT: Walsh?

22 MS. CAMPBELL: Walsh.

23 THE COURT: When was that?

24 MS. CAMPBELL: That was made on August 1st --

25 MR. HARPOOTLIAN: August 1st.

1 MS. CAMPBELL: -- at the hospital that night. They
2 didn't get there, I believe, until around midnight, so
3 it was the 1st.

4 THE COURT: Walsh is an officer?

5 MS. CAMPBELL: C.P.D.

6 THE COURT: C.P.D. at the hospital, and that's a
7 verbal statement?

8 MS. CAMPBELL: Her statement.

9 THE COURT: And you take the position that's
10 voluntary?

11 MS. CAMPBELL: Yes, sir.

12 MR. HARPOOTLIAN: We take the position it's not.

13 THE COURT: And number two?

14 MS. CAMPBELL: The second statement, I believe, she
15 gave later that morning to Investigator Benson. We're
16 checking on him tonight, Your Honor. He has suffered a
17 stroke, so I doubt he'll be available for court tomorrow,
18 but we're checking on it.

19 THE COURT: You're saying he will or will not?

20 MS. CAMPBELL: We don't know yet.

21 THE COURT: Where was that taken?

22 MS. CAMPBELL: That was taken at --

23 THE COURT: Or where was that received?

24 MS. CAMPBELL: That was at C.P.D.'s headquarters
25 shortly after her initial oral statement or within a few

1 hours.

2 THE COURT: So midnight, early morning hours.

3 MS. CAMPBELL: I believe it was 2:30 in the morning,
4 on August 1st at 2:34 a.m.

5 THE COURT: Okay. That's two, three.

6 MS. CAMPBELL: And then the only other statement, Your
7 Honor, was she was -- she went home that night. Several
8 days later, I believe on the 4th, she did accompany
9 Investigator Dow and Investigator Menendez. We'll
10 bring one of them.

11 She took them around, showed them, talked to them
12 about where she had taken the baby that afternoon during
13 that walk.

14 THE COURT: Menendez and who?

15 MS. CAMPBELL: Dow, D-O-W.

16 THE COURT: Sort of a walk through?

17 MS. CAMPBELL: Yes, sir.

18 THE COURT: Voluntary statements?

19 MS. CAMPBELL: Noncustodial voluntary.

20 THE COURT: Noncustodial voluntary. Number four?

21 MS. CAMPBELL: That would be the extent of the
22 additional statements, other than what she gave on the
23 6th.

24 THE COURT: Well, let's talk about the 6th.

25 MS. CAMPBELL: The 6th, the morning of her initial

1 statements were to Investigator Joby Gray.

2 THE COURT: What statement?

3 MS. CAMPBELL: The oral statement she made to him
4 after the polygraph. We would not, of course, in front
5 of the jury mention the polygraph part, just the statement
6 she made.

7 THE COURT: How about that, Mr. Harpootlian?

8 MR. HARPOOTLIAN: Your Honor, we -- we -- we object
9 to that because of the context of it, and I don't think
10 you can separate them, the polygraph. We object to that.

11 THE COURT: How about the advice of rights?

12 MR. HARPOOTLIAN: Well, I think as to the advice of
13 rights, we would -- we would object to it.

14 THE COURT: What if it does not come in through
15 Gray?

16 MR. HARPOOTLIAN: What does not come in through
17 Gray?

18 THE COURT: The advice of rights.

19 MR. HARPOOTLIAN: He is the one who did it. I don't
20 believe you can put them in.

21 MS. CAMPBELL: It can't come in unless it's through
22 Gray.

23 MR. HARPOOTLIAN: I mean, it's in the polygraph.
24 That's --

25 MS. CAMPBELL: It doesn't have anything about -- I

1 will hand up the form. The form is the a standard form.
2 It doesn't mention polygraph.

3 THE COURT: I understand. I understand.

4 MR. HARPOOTLIAN: The problem is this, Your Honor:
5 The jury doesn't get to understand the context of all of
6 that without knowing there is a machine sitting there.

7 THE COURT: I understand that, but she gets -- she
8 gives a voluntary advice of rights in front of Gray, and
9 Gray gets on the stand and puts in just the advice of
10 rights. I would have to allow it.

11 If he doesn't, because I think to some degree
12 immediately after the polygraph, she is -- she is told
13 she is lying, and she gives him some different story.

14 Now, but there is a lapse of time there before she
15 goes to Reese and Thomas.

16 MR. HARPOOTLIAN: Yeah.

17 THE COURT: I think -- well, I mean, I -- my thinking
18 is that I ruled that that -- it was voluntary from then
19 on unless you have some case to show me that it's the -- I
20 hate to use the word fruit of the poisoned tree.

21 MR. HARPOOTLIAN: But I didn't have the context of
22 it until today. If you give me until tomorrow morning,
23 I'll have you something very specific.

24 THE COURT: Well, I'm sure the State will, too.

25 MS. CAMPBELL: Yes, sir.

1 THE COURT: But it would be my inclination, and I will
2 rule formally after we hear all of it, the testimony, all
3 of the statements that from one p.m. on, she has been given
4 her advice of rights. She continues to talk, she continues
5 to give a statement, not to Gray who was sitting there
6 with a machine --

7 MR. HARPOOTLIAN: Right.

8 THE COURT: -- who says, "The machine says you're
9 lying," maybe or maybe not, but I think from that point
10 forward with -- unless you can show me something that
11 takes the voluntariness away from the statement
12 -- she's -- it's hard to say it's voluntary when you're
13 confronted with a machine you may or may not know anything
14 about.

15 MR. HARPOOTLIAN: Here --

16 THE COURT: But I think once she continues to talk
17 with the officers, by a preponderance of the evidence is
18 all I've got to find.

19 MR. HARPOOTLIAN: Right.

20 THE COURT: They have -- they say it was voluntary.
21 She made no effort to stop, leave or anything else,
22 cooperative.

23 I mean, those kind of statements in the record give
24 me a preponderance of the evidence. I mean, that's the
25 only standard.

1 MR. HARPOOTLIAN: Yes, sir, Your Honor, and I think
2 we've got some pretty hard case -- some U.S. Supreme Court
3 cases that may enlighten you on it.

4 Before I argue that off the cuff, I'd like the chance
5 to look at that tonight, make sure it's --

6 THE COURT: Absolutely. All right. Nine o'clock?

7 MR. HARPOOTLIAN: Sure.

8 THE COURT: I mean, the jury coming at 11:00.

9 MR. HARPOOTLIAN: Well...

10 THE COURT: You've got the whole other issue.

11 MR. HARPOOTLIAN: Are we still doing it? Okay.

12 THE COURT: We started it. Either that or we're going
13 to tell the jury to come back Wednesday.

14 MR. HARPOOTLIAN: No, we can do it, no problem.

15 THE COURT: We may -- and that may be what we have
16 to do.

17 MR. HARPOOTLIAN: I doubt I'll have any questions
18 for the witnesses on the second issue.

19 THE COURT: Okay.

20 MR. HARPOOTLIAN: Thank you, Your Honor.

21 THE COURT: Nine o'clock.

22 MS. JUSTICE-GARFIELD: Your Honor, I'll turn over
23 now Dr. Nichols' notes.

24 THE COURT: All right. Ms. Garfield, state for the
25 record.

1 MS. JUSTICE-GARFIELD: I have just turned over to
2 the defense the notes requested from Dr. Clay Nichols.

3 THE COURT: At 5:40 on Monday.

4 MS. JUSTICE-GARFIELD: Yes, sir.

5 THE COURT: And from the -- I'm going to ask both of
6 you to look at the issue of the duration of the waiver.
7 I mean, how long does a waiver last? Fourteen days?

8 How often does law enforcement have to reinforce or
9 re-advise counsel -- I mean, the defendant of their
10 rights, Miranda rights?

11 I mean, I'll be happy to -- I mean, once you do it,
12 is it good forever? All right. See if you can find some
13 authority on that.

14 MR. HARPOOTLIAN: We'll go scratching. We'll be
15 scratching, Judge. We'll be looking for it.

16 THE COURT: All you have to do is hit Google.

17 MR. HARPOOTLIAN: No, all you have to do is hit
18 Newman.

19 THE COURT: Nine a.m. Thank you.

20 MR. HARPOOTLIAN: Thank you, Judge.

21 THE COURT: You're welcome.

22 (There was an overnight recess.)

23 THE COURT: All right, Solicitor. Are you ready to
24 continue?

25 MS. JUSTICE-GARFIELD: Yes, Your Honor. The State

1 calls Investigator Noel Dow.

2 NOEL DOW,

3 after being duly sworn, testified as follows:

4 THE CLERK: Have a seat in the witness stand, please.

5 DIRECT EXAMINATION:

6 BY MS. JUSTICE-GARFIELD:

7 Q Please state your name for the record.

8 A Noel Dow.

9 Q Where are you employed?

10 A Columbia Police Department.

11 Q What are your duties with the Columbia Police
12 Department?

13 A I'm a major crimes investigator. I investigate
14 major crimes.

15 Q Does major crimes include homicide cases?

16 A Yes, ma'am.

17 Q As well as child abuse cases?

18 A Yes, ma'am.

19 Q Were these your duties back in 2008?

20 A Yes, ma'am.

21 Q Specifically, were these your duties in August of
22 2008?

23 A Yes, ma'am.

24 Q Were you requested by another investigator to assist
25 in the investigation of a death of a child back in August

1 of 2008?

2 A Yes, ma'am.

3 Q Specifically on August 4th, 2008, what were you

4 requested to do?

5 A Talk to Ms. Kendra P. Samuel.

6 Q Were you aware at that time what Ms. Samuel's role

7 was in this investigation?

8 A No.

9 Q Investigator Dow, I see you're look at something.

10 Are those your notes?

11 A Yes, ma'am.

12 Q Are you using those to refresh your memory?

13 A Yes, ma'am.

14 Q Investigator Dow, where were you asked to go to?

15 A I was asked to go to 2131 Sligh Avenue Apartment H.

16 Q And who were you to meet at that place?

17 A Ms. Samuel.

18 Q And did you do so?

19 A Yes, ma'am.

20 Q Did you meet Ms. Samuel?

21 A Yes, ma'am.

22 Q What were your purposes for meeting Ms. Samuel?

23 A The purpose for meeting with her was to get information

24 from her, have her tell me what she did on, I think it

25 was July 31st, 2008.

1 Q And did Ms. Samuel freely cooperate with your
2 request?

3 A Yes, she did.

4 Q If she had said no, what would you have done?

5 A She was free to walk away at any time.

6 Q Did she assist you?

7 A Yes, she did.

8 Q And can you please relay to the judge exactly what
9 she relayed to you?

10 A Yes, ma'am. On -- she -- she showed me and she told
11 me that on July 31st at about 5:40 showed me the route
12 that she walked on July 31st.

13 She stated that on July 31st at approximately
14 5:40 p.m. she left Apartment H, holding the baby in her
15 arms. The baby was only wearing diaper.

16 She stated that she walked out the apartment down
17 the steps, walked out the front door, made a right and
18 walked to the street, which was Sligh Avenue. She made
19 a right on Sligh Avenue, walked on the right-hand side
20 of the sidewalk, made a left on Georgia Elam Lane, and
21 she walked on the right-hand side of Georgia Elam Lane.
22 The right-hand side of Georgia Elam Lane does not have
23 a paved sidewalk. That's why.

24 Ms. Samuel stated she walked back and forth on Georgia
25 Elam Lane in order to calm the baby down. She said she

1 was walking back and forth calming the baby down in the
2 2100 block of Georgia Elam Lane.

3 She stated that she walked in the park and sat down
4 on the yellow children's playground. She sat on the
5 yellow children's playground for approximately ten
6 minutes, and she stated the baby was asleep and her
7 boyfriend called her.

8 The boyfriend picked her up, and the baby, from
9 Georgia -- from the park. Ms. Samuel stated that after
10 she calmed the baby down by walking back and forth in the
11 2100 block of Georgia Elam Lane, a black woman asked her
12 how old was the baby.

13 The black woman lives at 2104-B Sligh Avenue. Ms.
14 Samuel said the black woman was middle aged, wearing a
15 black top and white bottoms. Ms. Samuel then stated that
16 she waved at a man and woman sitting on the porch at 2104-A
17 Ithaca Street.

18 Q While she is relaying this information to you, did
19 you physically walk this path with her?

20 A Yes.

21 Q And was that the extent of your interaction with
22 Ms. Samuel?

23 A Yes.

24 Q Did you have any other -- anything else to do with
25 this investigation?

1 A No.

2 Q After this?

3 A No.

4 Q During your meeting with Ms. Samuel, did you coerce
5 her in any way?

6 A No.

7 Q Did you threaten her in any way?

8 A No, ma'am.

9 Q Did you make any promises towards her?

10 A No, ma'am.

11 Q Can you explain how Ms. Samuel's demeanor was when
12 she was with you?

13 A She was calm, cooperative.

14 MS. JUSTICE-GARFIELD: Thank you, Investigator Dow.
15 Please answers any questions the defense may have.

16 MR. HARPOOTLIAN: No questions.

17 THE COURT: You may come down, sir. Thank you very
18 much.

19 THE BAILIFF: Watch your step.

20 THE WITNESS: Thank you.

21 MR. GOLDBERG: The State calls officer Walsh.

22 MICHAEL WALSH,
23 after being duly sworn, testified as follows:

24 THE CLERK: Thank you. Have a seat in the witness
25 stand, please.

DIRECT EXAMINATION:

1
2 BY MR. GOLDBERG:

3 Q State your name for the record, please.

4 A I'm Austin Michael William Walsh.

5 Q Officer Walsh, where are you employed?

6 A I'm employed with the City of Columbia Police
7 Department.

8 Q How long have you been with the City of Columbia?

9 A I've been there since August 2006.

10 Q And what are your duties with the police department?

11 A I'm in the patrol division. I patrol the north region
12 area. I'm also a member of the K-9 team.

13 Q And were those your duties back in July of 2008?

14 A Yes, sir.

15 Q Okay. And did you have an occasion to respond to
16 Richland Memorial Hospital back on July 31st, 2008?

17 A Yes, sir.

18 Q And at some point during your response there, did you
19 come into contact with the defendant, Kendra Samuel?

20 A Yes, sir.

21 Q Can you tell the judge how you ended up in the hospital
22 and how you ended up in contact with Ms. Samuel?

23 A Yes, sir.

24 Your Honor, I was dispatched to Richland Memorial
25 Hospital for the unresponsive infant call for service.

1 When I got there, I met with the nurse who stated that
2 the infant came in and, you know, was possibly
3 deceased -- or it was deceased at the time.

4 My initial duties are to respond to the call, find
5 out what the call is about. I then notify my supervisor
6 who notifies the watch commander, and then that gets the
7 whole chain going.

8 I then try and locate witnesses or anybody that might
9 know about the case, and I made contact with Kendra at
10 that time. I didn't make contact with the mother. I made
11 contact with the nurse and Miss Kendra.

12 Q And when you made contact with Ms. Samuel, did you
13 have any idea what her role in this case would ultimately
14 be?

15 A No, sir. All I knew was she was a roommate and the
16 victim's Godmother.

17 Q Okay. And at the time that you made contact with her,
18 were you in uniform, identify yourself?

19 A Yes, sir.

20 Q Okay. Did you tell her she had to talk to you?

21 A No, sir. I just asked if she -- you know, what was
22 going on, if she knew what was happening. I was primarily
23 trying to get the mother's information from her because
24 she knew who the mother was.

25 Q What did Ms. Samuel tell you when you spoke to her?

1 A She told me that she lives with the mother; that
2 she's the Godmother of the baby and that the mother -- she
3 was baby-sitting the baby after daycare.

4 She took him for a walk in the park because he was
5 fussy. He fell asleep. They came back, then they all
6 went to sleep, got up, got some pizza or something like
7 that. She left, and then at that time they realized that
8 the baby wasn't breathing.

9 Q And during this time that she was telling you this
10 account of what happened, did you threaten her in any way?

11 A No, sir.

12 Q Did you make any promises to her in any way?

13 A No, sir.

14 Q If she had said, "I don't want to talk to you," would
15 she have been allowed to leave?

16 A Yes, sir. She was not in custody at the time.

17 Q Okay. Do you recall what her demeanor was like when
18 she was speaking to you?

19 A She was kind of in shock and all. I mean, it was,
20 you know, a pretty tragic, you know, death to the baby.
21 She didn't seem, you know --

22 Q Did you --

23 A -- I mean, like she was hiding anything. I mean,
24 she -- she looked seriously concerned and shocked.

25 Q Did you have any other contact with her after this

1 conversation?

2 A No, sir.

3 MR. GOLDBERG: Thank you, sir.

4 THE WITNESS: Yes, sir.

5 CROSS-EXAMINATION:

6 BY MR. HARPOOTLIAN:

7 Q Just a couple of questions.

8 She seemed seriously concerned?

9 A Yes, sir.

10 Q And upset, the death of a baby, I think is what you
11 said?

12 A Yes. It was a pretty traumatic situation.

13 Q Right, and --

14 A I mean, everybody handles things differently.

15 Q Right.

16 A She didn't look --

17 Q And I think you just said didn't appear to be hiding
18 anything.

19 A No. She wasn't trying to -- she didn't appear to be --

20 (Talking over each other.)

21 (Unintelligible)

22 Q -- seemed to be very candid.

23 A Yes, sir.

24 Q That was her demeanor?

25 A Yes, sir.

1 MR. HARPOOTLIAN: Thank you. No further questions.

2 THE COURT: You may come down. Thank you very much.

3 THE BAILIFF: Watch your step there.

4 MS. JUSTICE-GARFIELD: Your Honor, that's all the
5 State has. We would hand up the statements.

6 THE COURT: All right. How do you want to proceed?

7 MR. HARPOOTLIAN: Whatever way you want, Your
8 Honor.

9 THE COURT: All right. All right. You -- Mr.
10 Harpootlian, you object to the -- what's your position
11 on the two statements offered this morning?

12 MR. HARPOOTLIAN: We don't have any objection to
13 those.

14 THE COURT: Okay. All right. State your objections
15 to the -- I have not had a chance to read your memo, but
16 I'll be glad to hear your arguments at this time.

17 MR. HARPOOTLIAN: Your Honor, we would rather take
18 a break, read it and then have us argue, take five minutes
19 to look over it.

20 THE COURT: Do you think it takes you that long?

21 MR. HARPOOTLIAN: I -- it may take ten.

22 (Pause)

23 THE COURT: Well, give me the...

24 (Pause)

25 THE COURT: All right. Mr. Harpootlian, I have read

1 your memo.

2 MR. HARPOOTLIAN: May it please the Court, Your
3 Honor. We have tried to refer to the statements one
4 through five in our memorandum to try to keep things
5 semi-clear.

6 They are separate and distinct statements beginning
7 with the statement made to Officer Gray in going through
8 the subsequent statements.

9 THE COURT: Mr. Gray is number one.

10 MR. HARPOOTLIAN: Gray is number one. Let me make
11 sure we are all viewing the same sheet as you.

12 THE COURT: Just for the record, I have not read all
13 of the statements, nor have I listened to the D.V.D.

14 MR. HARPOOTLIAN: Well, Your Honor, in
15 talking about --

16 THE COURT: But I may need to.

17 MR. HARPOOTLIAN: You -- and may very well need to,
18 especially the statement number four where the
19 investigator is yelling at her and she is crying and
20 they are raising their voice at her and calling her a
21 liar. We'll get to that in just a minute.

22 It seems to me, the State -- I saw the memo in the
23 case they handed us, she was given -- they are taking the
24 position she was given her Miranda warning prior to the
25 polygraph, and that carries on all the way through.

1 THE COURT: Right.

2 MR. HARPOOTLIAN: That's simply their position, but
3 when one looks at the United States Supreme Court case,
4 which is cited in McNeal and more importantly, how that
5 case was interpreted in a case very similar to this by
6 the Supreme Court in appeals in West Virginia in 1995.

7 It is clear that our Supreme Court and the United
8 States Supreme Court has said that Miranda applies only
9 to custodial interrogations, so if she is not in custody
10 and clearly, Gray has indicated that. The State's
11 position is she was not in custody when she was being
12 Mirandized, then the question becomes does she -- two
13 things: Does she then become in custody at some point
14 after that, and does she need to be re-Mirandized?

15 I think the McNeal case is clear when the United
16 States Supreme Court says, we have, in fact, never held
17 that a person can invoke his Miranda right
18 anticipatorily in a context other than custodial
19 interrogation.

20 If Miranda's right to counsel can be invoked at a
21 preliminary hearing, it could be argued there is no logical
22 reason why it could not be invoked by the letter prior
23 to arrest or, indeed, prior to identification of a
24 suspect.

25 So -- and the West Virginia Supreme Court said, as

1 suggested above, and they quote again from Miranda, and
2 Miranda says...

3 (Pause)

4 Well, the quote from Miranda says it's suggested the
5 Miranda right to counsel has no applicability outside the
6 context of custodial interrogation. Therefore, until the
7 defendant was taken into custody, any effort on his part
8 to invoke the Miranda rights was, legally speaking, an
9 empty gesture.

10 What they say, and what the United States Supreme
11 Court says, and we can invoke the evidence case, is that
12 Miranda is ineffective prior to being in custody.

13 You're got to -- once they're taken into custody,
14 their Miranda rights -- they must be Mirandized. So when
15 Gray had Mirandized here -- and, Your Honor, again, there
16 is a case out of the ninth circuit, Federal Court of
17 Appeals, Gilyard, which indicates that the post --
18 pre-polygraph Miranda warnings are not effective post
19 polygraph. That it is a separate interrogation. We've
20 quoted and given you a copy of Gilyard.

21 So as to the sequence of events, Gray's Miranda
22 warning may have been effective as the polygraph test,
23 but it was not effective as to the statement given by her
24 to him afterwards.

25 Unless you take the position she is still not in

1 custody, and even then, because of the intertwining
2 polygraph examination, it becomes impossible to explain
3 the statement without saying that she was told she lied
4 on a polygraph.

5 It's for another reason, altogether, not admissible.
6 The prejudicial far outweighs the probative, but after
7 that, she is taken to a waiting room and interrogated by
8 a S.L.E.D. agent who testified yesterday, Shockley -- and
9 let me find my little timeline here.

10 (Pause)

11 Oh, here it is.

12 She is then interrogated by Thomas and Shockley.
13 That -- that is statement two -- let me make sure I'm
14 getting that right.

15 (Pause)

16 Right. Which is statement two, which is the
17 interrogation by Shockley and Thomas, that goes from
18 1:27 for ten minutes, 49 seconds. Then there's a break.
19 Then there's another 20 minutes and 32 seconds.

20 Now, after that, Agent Shockley has testified in his
21 opinion she was in custody. She was not free to leave.

22 We would take the position prior to that, based on
23 the totality of the circumstances, she was in custody.
24 But certainly after that, she -- one of the agents takes
25 the position she is in custody, could not leave.

1 So for statements four --

2 THE COURT: What happened to three?

3 MR. HARPOOTLIAN: I'm sorry. Three, three is the
4 written statement, which is taken after Shockley leaves,
5 which is the written statement.

6 We would take the position that's -- she should have
7 been re-Mirandized. She is in custody, and then
8 subsequent to that, there is a tape recorded interview,
9 which is number four, which is done with Reese and Hurt.

10 Then subsequent to that is the -- is the addendum
11 to the written statement, the last three pages? Two? Two
12 pages, which even Reeves -- the City police officer,
13 Reese testified that -- Reese testified that in his opinion,
14 she was in custody then.

15 So if -- if you start at that and go forwards, Reese
16 indicates she is in custody for that last two written pages.

17 Shockley indicates that she was in custody for
18 everything prior to that up to the end of the taped
19 interview, which would be number two, right? Yeah.

20 That he -- that he did, which was a taped interview,
21 but the written statement taken subsequent to that would
22 have been, according to his opinion, while she was in
23 custody, so, Judge, I mean, this idea that somehow she
24 was Mirandized before a polygraph and that carries -- and
25 she was clearly, according to everybody's testimony, not

1 in custody, that's the uncontradicted testimony by
2 Officer Gray.

3 She is then transitioned into custody, certainly
4 after Shockley and -- at the minimum, after Shockley and
5 Thomas interviewed her on tape prior to her written
6 statement, according to Shockley, and no question,
7 according to Reese, after she has given her taped statement
8 to him.

9 So you don't have to get into this sort of objective
10 standard what a reasonable person in her position would
11 have thought if you just adopt Shockley's position, which
12 is he is the police officer, and he's taking the position
13 she is in custody.

14 Yet, they don't re-Mirandize her, and the United
15 States Supreme Court, the Supreme Court of West Virginia
16 and even our Supreme Court in Evans, although they don't
17 address this exact issue --

18 THE COURT: Well, she wasn't Mirandized at all in
19 Evans.

20 MR. HARPOOTLIAN: Correct, but what they say in
21 Evans, which I think is important, and I want to make sure
22 I quote the language specifically is...

23 (Pause)

24 Oh, here it is.

25 (Pause)

1 I'm sorry. I've lost it. Hold on one second.

2 (Pause)

3 Bradshaw, Neil...

4 (Pause)

5 Here it is. Quoting Miranda in Evans, our Supreme
6 Court said quote, "Law enforcement must state the Miranda
7 warnings," emphasis added by us -- this is on page
8 seven -- "after a person has been taken into custody or
9 otherwise deprived of his freedom of action in anyway,"
10 quoting Miranda.

11 So our Supreme Court has said after taken into
12 custody. I mean, this isn't a staleness issue, even though
13 you have asked for, and we have given you cases on that,
14 and the State is saying -- taking the same cases and
15 interpreting it another way.

16 This has nothing do with staleness. This has to do
17 with when is she in custody, and can you -- can you -- can
18 you prophylactically give a Miranda warning when she is
19 not in custody and then when she is in custody not
20 re-advise her.

21 The United States Supreme Court, the Supreme Court
22 of West Virginia, and even our Supreme Court in Evans made
23 it clear that once custody attaches, she has to be advised.
24 So taking the evidence in the light most favorable today,
25 you don't have to do that by the preponderance of the

1 evidence here, Shockley says she is in custody after his
2 interview. Reeves says she is in custody after his
3 interview.

4 So if you buy at all Shockley's testimony, anything
5 after that initial taped interview would be inadmissible
6 under Miranda.

7 Now, Your Honor, we do understand that under Harris
8 vs. New York, these statements may come into play later
9 on during the trial, should the defendant decide to
10 testify. However, at this juncture, there is no evidence
11 before this Court that she was not in custody after
12 Shockley's finished with her because he is one of the
13 interrogating officers.

14 He is one of the officers who is sitting there with
15 her. It's not him sitting back as an expert. When he
16 walks out of that room, his opinion is she is in custody.
17 He made that clear.

18 In addition to that, we take the position, even while
19 she was with him, that viewing it objectively, as this
20 court should do, that given the fact she is in a room -- we
21 have outlined these factors -- I'm not going to
22 belabor -- in a room, in the bowels of the police
23 department, her mobility -- you heard that you have to
24 have a police escort to get to that room, that a
25 reasonably objective person in that position would

1 perceive that they were in custody. We'd ask that all
2 statements be excluded.

3 I'm checking with my lawyer to see if I have forgot
4 anything.

5 (Pause)

6 Your Honor, it may be advisable that you listen to
7 at least the last taped interview, which is an hour and
8 ten, 15 minutes in which she is being yelled at, in which
9 she is being pressured, in which she legally demonstrates
10 as evidence of her free will being overborne by the
11 tactics used by the officers who were interrogating.

12 So if Your Honor does not adopt our position on the
13 custodial status, we would ask you as a further grounds
14 to listen to the tape.

15 THE COURT: What if there had been no polygraph?
16 Let's take that out of the picture for a moment, and the
17 police in their interrogation simply told her, "We don't
18 believe you."

19 MR. HARPOOTLIAN: Right.

20 THE COURT: "We have other facts that we know that
21 tell us that you're lying."

22 MR. HARPOOTLIAN: Right.

23 THE COURT: What's the difference between that and
24 the polygraph saying you're lying?

25 MR. HARPOOTLIAN: Well, that fourth circuit -- I mean,

1 the ninth circuit case Gilyard indicates that once you
2 tell them you're lying, that they at that point perceive
3 that their freedom is being limited. They're not free
4 go. They're not free to walk out; that we believe you
5 committed a crime. They're making an accusation at that
6 point and a person can --

7 THE COURT: Well, "We know facts that are different
8 from what you're telling us."

9 MR. HARPOOTLIAN: Right. Well, under these
10 circumstances, arguably up until the point Shockley
11 finishes, there may be some perception of freedom of
12 movement but Shockley -- Your Honor, the officers, their
13 witness, their person that takes the statement says she
14 was in custody. She was not allowed to leave so --

15 THE COURT: So then if you -- by following your
16 argument, then the Miranda, the Mirandizing of your
17 client, was a nullity. In other words, it has --

18 MR. HARPOOTLIAN: Absolutely.

19 THE COURT: -- no real effect because she was not in
20 custody at that time.

21 MR. HARPOOTLIAN: That's not my position. That's
22 the United States Supreme Court's position in McNeal,
23 Miranda, and as interpreted by the West Virginia Supreme
24 Court, that is Miranda applies to -- you know, it cuts
25 the other way all the time, all the time.

1 "She wasn't in custody. She didn't have to be
2 Mirandized. You know, we were interviewing." So, you
3 know, that was always the argument made. There was no
4 reason to Mirandize because her wasn't in custody.

5 Well, it -- it cuts both ways. If there is no reason
6 to Mirandize her because she is not in custody, then those
7 Miranda Warnings are not effective, under Miranda, under
8 McNeil, under that West Virginia case, and it's clear
9 language in the Evans case.

10 So, Your Honor, even if she is in custody, that's
11 not what the police officers testified to. She was not
12 in custody when she came to take the polygraph. She was
13 not in custody until she began -- our position would be
14 that she began the interview with Shockley and Thomas,
15 but certainly after the interview with Shockley and
16 Thomas. Shockley says she is in custody. There is no
17 dispute, so polygraph or not, she is not in custody, Miranda
18 has no effectiveness.

19 THE COURT: All right.

20 MR. HARPOOTLIAN: When she -- when she gets in custody,
21 Miranda becomes effective.

22 Your Honor, so at the minimum, all that ought to be
23 admissible would be the statement, the recorded statement
24 given to Shockley and to Thomas.

25 Everything after that should be excluded based on

1 the failure to re-Mirandize her -- or not re-Mirandize
2 her, Mirandize her. Miranda only applies in a custodial
3 context.

4 THE COURT: How about the Gray statement?

5 MR. HARPOOTLIAN: Sir?

6 THE COURT: How about the Gray statement?

7 MR. HARPOOTLIAN: Well, we believe that ought to be
8 excluded because -- I mean, how do we explain the context
9 of that statement, "You failed the polygraph."

10 I mean, the mere mention of the polygraph is not
11 allowed under our are Supreme Court ruling, so how -- our
12 403 analysis, the prejudicial far outweighs the probative
13 because again, if you rely on the Shockley statement, what
14 she tells Gray is basically what she tells Shockley and
15 Thomas, and even in more detail.

16 THE COURT: All right. Let me hear from the State.

17 MS. CAMPBELL: May it please the Court, Your Honor.
18 Respectfully, we would disagree with his unique
19 interpretation of Miranda and how it applies to this
20 statement.

21 The only case he relies on as far as the polygraph
22 is a ninth circuit case, which would be the northern
23 district of California, which is a nineteen-ninety---

24 THE COURT: Eighty---

25 MS. CAMPBELL: '83 case, excuse me, Your Honor.

1 Since then, there have been numerous cases handed
2 down by the Supreme Court, and more specifically, Your
3 Honor our Supreme Court as far as what's appropriate or
4 not.

5 I would note in -- ironically in -- he argues that
6 the statements of the polygraph examiner should be
7 excluded. However, some of the cases he handed up,
8 statements made to the polygraph examiner were included
9 and presented to the jury.

10 Including his case, State vs. Cannon, I would also
11 note State vs. Rochester. In both of those cases -- in
12 Rochester specifically, I believe the defendant was given
13 three polygraph examinations and the statements were
14 admissible.

15 I'm not saying the fact that the polygraph was involved
16 was admissible. I would agree with that. However, the
17 statements were admissible, Your Honor, under a totality
18 of the circumstances.

19 Specifically, Your Honor, the only lawful --

20 THE COURT: Slow down.

21 MS. CAMPBELL: West Virginia, California, and I
22 believe the Evans case.

23 As you've already noted in Evans, and I don't need
24 to explain it to you. I know you're obviously familiar
25 with it, that was a case where she wasn't --

1 THE COURT: I've seen it.

2 MS. CAMPBELL: -- given Miranda rights, so he's
3 arguing it both ways. In this case, the State did -- or
4 the officers did what they should do.

5 Even though she came in voluntarily, they advised
6 her of her rights, so it would not become a Florence Evans
7 situation, Your Honor.

8 He argues it one way that because she wasn't in
9 custody when she was given her Miranda rights that Miranda
10 doesn't apply, but if we hadn't done that, I submit that
11 he would be arguing that she should have been advised
12 her of her rights regardless of whether she was in
13 custody.

14 All we're asking you to do is follow some of the case
15 law they have handed up. Specifically, State vs. Kevin
16 Goodwin. It was murder case tried here in Richland County.
17 In that case, the defendant over a period of time, gave
18 officers -- he was advised of his rights. He gave officers
19 four statements.

20 The officers then went back the next day, took him
21 back out of the jail. They did not re-advise him. He gave
22 another statement. Then the officers went back a second
23 time, took him out of jail, did not re-advise him, and
24 took them -- he showed them where he had stashed some of
25 the guns that he had stolen during the burglary,

1 resulting in the murder of Dr. Dillard here in town.

2 In addition to that, Your Honor, we have handed up
3 numerous cases. We would ask you just to follow the state
4 law as it is in this case talking about the advice of
5 rights.

6 There is nothing in this record that indicates that
7 this woman ever said she didn't want to talk. There is
8 nothing in this record that indicates she tried to invoke
9 any of her rights.

10 The only thing that is in this record is that she
11 was initially advised of her rights. She waived her
12 rights. She voluntarily talked to the officers, and even
13 prior to the last interview with Investigator Reese, she
14 was again reminded of what those rights were and indicated
15 she wanted to continue talking. She wanted to continue
16 talking to the police.

17 At the end of the statement the defense wants you
18 to listen to, and we would like you to listen to it, as
19 well, Your Honor, she even indicates that she wished she
20 had told them the truth sooner.

21 Under a totality of the circumstances, I don't know
22 how much clearer it could be in this case with these
23 facts that these officers did in making sure that her rights
24 were protected.

25 I'm not aware of any South Carolina law that says

1 if a person is not technically in custody -- although I
2 submit had it been that they haven't advised her of her
3 rights prior to talking to her, he then would say it was
4 a custodial situation as in evidence of a similar
5 situation, and she should have been advised of her rights.

6 In this case, the officers did what they were
7 supposed to do. They advised her of her rights. She was
8 a person of interest in this case. There's no question
9 she voluntarily brought herself to that place.

10 Once advised of her rights, she chose to waive her
11 rights. That is the uncontradicted testimony in this
12 case, and she was cooperative with police.

13 There is nothing in this can record that
14 indicates -- and pursuant to all case law we handed over,
15 Your Honor -- I think you're familiar with it -- that
16 indicates she ever invoked any of her rights or chose not
17 to be cooperative.

18 I don't know that it could be any clearer than in
19 this case, because number one, it's not necessary because
20 she was not in custody. However, there is nothing that
21 precludes --

22 THE COURT: Was she free to leave?

23 MS. CAMPBELL: According to officers, for at least
24 most of the day, she was free leave, and there is nothing
25 in this record that precludes the officers -- however,

1 out of an abundance of caution, in order to avoid a
2 situation like Florence Evans from advising of her rights
3 initially or to avoid a situation like Kenneth Mabe where
4 they did not advise at first. They later advised, and
5 once he made some incriminating statements, the Supreme
6 Court have held, no, he should have been advised at first,
7 even though that was another situation where he
8 voluntarily came down to the police substation, and at
9 that point --

10 THE COURT: I'm not sure he voluntarily came over to
11 the police station, Mr. Mabe. I think they took him from
12 the funeral.

13 MS. CAMPBELL: I think the Supreme Court in their
14 latest ruling said the first statements were voluntary
15 and were not custodial.

16 THE COURT: Oh, I understand that.

17 MS. CAMPBELL: I mean, so that would be a -- I mean,
18 anyway, I don't know how he got there was the issue, but
19 my position is, and what the Supreme Court held, was that
20 the first statements were then -- that it was not necessary
21 for Miranda, but because he made incriminating
22 statements, and only at that point did they Mirandize him,
23 then the subsequent statements become the fruit of the
24 poisonous tree or something to that effect.

25 So Your Honor, I don't know how else under our case

1 law these officers could not have done a better job in
2 protecting the record and in making sure that her rights
3 were protected that day. They jumped through the hoops
4 and they even --

5 THE COURT: Well, there's --

6 (Talking over each other.)

7 MS. CAMPBELL: -- through the --

8 THE COURT: -- just not much evidence, and I'll go
9 back over the statements, that they were particularly
10 concerned about her rights.

11 The Miranda -- you know, it would have been one
12 thing for them to have the advice of rights when they took
13 her from the -- from the polygraph room to the
14 interrogation room and at least show them to her and said,
15 "You are aware of your rights, are you not?" or something
16 like that.

17 Now, I know Investigator Reese said something along
18 those lines late in the afternoon, but it does concern
19 me that this -- this procedure -- and I don't know of its
20 extent in the department -- of taking a defendant, a
21 suspect, a person of interest, whatever you want to call
22 them, and asking them to come in and walk into a polygraph
23 room and ask them, "Did you commit the crime?" and they
24 say no.

25 Then the officers say, "You're lying, you're lying.

1 You're lying, you're lying. We know you're lying because
2 the polygraph says you're lying, not because something
3 we know about the facts of the case that you're not telling
4 us," but it does, I think -- it's just got to enter a
5 person's mind.

6 It's not a trivial act on the part of law enforcement
7 to say, "This machine says you're lying." It's like
8 the -- it's not a breathalyzer these days. It's
9 something else -- but that can be conclusive proof in a
10 driving under the influence case.

11 To tell somebody -- I mean, I think that is deceptive
12 practice to take -- to take suspects or people of
13 interest into an interrogation room, a polygraph room,
14 and that's the first thing we do. We make it clear right
15 up front that we don't believe you, and this machine
16 doesn't believe you. I mean, it taints the whole process
17 in my mind.

18 Now, at what point does she become custodial?
19 There's no question there is an interrogation. At what
20 point does she become custodial? It's an easy thing to
21 read them their Miranda rights.

22 It's an easy things to say, "You have the right to
23 a lawyer," but the fear on the part of law enforcement
24 is that she will lawyer up, so we don't tell her. We don't
25 tell her again.

1 She might lawyer up, and then we'll have -- our case
2 is adversely affected if she lawyers up. So it
3 just -- it's -- I will tell you it's troubling, Ms. Campbell,
4 that that's the way you get a confession.

5 You use the polygraph to prove to the defendant that
6 they're lying, and then you go through an interrogation
7 process and eventually get what you want.

8 So -- now, it -- it's not evidence, but it's close
9 to evidence. I know there was no Miranda given at all,
10 but in Evans, you've got a crying distraught woman who
11 is taken into the back of the Chesterfield County jail
12 or law enforcement headquarters, whatever it was, and she
13 is interviewed for three or four hours crying, asking for
14 help.

15 MS. CAMPBELL: Yes, sir.

16 THE COURT: I don't know if this -- I don't know if
17 this --

18 MS. CAMPBELL: And perhaps it would help you --

19 THE COURT: -- says the same thing, but --

20 MS. CAMPBELL: -- to help you to listen to --

21 THE COURT: It may, it may, and I think I possibly
22 should.

23 MS. CAMPBELL: And if I --

24 THE COURT: And, Judge Floyd said what really turns
25 it for me was that when -- and I'll go ahead -- that her

1 story was challenged, and once that was challenged, that
2 changes from just routine inquiry, name, rank, serial
3 number, the detectives, in fact, put it to her that they
4 did not believe her.

5 As soon as that occurred, then the switch -- there
6 was a switchover to the female officer, and her eventual
7 confession. And that's -- I will tell you, that's my
8 concern.

9 MS. CAMPBELL: And the only distinguishing factor I
10 would note, as you already noted, Your Honor, is she was
11 not advised of her rights in that case, if you're referring
12 Evans.

13 THE COURT: Not at all.

14 MS. CAMPBELL: At all. And I would say that
15 distinguishes it rather significantly from this case.

16 And, Your Honor, I would also hand up State vs.
17 Rochester and State vs. Cannon, as well as State vs. Kevin
18 Goodwin, and the additional cases that I've already handed
19 up.

20 I think I already handed up Rochester. In
21 Rochester, that was when a defendant was taken in, given
22 a polygraph, confronted three different times with three
23 different tests -- the polygraph failed. They said it
24 was all admissible.

25 In State vs. Cannon, again, this is when a person

1 was placed under arrest and was given a polygraph, and
2 he continued to deny his guilt even when they confronted
3 him and eventually came around.

4 State vs. Goodwin is a case where the defendant was
5 interrogated on one day. He was Mirandized one time at
6 the beginning of the interrogation. He was then
7 subsequently retaken out of jail, interviewed a second
8 time the next day.

9 He was then taken out of the jail a third -- a second
10 time, and interviewed. I believe it was that next same
11 day and taken to where the guns were, and the Courts held
12 that was all admissible.

13 In addition to that, Your Honor, a specific case
14 remaining on point is State vs. Simmons, Alphonso Simmons,
15 you actually tried that case, which talks about the length
16 of time and everything that starts interrogation; that
17 there was no need to re-Mirandize each time.

18 In that case, there was a lengthy thing. State vs.
19 Saltz, Your Honor, is a significant case on point as far
20 as length of time. In that case, the defendant was a
21 17-year-old young man who was taken into custody,
22 interrogated. That case may be probative as far as your
23 analysis.

24 THE COURT: Well, I have all of those with the
25 exception of Goodwin, and it may be it's --

1 MS. CAMPBELL: Your Honor, I --

2 THE COURT: -- not in this stack.

3 MR. HARPOOTLIAN: We gave them to you.

4 THE COURT: You gave them. Okay.

5 MR. HARPOOTLIAN: It...

6 THE COURT: Well, this probably should have been done
7 last week.

8 MR. HARPOOTLIAN: If Your Honor needs an extra copy
9 of Goodwin, we've got it right here.

10 MS. CAMPBELL: I gave --

11 THE COURT: Well, if you gave it to me, it's here.

12 MR. HARPOOTLIAN: Well, I just wanted to make sure
13 if we didn't give to it you, two of them are better than
14 none.

15 MS. CAMPBELL: Your Honor, specifically, if I could
16 just to put on the record --

17 THE COURT: I've got it right here.

18 MS. CAMPBELL: -- State vs. Rochester.

19 THE COURT: I'm sorry?

20 MS. CAMPBELL: State vs. Rochester. Specifically,
21 there's a little more in that case. They Mirandized him
22 one time, took him out, gave him a polygraph, confronted
23 him, he denied it.

24 They then polygraphed him, I believe a couple more
25 times, confronted him each time. The courts then held

1 that was admissible.

2 Rochester is perhaps -- the case that even the defense
3 quotes -- the most widely quoted in all of these subsequent
4 cases as far as being good law.

5 MR. HARPOOTLIAN: Your Honor, very briefly,
6 Rochester -- if you just read the facts, it says, "At about
7 seven p.m. that evening, the Appellant was taken into
8 custody and transported into the" --

9 THE COURT REPORTER: I'm sorry. You need to slow down
10 and speak up. I can't --

11 MR. HARPOOTLIAN: I'm talking faster than her?

12 THE COURT REPORTER: -- hear you.

13 You're both talking really fast.

14 MR. HARPOOTLIAN: Okay. I'll slow down.

15 THE COURT REPORTER: Thank you.

16 MR. HARPOOTLIAN: "At about seven p.m. that evening,
17 Appellant was taken into custody and transported to the
18 Sumter police station for a polygraph test. Prior to
19 being tested, the polygraph examiner administered
20 Miranda, in custody."

21 Goodwin, in custody; Cannon, in custody. So it's a
22 different factual situation, and Your Honor, we would
23 submit that, you know, how are we supposed to tell this
24 jury that she goes and sits down with Gray and then
25 spontaneously bursts into a statement.

1 We can't tell them, tell this jury he administered
2 a polygraph, which we believe was fatally defective
3 because of the way it was conducted, and then says -- then
4 sits down in the chair and says, "You lie".

5 As Your Honor pointed out, it's fraught -- this whole
6 process is fraught with the problems that it is structured
7 to get a statement without re-advising her, but I don't
8 need to belabor that. You've got the cases and anything
9 else you need.

10 THE COURT: All right.

11 MS. CAMPBELL: Your Honor, I would just refer -- and
12 I've handed up a whole line -- there are cases on point
13 where the officers are found to have specifically lied
14 about statements they have taken on the defendant, and
15 they found that did not --

16 THE COURT: I'm -- I'm familiar with that --

17 MS. CAMPBELL: Yes, sir.

18 THE COURT: -- line of cases.

19 MS. CAMPBELL: Yes, sir.

20 THE COURT: All right. Let's -- what about this
21 second issue of the Shaken Baby Syndrome? How do you plan
22 to proceed on that?

23 MS. CAMPBELL: We should be very brief, Your Honor.
24 We have Dr. Luberoff here. She can go over the issues
25 set out in Rule 702.

1 THE COURT: All right.

2 MS. CAMPBELL: Your Honor, I would at this time --

3 THE COURT: How long -- how long -- I'm just trying
4 to manage the time and the fact that the jury will be here
5 in 40 minutes.

6 MR. HARPOOTLIAN: Your Honor, maybe I can...

7 This would be a motion in limine, as I understand
8 it.

9 What is it?

10 MS. CAMPBELL: Under Rule 702, I think under State
11 vs. White and State vs. Counsel, we have to show that the
12 scientific evidence or nonscientific evidence, which
13 we'll have a motion on that in a minute, has to meet a
14 certain parameter before it can be admitted.

15 MR. HARPOOTLIAN: Well, it would be a motion in limine
16 which can be revisited at any time during the trial, as
17 I understand the rules. So whatever --

18 THE COURT: It can be, yes.

19 MR. HARPOOTLIAN: So this would be a motion -- as I
20 understand Counsel -- I mean, as I understand the motions
21 practice here, we have to make such a motion to suppress.

22 If we made such a motion, I withdraw it at this time,
23 reserving the right to raise it at any point during the
24 trial, which I believe is my right under Counsel.

25 So if she wants to go through this process, I'll have

1 no questions. She can put it up, and Your Honor can rule
2 whatever you want to rule, but then we may revisit it
3 during the trial. So --

4 THE COURT: I understand you can revisit it with the
5 witnesses, correct?

6 MR. HARPOOTLIAN: With -- sure, with a witness. I
7 mean, if she is wanting to put Luberoff up to testify that
8 Shaken Baby --

9 THE COURT: That there is a basis for, as I understand
10 it, a diagnosis --

11 MR. HARPOOTLIAN: Sure.

12 THE COURT: -- of Shaken Baby Syndrome.

13 MR. HARPOOTLIAN: We understand that.

14 THE COURT: You --

15 MR. HARPOOTLIAN: Are we conceding that it is a valid
16 diagnosis?

17 THE COURT: No.

18 MR. HARPOOTLIAN: No. And Your Honor, finding
19 that --

20 THE COURT: But if you stipulate that it is a
21 diagnosis, that is extant -- that is extant in the medical
22 field, whether it's valid or not, I mean, you can challenge
23 the validity with any witness you want, but it's --

24 MR. HARPOOTLIAN: Beg the Court's indulgence.

25 MS. CAMPBELL: May I approach, Your Honor?

1 (Pause)

2 MR. HARPOOTLIAN: We don't object. We don't contest
3 the fact that such a diagnosis has existed.

4 THE COURT: You stipulate it?

5 MR. HARPOOTLIAN: That such a diagnosis has existed.
6 Now, whether or not it's valid in this case, whether it
7 was appropriately applied, whether there are other
8 medical entities that question the so-called triad.

9 I mean, all of that, I think, we would ask the witness
10 when they testify in front of the jury on cross-examination
11 and maybe even in a Counsel hearing. I'm not -- I'm not
12 sure. We've got to wait. We've got to wait and see what
13 the context is.

14 THE COURT: All right. Well, how does the State wish
15 to proceed?

16 MS. CAMPBELL: Your Honor, if he's conceding that it's
17 a diagnosis, and he just wishes to cross-examine on the
18 validity of it, I have no problem.

19 Our concern is -- according to State vs. White, prior
20 to putting up any kind of testimony, there has to be a
21 hearing under 702 as far as any scientific or
22 nonscientific evidence.

23 We were concerned with doing this and making sure
24 it was a valid diagnosis, because prior to opening
25 statement, in order to mention shaken baby, we think that

1 has to happen.

2 THE COURT: What --

3 MR. HARPOOTLIAN: Your Honor, maybe I can cut to the
4 chase.

5 What's the non-scientific --

6 MS. CAMPBELL: That's your evidence. I'm getting
7 ready to get into that.

8 MR. HARPOOTLIAN: What's our evidence?

9 MS. CAMPBELL: We would request a 702 hearing on -- we
10 were given a witness list yesterday, Your Honor. We
11 weren't aware of what the defense was going to be in
12 this, but on that list, he has Mr. Stuart Allen, who is
13 a forensic audio expert, a Dr. Michael Balko, who is a
14 forensic pathologist; a Marvin Dawson, who is a documents
15 examiner.

16 THE COURT REPORTER: I'm sorry, Luck. You need to
17 slow down.

18 MS. CAMPBELL: Sorry.

19 THE COURT REPORTER: Thank you.

20 MS. CAMPBELL: Okay.

21 Alan Hirsch, who is an expert on recanting confessions
22 and false confessions; Joseph Scheller, who is a pediatric
23 neurologist, and Dr. Jeff McKee who wrote a book on "My
24 Mother Has Killed Children" and is a psychologist here
25 in town.

1 Your Honor, in State vs. Jarrell, specifically prior
2 to the defense making opening arguments, whether any of
3 those types of evidence would be admissible, we would ask
4 for a hearing and no mention of that in opening statement
5 until we -- I don't know if he plans to offer any of it
6 or not.

7 MR. HARPOOTLIAN: We don't either.

8 MS. CAMPBELL: But under Jarrell, you would note in
9 that case the defense sought to offer testimony from the
10 psychologist, specifically Dr. Jeff McKee, the same
11 psychologist in this case.

12 It was not admitted. It was not relevant for that
13 purpose.

14 MR. HARPOOTLIAN: We would allow --

15 MS. CAMPBELL: Therefore --

16 THE COURT: Just a moment.

17 MR. HARPOOTLIAN: We would allow a hearing prior to
18 offering that testimony outside the jury's presence. We
19 listed every possible potential witness.

20 MS. CAMPBELL: My only --

21 MR. HARPOOTLIAN: My sense right now is none or one
22 or two of them may testify. I don't know.

23 MS. CAMPBELL: And just anything outside the
24 parameters of the medical diagnosis, we would object to
25 being mentioned in the opening statement without a

1 hearing on the admissibility of those.

2 MR. HARPOOTLIAN: Right. I don't have a problem
3 with that.

4 THE COURT: All right. You're requesting a 702
5 hearing?

6 MS. CAMPBELL: I'm requesting a 702 hearing on all
7 their experts in these various fields I just enumerated.

8 THE COURT: Call your first witness.

9 MS. CAMPBELL: They are their witnesses. I don't
10 have access to them.

11 THE COURT: Oh, I thought you said you wanted to call
12 a witness.

13 MS. CAMPBELL: No, sir. I'm sorry. I just requested
14 a hearing. I don't have to do it pretrial. I assume they
15 aren't here, most of them, but we are requesting a hearing.

16 My concern is I don't want him talking about --

17 THE COURT: Now?

18 MS. CAMPBELL: -- this type of evidence without the
19 hearing and you saying it would be relevant and admissible
20 in this case in opening argument.

21 I have no problem with doing the 702 hearing when
22 they are available, because I understand they're out of
23 town.

24 THE COURT: Are you requesting a hearing now?

25 MS. CAMPBELL: No, sir. I'm requesting a hearing at

1 whatever you deem the appropriate time, but I'm
2 requesting that he not mention anything to do with
3 forensic audio experts, document examination,
4 authenticity.

5 MR. HARPOOTLIAN: Well --

6 MS. CAMPBELL: -- recanted confessions or false
7 confessions.

8 MR. HARPOOTLIAN: -- I'm going to talk
9 about -- depending on your ruling, Your Honor, I may talk
10 about --

11 THE COURT: Well, I have nothing to rule on at the
12 present time.

13 MR. HARPOOTLIAN: No, no. I'm talking about
14 confessions, the so called. If Your Honor --

15 THE COURT: Oh.

16 MR. HARPOOTLIAN: -- rules them out, then I'm not
17 going to be talking about false confessions much. If Your
18 Honor rules them in, then I may be talking about false
19 confessions.

20 MS. CAMPBELL: Your Honor, there is --

21 THE COURT: That is not what she is talking about.

22 MR. HARPOOTLIAN: Well, am I talking -- am I talking
23 about a forensic person testifying? No, absolutely not.
24 I wouldn't do that.

25 MS. CAMPBELL: If he is talking about any experts in

1 his opening statement, talking about those issues, we have
2 an objection to --

3 (Talking over each other.)

4 MR. HARPOOTLIAN: And Your Honor --

5 MS. CAMPBELL: -- under 702.

6 MR. HARPOOTLIAN: -- end that, period. And if I
7 insinuate it, I'm sure I'll catch a dagger in the back.

8 THE COURT: Well, then I need not go into the White
9 and Jarrell at this time; is that correct?

10 MS. CAMPBELL: As long as he's not taking about any
11 of those experts or their testimony.

12 MR. HARPOOTLIAN: I won't, I won't. I swear.

13 THE COURT: All right.

14 MS. CAMPBELL: And --

15 THE COURT: What else do we need deal with pretrial?

16 MS. CAMPBELL: I don't have anything else. I'll just
17 go release Dr. Luberoff.

18 THE COURT: Do what?

19 MR. HARPOOTLIAN: Can I talk with her? I'd like to
20 talk with her.

21 MS. CAMPBELL: You've already been talking to her and
22 to Dr. Rosa.

23 MR. HARPOOTLIAN: Well, they're not very
24 cooperative.

25 MS. CAMPBELL: No, sir. There's nothing else.

1 THE COURT: Nothing else pretrial?

2 MR. HARPOOTLIAN: No, sir, except for the statements.
3 Your Honor, may we be at ease about 30 minutes then?

4 THE COURT: Yes.

5 MR. HARPOOTLIAN: Thank you.

6 THE COURT: Stand at ease.

7 (WHEREUPON, a short break was taken.)

8 THE COURT: All right. I reviewed the case law
9 submitted by counsel.

10 I first wondered about the issue of the noncustodial
11 interrogation or statement given at the polygraph room
12 and counsel's argument is that the defendant needed to
13 be in custody prior to the giving of -- the giving of the
14 Miranda warnings and Miranda rights.

15 In the McNeal case, that language quoted by West
16 Virginia is in footnotes. I always wondered about
17 footnotes and the efficacy with regard to holding.

18 "In this language, we have, in fact, never held
19 that a person never invoked his Miranda warnings
20 anticipatorily in a context other than custodial
21 interrogation, which a preliminary hearing will not
22 always or usually involve." They cite a Pennsylvania
23 case. I know the West Virginia case was cited as a
24 determinative factor in their decision.

25 They go on to say in that same footnote, this U.S.

1 Supreme Court, that the Miranda right to counsel cannot
2 be invoked at a preliminary -- can be invoked at a
3 preliminary hearing. It could be argued there is no
4 logical reason why it could not be invoked by a letter
5 prior to arrest or even prior to identification as a
6 suspect. Most rights must be asserted when the government
7 seeks to take action they protect against. So I -- I think
8 the weight is effective, and I so rule.

9 The -- there are numerous instances in the cases cited
10 where statements, confessions, admissions are made in the
11 custody of law enforcement prior to any arrest or prior
12 to any waiver being offered to the defendant -- the
13 Bollington case, the defendant was sitting in a police
14 car.

15 At least case law doesn't say he was under arrest,
16 talking in a patrol car, when Bollington explained he and
17 his wife had been separated for months, and she lived
18 outside the marital home -- this is the burning of the
19 marital home, deceased, killing the wife -- Detective
20 Friar decided to advise him of his Miranda rights.

21 It doesn't say he was in custody. It just says he
22 was advised of his Miranda rights. It frankly doesn't
23 ever go on to say when he was held in custody.

24 He was in the patrol car, and the defendant signed
25 the waiver, the printed waiver. The officer -- I beg your

1 pardon, the officer then talks to another officer who,
2 obviously, was told there had been a struggle in the house.
3 At that point in time, Bollington was placed under arrest.
4 In other words, the statements he gave in the Miranda
5 Warnings were pre-custody, pre-arrest.

6 In Rochester, of course, there were three Miranda
7 warnings given in that case, but in that case, they do
8 say -- and that's a case following a polygraph
9 examination.

10 Prior to being tested, the polygraph examiner
11 administered the Miranda warnings, and although there
12 were two other Miranda Warnings given, and an application
13 for appointment of counsel, which was done at the Sumter
14 County Jail.

15 The Court says the appellant argues that these
16 statements were improperly admitted because they were
17 obtained after he had invoked his right to counsel by
18 requesting appointment of a Public Defender.

19 We need not address this issue or whether or not these
20 statements were voluntary -- voluntary - voluntarily
21 made because these statements were merely cumulative to
22 the properly obtained -- to those properly obtained in
23 the December 20th, 1987 confession and to Appellant's
24 testimony at trial.

25 Well, they say -- and this is the Supreme Court case.

1 They say that the statement made after the polygraph test
2 was administered was admissible, and that's all
3 that -- regardless of if they invoked later statements,
4 they say it really didn't matter because those statements
5 were merely cumulative to the properly obtained
6 December 20th, 1987 confession.

7 That was the confession at the police station some
8 three hours after being administered the polygraph
9 examination.

10 At some point, the polygraph examiner told the
11 Appellant they were probably -- certainly, probably in
12 his best interest to tell the truth.

13 Between ten and eleven, the Appellant gave a detailed
14 confession admitted -- admitting to abducting the victim,
15 running over her with the car, the victim earlier, and
16 setting fire to her body.

17 So there is support in our jurisdiction for
18 statements given post a polygraph exam, and I don't feel
19 that the subsequent interrogation or questioning by the
20 Columbia Police Department was excessive or
21 overbearing.

22 Certainly once someone has it put in their mind that
23 the police did not believe them, I feel it's perfectly
24 reasonable for that person to try to explain their
25 behavior in some other context than admitting guilt, and

1 that frequently is the case.

2 The length of time that the officers interrogated
3 the defendant, as was pointed out in the State's brief,
4 there were numerous breaks in the custodial interrogation
5 that were not -- it was not a continuous five, six or seven
6 hours of interrogation.

7 There were breaks from time to time, and I have to -- I
8 have to take -- hear some -- it's the only evidence that
9 I have that the officer said the defendant was cooperative,
10 and -- and certainly making an admission of guilt, of some
11 guilt, is a difficult thing for anybody.

12 So I've carefully considered all of the evidence
13 which has been offered by the State and the defendant,
14 and I am convinced by a preponderance of the evidence,
15 and so find, that the alleged statements were obtained
16 from the defendant, that the defendant was fully advised
17 of her rights under the fifth and sixth amendments of the
18 constitution of the United States, and the defendant was
19 advised by -- of the constitutional safeguards required
20 by Miranda v. Arizona and so follows: The defendant was
21 advised prior to any interrogation that she had the right
22 to remain silent.

23 The defendant was advised prior to any interrogation
24 she waived -- if she waived her right to remain silent
25 and made a statement, such statement could and would be

1 used against her in a court of law.

2 The defendant was advised prior to any interrogation
3 that she had the right to employ or select an attorney
4 of her own choice, and that if he did not have the money,
5 funds, or resources to employ an attorney, that the Court
6 would appoint and provide an attorney for her, if she so
7 desired, without cost or expense to her; and that she had
8 a right to waive her attorney's presence with her at all
9 times during all interviews and interrogations, and that
10 the defendant was advised prior to any interrogation that
11 she had the right to consult with her attorney before the
12 interrogation; that the defendant was advised prior to
13 any interrogation she had the right to interrupt and
14 terminate the interrogation at any time; that she had the
15 further right to stop answering questions at any time
16 during the interrogation, and the defendant was advised
17 prior to any interrogation that if during the interrogation
18 if she desired an attorney, the interrogation would cease
19 until an attorney was provided for her, and she would be
20 given an opportunity to consult with her attorney prior
21 to any further interrogation.

22 The defendant knowingly and intelligently waived her
23 rights under the fifth and sixth amendments to the
24 Constitution of the United States and that constitutional
25 safeguards required by Miranda v. Arizona and that the

1 alleged statement was obtained from the defendant, was
2 freely and voluntarily given without duress, without
3 coercion, without undue influence, without reward,
4 without promise or hope of reward, without promise of
5 leniency, without threat of injury and without compulsion
6 or inducement of any kind, and that such alleged statement
7 was the voluntary product of the free and unconstrained
8 will of the defendant.

9 This Court finds all of the forgoing conclusions by
10 the preponderance of the evidence. I, therefore, find
11 the statements are admissible into evidence.

12 Anything further?

13 MS. CAMPBELL: Your Honor, just for the record, as
14 far as Investigator Gray's testimony, we would not be
15 mentioning anything about the polygraph, just about how
16 he advised her of her rights, what he advised her of, and
17 what the statements were she made to him.

18 We will make sure that he understands he cannot
19 mention that a polygraph was administered or the testing
20 was done or anything of that sort.

21 MR. HARPOOTLIAN: We want to bring in the polygraph.

22 THE COURT: What?

23 MR. HARPOOTLIAN: We want the polygraph. We want to
24 show that he says to her, "You lie". Now, how can we do
25 that when the Supreme Court has prohibited the mention

1 of the polygraph?

2 The 403 analysis on this, Judge, we would submit,
3 Gray's statement, we submit, dictates that that statement
4 be excluded, at least that statement ought to be
5 excluded.

6 He can testify that he Mirandized her, but anything
7 that comes after -- he says, "I gave you a polygraph exam
8 and you lie." Then --

9 THE COURT: I agree with you.

10 MR. HARPOOTLIAN: Thank you.

11 MS. CAMPBELL: Excuse me? I'm sorry? I...

12 THE COURT: The statement given to Gray is
13 inadmissible.

14 MS. CAMPBELL: So all he would be allowed to, under
15 your ruling, Judge, is to say that he advised her of the
16 Miranda rights at 10:30 and then turned her over to the
17 other officers at 1:30?

18 THE COURT: (Nods in the affirmative).

19 MS. CAMPBELL: Okay. Your Honor, if we could take
20 a ten-minute break, I need to discuss something.

21 THE COURT: Do what?

22 MS. CAMPBELL: I just need to take up something with
23 Mr. Giese.

24 THE COURT: Mr. Giese?

25 MS. CAMPBELL: Yes, sir.

1 THE COURT: Okay. Go ahead.

2 (WHEREUPON, a short break was taken.)

3 MS. CAMPBELL: May it please the Court. Your Honor,
4 based on your ruling, as I understand it that
5 Investigator Gray would only be allowed to testify to the
6 Miranda rights and none of the statements she made to him
7 would be admissible, we would respectfully choose to
8 appeal that at this time.

9 I did consult with Solicitor Giese about the matter,
10 and we just feel like in this case, because of the three-hour
11 time period, it would be crucial for the jury to understand
12 that he did speak with her.

13 He is the one that initially got the first confession
14 from her where she admitted wrongdoing. We feel like it's
15 crucial to our case.

16 We have just ask for purposes of appeal that all the
17 testimony from this pretrial be incorporated, including
18 the Court's Exhibits that we submitted, including the
19 transcripts, as well as the tape recording and all
20 testimony relevant to this issue.

21 MR. HARPOOTLIAN: And let me -- let me make sure, just
22 for the record, because we know the record is critical
23 on this, could we review -- if it please the Court, could
24 we review what's in the record so there's no -- if we need
25 to supplement, we can do it right now?

1 MS. CAMPBELL: Yes, sir. And, Your Honor, as well as
2 all the case law that has been handed up to the court both
3 by the defense and the State, I would ask to be made a
4 part of the record, as well. Just for purposes to make
5 sure we understand --

6 MR. HARPOOTLIAN: We actually filed our memo with the
7 attachments this morning --

8 MS. CAMPBELL: Well --

9 MR. HARPOOTLIAN: -- so it would be part of the
10 clerk's --

11 MS. CAMPBELL: Okay. We have not filed ours, so we
12 would --

13 THE COURT: I think you should. Mine are now all
14 marked up.

15 MS. CAMPBELL: That's fine. No problem. We'll file
16 a clean copy with the Court so that will be part of the
17 record.

18 MR. HARPOOTLIAN: Just file it with the Clerk of
19 Court and then as part of the record later on. Could I
20 just to make sure we've got everything in, so we don't
21 find that we have a problem later on, all the recordings,
22 are in?

23 MS. CAMPBELL: Yes, sir. I made those as Court's
24 Exhibit No. 1, which are the tape recordings, and then
25 Court's Exhibits 2, 3, and 4, are the transcripts from

1 those tape recordings, which have been provided to you.

2 MR. HARPOOTLIAN: Okay.

3 MS. CAMPBELL: There are three discs that incorporate
4 Court's No. 1.

5 MR. HARPOOTLIAN: Okay. Court's 1 --

6 MS. CAMPBELL: Has three discs, which includes the
7 entire tape recorded conversations. It's three because
8 one is a continuation.

9 MR. HARPOOTLIAN: Okay. Then what are these?

10 MS. CAMPBELL: Those are State's Exhibits. Those
11 are duplicates of Court's Exhibit 1, which are State's
12 3, 4 and 5.

13 MR. HARPOOTLIAN: Okay. And then this is a
14 transcript of...

15 MS. CAMPBELL: Those are the three -- Court's
16 Exhibits 2, 3 and 4 are transcripts of the discs that are
17 in evidence. State's Exhibit No. 1 is the advice of
18 rights form used by Investigator Gray prior to the
19 polygraph.

20 MR. HARPOOTLIAN: And 2 is the written statement with
21 the --

22 MS. CAMPBELL: With the addendums --

23 MR. HARPOOTLIAN: -- addendums --

24 MS. CAMPBELL: -- that we discussed with the
25 testimony.

1 MR. HARPOOTLIAN: Graham, wake up.
2 Is that everything?
3 MR. NEWMAN: Yeah, I think so.
4 MR. HARPOOTLIAN: I think that's it, Your Honor. I
5 just wanted to make sure before we adjourned that
6 everything is a part of the record.
7 THE COURT: What about this?
8 MR. HARPOOTLIAN: Oh, also Investigator Gray's notes
9 were made a Court's Exhibit.
10 MS. CAMPBELL: That's fine. We just would ask
11 permission to make a copy of those, as we don't have a
12 copy.
13 MR. HARPOOTLIAN: I don't either so...
14 MS. CAMPBELL: I'll make you a copy, as well.
15 MR. HARPOOTLIAN: Luck.
16 (Pause)
17 (Counsel confers)
18 MR. HARPOOTLIAN: Your Honor, I think that's
19 correct.
20 MS. CAMPBELL: The eight-page written statement is
21 a State's exhibit. All State's exhibits we would
22 incorporate into the record, with the Court's permission.
23 MR. HARPOOTLIAN: And Court's Exhibits, too.
24 MS. CAMPBELL: And Court's Exhibits.
25 MR. HARPOOTLIAN: Right.

1 THE COURT: Anything further?

2 MR. HARPOOTLIAN: No, sir.

3 MS. CAMPBELL: No, sir.

4 Your Honor, I'll get a formal written notice
5 to the -- I guess I submit that.

6 MR. HARPOOTLIAN: Do what now?

7 MS. CAMPBELL: I'll figure out --

8 THE COURT: Ask him. He did it.

9 MR. HARPOOTLIAN: I've done it a few times. Just you
10 file it and serve it, file it downstairs --

11 MS. CAMPBELL: Okay.

12 MR. HARPOOTLIAN: -- and you serve it.

13 MS. CAMPBELL: We'll get that taken care of this week.

14 MR. HARPOOTLIAN: Ten days.

15 MS. CAMPBELL: Okay.

16 MR. HARPOOTLIAN: Right?

17 THE COURT: Right. Have a seat, and I'll dismiss the
18 jury. Bring the jury, please.

19 (WHEREUPON, the jury came into open court at
20 approximately 12:07 p.m.)

21 THE BAILIFF: The jury seated, Your Honor.

22 THE COURT: All right. Thank you very much. Good
23 morning, ladies and gentlemen.

24 THE JUROR: Good morning.

25 THE COURT: Or afternoon.

1 Let me first apologize to you for keeping you
2 waiting back in the jury room. I know that's not the most
3 comfortable place. It may be the most comfortable place
4 in the courthouse.

5 It's certainly not a comfortable place to be confined
6 and waiting, but as I told you yesterday afternoon, there
7 were a number of legal matters that needed to be taken
8 up before the trial started.

9 And let me just say that those legal matters have
10 created some -- some problems with going forward with the
11 case at this time.

12 The case not going to go forward at this time, so
13 I'm going to dismiss you now and ask you to return to the
14 jury assembly room for further instructions. I don't
15 know if there will be other cases to be assigned this week,
16 but we will not need your services for this case.

17 Now, I do want to thank you for coming. The issues
18 that have arisen are probably going to have to be dealt
19 with, and there's no -- they are going to have to be dealt
20 with.

21 There's no sense in you sitting back there waiting
22 for us to do that. So I think they are such -- they are
23 such issues that the case is not going to be able to go
24 forward this week.

25 So thank you. This happens sometimes. It doesn't

1 happen very often, but it does happen from time to time,
2 when a jury is called and then legal matters come up
3 because, you know, we don't know -- I don't know in advance,
4 particularly what matters are going to come up the
5 following week, but this one came up.

6 We've been here -- we were here all yesterday afternoon
7 and all this morning, and I've not been able to resolve
8 it.

9 So with that in mind, I just continued the case to
10 a later date. It's -- it just cannot be heard at this
11 time, so thank you very much for coming. The bailiffs
12 will show you how to return to the jury assembly room.

13 You may be called later this week, you may not, but
14 thank you for coming, and I appreciate your willingness
15 to serve.

16 THE JUROR: Thank you, Jesus.

17 THE COURT: The jury is dismissed.

18 (WHEREUPON, the jury left open court at approximately
19 12:10 p.m.)

20 THE COURT: All right. Next case.

21 MS. CAMPBELL: Thank you, Your Honor.

22 MR. HARPOOTLIAN: Thank you.

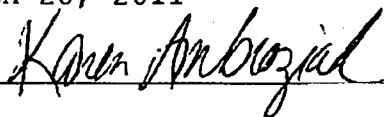
23 (Whereupon, the proceedings were concluded.)
24
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

I, Karen Tracy, Official Court Reporter for the 5th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the General Sessions Court for Richland County, South Carolina, on the 29th and 30th days of November, 2010.

March 28, 2011



Karen Ambroziak, Court Reporter

My Commission Expires: 04/01/14

COUNTY OF RICHLAND)
STATE OF SOUTH CAROLINA)
The State of South Carolina)
vs.)
Kendra Patricia Samuel,)
Defendant.)

COURT OF GENERAL SESSIONS

Case No.: 08-GS-40-07372

**MOTION TO SUPPRESS
STATEMENTS**

JEANETTE W. MCBRIDE
C.C.P. & G.S.

2009 SEP 30 PM 2:33

199

RICHLAND COUNTY
FILED

The Defendant, Kendra Patricia Samuel, hereby files this Motion to Suppress evidence of any and all statements given by her to law enforcement officials. The Defendant bases this Motion upon Miranda v. Arizona, 384 U.S. 436 (1966), Jackson v. Denno, 378 U.S. 368 (1964), and all other pertinent case law.

Pursuant to this Motion, the Defendant requests this Honorable Court conduct a hearing regarding this Motion to Suppress to determine whether to exclude from introduction into evidence the aforementioned statements

Respectfully Submitted,



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ATTORNEY FOR DEFENDANT

Columbia, South Carolina
9/30, 2009.

COUNTY OF RICHLAND) COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA) Case No.: 08-GS-40-07372

The State of South Carolina)

vs.)

Kendra Patricia Samuel,)

Defendant.)

**MEMORANDUM IN SUPPORT OF
MOTION TO EXCLUDE STATEMENTS**JEANETTE MCENIDE
C.C. H. G.S.

2010 NOV 30 AM 9:06

RICHLAND COUNTY
FILED

Defendant Kendra Samuel, by and through her undersigned attorneys, submits this memorandum in support of her motion to exclude statements provided to law enforcement. For the reasons stated herein, the motion should be granted.

BRIEF STATEMENT OF FACTS

This memorandum pertains to statements provided by Kendra Samuel to law enforcement on August 6, 2008.

Based on a written *Miranda* waiver provided by the State, the record indicates that Columbia Investigator Joe Gray began questioning Kendra at approximately 10:30 in the morning. The interaction between Gray and Samuel would last until approximately 12:30 pm (Statement I) and centered upon Gray's polygraph examination of Samuel. Gray asked three substantive questions of Samuel pertaining to the death of Aiden Harling. These questions were repeated in three consecutive examinations. After the conclusion of the examinations, Gray announced that Samuel failed the polygraph and instructed her to "come clean." Gray then alleges that Samuel admitted to harming Aiden Harling.

Following the polygraph interrogation, Samuel was ushered to a different room where she was interrogated by Columbia Investigator Thomas and SLED Agent Shockley. This interrogation was partially taped (Statement II) and partially written (Statement III), lasting

from approximately 1:27 pm until 2:30 pm.

After the interrogation that led to Statement II, Samuel was taken to yet another room where she was aggressively interrogated by Columbia Investigator Reese, Investigator Thomas, and SLED Agent Hurt. Like Statement II, this interrogation was only partially taped (Statement IV). The third interrogation lasted from approximately 3:30 pm until 5:30 pm, ending with a written "Q & A." (Statement V).

BURDEN OF PROOF

"When seeking to introduce a confession, the State must prove that the statement was voluntary and taken in compliance with *Miranda*." *State v. Middleton*, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). "To protect against this danger, the *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief." *U.S. v. Patane*, 542 U.S. 630, 639 (2004). Even in the presence of *Miranda* warnings, however, "[a] confession is not admissible unless it was voluntarily made. A determination of whether a confession was given voluntarily requires an examination of the totality of the circumstances." *State v. White*, 311 S.C. 289, 294, 428 S.E.2d 740, 743 (Ct. App. 1993)(internal citations omitted). "This voluntariness requirement is in addition to the intelligent waiver mandate of *Miranda*." *State v. Miller*, 375 S.C. 370, 379-380, 652 S.E.2d 444, 449 (Ct. App. 2007).

ANALYSIS

The Defendant asserts that Statements I through V are inadmissible as they, first, were custodial interrogations conducted without sufficient *Miranda* warnings, and second, were statements made in circumstances in which the Defendant's voluntariness and free will were overborne. Each point shall be addressed in turn.

I. Sufficiency of *Miranda* Warnings

"*Miranda* warnings are required for official interrogations only when a suspect 'has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *State v. Easler*, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997) (quoting *Miranda*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)). Thus, in order to determine when Samuel enjoyed the protection of *Miranda*, our analysis in this case must begin with an identification of the moment that Samuel was "in custody" and the questioning that may be considered an "interrogation."

a. When were the *Miranda* protections triggered?

i. Custody

For the purposes of a *Miranda* analysis, "custody is determined by an objective analysis of 'whether a reasonable man in the suspect's position would have understood himself to be in custody.'" *State v. Ledford*, 351 S.C. 83, 88, 567 S.E.2d 904, 907 (Ct. App. 2002), quoting *Easler* at 128, 489 S.E.2d 617, 489 S.E.2d at 621. "The initial determination of whether an individual was in custody depends on the objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the person being questioned." *State v. Sprouse*, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996), citing *Stansbury v. California*, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994).

Determination of a declarant's "custodial" status is a totality of the circumstances analysis which must include consideration of "the individual's freedom to leave the scene and the purpose, place and length of the questioning." *Easler* at 127, 489 S.E.2d at 621, citing *United States v. Helmelt*, 769 F.2d 1306 (8th Cir. 1985). The South Carolina Supreme Court applied this criteria while considering a very similar police department confession in *State v. Evans*, 354 S.C. 579, 582 S.E.2d 407 (2003).

We believe that the trial judge's order provides abundant justification for his determination that Evans was in police custody. First, he found Evans was not *free to leave*. When Evans went to the restroom, Agent Edwards accompanied her at all times and waited outside the restroom. Also, the officers would not permit Evans' cousin to go back to the interview room. Second, the *place* where the agents interviewed Evans also concerned the judge in that it was in a back office in the police station. Third, the judge noted that the interview was *lengthy*, as it lasted three hours. Finally, the judge was most concerned with the agent's *purpose*. He said:

What really turns it for me was that when ... That her story was challenged and once that was challenged, that changes from just a routine inquiry to name, rank and serial number. They (Alexander and Ross), in fact, put it to her that they did not believe her. As soon as that occurred, then the switch over to the female officer (Edwards) occurred.

Id. at 584, 582 S.E.2d at 410.

The immediate similarity between the interrogation of Kendra Samuel and that of the *Evans* defendant lies in the confrontation of the declarants with the officer's belief that they were lying. As Investigator Gray testified during the hearing, subsequent to Samuel's polygraph examination he "walked into the examination room, placed his chair in front of hers, and told her that she failed the polygraph." At that precise moment, a reasonable person—no matter what their intention was in initially traveling to the police station—would have understood themselves to have been accused by the police of a heinous crime and, as a necessary corollary, not free to leave.

The other circumstances surrounding Samuel's interrogation further establish the custodial nature of the situation. Similar to *Evans*, Samuel's polygraph was conducted in a back room of the Columbia Police Department behind a closed (if not locked) door. The length of the interrogation was substantial. The *Miranda* waiver at issue was signed at 10:31 am and the polygraph results—which were obtained prior to the confrontation of Samuel—indicate that

Gray did not first confront Samuel until at least 12:16 pm.¹ Under the totality of these circumstances, a reasonable person standing in the shoes of Samuel would not feel free to leave.

As a result of the foregoing, Samuel was in police custody at the time Investigator Gray chose to confront her with the results of her polygraph.

ii. Interrogation

"Interrogation is either express questioning or its functional equivalent. It includes words or actions on the part of police that the police ... should know are reasonably likely to elicit an incriminating response." *State v. Kennedy*, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998)).

One need only review the list of questions read to Kendra Samuel by Investigator Gray to determine that the polygraph examination contained "words or actions...reasonably likely to elicit an incriminating response." *Id.*

- "Do you know how that child was hurt?"
- "Did you do anything to hurt that child?"
- "Do you know who hurt that child?"

As shown above, the questions presented to Samuel were designed specifically to address her culpability for the death of "that child"—Aiden Harling. Thus there is no doubt that these questions constituted an "interrogation" for the purposes of *Miranda*. Furthermore, even to the extent that the polygraph itself was not an "interrogation," clearly Gray's confrontation of Samuel about her supposed failure of the exam was calculated to elicit a response that amounted to nothing less than an admission of guilt.

Thus, because the substance of the polygraph and its follow-up questioning constituted an interrogation and because the totality of the circumstances surrounding Samuel's presence and

¹ This, of course, does not take into account the additional interrogation of Samuel's lasting to approximately 6 pm that evening.

questioning subsequent to the polygraph constituted "custody," all questioning of Kendra Samuel from the moment police chose to confront her with the results of the polygraph until the moment of her ultimate arrest constituted "custodial interrogation" and any statements received therefrom are inadmissible unless Samuel had been adequately advised of her *Miranda* rights.

b. After the *Miranda* protections were triggered, did the Gray waiver form constitute an intelligent waiver that pertained to all statements?

Having determined that Samuel enjoyed the protections of *Miranda* from the moment she was confronted with the polygraph results, we must now address whether the 10:31 am advice of rights satisfied law enforcement's duties under *Miranda*. For three reasons, the 10:31 waiver was insufficient: first, the 10:31 am advice of rights was non-custodial and thus ineffectual; second, the advice of rights related only to the polygraph and was rendered ineffective when officers chose to engage in post-polygraph interrogation; and third, the 10:31 am advice of rights was rendered stale by the length of time separating the *Miranda* reading and the subsequent interrogations.

i. The statements are inadmissible because the purported Miranda waiver was invalid

Testifying under oath during the *Jackson v. Denno* hearing, all officers for the State insisted that Samuel was not in police custody at the time she agreed to participate in the polygraph and signed the written waiver of her *Miranda* rights. Investigator Reese insisted that Samuel was not in custody until she provided the recorded confession within Statement IV. Agent Shockly, meanwhile, felt as if Samuel was in custody subsequent to the recorded confession within Statement II. What is undeniable, however, is that all parties to this case agree that Samuel was not in custody when she signed the 10:31 am advice of rights form. This is fatal to the efficacy of the advice of rights.

Quoting *Miranda* itself, our State Supreme Court has observed that “[l]aw enforcement must state the *Miranda* warnings ‘after a person has been taken into custody or otherwise deprived of his freedom of action in any way.’” *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003)(emphasis supplied), quoting *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). The South Carolina Supreme Court has not had occasion to opine whether a non-custodial advice of rights remains effective when the otherwise-casual setting transforms into one of custodial interrogation. The Supreme Court of West Virginia has done so, however, and rejects prosecutors’ attempts to rely upon non-custodial *Miranda* readings.

[T]he *Miranda* right to counsel has no applicability outside the context of custodial interrogation. Therefore, until the defendant was taken into custody, any effort on his part to invoke his *Miranda* rights was, legally speaking, an empty gesture. We believe the “window of opportunity” for the assertion of *Miranda* rights comes into existence only when that right is available.

State v. Bradshaw, 193 W. Va. 519, 530, 457 S.E.2d 456, 467 (W.V. 1995).

The Bradshaw opinion relied upon the United States Supreme Court opinion of

We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than “custodial interrogation”.... Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.

McNeil v. Wisconsin, 501 U.S. 171, 189, 111 S. Ct. 2204, 2215, 115 L. Ed. 2d 158 (1991).

McNeil’s holding, as applied to the instant matter, begs the following questions: if, in fact, Kendra Samuel was not in custody at the time her *Miranda* rights were read to her, how was Samuel supposed to have invoked such rights? If, in fact, Samuel was not in custody at the time

her *Miranda* rights were read to her, of what exactly was she being advised? The United States Supreme Court has specifically rejected the notion that a *Miranda* rights might "be asserted initially outside the context of custodial interrogation." *Id.* Because Samuel possessed no *Miranda* rights at 10:31 am, her signing of the *Miranda* waiver was, in the words of the West Virginia Supreme Court, "an empty gesture." *Bradshaw* at 530, 457 S.E.2d at 467. As a result, law enforcement's failure to advise Samuel of her rights subsequent to taking her into custody renders Statements I through V inadmissible.²

ii. The statements are inadmissible because the *Miranda* waiver applied only to the polygraph

The Ninth Circuit Court of Appeals considered a very similar case in *U.S. v. Gillyard*, 726 F.2d 1426, 1429 (9th Cir. 1984). There the government *Mirandized* a suspect prior to conducting a polygraph examination. The government then confronted Gillyard with the results of a polygraph before passing him off to other officials for further interrogation regarding the subject matter of the examination. The Ninth Circuit, finding that the initial *Miranda* warnings did not extend to the subsequent interrogation, emphasized the separation between Gillyard's understanding of that to which he was consenting (a polygraph) and that to when he was subjected (an extended interrogation with additional officers). Said the court, "[h]ere the questioning was not merely a continuation of the polygraph examination but a change to accusatory questioning by two officers who had nothing to do with the polygraph examination."

U.S. v. Gillyard, 726 F.2d 1426, 1429 (9th Cir. 1984)

The present case could not be more similar. Investigator Gray gained Samuel's waiver of rights by representing to her that she would be submitting to a polygraph examination. Only after

² Even if the Court were to disagree that Samuel was "in custody" for the purposes of *Miranda* during the post-polygraph confrontation with Investigator Gray, certainly her custodial status changed when she was escorted to a locked interrogation room for Statements II through V.

confronting her with the results of that examination was it revealed that Samuel was to be extensively interrogated. In fact, her interrogation would carry on for five additional hours in two different rooms before five different officers. Thus, under the authority of *Gillyard*, Samuel's waiver does not extend to Statements II, III, IV and V.

- iii. The statements are inadmissible because the length in time between the initial *Miranda* waiver and the subsequent statements rendered the waiver stale

According to the documentation produced by the State, Investigator Joe Gray advised Kendra Samuel of her rights at 10:31 am on August 6, 2008. This advice of rights took place approximately one hour and fifteen minutes prior to the commencement of Samuel's polygraph examination, three hours before the commencement of Statement II, and five hours before the commencement of Statement III. Such an advice of rights satisfies *Miranda*'s requirements only as to Statement I (which, of course, is inadmissible for reasons independent of *Miranda*).

Beyond the polygraph-specific holding of *Gillyard*, the shift in time and circumstances between 10:30 am and Statements II through V renders stale the initial advice of rights. South Carolina courts describe the means by which a waiver of rights expires only in the most general terms: "waiver continues until such time as the individual being questioned indicates that he wishes to revoke the waiver or circumstances exist which establish that his will has been overborne and his capacity for self-determination critically impaired." *State v. Moultrie*, 273 S.C. 60, 62, 254 S.E.2d 294, 295 (1979). North Carolina, however, provides useful guidance as to when "capacity for self-determination" becomes impaired.

The five factors to be considered are:

- (1) the length of time between the giving of the first warnings and the subsequent interrogation.
- (2) whether the warnings and the subsequent interrogation were given in the same or different places.

- (3) whether the warnings were given and the subsequent interrogation conducted by the same or different officers,
- (4) the extent to which the subsequent statement differed from any previous statements;
- (5) the apparent intellectual and emotional state of the suspect.

State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (N.C. 1986).

In this case, all five of the *Fisher* criteria suggest that Samuel's signed waiver of rights expired before she gave Statements II through V. First, three and five hours elapsed between the waiver and Statements II and III, respectively. Samuel was transported to different rooms to give the additional statements where she was interrogated by different officers from differing police forces. All three statements differed markedly, to the point where Samuel "confessed" to fabricating Statements I and II at the end of her third and final statement. And, as the tape shows, Samuel's emotional state by the conclusion of Statement III was one of a sobbing, nervous wreck begging the police to stop yelling. Such evidence constitutes circumstances "which establish that [the Defendant's] will has been overborne and [her] capacity for self-determination critically impaired." *Moultrie* at 62, 254 S.E.2d at 295. As a result, even if the *Miranda* waiver initially was effective, the length of time and related circumstances between it and the subsequent statements rendered the advice of rights stale.

II. Voluntariness of Statement

Beyond the considerations of a *Miranda* waiver, our courts have set forth a variety of other elements that go to the general voluntariness of a "confession". "When considering the voluntariness of a statement, the court and jury should consider 'not only the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health.'" *State v. Goodwin*, 2009 WL 1851309, 6 (Ct. App. 2009), quoting *Withrow v. Williams*, 507 U.S. 680, 693, 113 S.Ct. 1745

(1993) (internal citations). The continuity, location and length of the interrogation have been discussed above, but the "crucial element" of police coercion renders Statements I through III involuntary.

Improper police coercion may take any of a variety of hues and forms. "The confession may not be 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by the exertion of improper influence.'" *State v. Rochester*, 301 S.C. 196, 200, 391 S.E.2d 244, 246 (1990), citing *Hutto v. Ross*, 429 U.S. 28, 30, 97 S.Ct. 202, 203 (1976). Misrepresentations by police are a relevant factor, though they do not automatically render a confession inadmissible. *Frazier v. Cupp*, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). "Coercion is determined from the perspective of the suspect." *State v. Miller*, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007).

"The police dominated atmosphere generates 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.'" *State v. Lynch*, 375 S.C. 628, 635, 654 S.E.2d 292, 296 (Ct. App. 2007). In this case, the "police dominated atmosphere" is self-evident within Statements I through V. All statements were given in police headquarters, behind closed doors, without the benefit of counsel, while in the presence of one or more police officers. The initial use of a polygraph examination to place Samuel on the defensive also contributes to the coercive nature of the interrogation. *State v. Cannon*, 260 S.C. 537, 545, 197 S.E.2d 678, 681 (1973) (finding no coercion because of repeated advice of rights).

Our Supreme Court has recognized that the driving consideration behind this criterion is whether the interrogation was "aggressive, leading and comprehensive in nature, or intense and coercive in atmosphere." *Cannon* at 545, 197 S.E.2d at 681. Each of the three statements given

to officers on August 6, 2008 demonstrates evidence of this type that goes to the involuntariness of the confession.

First, Statement I was obtained after the utilization of a polygraph that was designed in a manner prone to produce faulty results. As shown above, the specific questions contained within the polygraph were seeking information about Samuels and "that child." The State produced no expert testimony whatsoever that this remarkably vague questioning was, in fact, proper.

Second, Statements II and III were obtained several hours subsequent to the polygraph interview after Samuel had been locked in an interrogation room. Samuel was not advised of her *Miranda* rights and the interrogation continued until officers were satisfied—at that time—with the version of events they coached her into relaying.

Finally, Statement IV and V reached a crescendo of coercion in which Investigator Reese is heard openly accusing Kendra of lying. After approximately fifty minutes of discussion with the Defendant, Reese loudly raises his voice to berate Kendra. The Defendant is then heard sobbing while asking the officers to stop yelling. Only after this harsh treatment does Kendra allegedly "confess" to the allegations of Shaken Baby Syndrome that the officers needed to complete their case. It also should be noted that this intimidating posture assumed by Reese took place in a closed room with two other police officers.

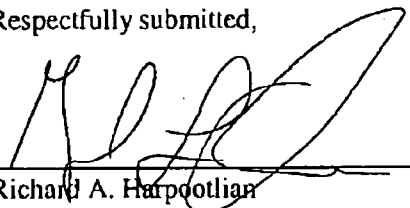
"In deciding the question of fact whether such a confession is free from threat or inducement, the conduct of the officer will be rigidly scrutinized." *State v. Brown*, 47 S.E.2d 521, 525 (1948). The physically and verbally intimidating manner in which investigator Reese conducted his interrogation is proof-positive of the lack of voluntariness accompanying Statements IV and V. Undoubtedly, Samuel—a woman of relatively small stature—would have been afraid of this man raising his voice in such an accusatory fashion.

The totality of the circumstances surrounding Statements I through V establishes that Samuel's voluntariness and free will were overborne by the aggressive actions of law enforcement. As a result, even in the presence of a valid Miranda waiver (which Defendant does not concede), Statements I through V are inadmissible.

CONCLUSION

For the reasons stated herein, the statements provided by Kendra Samuel to police on August 6, 2008 should be suppressed from admission into evidence.

Respectfully submitted,



Richard A. Harpootlian
Graham L. Newman
RICHARD A. HARPOOTLIAN P.A.
1410 Laurel Street
Columbia, South Carolina 29201
(803) 252-4848
(803) 252-4810

ATTORNEYS FOR DEFENDANT

INTERROGATION; ADVICE OF RIGHTS

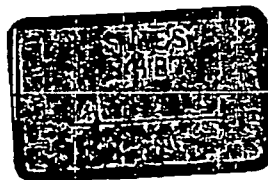
YOUR RIGHTSPlace 1 Justice SquareDate 08-06-08Time 1030

- Before we ask you any questions, you must understand your rights.
- You have the right to remain silent.
- Anything you say can be used against you in court.
- You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.
- If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

— If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed Henry SamuelWitness: [Signature]Witness: [Signature]Time: 1031-AR

Or 2187 N d



COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT FORM

Page 1 of 214

Date: 08-06-08 Time: 1430 Place: #1 Justice SQ

I am Kendra Samuel My birthday is 8-1-87

My address and phone number are: 1 Granary Ct. Columbia, SC

I am giving this statement concerning _____
to INV. THOMAS who has identified himself as INV.

On July 31st, 2008 at 5:30pm Jessica Davis and her grandmother and Cousin and 2yr old son left to go run errands. Aidan and I remained at the apartment to await their return. I changed Aidan and took off his outfit and placed him in his carseat. He began to cry so I went to pick him up and I didn't put the hand rail down on the carseat so he bumped his forehead and I didn't have a good grip on him so I accidentally dropped him while trying to stand up. He hit the back of his head as he hit the wood floor. I picked him up immediately and he took in a deep breath. He looked dazed but his eyes were still open. I shook him just to get him over the shock and hear him cry. When he didn't cry I panicked and took him outside to walk around 5:45-6:00pm. I walked for 30mins before I sat down on the playground and I tried again several times to get him to cry by shaking

Sworn and subscribed to me this
6th day of August 2008
Kendra Samuel
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 3/12/2014

ISI Kendra Samuel
ISI _____

Kendra Samuel received a copy of this statement consisting of 6 pages
from INV. Pegram ISI Kendra Samuel

Form 34:91

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

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him his eyes where still open so I just believed he was still in shock and he would be ok. Around 6:40 or so Jamal Wiggins called and asked where I was I told him the park. He said ok I am going to come get you. I got off the playground and started waiting to where I could be seen to get picked up. The community safety guy told me to make sure I got the baby out the room and I said ok. Jamal picked us up and we drove back to the house. I took Aidan upstairs around 7:00pm or so and placed him in his crib and covered him with his blanket. Jamal and I went to anthony's got hot dogs and returned shortly. We talked to Jessica for awhile and then we decided to take a nap around 8pm or so. I remained in the room with Jamal and Aidan for about 25 mins or so and I heard Aidan pass gas I knew then that he was ok. I got up and left so I wouldn't wake Jamal or Aidan up. I talked to Jessica until I heard Jamal wake up. I went in the room and Jamal

Sworn and subscribed to me this

6 day of August 2008

NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 3/12/2019

ISI Heneta Samuel

ISI _____

Heneta Samuel received a copy of this statement consisting of 6 pages

from Law. Pagan ISI Heneta Samuel

88POL03

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

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Said he wanted to go change out of his work clothes. It was around 10:30pm when he said this. We left at 10:40pm and headed to his house. While he was inside changing I stayed in the car and talked to Jessica on my cell phone about a job I wanted her to try for. We hung up with each other around 11:00pm and at 11:14 she called me saying Aidan wasn't breathing. We rushed back to her house and took her to the hospital because the ambulance was already gone.

Sworn and subscribed to me this

6 day of August 2008

NOTARY PUBLIC OF SOUTH CAROLINA

MY COMMISSION EXPIRES: 2/12/2014

Kendra Samuel

received a copy of this statement consisting of 6 pages

from D.W. Pegram

ISI x Kendra Samuel

ISI

ISI x Kendra Samuel

88POL03

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

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Q: What part of the baby's head hit the floor, when you dropped him?

A: His head. The back of his head.

Q: Did you shake the baby after it was dropped?

A: Yes. To make him respond.

Q: How did the baby react after you dropped it?

A: He took in a deep breath.

Q: Why did you take the baby to the park?

I panicked and thought walking him would help him get over the shock.

Q: Why didn't you tell the officer that stop you in the park about the baby?

A: I still had hope he was going to be OK because Aidan had had a fall before and he

Sworn and subscribed to me this

6 day of August 2008

NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 3/12/2010

/s/ Kendra Samuel

/s/

Kendra Samuel

received a copy of this statement consisting of 6 pages

from E.A. Perum

/s/

Kendra Samuel

88POL03

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

(5)
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got ok. I never saw the guy as an officer. We just saw him as an older guy with a hobby of driving around the neighborhood.

Q: DID YOU TELL JAMES ABOUT THE INCIDENT, LIKE HE PICKED YOU UP FROM THE PARK?

A: I still believed that Aidan was going to be ok. I just knew that all he needed was time to get over the shock.

Q: DID YOU LET ANYONE TOUCH THE BABY BEFORE YOU PUT IT TO BED?

A: No. No one asked to touch him.

Q: TELL ME ABOUT THE OTHER INCIDENT WHERE THE BABY FELL OUT OF IT BABY SEAT?

A: It was early morning and I put the air mattress in the living room on the floor. I fell asleep. Later Jessica put the car seat above my

Sworn and subscribed to me this
6 day of August 2008

NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 3/12/2014

Linda Samuel

received a copy of this statement consisting of 6 pages

from Det. Pegram

ISI [Signature]

ISI [Signature]

88POL03

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

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head and said she was going to run errands. I said ok and went back to sleep. I was scared out of my sleep when I felt something hit the bed. I turned around and saw Aidan and his blankets on my airbed. He was shocked and looked dazed at first but he got over it and began to cry. I picked him up and held him he calmed down and was ok.

Q: How High Was The Chair That The Baby Fell From?

A: Around 2 1/2 to 3 feet.

Q: WHEN DID THIS INCIDENT HAPPEN?

A: Weeks ago I can't remember the exact date.

Sworn and subscribed to me this
6 day of August 2008
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 3/12/2014

Kendra Samuel

from Mr. Pegram

ISI Kendra Samuel

ISI

received a copy of this statement consisting of 6 pages

ISI Kendra Samuel

88POL03

CONT. From P. 6

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

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Q: DID YOU LIE, WHEN YOU TOLD US THAT YOU DROPPED THE BABY BEFORE SHAKING IT?

A: Yes.

Q: WHAT REALLY HAPPENED TO THE BABY IN THE HOUSE?

A: Aidan kept crying after I tried to calm him and he wouldn't so I shook him out of frustration. I shook him until he stopped crying and he took a deep breathe and looked dazed.

Q: DID HIS BODY GO LIMP?

A: Yes sir. His head fell forward and his limbs went loose.

Q: WHEN DID YOU NOTICE THAT THE BABY WAS NO LONGER BREASTFEEDING?

A: When we were at the park, I noticed his belly wasn't moving anymore.

Sworn and subscribed to me this
6th day of Aug 2008
Beverly Moore
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 2012

ISI *[Signature]*
ISI *[Signature]*

_____ received a copy of this statement consisting of _____ pages
from _____ ISI *[Signature]*

88POL03

COLUMBIA S.C. POLICE DEPARTMENT
STATEMENT CONTINUATION

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Q: DID FEEL A HEART BEAT AT ALL?

A: No sir. Not after we sat down in the park for awhile.

Q: DID ANYONE OTHER THAN YOU
HARM THIS CHILD?

A: No sir. It was only me.

Q: DID ANYONE ELSE NO WHAT
YOU DID TO THE BABY BEFORE
YOU TOLD US?

A: No sir. I was too scared to tell anyone. I was trying to figure out a way to kill Jessica but was too afraid.

Q: WHY DIDN'T YOU SEEK MEDICAL
HELP FOR THE BABY?

A: I was still holding on to an ounce of hope he would be ok despite what I knew. Never had I dealt with situations like this and I was afraid and ashamed of what I did.

Sworn and subscribed to me this
2nd day of Aug 2008.
K. J. J. J. J.
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 2012

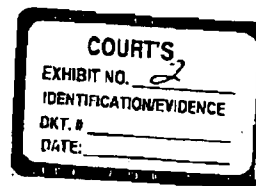
ISI K. J. J. J. J.
ISI

received a copy of this statement consisting of pages

from

ISI K. J. J. J. J.

88POL03



1 INTERVIEW OF KENDRA SAMUEL

2 AUDIO FILE 01 TRACK 1

3 A.L. THOMAS: Today's date is 8-6 of 2008.

4 Time is 1:27. And I'm in an interview with Kendra
5 samuels. In the interview room with me is Agent Shockley
6 from SLED, and I am Investigator A.L. Thomas.

7 Kendra's about to give a statement in regards
8 to an infant's death that occurred at 2131 Slighs Avenue
9 on 7-31 of 2008. Kendra has already been advised of her
10 rights and is giving this statement freely.

11 Kendra, you need to speak clearly into the
12 recorder here. What we want to know is just basically
13 what transpired on the 31st of July in regards to this
14 infant child.

15 KENDRA SAMUEL: Yes, sir.

16 After Jessica and her grandmother and her
17 cousin left to go the prescriptions and everything, I
18 changed Aidan's (phonetic) diaper, and I put him back in
19 his little car seat that was in his mom's room, and he
20 started to get fussy. So, you know, while I changed him,
21 I also took off his little Pooh outfit because he
22 sometimes gets hot and gets fussy.

23 So I put him in a little car seat. He started
24 to fuss. So I went back, and I went to get him out of the
25 car seat, but I didn't put the handrail down like I should

1 have before I tried to pick him up. And so when I pulled
2 him out, his head bumped the handrail a little bit, and
3 when I had him -- I finally got him out, I didn't have him
4 as gripped as I could have before I completely stand up,
5 and I dropped him, and he hit the back of his head.

6 THOMAS: Okay. When you say he hit his head
7 on the rail, did he hit the top of his head on the rail.

8 SAMUEL: Yeah, a little bit; the top of the
9 head a little bit on the rail. When I stood up a little
10 bit, before I can even stand up completely -- I didn't
11 have a good enough grip because I should have put the
12 handrails down -- he fell out of my hand.

13 THOMAS: All right. And in falling, what
14 portion of his body struck what surface?

15 SAMUEL: The head -- his head hit the wood
16 floor in the apartment.

17 THOMAS: Okay. And the apartment has hardwood
18 floors.

19 SAMUEL: Yes, sir.

20 SHOCKLEY: What part of his head hit the
21 floor?

22 SAMUEL: The back of his head.

23 SHOCKLEY: How did he land?

24 SAMUEL: The back of his head. You know, he
25 was down like this on his back when he fell --

1 THOMAS: Okay.

2 SHOCKLEY: Okay.

3 SAMUEL: -- because I had picked him up like
4 this, you know, out of his car seat, like, you know --

5 THOMAS: And you were trying to hold, trying
6 to hold him up and --

7 SAMUEL: Yes, sir.

8 THOMAS: -- the weight --

9 SAMUEL: Because the handrail should have been
10 down before I tried to get him.

11 THOMAS: Okay.

12 SHOCKLEY: Okay.

13 THOMAS: All right, and after he's fallen and
14 he's hit the back portion of his head --

15 SAMUEL: Yes, sir.

16 THOMAS: -- you immediately pick him up? Is
17 that correct?

18 SAMUEL: Yes, sir.

19 THOMAS: Okay, go ahead.

20 SAMUEL: And when I immediately picked him up,
21 he kind of, like, breathed in, so I thought he was okay --
22 from the shock of it, he was shocked. But I realized
23 after a while, he was just kind of looking at me like,
24 like spaced out. And I, like, was trying to, like, get
25 him to start moving or crying, at least something. And he

1 wouldn't.

2 So I was sitting there, and I was panicking,
3 and I shook him a little bit and said, "Come on, Aidan.
4 Talk to Auntie. Let Auntie know you're all right. Please
5 let her know you're all right." And --

6 THOMAS: Okay. And when you say you shook him
7 a little bit --

8 SAMUEL: Just a little bit. "Come on. Let
9 Auntie know you're okay --"

10 THOMAS: Okay, a nervous --

11 SAMUEL: "Come on." Yeah, yeah.

12 THOMAS: -- kind of a nervous shake --

13 SAMUEL: "Come on."

14 THOMAS: -- 'cause you're getting nervous now
15 --

16 SAMUEL: Yeah.

17 THOMAS: -- not knowing the effects of the
18 fall.

19 SAMUEL: Yes, yes. And when he wouldn't
20 respond, I got so scared, and I said, "Oh, my God. I
21 don't understand," you know. His little heart was still
22 beating. I don't understand. So I just took my purse and
23 I walked him to the park because I was just scared, and I
24 didn't know what to do. I didn't know what to do. I was
25 like, "How can I accidently drop you?" you know.

1 And so I walked him to the park, and I kept
2 walking back and forth, holding him and cradling him and
3 looking at him, you know. And he was just looking like
4 spaced out, just spaced out.

5 So I finally got to -- after I got tired of
6 walking, I sat down on a park area, and I still tried to
7 shake him a little bit to see if he would, you know,
8 respond to me.

9 THOMAS: All right. So once you got to the
10 park, you're still concerned --

11 SAMUEL: I was still trying --

12 THOMAS: -- that he was not moving --

13 SAMUEL: to get him to talk to me.

14 THOMAS: -- and so that's when you shake him a
15 little bit more, just to try to get a response --

16 SAMUEL: Yeah, just to get a response.

17 THOMAS: -- but you're still not getting a
18 response, just got the open-eyed --

19 SAMUEL: I was still -- I said -- just open
20 eyes. That's it. That's it.

21 THOMAS: Okay.

22 SAMUEL: That's it. So when I got back to the
23 house with him, I just laid him in the crib, and I just
24 covered him up. I just covered him up.

25 THOMAS: Okay. Now, we'll back up a little

1 bit, and then we'll go back onto what happened once you
2 got to the house, okay? But I'm just going to walk you
3 through a little bit more, just for a little more detail.

4 You're in the home. The initial drop occurs.
5 You hear the gasping of breath.

6 SAMUEL: Yes.

7 THOMAS: The eyes start opening wide, and
8 you're not getting the response that you're accustomed to,
9 so --

10 SAMUEL: Yes.

11 THOMAS: -- the shaking that you do there,
12 it's just trying to alert him --

13 SAMUEL: Just to, just to try to get him to at
14 least cry, something, something, do something.

15 THOMAS: All right. And from the time that
16 you initially drop him and he's giving you that response,
17 how much time had lapsed prior to you walking to the park?

18 SAMUEL: Um, maybe a few minutes, a few
19 minutes, maybe ten minutes tops of me trying to just get
20 him to respond to me while he was in the house, and when
21 he wasn't, I was like, "Man --" you know, his eyes were
22 still open, so I was like, Okay, maybe if I just walking
23 him a little bit, you know, maybe the initial shock will
24 go away, and he'll just start talking to me. He'll start
25 crying. He'll start doing something, something he'll

1 start doing.
2 THOMAS: Okay. So approximately ten minutes
3 after the fall, you start getting into panicky mode there
4 --
5 SAMUEL: Yes.
6 THOMAS: -- and so you're thinking, Fresh air.
7 Get outside.
8 SAMUEL: Yes.
9 THOMAS: Something might --
10 SAMUEL: He'll get off the initial shock, off
11 the initial shock, and he'll just come and, you know,
12 start crying, you know.
13 THOMAS: All right. So now, you walk him to
14 the park. How are you holding him when you're walking
15 him?
16 SAMUEL: Um --
17 THOMAS: Is it a cradling?
18 SAMUEL: Cradling him.
19 THOMAS: Okay, so you have more of a cradling
20 --
21 SAMUEL: I'm cradling him --
22 THOMAS: -- close to your body type --
23 SAMUEL: -- close to my body.
24 THOMAS: Okay. And is the way you're holding
25 him almost the entire time?

1 SAMUEL: while I was walking.

2 THOMAS: Okay, while you were walking. Okay.

3 As you was doing the cradle walk to the park, you get him
4 to the park, and you're still concerned --

5 SAMUEL: I'm still concerned.

6 THOMAS: -- because you're not getting any
7 response.

8 SAMUEL: I'm still just because I'm like,
9 "Okay, I've been out here for a little bit, and you're
10 still not doing anything, honey." And so I sit down in
11 the middle of the playground, and --

12 THOMAS: How many minutes before you try one
13 more time just to shake him to alertness?

14 SAMUEL: I don't know how long I was walking
15 back and forth. I don't remember how long I was walking
16 back and forth. I, I -- altogether, I had to have been
17 out there maybe about 30 minutes walking back and forth --

18 THOMAS: Okay.

19 SAMUEL: -- maybe, you know.

20 THOMAS: So about 30 minutes, and then you
21 tried again --

22 SAMUEL: When I finally sat down, I tried
23 again to get him to do something. I tried shaking his
24 little arms to get him to -- shaking him a little bit,
25 "Come on, honey. Please." I wasn't trying to shake him

1 to hurt him, just to get --

2 THOMAS: Just to --

3 SAMUEL: -- a response.

4 THOMAS: I got you.

5 SAMUEL: Just something. Just give me

6 something.

7 THOMAS: Okay.

8 SAMUEL: But he wouldn't give me anything.

9 THOMAS: Okay. So you still got no response.

10 SAMUEL: No, sir.

11 THOMAS: Was his eyes still open at the time?

12 SAMUEL: Eyes were still open.

13 THOMAS: Eyes were still open at the time. So

14 it looked like --

15 SAMUEL: That's why I kept thinking, you know,

16 He's all right. His eyes are still open.

17 THOMAS: Okay.

18 Now, I know you're in panic mode, so you

19 probably wasn't really thinking to check the heartbeat.

20 Could you tell --

21 SAMUEL: No.

22 THOMAS: -- whether the heart was beating or

23 not?

24 SAMUEL: I didn't think to check.

25 THOMAS: Okay. So you really didn't check.

1 SAMUEL: I didn't think to check.
2 THOMAS: You just saw the eyes --
3 SAMUEL: Yeah.
4 THOMAS: -- and you was trying to get some
5 type of reaction.
6 SAMUEL: Some type of reaction.
7 THOMAS: Okay.
8 Now, while you were out in the park, you
9 encountered law enforcement. Housing police officers,
10 they stopped you to ask you questions. Do you recall any
11 of that?
12 SAMUEL: Um --
13 THOMAS: Um, there were, uh --
14 SAMUEL: No, no.
15 THOMAS: -- housing security or housing
16 police. It's getting ready to storm.
17 SAMUEL: Oh, yes. The, the guy who does the
18 little patrol, he say, "You better get in the house."
19 There may be -- it's going to rain soon. You need to get
20 in the house."
21 And I just said, "Yes, sir," and I kept going.
22 THOMAS: Okay. Now, my questions -- you got
23 to understand, these are logical questions --
24 SAMUEL: Yes.
25 THOMAS: -- that I have to ask. You have a

1 non-respondent child. You're in panic mode, which I
2 understand.

3 SAMUEL: Yeah.

4 THOMAS: And law enforcement of some nature is
5 approaching you. Why didn't you tell them, "Listen, this
6 baby's not responding to me. Call 911. Call an
7 ambulance. Get me some help."? Why did this not occur at
8 this time? This is kind of like --

9 SAMUEL: I kept thinking he would come to.
10 All I wanted him to do was come to and be all right. I
11 didn't -- I was like, "Lord, I just want him to come to."
12 I didn't -- I was like, I don't have -- in my mind, I was
13 like, I don't have to go that far with law enforcement
14 because he's gonna come to, you know. He's just, he's
15 just still in initial shock. He's just still in initial
16 shock. He's gonna come to.

17 THOMAS: Okay. So you're thinking the baby's
18 in shock and that eventually, he's gonna respond.

19 SAMUEL: Yes, sir.

20 THOMAS: So you did not elect -- but do you
21 understand where to me it would be mindful, and
22 particularly for the health of the child, at that point,
23 you actually have law enforcement there to get you
24 something immediate. And that's why I have to ask that
25 question.

1 SAMUEL: I was just thinking he was just gonna
2 come to.

3 THOMAS: Okay.

4 SAMUEL: You know, I was just thinking he was
5 just gonna come to and I wouldn't need that. I was like,
6 you know, he's gonna come to.

7 THOMAS: Okay.

8 SAMUEL: He's gonna come to.

9 THOMAS: Now, how many times --

10 SAMUEL: And then that guy, that guy at the
11 time, he -- that was the community safety guy. I didn't
12 think anything of him. I was just like, he's just a guy
13 that just, you know, goes around making sure the kids
14 don't be bad, you know?

15 THOMAS: Okay. So you didn't really see him
16 as law enforcement.

17 SAMUEL: No.

18 THOMAS: So just --

19 SAMUEL: No, not at all.

20 THOMAS: -- a security guard or a park person

21 --

22 SAMUEL: Yes.

23 THOMAS: -- or what have you.

24 SAMUEL: Yes.

25 THOMAS: Oh, okay. So that's, that's your

1 frame of mind. And I needed that. I just needed to know
2 where your frame of mind is at this time because that's a
3 question that's going to be asked down the road is, you
4 know, you have that availability right there --

5 SAMUEL: Yeah.

6 THOMAS: -- and why didn't you take it.

7 SAMUEL: Yes.

8 THOMAS: Okay. Going a little further, did
9 they encounter you once or twice? Do you remember them
10 encountering once or twice?

11 SAMUEL: Just once. I only saw him once.

12 THOMAS: You only remember -- okay, you only
13 remember one encounter.

14 SAMUEL: I remember him once.

15 THOMAS: Okay.

16 Now, you're in the park. You're still in
17 panic mode. You're still trying to revive the child --

18 SAMUEL: Yes, sir.

19 THOMAS: -- or get some signs of life. What
20 point does the communication between you and your
21 boyfriend --

22 SAMUEL: This is after I was sitting down in
23 the playground, and I shook him a little bit the second
24 time to try to get him to say something. He's like,
25 "Where are you?"

1 And I was like, "I'm at the park." And he
2 came and picked me up and took me --

3 (Device beeped.)

4 SAMUEL: -- to the house. He didn't know --

5 THOMAS: Go ahead.

6 SHOCKLEY: Did it stop?

7 THOMAS: No. It's about to in about 50-
8 something seconds.

9 SAMUEL: He didn't know at all what was going
10 on with Aidan. He thought he was sleeping. My boyfriend
11 never had anything to do with Aidan like that, you know.
12 He was too scared to even hold him because he was so
13 little. He didn't know what was going on. He just
14 thought Aidan was sleeping, and he was taking me home so I
15 wouldn't get rained on.

16 THOMAS: Okay. I'm gonna pause you for right
17 now. Um --

18 (Device beeped.)

19 THOMAS: -- we're gonna take a break. We're
20 having a technical malfunction with the recorder. We'll
21 continue this in just a moment.

22 --- end of audio file ---

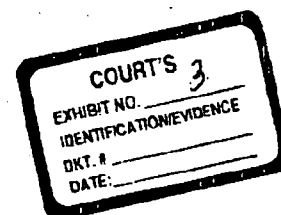
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24

25

AUDIO FILE 01 TRACK 2

1
2 THOMAS: This is a continuation of the
3 interview of Kendra Samuels. The interview is continuing
4 from her being in the park and notifying her boyfriend --
5 SAMUEL: He called me --
6 THOMAS: Oh, your boyfriend called you.
7 SAMUEL: -- to see where I was because he saw
8 it was gonna rain, and he was like, "where are you?"
9 THOMAS: okay. All right. And you tell him --
10 SAMUEL: I'm at the park with Aidan.
11 THOMAS: Okay.
12 SAMUEL: Okay.
13 SHOCKLEY: I want to ask you a question.
14 SAMUEL: Yes, sir.
15 SHOCKLEY: Kendra, back up here. Just before
16 your boyfriend called you and stuff, you said as you were
17 walking around at the park that you shook Aidan once, you
18 know, to try to get a response out of him again.
19 SAMUEL: Yeah.
20 SHOCKLEY: And were there other times that you
21 tried to shake him to get responses out of him?
22 SAMUEL: When I sat down on the playground
23 area, it was a couple of times I tried to shake him just
24 to get a response, just something out of him, just
25 something. And I was just so far gone. It was just like



1 I was just zoned on him. Nothing else was around me. I
2 was just trying to get something out of him, just
3 something. I shook him a few times just to get something
4 out of him.

5 SHOCKLEY: Okay, so there were a few times you
6 shook him there at the park trying to get some kind of
7 response --

8 SAMUEL: Something, yes, sir.

9 SHOCKLEY: -- even to cry or move --

10 SAMUEL: Something.

11 SHOCKLEY: -- or do anything like that.

12 SAMUEL: Something, because I felt he's still in shock, you
13 know. I just -- he's still in shock. His eyes are open. He's fine.
14 He's just in shock, you know. He's -- eventually, he's just get over
15 this. Eventually, he'll just get over this.

16 SHOCKLEY: Okay.

17 THOMAS: And you feel that the shock is due to the fall --

18 SAMUEL: Yes, sir.

19 THOMAS: -- because of the way he bumps his head.

20 SAMUEL: Yes, sir.

21 THOMAS: Okay.

22 SHOCKLEY: All right.

23 THOMAS: I -- when your boyfriend picks you --

24 I'm sorry, Shockley. You look like you may have another
25 question. I'm sorry.

1 SHOCKLEY: I was just going to say after you'd shaken him a
2 few times and you still don't get a response out of him -- I'm trying
3 to get just my timeline straight here. You're walking around in the
4 park. You sat down at the playground.

5 SAMUEL: Yes.

6 SHOCKLEY: And you shook him a couple -- you said a several
7 times, a few times --

8 SAMUEL: A few times.

9 SHOCKLEY: -- a few times, and you didn't get a response.
10 The security officers -- did you meet them after you sat down and you
11 tried to revive him by shaking him and stuff, or was that before, or
12 was it before and after? I'm just trying to get my --

13 SAMUEL: Just -- I ran into him afterwards, because he
14 said, "It's about to rain. Get the baby out the rain."

15 And I was like, "well, we're on our way home now."

16 SHOCKLEY: Okay.

17 THOMAS: Okay.

18 SHOCKLEY: Okay.

19 THOMAS: And when you -- again, when you saw the security
20 officer, how, exactly, did you hold the child, again?

21 SAMUEL: I was still, I was still cradling him.

22 THOMAS: Still cradling him close to your body.

23 SAMUEL: Yeah.

24 THOMAS: Okay.

25 SHOCKLEY: And then your boyfriend called.

1 SAMUEL: He called. That's why I told the officer -- the
2 security guard that, you know, the little guy, I was like, "we're on
3 our way home."

4 He called while I was on the playground, and he was like,
5 "where are you?"

6 And I was like, "well, I'm at the park."

7 And he came -- he was like, "well, stay there. It's gonna
8 rain. I'm coming to get you."

9 SHOCKLEY: He is -- who is he?

10 SAMUEL: My boyfriend.

11 THOMAS: What's his name?

12 SHOCKLEY: What's his name?

13 SAMUEL: Jamal.

14 SHOCKLEY: Jamal.

15 THOMAS: What's his last name?

16 SAMUEL: Regans (phonetic).

17 SHOCKLEY: Okay.

18 SAMUEL: And he said, "Okay, I'm gonna come get you." So I
19 got off the playground. I started walking toward the road because I
20 knew where he would pull up. He usually pulled up there to meet us at
21 the park all the time.

22 So the security guy walked by, the community guy, and I was
23 like, "well, we're --"

24 He's like, "You know, you better get the baby out of the
25 rain. It's gonna rain."

1 I said, "Yes, sir. We're on our way home now."

2 THOMAS: Okay. And when Jamal pulls up, you're still
3 cradling the child.

4 SAMUEL: Yes, I'm still holding him.

5 THOMAS: Okay. Now, when you get in the car, you're
6 holding the baby the same way still.

7 SAMUEL: Yes, still cradling him.

8 THOMAS: Do you communicate with Jamal anything about
9 what's going on with the baby?

10 SAMUEL: No.

11 THOMAS: Okay. So what kind of, what kind of conversation
12 are y'all having in the car?

13 SAMUEL: He was like, he was like, "I told you, I hate you --
14 walking around this neighborhood. It's just so ghetto, you know. I
15 hate this neighborhood."

16 And I was like, "Well, I just had to walk him."

17 And that's it. And we got to the -- it's no time with a,
18 with a drive to get back to the house. We got there quickly. There
19 was nothing else said, I just hopped out the car. And he stayed in the
20 car because he wanted to go to Anthony's Hot Dog Stand.

21 THOMAS: Okay. So he didn't come upstairs --

22 SAMUEL: No.

23 THOMAS: -- at that time. And you -- again, you're holding
24 that baby close, so nobody's really seeing anything --

25 SAMUEL: No.

1 THOMAS: -- other than the way that you're embracing the
2 child.
3 SAMUEL: Yes.
4 THOMAS: Is that right?
5 SAMUEL: Nobody.
6 THOMAS: So did he make mention of any notice --
7 SAMUEL: No, he just --
8 THOMAS: -- about the child.
9 SAMUEL: -- he had seen me hold Aidan before, and he just
10 thought, well, she put him to sleep again.
11 THOMAS: Okay.
12 SAMUEL: I guess that's what he --
13 THOMAS: Okay.
14 SHOCKLEY: Do you know about what time it was when you got
15 back to the house?
16 SAMUEL: Maybe around 7:00, 7-ish.
17 SHOCKLEY: Okay.
18 SAMUEL: Yeah.
19 THOMAS: Okay. All right. All right. So it was around
20 7-ish or maybe a little after. Your boyfriend drops you off. He's
21 waiting downstairs, because y'all are going to get something to eat.
22 SAMUEL: And we came right back.
23 THOMAS: Okay. When you come upstairs and you actually
24 come into the house, take me, take me through that slowly --
25 SAMUEL: When I had him?

1 THOMAS: -- because everybody's home now. Yeah,
2 everybody's home.
3 SAMUEL: Everybody's home.
4 SHOCKLEY: Who?
5 THOMAS: Who was in the house?
6 SHOCKLEY: When you walked in the house --
7 SAMUEL: She's in the --
8 UNKNOWN MALE SPEAKER: I'm sorry. I need to get something.
9 SAMUEL: She's in the house. The grandmother's in the
10 house. The two-year-old son was in the house. And the aunt -- and the
11 cousin is in the house.
12 THOMAS: Okay. So that's -- she means the mother. Is that
13 right?
14 SAMUEL: The grandmother.
15 THOMAS: The grandmother.
16 SAMUEL: Not her mo -- it's not her mom. It's her dad's
17 mom. So it's her grandma.
18 THOMAS: Okay. And then the 12-year-old and the 2-year-
19 old.
20 SAMUEL: Yes.
21 THOMAS: Okay. All right. All right.
22 Take me through the door, and tell me exactly what you do
23 when you come through.
24 SAMUEL: I walk through the door, and she was like, "You
25 took Aidan to the park?"

1 I say, "Yeah, I took him to the park."

2 And then, the grandmother goes, "I want to kiss him, but he
3 looks like he's sleeping."

4 I said, "Yes, ma'am," because at that point, I was like,
5 well, yeah, they see too that he's moving, he's breathing. Yeah, then
6 he's fine, you know. I just, you know, put him in the crib, and I
7 covered him up, and I was like, well, he's okay, you know. They see
8 him like I see him, you know. He's -- and I went to the hot dog thing
9 and I came back.

10 SHOCKLEY: well, when you walked in the house with him, did
11 you tell them he was asleep? Did they ask, or did they just assume
12 that he was asleep? Did anybody get up and touch him or kiss him, or
13 did you just walk him straight in there and just --

14 SAMUEL: I just walked, I just walked him straight in there
15 and put him in a bed. Everybody was like, "Okay, I don't want to
16 bother him because he's sleeping." And I was like -- and I just put
17 him in a bed.

18 THOMAS: Okay. But they asked you was the baby asleep
19 because of the way you were holding it.

20 SAMUEL: No, they didn't ask me.

21 THOMAS: Okay. You just told them he was asleep.

22 SAMUEL: I didn't say anything.

23 THOMAS: Okay.

24 SAMUEL: I didn't say anything. I was just like, well,
25 yeah, they see like I see. They was like, well, he's sleeping. They

1 see like I see, you know, that he's fine. And I still the ounce like
2 he's fine, the ounce of hope like he's fine, you know. There's nothing
3 wrong with my godson. He's fine. I still had that in me that he was
4 fine. So I just put him in there and was like, Okay, he's gonna sleep,
5 and he's gonna sleep this off, and -- the shock -- and he's gonna wake
6 up, and he's gonna cry.

7 SHOCKLEY: So you walked straight into the house. You
8 didn't really say anything to any of them.

9 SAMUEL: No.

10 SHOCKLEY: And you just put him in the bed --

11 SAMUEL: I just put him the bed.

12 SHOCKLEY: -- like he was asleep. And you -- at this
13 point, you knew there was probably something wrong with Aidan, didn't
14 you?

15 SAMUEL: I swear, I just was holding on to that ounce, that
16 ounce of hope that he was all right, that he was all right. And then,
17 when they walked through and everybody was looking at him like, Okay,
18 he's fine, then I was like, yeah, you know, he's fine. Yeah, yeah,
19 he's fine, you know. He's gonna be all right. He's just gonna sleep
20 this shock off. He's gonna be okay. He's gonna be okay. I had never
21 dealt with anything like this before. I honestly --

22 SHOCKLEY: You didn't, you didn't -- why didn't you say
23 something to them? I mean, you knew there was some problems with Aidan
24 because you had tried to revive him, right? Why didn't you just say
25 something like, "Hey --"?

1 SAMUEL: I was still holding on to him being okay, and I
2 was like, I can't tell his mom that I dropped him. He's gonna be all
3 right. She don't need to be stressed because he's gonna be okay. He's
4 gonna be absolutely fine. He's just gonna, just, just sleep this off.

5 THOMAS: So you're, you're saying you're trying to convince
6 yourself --

7 SAMUEL: That he's all right.

8 THOMAS: -- that everything is fine. All right, and for
9 that reason is why you're not acknowledging to anybody, law
10 enforcement, family --

11 SAMUEL: Yes.

12 THOMAS: -- friends, or anyone --

13 SAMUEL: Yes. No, I didn't acknowledge anybody because I
14 was just --

15 THOMAS: -- that --

16 SAMUEL: --- in my heart, I knew he was just gonna be fine.

17 THOMAS: Okay. All right. So once, once you placed the
18 child in the crib and you put the cover on him, you go get something to
19 eat --

20 SAMUEL: Yes, sir.

21 THOMAS: -- all right, with your boyfriend.

22 SAMUEL: Yes, sir.

23 THOMAS: All right. During that, during that travels to
24 the restaurant and back, is there any time that you communicate to
25 anyone --

1 SAMUEL: No.
2 THOMAS: -- Jamal --
3 SAMUEL: No.
4 THOMAS: -- or anyone what happened at the house?
5 SAMUEL: No, not at all.
6 THOMAS: All right.
7 SAMUEL: Because -- no.
8 THOMAS: Okay. At any point, did any kind of conversation
9 come up? "I dropped the baby --"
10 SAMUEL: No, nothing, nothing.
11 THOMAS: Okay. So you just kept that to yourself.
12 SAMUEL: I kept that, I kept that -- yes, sir. I just,
13 just was hoping he was all right. I was like, in my heart, he's fine.
14 He's just gonna sleep this off. He is fine. There's nothing wrong
15 with him.
16 THOMAS: Okay. Now, when -- after you come back with the
17 food, Jamal for a while in the room with the baby. All right. Did you
18 ever come back to check to see if the baby moved --
19 SAMUEL: I, I --
20 THOMAS: -- or anything?
21 SAMUEL: -- I wasn't there. I was in there for a little
22 bit too, and I heard him farting, so I thought he was fine. I heard
23 farting noises, so I was like, Okay, thank God, he's fine.
24 THOMAS: All right. So you heard some type --
25 SAMUEL: Gas.

1 THOMAS: -- gas.
2 SAMUEL: Yes. Yes.
3 THOMAS: Okay. And this is during the time that you're
4 laying down with Jamal --
5 SAMUEL: Yes.
6 THOMAS: -- on the mattress.
7 SAMUEL: Yes. And I was like, Okay, I knew he'd be okay.
8 THOMAS: Now --
9 SAMUEL: He's up there. He's gassy. I was like, Good,
10 he's farting. He's fine, you know. He's finally all right.
11 THOMAS: Okay. Now, all right, after hearing --
12 And I'm sorry. Go ahead.
13 SHOCKLEY: I was just going -- I'm trying to get my
14 timeline here a little bit.
15 THOMAS: All right.
16 SHOCKLEY: Around the 7:00 is when you --
17 SAMUEL: We first --
18 SHOCKLEY: -- you first came back in, and you just walked
19 in the house, and you went in there, and you put him in his crib --
20 SAMUEL: Yeah.
21 SHOCKLEY: -- and you say you -- did you say you covered
22 him with a blanket --
23 SAMUEL: Yeah.
24 SHOCKLEY: -- or put a blanket over him?
25 SAMUEL: Yeah, I partially covered him with his Pooh

1 blanket.

2 SHOCKLEY: Okay. And that was right around 7:00. And then

3 --

4 SAMUEL: At around 7:00. And then when I --

5 SHOCKLEY: Then you turned around, and y'all, you and Jamal
6 leave right then. Did you walk right back out there when y'all go to
7 get the hotdogs or whatever?

8 SAMUEL: Yes, and then we came right back because the stand
9 is not more than five minutes away from the house. And then we came
10 right back to the house.

11 SHOCKLEY: Okay. So around 7:20 to 7:30, you would have
12 been back at the house maybe, you think.

13 SAMUEL: Maybe, yeah, because there was a little wait for
14 it because --

15 SHOCKLEY: Right.

16 SAMUEL: -- there was a little wait for the hot dogs and
17 stuff, so maybe around that time, we came back, and maybe around 8:00
18 is when -- after we finished talking to Jessica and hearing about her
19 spider bite and everything, we laid down in the room with Aidan.

20 SHOCKLEY: Okay. So when you got back, you talked to
21 Jessica for a little while and stuff like that.

22 SAMUEL: About her spider bite, and she was explaining to
23 me about how she was glad that her grandmother finally came back around
24 and was talking to her again. And then everybody just got sleepy, and
25 then we just decided, I was like, okay, let's go in. We just went in

1 there. We put the air mattress on the floor, and we laid under Aidan.

2 And I kept, you know, hearing him fart and everything, so I
3 was like, Good, he's fine. I knew he was all right. I knew it,
4 because he was, he was farting, you know. So I knew he was all right.
5 I knew he was okay.

6 THOMAS: Now, at any point, did you actually go back to
7 actually touch him, look at him, or see if he'd open his eyes again or
8 anything like that?

9 SAMUEL: Um, when I heard him farting, I just thought he
10 was fine. I was like, I'm not gonna bother him. Let him go ahead and
11 sleep this off and finally be okay when he does wake up, you know. I'm
12 just gonna leave him alone and let him just get this -- you know, just
13 go ahead and continue to just come to just because I heard him farting,
14 and I was like, you know, he's just getting over that shock.

15 SHOCKLEY: You -- what makes you think it was farting or
16 passing gas, or do you think -- what makes -- you just, you just know
17 that sound, I mean --

18 SAMUEL: yeah, I heard him farting, you know --

19 SHOCKLEY: Okay.

20 THOMAS: Okay.

21 SAMUEL: -- and I was like, Okay, good. He's farting, you
22 know.

23 THOMAS: Okay.

24 SAMUEL: He's, he's pooped on me before, you know. So it's
25 like, Okay, he's fine, and he's okay, you know.

1 SHOCKLEY: But you never, you never actually went and
2 physically, like, touched him or looked him or checked on him --
3 SAMUEL: I didn't mess with him anymore.
4 SHOCKLEY: You didn't mess --
5 SAMUEL: -- after I laid him down.
6 SHOCKLEY: Y'all were just laying on that mattress --
7 SAMUEL: Yes.
8 SHOCKLEY: -- and you heard that, but you didn't --
9 SAMUEL: I didn't bother him --
10 SHOCKLEY: -- go up there and actually check on him.
11 SAMUEL: -- because I was like, He's farting. He's not
12 choking or anything. He's farting. Good. He's coming to. He's
13 gotten over that shock. He's stopped being in shock.
14 THOMAS: Now, you didn't lay down for a long period of time
15 with Jamal. How long did you lay down with Jamal?
16 SAMUEL: Uh, maybe about 20, 25 minutes. That's it. And
17 when I heard Aidan farting, I was like, Good. I'm gonna let both of
18 them sleep.
19 THOMAS: Okay. So the, the, the air or the farting that
20 you heard gave you kind of a relief --
21 SAMUEL: Yes.
22 THOMAS: -- and so that's when you left the room --
23 SAMUEL: Yes.
24 THOMAS: -- and started -- when you left, what did you do?
25 SAMUEL: I just went out there and sat with her.

1 THOMAS: Around what time did you hear the farting or what
2 have you, the gas?

3 SAMUEL: Um, maybe around 9:00, just when he's -- yeah, I
4 heard the farting, and I was like, Okay, he's -- I knew he was all
5 right, you know. I knew he was fine, you know. So --

6 SHOCKLEY: So you and Jamal, y'all laid down for about an
7 hour. Y'all laid down around 8:00 --

8 SAMUEL: We laid around by 8:00.

9 SHOCKLEY: -- and you stayed there for another --

10 SAMUEL: I stayed in there with them for maybe what I felt
11 was like 25 minutes tops. So it was like 8:25 I heard him, and I was
12 like, He's fine, okay --

13 SHOCKLEY: That's when you heard --

14 SAMUEL: -- and then I laid there for a little bit more to
15 make sure, you know, I heard him. And I was like, Okay, I'm gonna get
16 up, and I'm gonna go out there with his mom. He's fine. Thank God. I
17 knew he was all right. I knew he was all right. So by the time -- it
18 wasn't that long that I was out there with her that Jamal got up, and
19 we left, and he said it was 10:30. So I didn't feel I was out there
20 with her long.

21 THOMAS: Okay. So around 10:30 is when Jamal actually
22 wakes up --

23 SAMUEL: He finally wakes up.

24 THOMAS: -- and he actually takes a -- he actually takes a
25 long nap there that you know of.

1 SAMUEL: Yeah.

2 THOMAS: He gets up and says, "It's 10:30." He then waits

3 --

4 SAMUEL: He's like, "I want to go change my work clothes,
5 Kendra. I've been in my work clothes. I want to go change."

6 I said, "okay," and I drove with him to his house to get
7 his work clothes changed and everything.

8 THOMAS: And how long after you leave that you receive a
9 call from the mother?

10 SAMUEL: When I was in the car with him, waiting for him to
11 get changed -- he was in the house, I was in the car -- I had called
12 her. I thought he was fine because I heard him farting and stuff, so I
13 was like, Okay, good, he's fine.

14 So I was like, "well, Jessica, there's this job at the
15 hospital I keep hearing about, and I know you want more hours." And I
16 was telling her about that. Around 11:09, we hung up with each other,
17 and 11:14, I got the call, and she was saying he wasn't breathing.

18 THOMAS: Okay. Now, after you get the call, and she's
19 saying, "He's not breathing," what do you do?

20 SAMUEL: I told her to get off the phone with me. I hung
21 up with her, and I called 911 too, and then Jamal raced us back to the
22 house, and I grabbed, I grabbed her to pull her to take her to the
23 hospital because she said the ambulance pulled off already. And then
24 she was like, "Jermaine's upstairs. Remember, he's sleeping." I
25 grabbed him, she grabbed her bags, and we went to the hospital.

1 THOMAS: Okay, so you called 911 as well.

2 SAMUEL: Yes, we both called.

3 THOMAS: All right. And upon your arrival, the baby was
4 already gone -- the ambulance.

5 SAMUEL: It was -- yeah.

6 THOMAS: Okay. All right. And then you transported the
7 mother to the hospital.

8 SAMUEL: Yes.

9 THOMAS: And at this point, you don't -- you still don't
10 see an opportunity to let them know, "well, I did have an incident
11 where I dropped the baby," or what's going on.

12 SAMUEL: I was too scared to tell her. I, I was too afraid
13 to tell her that I dropped him. It was then that I was like, Oh, my
14 God, that it finally hit me when we were driving up to the hospital. I
15 was like, Oh, my God.

16 I was too afraid to tell my best friend that I accidentally
17 dropped him. I didn't want to hurt her. She had been through so much
18 in her life that she confided in me and she considered -- you know, no
19 one was there helping her. She used to call me. She used to say,
20 "Kendra, you're like more of a father to my kids than anybody." I
21 didn't have it in my heart to tell her that I accidentally dropped him.
22 I could not bring myself to tell her. I couldn't bring myself to tell
23 her.

24 THOMAS: Now, how long have you been staying with her?

25 SAMUEL: Um, I was at her house all the time. This has

1 been the very first week that I've actually stayed stayed.

2 THOMAS: So it's only been -- but you come there often.

3 SAMUEL: All the time.

4 THOMAS: How often, how often have you kept the baby for
5 her, then?

6 SAMUEL: Oh, plenty of times.

7 THOMAS: Okay.

8 SAMUEL: There's been plenty of times that I kept the baby
9 before.

10 THOMAS: And for what reason do I keep the baby?

11 SAMUEL: She had to run errands, and, you know, she -- at
12 first, they messed up his birth certificate, his name on his Social
13 security and birth certificate. She had to travel to get those
14 changed. And she doesn't have a vehicle, nor do I. And I was like,
15 "No need to walk the baby in the heat. I'll watch him." It's been
16 plenty of times I watched him.

17 THOMAS: Okay. So a number of times through the -- and the
18 baby's only two months old, so --

19 SAMUEL: Yes. There's a number of times that I've watched
20 him.

21 THOMAS: Can you give me a general number, say in the two-
22 and-a-half months time period since the baby's been born that you've
23 actually watched, from one to how many times?

24 SAMUEL: My tops would say five before she finally put him
25 in daycare --

1. THOMAS: Okay.

2 SAMUEL: -- because I had to start work, and she was like,

3 "Kendra, I can't keep putting my kids off on you. It's not fair.

4 You're not the one who got me pregnant. Where is their father?"

5 THOMAS: Okay. So at least five times.

6 SAMUEL: Yes.

7 THOMAS: Possibly more, but at least five times --

8 SAMUEL: Yes.

9 THOMAS: -- prior to her going through daycare.

10 SAMUEL: Yes.

11 THOMAS: Okay.

12 SAMUEL: And she finally got her ABC voucher.

13 THOMAS: Okay. All right.

14 SHOCKLEY: Um, would there have been any other times -- I'm

15 just trying to think of -- and I know you were, you were upset at

16 everything that had happened. You dropped a child and you tried to

17 revive him and do everything, and you kept holding on to that hope

18 that, you know, he was going to be okay --

19 SAMUEL: Yes.

20 SHOCKLEY: -- and you shook him at the house, and then a

21 couple times at the park, you tried to shake him some more to revive

22 him. And you kept holding, like I think you said, that ounce of hope

23 that he would be okay.

24 SAMUEL: That ounce of hope that --

25 SHOCKLEY: Right. That makes -- I just want to wonder -- I

1 wonder here, was there ever another time when you were keeping him or
2 something where there was an accident where you may have dropped him or
3 something happened, and he became okay later on? You know, maybe you -
4 - was there another time you ever dropped him --

5 SAMUEL: Um, she, um --

6 SHOCKLEY: -- and shook him a little bit --

7 SAMUEL: I never shook him, but there was a time where she
8 was like, "Okay, Kendra, I'm going to run out." I was like -- this is
9 the time, you know, I got there early morning. And it was like -- I
10 just went ahead and put the air mattress -- I blew it up, and I put it
11 in the living room floor.

12 So she had carried his car seat and put it over the
13 recliner that's right above -- I was right below the recliner. She had
14 put his car seat up there. She said, "Kendra, I'm gonna go out to the
15 store really quick, and I'm gonna be back."

16 I said, "Okay," and I was still asleep because he was
17 asleep, so I just sleep, you know. He was in the chair. And the next
18 thing you know --

19 (Device beeps.)

20 SAMUEL: -- boom, he falls out of the chair into the
21 mattress with me. And I called her, and I let her know, "Look, he fell
22 out of that seat into the bed." He wasn't strapped in when she had him
23 above me. And I was asleep, and he fell onto it, and he was all right.
24 You know, he cried, you know, a little bit --

25 THOMAS: But he was fine.

1 SAMUEL: -- but he was a little shocked, but he was fine.
2 THOMAS: How long ago was that, prior to this one?
3 SAMUEL: Um, a while ago, maybe --
4 SHOCKLEY: A couple days, a week, what?
5 SAMUEL: Weeks ago. Weeks ago.
6 THOMAS: All right.
7 (Device beeps.)
8 THOMAS: About a couple weeks.
9 SAMUEL: Yeah.
10 THOMAS: I got 25 seconds.
11 SHOCKLEY: Okay. I was just trying to see -- because you
12 kept thinking he would come out --
13 SAMUEL: Yes.
14 SHOCKLEY: -- there was some other time that he would have
15 -- if you knew of him falling --
16 SAMUEL: Yes.
17 SHOCKLEY: -- or being accidentally dropped or anything
18 like that happening to him that would make --
19 SAMUEL: Yeah, he fell out of the --
20 SHOCKLEY: -- give you that hope that he would --
21 SAMUEL: Yes.
22 SHOCKLEY: -- hold on, since you didn't --
23 SAMUEL: Yes, sir.
24 SHOCKLEY: -- talk to anybody.
25 SAMUEL: Yes.

1 THOMAS: And that would have been --
2 SAMUEL: That was when he --
3 THOMAS: -- out of the car seat --
4 SAMUEL: Yeah.
5 • THOMAS: -- onto the mattress.
6 SAMUEL: And he fell onto my mattress and scared me out of
7 my sleep. And he was -- (Breath sound.) -- you know, and --
8 SHOCKLEY: Did he hit the --
9 SAMUEL: -- he was all --
10 SHOCKLEY: -- did he hit the floor --
11 SAMUEL: He hit the air mattress.
12 SHOCKLEY: -- and the mattress --
13 SAMUEL: He hit --
14 SHOCKLEY: -- or just the mattress or --
15 SAMUEL: -- he hit the mattress, just, you know, but --
16 --- end of audio file ---
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AUDIO FILE 08-24408 SAMUEL INTERVIEW

KEVIN E. REESE: Okay. Today's date is August the 6, 2008.

The time is 3:58 p.m. in the afternoon. We are at Number One Justice Square, Columbia, which is the Columbia Police Department.

I am Investigator Kevin E. Reese. Also, we have in the room with us Investigator A.L. Thomas -- both of us are from Columbia Police Department -- and Sarah Hurt (phonetic), who is with the SLED Child Fatality Unit. And we are here to interview Kendra Samuel. And this is a continuation of an interview from earlier today that was conducted by Lieutenant Shockley of SLED's Child Fatality Unit and A.L. Thomas.

Kendra, could you -- would you mind bring your chair a little closer for me, pull up a little closer.

Okay, Kendra, I'm going to ask you -- you are -- you have been advised of your rights earlier today. Is that correct?

SAMUEL: Yes, sir.

REESE: Okay. Is there anything you want to change right now about those right? Do you want to continue talking with us?

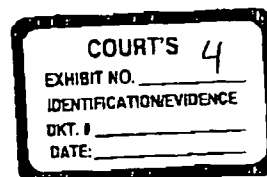
SAMUEL: Yes, sir.

REESE: Okay. Um, let me ask you at this time, are you okay? Do you need a break to go to the restroom or some food, some water, a soda, anything?

SAMUEL: No, sir.

REESE: You sure?

SAMUEL: Yes, sir.



1 REESE: Okay. All right. When you talk, could you speak
2 up a little --
3 SAMUEL: Yes, sir.
4 REESE: -- a little bit louder for me.
5 SAMUEL: Yes.
6 REESE: And just talk normally, and that recorder there
7 will pick you up.
8 SAMUEL: Okay.
9 REESE: And for your edification, you are being recorded.
10 This is just a continuation from your earlier interview.
11 SAMUEL: Understand.
12 REESE: All right. And the reason that you're being
13 interviewed con -- that we're interviewing you now, as you'll remember,
14 Investigator Thomas was here with you --
15 SAMUEL: Yes.
16 REESE: -- during the interview. And myself and Agent Hurt
17 was not here. But we have interviewed the girl you just referred to as
18 your best friend before I, I turned on the tape recorder.
19 Can you tell me -- can you say again what you just said
20 about your best friend.
21 SAMUEL: Yes, I don't want to lose my best friend.
22 REESE: You don't want to lose your best friend.
23 SAMUEL: Yes, she's my best friend.
24 REESE: Okay. I understand that. How long have you two
25 been best friends?

1 SAMUEL: Two years.

2 REESE: Two years.

3 SAMUEL: Yes, sir.

4 REESE: Okay. I want to bring your attention to your
5 statement that you gave the other investigators earlier --

6 SAMUEL: Yes, sir.

7 REESE: -- as well as the statement that you gave us the
8 other day. And you -- okay, I don't want to bring that one up -- that
9 information there up.

10 Unfortunately, based on the information that I have, based
11 on all of the information that we have during the -- gathered during
12 this information (sic) and the results of the autopsies, and speaking
13 with the doctors, and speaking with the other witnesses in this case --
14 that is the grandparents and all those other people --

15 SAMUEL: Yeah.

16 REESE: -- that you had some contact with on the 31st.
17 This is an incident --

18 SAMUEL: Yes.

19 REESE: -- that happened on the 31st of July.

20 SAMUEL: Yes.

21 REESE: Right?

22 SAMUEL: Yes, sir.

23 REESE: And based on all that information that I -- that
24 we've put together in this case, and after reading over your statement,
25 I'm, I'm not totally satisfied with the notion that you have distorted

1 the truth a little bit, to say the least. In other words, you've told,
2 in my opinion -- and the reason we're just coming back around to you is
3 because the investigators on this case, we just met again and discussed
4 --

5 SAMUEL: Yes, sir.

6 REESE: -- everything that's been going on so far.

7 SAMUEL: Yes, sir.

8 REESE: And either you are severely confused about the
9 issues -- that is, based on the information we've gotten put together
10 so far -- or you're lying. And you're lying about certain things. And
11 so what I want to do is I want to go back over some things with you.

12 SAMUEL: No problem.

13 REESE: Okay. Would you mind telling me what you told
14 Investigator Thomas and Shockley when they were in here. Give me a
15 scenario of what happened here on this day.

16 SAMUEL: I changed Aidan's diaper, and I put him in his car
17 seat. And when he started to cry, I went to get him. And I didn't put
18 the arm rail down to his car seat, so he slightly bumped his forehead.

19 REESE: Okay, can you --

20 SAMUEL: I didn't --

21 REESE: -- can you, can you, can you slow down a little bit
22 for me?

23 SAMUEL: Yes, sir.

24 REESE: Yeah, just don't talk so fast for me.

25 SAMUEL: No problem.

1 REESE: I'm trying to jot down some information.
2 SAMUEL: No problem.
3 REESE: Okay.
4 SAMUEL: And I didn't have a well enough grip on him. And
5 I dropped him.
6 REESE: Okay. You didn't have a well enough grip on him,
7 and you dropped him.
8 SAMUEL: Yes, sir. I dropped him.
9 REESE: Where, where were you when you dropped him?
10 SAMUEL: I was in the apartment when I dropped him.
11 REESE: Where in the apartment?
12 SAMUEL: In her bedroom.
13 REESE: Which bedroom would that be?
14 SAMUEL: That would be the bedroom closest to the restroom.
15 REESE: Did you drop him on the floor or the bed or what?
16 SAMUEL: Yeah, the floor.
17 REESE: If I'm going -- if I'm inside the apartment, and I
18 just came through the door -- direct me through this -- and I'm going
19 to one of the bedrooms, am I, am I -- the apartment has how many
20 bedrooms?
21 SAMUEL: Two.
22 REESE: Okay. Do I go to the bedroom to the left, or do I
23 go to the bedroom to the right?
24 SAMUEL: The bedroom to the right. That would be -- the
25 bedroom to the left. That's the one closest to the bathroom. That's

1 her bedroom straight ahead. You can see into hers. You can't see the
2 door to the right. That's the second bedroom, but hers is the one you
3 can see from the hallway if you were sitting on the long couch.

4 REESE: All right. Well, let me ask you this, then,
5 because I'm not clear on that. Would it be the bedroom that's on the
6 front of the apartment building or the bedroom that's on the rear?

7 SAMUEL: The bedrooms are both in the same area. They're
8 both in the same area, and that's when you're coming in the door, you
9 look straight ahead, and there's a bathroom -- you can see into her
10 bedroom. Next to her bedroom is a bathroom, and on the other side is a
11 bedroom. They're all in the same area. That's to the rear of the, of
12 the apartment.

13 REESE: Did you, did you -- did this happen where you
14 dropped him to the floor -- that's right, right?

15 SAMUEL: Yes, sir.

16 REESE: You dropped him to the floor. Did it happen in the
17 bedroom where the -- we're talking about Aidan.

18 SAMUEL: Yes.

19 REESE: You dropped Aidan to the floor.

20 SAMUEL: Yes.

21 REESE: Did it happen in the bedroom in which Aidan's crib
22 is in?

23 SAMUEL: No, sir.

24 REESE: So it was in the other bedroom.

25 SAMUEL: Yes, sir.

1 REESE: It would have been in the bedroom that's closer to
2 the rear of the building.

3 SAMUEL: Yes, sir.

4 REESE: Okay. All right. What time was this?

5 SAMUEL: She left around 5:30. I'd say, maybe around 5 --
6 she left 5:30 to go to the store. I'd say maybe around 5:40 I dropped
7 him.

8 REESE: And what were you doing that caused you to drop
9 him, Aidan?

10 SAMUEL: I was trying to pick him up because he started
11 crying. I had put -- I put a movie in. He was fine, so I wouldn't put
12 him in his chair, so I put a movie in to watch, and when he started
13 crying, I went in to get him.

14 REESE: Okay. And when you went in to get him, what
15 happened?

16 SAMUEL: I tried -- I didn't put his arm rail, the rail
17 that you can carry the car seat in, down. So I picked him up. I tried
18 scooping him out, and I accidentally bumped his head, his forehead, on
19 the rail, and I didn't have a good enough grip, and he slipped, and he
20 fell, and he hit his head.

21 REESE: Okay. Now, when he slipped and when he hit the
22 floor --

23 SAMUEL: Yes, sir.

24 REESE: -- did he hit anything on the way down?

25 SAMUEL: No, sir. He just hit the floor, the wood floor,

1 with the back of his --

2 REESE: Were you leaning over or standing up?

3 SAMUEL: I was still coming from bending over down on --

4 his car seat was on the floor. I was still coming up from picking him

5 out of the car seat. I was still going up.

6 REESE: So the car seat was on the floor.

7 SAMUEL: Yes, sir.

8 REESE: And you were leaning over. So you leaned down

9 toward the floor.

10 SAMUEL: To get him out.

11 REESE: And scooped him up out of the car seat.

12 SAMUEL: Yes, sir.

13 REESE: And his head hit what at that point?

14 SAMUEL: His head hit --

15 REESE: How did he slip?

16 SAMUEL: Before I got him out of the seat, his head hit the

17 railing -- his forehead hit the rail, the arm rail, of the car seat.

18 And I thought -- I said, "Oh, my goodness," and I picked him up, and I

19 scooped, and I went to lift up, and I still didn't have a good enough

20 grip on him, and he fell.

21 REESE: Was he in clothing then?

22 SAMUEL: No, he was still in his Pamper.

23 REESE: He was in his Pamper.

24 SAMUEL: Yes, sir.

25 REESE: Was he in anything else?

1 SAMUEL: Just his Pamper.

2 REESE: Okay. who took his clothes off of him?

3 SAMUEL: I did when I changed his diaper because he's known

4 for getting hot. I didn't want him to get hot. He was fine. He

5 wasn't crying. So I tried to do everything I could to make sure he

6 wouldn't stop crying.

7 REESE: Okay. At this time, you're leaning down, and you

8 pick him up.

9 SAMUEL: Yes, sir.

10 REESE: And his head hit -- did his head hit anything on

11 the, on the, on the car seat itself?

12 SAMUEL: The, the rail of the -- you know how you can pull

13 it forward so you can carry the car seat itself. It hit that.

14 REESE: Are you talking about the handle that you --

15 SAMUEL: Yes, the hand rail.

16 REESE: Is that plastic, or is that metal?

17 SAMUEL: It's plastic.

18 REESE: That's plastic.

19 SAMUEL: It's plastic.

20 REESE: Did -- what kind of force was it that -- when his

21 head hit that? Was it a tremendous amount of force, or was it light

22 force? What?

23 SAMUEL: It was just -- it, it wasn't very -- it wasn't

24 tremendous. It just shocked him a little.

25 REESE: How so did it shock him?

1 SAMUEL: It shocked him. He was like, (Breath sound.) you
2 know. He was just shocked, and he started fussing a little bit. I
3 said, "Oh, honey, I'm so sorry," you know. I was --

4 REESE: What did it do -- what did he do when he shocked
5 him?

6 SAMUEL: He just, (Breath sound.) you know. He just got
7 shocked a little bit, and he started -- you know, he was already
8 crying, but he stopped for a second when it did that, and he cried a
9 little bit more. And I was like, "Oh, honey, I'm so sorry," and I
10 tried to, you know, scoop him up even faster so I can stop him from
11 crying from that too. And he slipped out of my hand because I didn't
12 have a good enough grip on him.

13 REESE: So are you, are you saying, for the purposes of
14 this tape recorder here --

15 SAMUEL: Yeah.

16 REESE: -- are you saying he took a deep breath when you --
17 when his head the, the rail --

18 SAMUEL: Yes, sir.

19 REESE: -- the handle?

20 SAMUEL: Yes, sir.

21 REESE: He took a deep breath.

22 SAMUEL: Yes, sir. And after he fell, he took a deep
23 breath too, you know. After he fell and hit his head, he said, (Breath
24 sound.).

25 REESE: All right. When he fell, did he fall out of your

1 arms or out of your hands?

2 SAMUEL: Out of my hands. I didn't have him in my arms. I
3 still had him in a -- I was going up when I -- trying to lift up after
4 catching -- after pulling him out the seat.

5 REESE: Okay. All right. Picture this for me: the back of
6 the, of the, the child seat.

7 SAMUEL: Yes.

8 REESE: Was he in the child seat properly?

9 SAMUEL: He was in the child seat fine.

10 REESE: Where would his head have been while he's sitting
11 or laying in the child seat?

12 SAMUEL: It was --

13 REESE: Would it have been toward the back of the child
14 seat?

15 SAMUEL: It was toward the back of the child seat, and he
16 has this little thing that goes around his head that they put in, like
17 a cushion kind of thing.

18 REESE: Okay.

19 SAMUEL: He was in there.

20 REESE: And were -- you were leaning over when his head hit
21 the child seat.

22 SAMUEL: Yes, sir.

23 REESE: And then immediately, when his head hit the child
24 seat, you hear him take this deep breath.

25 SAMUEL: Yes, sir. And I tried -- and I say, "Oh, Lord --"

1 REESE: And he looks like he's in shock to you.

2 SAMUEL: Yes, sir. And I try to pick him up. And I try to
3 -- because he started crying again. I said, "Oh, goodness." And he
4 was already crying, so I was like, Okay, I'm gonna pick -- I need to
5 pick him up even more faster than that, because he just got scared.
6 And I picked him up ---I tried to pick him up as fast as I could. He
7 still wasn't in my arms yet, and he fell before I can get him in my
8 arms.

9 REESE: Okay. How did you try to pick him up?

10 SAMUEL: I tried to pick him up --

11 REESE: Okay, now you're showing us with the doll here that
12 we have in here, right?

13 SAMUEL: Yes, sir.

14 He was in the car seat, and he was crying, and the rail was
15 up.

16 REESE: And he was sitting up like that in the child seat.

17 SAMUEL: Yeah, he had, he had fussed himself a little bit
18 downward, and I was like, Oh, goodness, okay. So I was like, "Okay,
19 Aidan, Auntie, Auntie baby." And I -- he bumped his head. I said,
20 "Oh." I said, "Oh, goodness, Aidan, Auntie's sorry," and I dropped him
21 by accident. He slipped out of my hands because I still didn't have a
22 good enough grip on him. I still didn't because I was still -- because
23 his car seat is a whole lot lower. It's a whole lot lower. His car
24 seat was on the floor.

25 And I said, "Okay." He was leaning forward. I said,

1 "Okay, Auntie baby," and I said, "Oh, goodness," and I said -- and I
2 accidentally dropped him because I did not have a good enough grip on
3 him. I didn't have a good enough grip on him because I tried to pick
4 him up before putting down the hand rail.

5 REESE: Okay, can you try -- can you pick the doll up for
6 me and just give him back to one of the investigators there. And can
7 you turn your chair back around for me, please.

8 How many -- how far were you -- how far would you think --
9 is it fair to say that he dropped? Ten feet? Twenty feet? Two feet?
10 One foot? Out of your -- when he dropped out of your hands.

11 SAMUEL: I wasn't completely stood up erect yet. I'm 5'6".
12 Maybe around -- maybe about 3 or 4 feet.

13 REESE: About 3 or 4 feet.

14 SAMUEL: Yes, sir. I wasn't completely erect yet.

15 REESE: And what kind of surface did he fall on?

16 SAMUEL: The wood floor.

17 REESE: On the wood floor. And what part of his body hit
18 the floor first?

19 SAMUEL: His head.

20 REESE: His head. All right. And what happened when his
21 body hit the -- when his head hit the floor? Did his entire body hit
22 the floor also?

23 SAMUEL: Yes, sir.

24 REESE: So he hit the floor headfirst.

25 SAMUEL: His head first, and then the rest of his body went

1 down. And he --

2 REESE: would this be the back of his head or the front of
3 his head that hit first.

4 SAMUEL: The back of his head.

5 REESE: Okay. what did you do then?

6 SAMUEL: I picked him up. And he, he had breathed in
7 heavy. And he just had this dazed look. And I started shaking him.
8 like, "Auntie baby, please tell me that you all right, you all right,
9 you all right, Auntie baby, you okay." And he -- his eyes were still
10 open. And he --

11 REESE: Was he breathing?

12 SAMUEL: At the time, yes, sir.

13 REESE: Was he responding to anything you were saying?

14 SAMUEL: No.

15 REESE: Was he crying?

16 SAMUEL: No. He was just in this dazed look, like, like a
17 glassy look. And so I grabbed my purse -- after trying to shake him to
18 get him to respond to me and I couldn't, I just grabbed my purse, and I
19 was like, "I'm gonna walk you. Maybe you'll get over this shock after
20 I walk you. Maybe you'll just get over it."

21 REESE: All right. Let me, let me stop you there. Let me
22 take you back, now, because you're getting too far ahead of me too.

23 when he fell on the floor, you picked him up, and he had
24 this sort of dazed look about him.

25 SAMUEL: Yes, sir.

1 REESE: Eyes open --
2 SAMUEL: Yes, sir.
3 REESE: -- or eyes closed?
4 SAMUEL: Eyes open.
5 REESE: Eyes open. But he's not crying --
6 SAMUEL: No.
7 REESE: -- or saying anything to you. He didn't cry at all
8 once he hit the floor.
9 SAMUEL: No. He just (breath sound).
10 REESE: Was that immediately as he hit the floor?
11 SAMUEL: After I picked, after I picked him up, he was like
12 (breath sound).
13 REESE: Okay. When you picked him, how did you pick him
14 up?
15 SAMUEL: I picked him up by his arms, under his armpits. I
16 picked him up under his armpits.
17 REESE: Picked him up under his armpits.
18 SAMUEL: Yes, sir.
19 REESE: Did anything happen with his head when you picked
20 him up under his armpit?
21 SAMUEL: His head just kind of --
22 REESE: What did you do with his head?
23 SAMUEL: -- he kind of --
24 REESE: What is that?
25 SAMUEL: -- because I picked him up under his armpits.

1 when I picked him up under his armpits, I didn't have my hands under
2 his head.

3 REESE: So are you saying that his head just fell back,
4 rocked back?

5 SAMUEL: Yeah.

6 REESE: Did his head go backwards?

7 SAMUEL: His head go backwards when I picked him up. And I
8 was like, "Auntie baby, you okay?" And he was just dazed looking, and
9 I just started shaking him a little, like, "Auntie baby, you all right?
10 You okay?" you know. "Please, do something. Cry or something,
11 something."

12 REESE: So at this time, there was a red flag sent up to
13 you that something was wrong.

14 SAMUEL: I just needed him to cry. I knew something was
15 wrong. I didn't think it was so serious. I just needed him to cry. I
16 just thought maybe he just, just needed to get off of that initial
17 shock. I was like, "Just please, please."

18 REESE: What did you think was wrong?

19 SAMUEL: I just thought maybe, maybe he's -- just the wind
20 was knocked out of him a little bit. Maybe he was just so scared he
21 didn't get a cry out yet. Because he had fallen before, and he just
22 was like shocked for a little bit, and then he started to cry.

23 REESE: Okay. When was it that he fell before?

24 SAMUEL: Weeks ago. I can't remember. He fell out of his
25 car seat on to the airbed.

1 REESE: Did anybody know that?

2 SAMUEL: Yes.

3 REESE: Who?

4 SAMUEL: His mom.

5 REESE: How did he fall then?

6 SAMUEL: I was asleep, and he fell -- his car seat was
7 above my airbed, on the single recliner that's there. And I woke up --
8 he scared me when he fell on the bed. I didn't know what fell, but all
9 I know is that it's a big boomp on the bed, and I turned over, and it
10 was him in the blankets on the bed. He had fell out of the car seat.

11 REESE: Where was his mom then?

12 SAMUEL: She went to the store. She, she put him in there.
13 I was asleep when she said, "Kendra, I'm going to run to the store real
14 quick. I'm putting Aidan up there."

15 SAMUEL: I said, "Okay," and just rolled over and went back
16 to sleep.

17 REESE: So how did, how did she know he fell?

18 SAMUEL: I called her.

19 REESE: You called her.

20 SAMUEL: Yes, sir.

21 REESE: And you told her that he fell?

22 SAMUEL: Yes, sir. Yes, sir.

23 REESE: Was he injured then?

24 SAMUEL: Not to my knowledge. He just had -- afterwards,
25 from where he fell, he had a little bruise on his face from where I

1 guess he hit the car seat, bottom of the car seat as --

2 REESE: And when you say weeks ago, how many weeks are you
3 talking about? In relationship to July the 31st?

4 SAMUEL: A month or so ago. A month or so ago.

5 REESE: A month or so.

6 SAMUEL: Yeah.

7 REESE: Okay. All right. So you've picked him up now, and
8 what's happening with him. You're back on the 31st...

9 SAMUEL: Yeah.

10 REESE: And you picked him up off the floor.

11 SAMUEL: Yes, sir.

12 REESE: And he's not responding to you or anything. Is
13 that what you're saying?

14 SAMUEL: He's just dazed look, and he was just dazed. And
15 I was like, "Come on, Aidan. Come on. Cry for me. Come on. Let me
16 know you're all right." And he wouldn't cry. I was like, "Okay, this
17 is a lot worse than when you fell before. Maybe if I walk you, you'll
18 just get over this shock, and you'll just go ahead, and you'll cry."

19 REESE: Are you talking to him like this, or --

20 SAMUEL: Yeah. I'm talking like, "Come on, Auntie baby.
21 Come on. Come on. Come on." I'm talking to him. I'm talking to him
22 like, "Come on. Do something."

23 REESE: Did you, did you say, "Maybe if I walk you --"

24 SAMUEL: No. I just -- in my head, I was like, Okay, I'm
25 just gonna walk him. I grabbed my purse, and I just like, I'm just

1 gonna walk him.

2 REESE: Okay. All right. So what happened then?

3 SAMUEL: When I walked back and forth, his eyes were still
4 open, and he was still kind of just looking dazed. But his, you know,
5 I could feel his heart was still beating, and he was still breathing.
6 I was like, Okay --

7 REESE: Was his eyes moving?

8 SAMUEL: No, he was just, he was just looking.

9 REESE: He was, he was, he was breathing, but he was in a
10 daze.

11 SAMUEL: He was just a daze, just a daze. He was just
12 looking. And I was like -- that's why I was like, Okay, then, he's
13 okay. If his heart's still going and he's still breathing, he's fine.
14 He's just shocked. I don't understand why you just won't cry for me.
15 And I just kept walking and walking, and then finally, I sat down in
16 the playground area, and I tried to shake him again to get him to cry,
17 you know.

18 REESE: How long -- and this happened in the apartment, and
19 then you left out of the apartment.

20 SAMUEL: To walk him.

21 REESE: And you walked him.

22 SAMUEL: Yeah.

23 REESE: Did you get as far as the park?

24 SAMUEL: I got to the park.

25 REESE: And how far, in time distance, is the park from the

1 apartment? How long did it take you to get out of the apartment to
2 where you had to go in the park?

3 SAMUEL: It took me about 15 to 20 minutes to get to the
4 park. It take -- you know, but I kept walking back and forth on the
5 road before I went to the park just to keep walking him back and forth,
6 to get him, you know, to get out of the shock before I went to sit
7 down. I didn't want to sit down. I just wanted to keep walking him
8 back and forth just to see, you know -- I was like, "Okay, you're gonna
9 get over this."

10 REESE: How old are you?

11 SAMUEL: Twenty-one.

12 REESE: And you got college background.

13 SAMUEL: Yeah.

14 REESE: And how much college education you got?

15 SAMUEL: Just two years.

16 REESE: Two years of college.

17 SAMUEL: Just two years.

18 REESE: And what did you major in in college?

19 SAMUEL: I majored in my -- I got my associates in science
20 degree. I'm on my way to USC for biology.

21 REESE: Okay. So you went two years to college, and you
22 have an associate's degree.

23 SAMUEL: Yes.

24 REESE: Did you study the human -- anything about the human
25 anatomy in college?

1 SAMUEL: Um, I took anatomy this past semester coming up.
2 REESE: Did you ever study anything about infants?
3 SAMUEL: No, we just did the basics: the atoms all the way
4 up to the cells, to the muscles. That's it.
5 REESE: And how long have you been working -- I understand
6 you work at the --
7 SAMUEL: Three weeks.
8 REESE: -- Richland Memorial Hospital over here --
9 SAMUEL: Yes, sir.
10 REESE: -- in the, at the child hospital --
11 SAMUEL: Yes, sir.
12 REESE: -- children's hospital.
13 SAMUEL: Yes, sir.
14 REESE: And you've been working there three weeks.
15 SAMUEL: Yeah. This would be my third week.
16 REESE: And what is your occupation over there?
17 SAMUEL: I'm environmental service tech, so basically, I'm
18 maintenance. I clean up, and I go in the rooms and clean up around the
19 patients.
20 REESE: Have you ever had the occasion to have interaction
21 with any of the children there?
22 SAMUEL: Only if the mom's in there, and I talk to them,
23 "Hey, cutie. You're cute." And then I leave. I've never had any
24 medical --
25 REESE: You ever had an occasion to pick up any of the

1 children there?

2 SAMUEL: No.

3 REESE: Hold them, cradle them, or anything?

4 SAMUEL: No, we're not allowed. No.

5 REESE: I'm curious, Kendra, as to how you, being -- you
6 seem very articulate and well educated. Certainly, you're old enough.
7 I'm curious as to how could you let this go on so long. You know, you
8 drop a child on the floor, an infant. He hits his head on the floor.
9 You said you hear him take a deep breath. His eyes are stable, not
10 moving. You yourself, by your own admission, feels that the child
11 might be in some sort of shock. And let me tell you this, too. I
12 checked the weather report out there that day. Was it hot out there
13 that day that you left the --

14 SAMUEL: The clouds was -- it was starting to cool off
15 because the clouds was forming, and it was going to rain.

16 REESE: Do you know the temperature out there that day?

17 SAMUEL: No.

18 REESE: Okay. The temperature was 95 degrees, according to
19 the weather service, all right? And you took the child out, and you
20 went in that weather out there. You were out there for a while with
21 this child in 95-degree heat. And by your own admission, also, you
22 were walking back and forth before you went to the park itself. Why
23 didn't you call -- you had your cell phone --

24 SAMUEL: Yes.

25 REESE: -- with you, right?

1 SAMUEL: Yes.

2 REESE: Why didn't you call -- before you left the house or
3 even while you were walking back and forth, why didn't you use your
4 cell phone, knowing that the child isn't getting any better, because
5 according to you, that's why I stayed out there that long. I'm
6 assuming you were in panic mode. -

7 SAMUEL: Yeah.

8 REESE: Why didn't you call the paramedics, call 911 right
9 then and there? You work around children, so you get to see children
10 every day.

11 SAMUEL: Yes, sir.

12 REESE: Explain that to me. Why did you not call an
13 ambulance for that child?

14 SAMUEL: I kept holding on to the fact that he was
15 breathing and thought he would be okay. I kept holding on to that. I
16 --

17 REESE: Did you actually think the child was okay?

18 SAMUEL: I thought he was gonna be okay.

19 REESE: Kendra, I spoke to the mother this morning, and she
20 explained to me about a couple of situations where the both of you have
21 gotten frustrated with, with Aidan.

22 SAMUEL: But we never hurt him.

23 REESE: You never heard him.

24 SAMUEL: We never hurt him.

25 REESE: You mean hurt?.

1 SAMUEL: WE never hurt him. We just would walk away. If
2 you got frustrated, you walk away. She's gone outside plenty of times,
3 talked to the neighbors, and came back.

4 REESE: And how about you?

5 SAMUEL: I've gone to my cousin's house. I can walk to her
6 house. I've gone to her house to get away. I'd call her, "The kids
7 are crying too much. I got to come over here." She would let me do
8 that.

9 REESE: And that's sort of like a cooling off period.

10 SAMUEL: Yes. Yes. She stays in Allen Benedict Court
11 Apartments. I would walk over there.

12 REESE: And so has Aidan ever put you in a position where
13 you needed to just put him down and walk away?

14 SAMUEL: Never by himself.

15 REESE: Never by himself.

16 SAMUEL: It's only when him and his brother are there
17 together and they're both screaming where it's like I had to go and
18 okay, I'm just gonna go to Meeka's (phonetic) house because I can't, I
19 can't take this, you know. This is the first time I'm ever dealing
20 with this. I'm gonna go ahead. I've been around babies, but I've
21 never been around babies that cried so much, so I'm just gonna go ahead
22 and walk over there. And she would say, "Okay," and then I would come
23 back after I've been --

24 REESE: Was Aidan cry so much?

25 SAMUEL: He cried all the time. I -- he cried a whole lot.

1 we just -- I never understood it, and I asked her about it, and she was
2 like, "Well, Jermaine used to cry this much when he was little, and he
3 was a preemie, so Aidan's just like his brother."

4 REESE: Has Aidan ever frustrated you?

5 SAMUEL: He's frustrated me, but I've left. You know, he -
6 -

7 REESE: And when you left, what did you do with Aidan?

8 SAMUEL: Never by myself. She was always there. She was
9 always there. I just left him alone. I've left him alone. She knows
10 me. If there's times where he's frustrated me and his brother's
11 frustrated me, I just don't bother them. I let them leave them alone,
12 and I let them -- I let the brother run around. I let little Aidan sit
13 in the car seat and still cry. I -- you know, she was there. I --

14 REESE: Okay, but you, you, you suggested to the mother on
15 this date that when they left that she leave you with --

16 SAMUEL: Yes, because --

17 REESE: -- Aidan with you and take Jermaine with her.

18 SAMUEL: The two-year-old with the store. Yes, sir.

19 REESE: Is that right?

20 SAMUEL: Because I've been to the grocery store with both
21 of them, and one will run, and one will be in her arms screaming. So I
22 was like, No need to go through that if I'm here. I'll just keep
23 Aidan, the smallest one.

24 REESE: Have you ever struck Jermaine before?

25 SAMUEL: Oh, I've spanked his butt for cursing.

1 REESE: Did the mother know that?

2 SAMUEL: Yes.

3 REESE: What kind of relationship is this that you have
4 with the mother?

5 SAMUEL: She's my best friend. She considers me to be an
6 auntie to them too.

7 REESE: And she authorized you to spank him.

8 SAMUEL: Yes, she said I could. And it's been an incident
9 at one point where he cursed and I popped him, and her mom was there,
10 and her mom got mad. But Jessica was like, "well, I told her to pop
11 him if he cursed. He can't go around cursing."

12 REESE: Did you make him cry when you popped him?

13 SAMUEL: No.

14 REESE: Where'd you pop him?

15 SAMUEL: I popped him in his little mouth. I didn't pop
16 him hard.

17 REESE: Okay. Um, in, in, in respect to Aidan, did you
18 ever pop Aidan?

19 SAMUEL: No. He's too little.

20 REESE: Okay. When -- on the 31st, when they left you --

21 SAMUEL: Mm-hmm.

22 REESE: -- with Aidan, Aidan started crying at some point -

23 -

24 SAMUEL: Yes.

25 REESE: -- right?

1 SAMUEL: Yes.

2 REESE: And what kind of cry was this? What did you think
3 he --

4 SAMUEL: He was, he was -- he had bee hoarse for a while,
5 crying. His cry was very hoarse like he was losing his voice, you
6 know, so it was just a hoarse cry. I was like, Okay, he's crying. Who
7 knew -- I didn't know what to think that cry was for because he had
8 been hoarse so long, who knows --

9 REESE: Did that cry alarm you in any way?

10 SAMUEL: That -- no. It just -- okay, maybe he's hungry or
11 something. Maybe --

12 REESE: Had you been at work that day?

13 SAMUEL: -- he needs to be held. Yeah.

14 REESE: All day?

15 SAMUEL: Seven to 3:30.

16 REESE: Seven to 3:30.

17 SAMUEL: Yes.

18 REESE: You pretty tired?

19 SAMUEL: No. I was up watching a movie.

20 REESE: At 3:30 in the afternoon, right.

21 SAMUEL: Yeah.

22 REESE: Were you hot? Was it hot inside y'all apartment
23 there?

24 SAMUEL: No, she had the air conditioner on.

25 REESE: So you were comfortable.

1 SAMUEL: I was comfortable.

2 REESE: And why did -- what did -- what happened that -- to
3 make Aidan start crying?

4 SAMUEL: Aidan would do--who knows? I don't know. Aidan
5 would do that. He -- I just considered him to be an arm baby. You
6 know, if you, you would hold him; he'd be fine, and you put him down,
7 he'd be okay for a few minutes, and then he'd start fussing. He's --

8 REESE: And is that what happened here? You put him down
9 for a few minutes, he starts fussing.

10 SAMUEL: Yeah, he started fussing, you know. I was like,
11 okay, got to pick him up. He's an arm baby. I had tried to get
12 Jessica before, I was like, "Jessica, don't hold him --"

13 REESE: Where's the television?

14 SAMUEL: The television is in the living room.

15 REESE: In the living -- is there a TV in the room that
16 Aidan was in?

17 SAMUEL: No, there's only a television in the living room.

18 REESE: All right. So where was Aidan when he started
19 crying?

20 SAMUEL: He was in his mother's bedroom?

21 REESE: And how did he get in his mother's bedroom?

22 SAMUEL: I put him in there after I changed him and took
23 off his Pooh outfit.

24 REESE: And was he awake then?

25 SAMUEL: Yes, and he was fine.

1 REESE: And so you left him in the bedroom, and you went
2 our and started watching TV.

3 SAMUEL: Yeah.

4 REESE: Is that right? And how long had you been out there
5 watching TV before whatever happened to get your attention with Aidan?

6 SAMUEL: I wasn't even out there long enough to get past
7 the first five minutes of the movie. I had sped it up to a point where
8 I'd passed all -- because it was a VHS. I sped it up past all the
9 little old opening credits that let you know what movies was coming
10 out.

11 REESE: What movie were you watching?

12 SAMUEL: "Tales from the Hood."

13 REESE: You ever seen that before?

14 SAMUEL: Yeah.

15 REESE: How many times?

16 SAMUEL: Ooh, several times.

17 REESE: That must be your favorite movie.

18 SAMUEL: I think it's funny when the, the little guy just
19 tells him that, you know, about the drugs, how he cause it to shit. I
20 just think that -- I think it's funny.

21 REESE: You think it's funny. Is it fair to say that's one
22 of -- at least one of your favorite movies?

23 SAMUEL: Yes.

24 REESE: Was anybody else there with you?

25 SAMUEL: No, it was just me.

1 REESE: Just you.

2 SAMUEL: Yes.

3 REESE: Okay, so when Aidan started crying, you had to get

4 up and go check on him.

5 SAMUEL: Yes, sir.

6 REESE: All right. And how long were you in the room to

7 check on him?

8 SAMUEL: I, I don't know how long I was in there before

9 when I tried to pick him up and he bumped his head and I dropped him.

10 REESE: Could you estimate?

11 SAMUEL: Maybe about ten minutes.

12 REESE: About ten minutes.

13 SAMUEL: About ten minutes.

14 REESE: What were you doing for ten minutes in the room?

15 Because you're missing your movie, now. But you're in a room with him

16 for ten minutes. What were you doing for the ten minutes that you were

17 in there?

18 SAMUEL: I was trying to get him -- after I dropped him and

19 I picked him up, I was trying to get him to respond to me. And his

20 heart was still going. He was still breathing. And I was like, Okay,

21 he's just dazed --

22 REESE: No, no, no, no, no. I'm talking about -- how long

23 were you in there before you tried to pick him up?

24 SAMUEL: How long was I in the living room?

25 REESE: The room, in the room with Aidan before you tried

1 to pick him up?

2 A.L.THOMAS: When you went to the room, how long did it
3 take before you got into the room and actually tried to pick Aidan up
4 is what he's asking.

5 SAMUEL: I got maybe five minutes, ten minutes tops into
6 the movie before he started fussing.

7 REESE: Okay, so you were into the movie -- was he fussing
8 for a while --

9 SAMUEL: NO.

10 REESE: -- and then you went in there? Did you go in there
11 immediately?

12 SAMUEL: Yes, I went in there immediately.

13 REESE: How did that make you feel leaving the movie and
14 going in there to check on him?

15 SAMUEL: I was fine. I was fine. I'd seen that movie
16 before. I've seen it several times.

17 REESE: Were you frustrated at any point?

18 SAMUEL: No, I wasn't frustrated with him. I was not
19 frustrated with him.

20 REESE: And the, the, the autopsy doesn't show any bruises
21 or knots or anything that I would imagine would have been conducive to
22 a child being dropped on his head from at least 3 feet up. And I think
23 you said 3 feet.

24 SAMUEL: Yeah, 3 or 4 feet. Yes, sir.

25 REESE: Can you explain that?

1 SAMUEL: What do you mean?
2 REESE: Why weren't there any -- if, if, if you were -- and
3 this was a hardwood floor.
4 SAMUEL: Yeah.
5 REESE: Do you think that if the two-and-a-half year old
6 had hit the floor from 3 feet up there would have at least been a knot
7 or a bruise or something?
8 SAMUEL: He hits his head all the time. The two-year-old
9 brother used to hit his head all the time, and he was all right.
10 REESE: With no knots?
11 SAMUEL: Not that I know of.
12 REESE: Okay. Did you notice whether any bruises or scalp
13 lacerations or knots or anything come on Aidan's head when --
14 SAMUEL: I didn't notice any of that.
15 REESE: Did you check?
16 SAMUEL: Yes, sir. I felt his head. I felt his head. I
17 felt the back --
18 REESE: And you didn't feel, you didn't feel anything.
19 SAMUEL: I didn't feel anything. His head was the same
20 size as it always was. I thought it was just fine.
21 THOMAS: Question. Did -- I don't believe I asked this on
22 the last question before my tape ran out. Baby's crying. You go in
23 there. At any point, are you -- did you try to feed him with a bottle
24 at all or --
25 SAMUEL: I tried to feed him with the bottle before I put

1 him in his chair, after I changed his Pamper. He peed on his Pooh
2 outfit. That's what, you know -- I was like, Okay, I'm gonna take this
3 off. And he peed on that, he peed on that, so I took that off. And I
4 tried to give him his bottle. His mama had left a bottle out before
5 she left. I tried to give him that, and he didn't want it. The bottle
6 was still sitting on the floor next to that single recliner where I
7 left it when I put -- when I went ahead and put him in his car seat.

8 THOMAS: So when you tried to feed him, he was -- he just
9 wouldn't suck the bottle, or --

10 SAMUEL: He didn't want it. If he didn't want it, he would -
11 just -- you know.

12 THOMAS: Stick his tongue out, push his tongue out.

13 SAMUEL: He was kind of just spit it out, you know. He
14 didn't even want his pacifier. He was just fine. He was just okay. I
15 was like, Okay, you're not crying today. That's good, you know. So I
16 just put him in the chair.

17 THOMAS: So because he's not taking a bottle, you assume
18 that he's full or that --

19 SAMUEL: He just didn't want it.

20 THOMAS: Okay. And then after he doesn't take the bottle,
21 is that when you placed him in the chair?

22 SAMUEL: Yeah. And I tried to give him his pacifier. He
23 didn't want that either.

24 THOMAS: Now, when you give him the bottle or the pacifier,
25 how many times are you trying to place it in his mouth at this time?

1 SAMUEL: I tried to give him the bottle twice, and I tried
2 to give him the paci twice. And when he didn't want neither one, I
3 just put the bottle down on the floor. It's between the TV and that
4 chair. And I just put the pacifier on the arm of the single recliner.

5 THOMAS: All right. At any point those two times, did you
6 try to force the paci or the bottle in his mouth?

7 SAMUEL: No, I didn't try to force it on him.

8 THOMAS: But he's not trying to take it or trying to --

9 SAMUEL: No, I didn't try to force it on him.

10 REESE: Had he always had this little cut up under his lip?

11 SAMUEL: I didn't even know -- to be honest, I didn't know
12 what that little cut came from. He had it already. That was already
13 there. I thought it came from him scratching himself. He scratched
14 his self all the time. That was there already. I thought he just
15 scratched his self again.

16 REESE: You, at some point, picked Aidan up and shook him,
17 didn't you?

18 SAMUEL: No, sir. I shook him after he fell, and he just
19 looked dazed.

20 REESE: And where were you when you shook him?

21 SAMUEL: I shook him in the bedroom. I was still in the
22 bedroom shaking him, like, "Come on, Aidan. Come on."

23 REESE: Can you describe the manner in which you shook him.
24 How did you shake him?

25 SAMUEL: I shook him like this. It was like, "Come on,

1 Aidan. Come on, come on."

2 REESE: Is that like an easy shake to you, or -- what was
3 his body doing when you were shaking him?

4 SAMUEL: Um, his head was just going back and forth.

5 REESE: His head was going back and forth.

6 SAMUEL: Yeah.

7 REESE: Is it fair to say his head was rocking back and
8 forth?

9 SAMUEL: Rocking back and forth.

10 REESE: And you mean frontwards and backwards.

11 SAMUEL: Frontwards and backwards.

12 REESE: Was his eyes open then?

13 SAMUEL: Yes.

14 REESE: Do you have anything you want to ask her?

15 SARAH HURT: When you were in there, when you were in the
16 room, you say you picked Aidan up out of his car seat.

17 SAMUEL: Yes, ma'am.

18 HURT: How long had you been, how long had you been picking
19 up, carrying around, toting, whatever you want to call it, Aidan? How
20 long?

21 SAMUEL: That day?

22 HURT: No. How long had you been part of his life, if you
23 want to say it that way?

24 SAMUEL: I've been there since she came home from the
25 hospital, but for the past three weeks, I wasn't able to talk or play

1 with him or his brother because I was at -- got started at the
2 hospital, and then I still had Target at the time. So some days, I
3 pulled 16 hours. And I told her, I said, "I feel bad." I had not been
4 able to talk to them or play with them. That's why I volunteered to
5 take him that day. I was like, I hadn't been able to talk to him and
6 play with him, plus she can't handle both of them while she's at the
7 store.

8 HURT: Okay. How long had you been living there? I'm
9 sorry.

10 SAMUEL: I came to visit all the time, all the time. I
11 would stay -- I would come early in the morning, and then, if I did not
12 leave a little bit, then I'd come and I stayed, you know, until late at
13 night. And then finally, you know, she asked me, you know, "Kendra,
14 what's going on?"

15 And I told her, "well, you know, there's problems at home,
16 and I need a place to stay." So I started staying with her. So it's
17 been about a week, a week and a half that I've been with her, a week
18 tops.

19 HURT: And how did it make you feel when you would come
20 home from working those 16-hour days, or when you would go to -- I'm
21 sorry -- when you would go to Jessica's house, and the babies would be
22 crying, or Aidan would be crying?

23 SAMUEL: I passed out on the single recliner. Every time
24 she woke up, she woke me up like, "You can't sleep like that. That's
25 weird." I would pass out. I would just be gone. She, you know, she

1 handled them. When I was on the couch, I would just pass out on the
2 couch and sleep. I wouldn't pick them up. I wouldn't play with them.
3 I'd come in and I'd fall asleep still in my uniform.

4 HURT: That's all I've got right now.

5 REESE: You said that at some point, when you were in the
6 room with Aidan and Jamal, you stayed for about 25 minutes or so.

7 SAMUEL: Mm-hmm.

8 REESE: And you heard Aidan pass gas. How do you know he
9 passed gas?

10 SAMUEL: I heard (nonverbal sound).

11 REESE: Mm-hmm.

12 SAMUEL: I was like, Okay, he's fine, you know. I knew
13 just all it was, he was just shocked. He was just shocked. I knew
14 that's what it was. He just (nonverbal sound), and I was like --

15 REESE: Okay. At any time, did you go and check on him
16 then?

17 SAMUEL: No. I felt he was okay. I didn't want to wake
18 him up. Let him go ahead and just keep sleeping this off, and then
19 he'll wake up, and he'll cry, and he'll be all right.

20 REESE: Um, you told Jessica, Jermaine's mother, when you
21 disciplined him before.

22 SAMUEL: Yes.

23 REESE: And you just spanked him on his hand.

24 SAMUEL: Um, I popped his butt.

25 REESE: You popped his butt.

1 SAMUEL: Yeah.

2 REESE: And she wasn't around then, right?

3 SAMUEL: She was there. She was there. When I popped his
4 butt, she was there. Every time I popped his butt, she was there.

5 REESE: But she didn't, she didn't see it. You just told
6 her that you did that.

7 SAMUEL: If she, if she didn't see it and she heard me pop
8 him, she'd go, "why'd you pop him."

9 And I told her, "well, I popped him because of this."

10 REESE: Okay, you ever --

11 SAMUEL: But she'd always been in the house.

12 REESE: -- you ever had a reason to discipline him and then
13 go back and tell her later on that you did it?

14 SAMUEL: No, she was always there.

15 REESE: She was always there.

16 SAMUEL: And she knew what was going on.

17 REESE: Have you ever popped him while she wasn't there?

18 SAMUEL: No.

19 REESE: All right. And when you heard Aidan pass gas, you
20 just assumed he was okay.

21 SAMUEL: Yes, sir.

22 REESE: Why didn't you -- I'm sure you heard him pass gas
23 sometime after Jamal had picked you up from the park.

24 SAMUEL: Yeah, this is when he was sleeping and --

25 REESE: You had contact with at least two security officers

1 and your boyfriend of three years.

2 SAMUEL: Just one security officer.

3 REESE: You and Jamal had gone --

4 SAMUEL: Just one.

5 REESE: -- you had Jamal had been going together for three
6 years.

7 SAMUEL: Three years.

8 REESE: Okay. Is Jamal somebody you can trust?

9 SAMUEL: Yeah.

10 REESE: Tell me what you told Jamal about this whole thing.

11 SAMUEL: I didn't tell him anything.

12 REESE: You told him absolutely nothing.

13 SAMUEL: I didn't tell him anything. I was like,
14 "Aidan's," you know, "I'm gonna put him, you know, in the bed, and I'll
15 be right back downstairs."

16 REESE: When the security guard -- there's one security
17 guard that you're talking about.

18 SAMUEL: Yeah.

19 REESE: When he approached you, what did he say to you?

20 SAMUEL: He said, "It's gonna rain. You need to get the
21 baby in the house."

22 I said, "Yes, sir. We're on our way there now."

23 REESE: At any time, did you tell the security guard that
24 you even possibly need help with this child?

25 SAMUEL: No.

1 REESE: Did you tell him that the child was in a daze?
2 SAMUEL: No.
3 REESE: Did you tell him that there was something wrong
4 with the child?
5 SAMUEL: No.
6 REESE: You told him nothing at all, did you?
7 SAMUEL: No, sir.
8 REESE: When you brought the child back home, you rode in
9 Jamal's car --
10 SAMUEL: Yes, sir.
11 REESE: -- your boyfriend of three years --
12 SAMUEL: Yes, sir.
13 REESE: -- and you never even told him anything about the
14 child --
15 SAMUEL: No.
16 REESE: -- that there was something wrong with the child.
17 SAMUEL: No.
18 REESE: Because he hadn't woken up yet, has he --
19 SAMUEL: No.
20 REESE: -- had he?
21 SAMUEL: He -- his eyes were still open, but, you know, he
22 was fine. I thought --
23 REESE: His eyes were open.
24 SAMUEL: His eyes were open.
25 REESE: He was fine.

1 SAMUEL: He --

2 REESE: Would you say that he was in a daze then still?

3 SAMUEL: He was in a daze, but, you know, his heart -- I
4 could still feel his heartbeat, and he was still breathing.

5 REESE: Well, how about when you got back home with him,
6 Kendra? You've got the mother, your best friend, and your best
7 friend's grandmother. What did you say to them when you brought the
8 child back in the house? What did you say to them about the condition
9 of the child?

10 SAMUEL: When I came in, they just looked and was like,
11 "Okay, I know you had to walk him to the park," you know. "You
12 probably just took him for a walk --"

13 REESE: No, I'm not asking you what they said. I'm asking
14 you what did you say to them about the condition of her child.

15 SAMUEL: I said, "He's okay. I'm gonna just put him in the
16 crib, and I'll be back."

17 REESE: But the fact of the matter is you still were at the
18 point where you did not think this child was okay.

19 SAMUEL: I thought he was -- I thought he -- because he was
20 still breathing --

21 REESE: Kendra, he was in a daze. You said yourself, his
22 eyes were just open. The kid was in a daze. Did you tell them that
23 the child was in a daze?

24 SAMUEL: No, I was still hoping --

25 REESE: Did you tell them that there was anything wrong

1 with the child?

2 SAMUEL: No.

3 REESE: You took the child in the bedroom. Is that right?

4 SAMUEL: Yes, sir.

5 REESE: And you laid the child in the bed.

6 SAMUEL: Yes, sir.

7 REESE: Did you lay the child on his back or on his

8 stomach?

9 SAMUEL: I laid him on his back, and I covered him up with

10 the blanket.

11 REESE: Was his eyes still open when you walked out of the

12 room?

13 SAMUEL: No, sir.

14 REESE: How did his eyes go closed?

15 SAMUEL: I didn't --

16 REESE: How did his eyes close?

17 SAMUEL: They were slightly like this. They weren't all
18 the way closed. They were just slightly like this, like he was going
19 to sleep.

20 REESE: You knew that child was dead, didn't you?

21 SAMUEL: No, sir.

22 REESE: You at least suspected that that little baby was
23 dead, didn't you? You work around children. You see this kind of
24 thing --

25 SAMUEL: But I haven't worked around children --

1 REESE: -- all the time.
2 SAMUEL: -- that long.
3 REESE: Did you at least suspect not only that something
4 was wrong with that child but that the child was dead?
5 SAMUEL: I thought he was gonna be okay.
6 REESE: That's not answering my question.
7 SAMUEL: (Inaudible) gonna be okay.
8 REESE: Did you at least suspect the child was dead? It's
9 a yes or no answer, Kendra. That's all I'm asking you for. What did
10 you think, Kendra?
11 SAMUEL: I thought he was going to sleep it off.
12 REESE: You thought what?
13 SAMUEL: I thought he was gonna sleep it off.
14 REESE: You thought he was gonna sleep it off.
15 SAMUEL: (Indistinct) going on with him. I thought he was
16 gonna sleep it off. And when I heard him farting later, I was like, I
17 knew he was gonna be okay.
18 REESE: Are you crying now? See, we're not with the
19 benefit of cameras here. Are you crying now?
20 SAMUEL: Yes, sir.
21 REESE: Are you okay?
22 SAMUEL: No, sir.
23 REESE: Okay, because I'm, I'm wondering now that I'm
24 asking you are you crying, you cover your eyes. I didn't see any
25 tears. And I still don't.

1 SAMUEL: No, sir. I'm not okay. I'm sitting here
2 thinking, How can I be so dumb? I just panicked. I just panicked.

3 REESE: No panicked.

4 SAMUEL: I was sitting here thinking, How can I be so dumb
5 and not try to -- I just -- I didn't have the heart to tell my best
6 friend I accidentally dropped her child after she -- all she had been
7 through in her life. I just panicked, and I was like, Oh, my God.
8 He's gonna be all right.

9 REESE: Kendra, listen here.

10 SAMUEL: Detective Reese, I would never intentionally hurt
11 nobody. This -- I've never been to jail. I worked hard in school. I
12 would never intentionally hurt nobody, nobody.

13 REESE: Well, I can under --

14 SAMUEL: You can ask anybody.

15 REESE: I can understand --

16 SAMUEL: You can ask anybody.

17 REESE: -- that you didn't intentionally hurt this child.
18 My issues are --

19 SAMUEL: Oh, my God.

20 REESE: -- what did you do to protect or give this child
21 some sort of first aid?

22 SAMUEL: I didn't know how to do anything. I don't know
23 CPR or know nothing. I didn't --

24 REESE: Do you know how to call 911?

25 SAMUEL: Yes, sir.

1 REESE: Did you call 911?
2 SAMUEL: No, sir.
3 REESE: In fact about it, you never even told anybody.
4 Isn't that right?
5 SAMUEL: No, sir.
6 REESE: You shook this baby out of frustration, didn't you?
7 SAMUEL: No, sir. No, sir.
8 REESE: Yes, you -- yes, you did.
9 SAMUEL: I shook this baby -- I never -- I never, never
10 meant to hurt him.
11 REESE: In fact about it, you never even dropped this child
12 on the floor, did you?
13 SAMUEL: I never meant to hurt him.
14 REESE: You shook the child out of frustration. Isn't that
15 right?
16 SAMUEL: (No response.)
17 REESE: Tell me the truth, Kendra. Tell me about it. It's
18 okay.
19 SAMUEL: You're yelling at me and --
20 REESE: I'm not yelling at you.
21 SAMUEL: -- you're getting loud with me.
22 REESE: Come on. Tell me the truth.
23 SAMUEL: That was my best friend. I'm --
24 HURT: Kendra, sweetheart, if it was just an accident, it
25 was just an accident.

1 SAMUEL: It was just an accident. I swear to God, it was
2 an accident.

3 HURT: (Inaudible) it was accident.

4 SAMUEL: I would never hurt nobody's child. I would never
5 hurt nobody's child.

6 HURT: I believe you.

7 SAMUEL: I want kids of my own. I would never hurt
8 nobody's child.

9 HURT: I believe you.

10 SAMUEL: I've been around kids all my life. I would never
11 hurt nobody's child. I've been her two-year-old son his whole life. I
12 would never hurt nobody.

13 HURT: If it was just an accident, Kendra, it's okay, if it
14 was just an accident.

15 SAMUEL: It was an accident.

16 HURT: well, how about you tell us what happened, okay? If
17 it was just an accident, then it's just an accident.

18 SAMUEL: (Indistinct phrase.)

19 HURT: Okay, we can work with things just being accidents.

20 SAMUEL: Not the way y'all making me feel.

21 REESE: Kendra, we need the truth, okay?

22 SAMUEL: You're making me feel like I'm such a criminal,
23 like I've been a mean person all my life, I swear. And I haven't done
24 anything to anybody. I'm that girl that always loved kids. kids loved
25 me. They came to me, didn't want to go back to mom. Jessica will tell

1 you sometimes I can get Aidan to sleep, and you know, she'd be trying,
2 and the minute I'd get him, he'd be like, "Okay, Mom," and be fine with
3 me.

4 Sometimes, she's like, "Kendra, I swear, I think he, he
5 thinks you're his mom and not me." I would never hurt nobody.

6 REESE: Kendra, this happened on the 31st of July.

7 SAMUEL: Yes, sir.

8 REESE: You've had a couple of contacts with the
9 investigators --

10 SAMUEL: Yes, sir.

11 REESE: -- with the police officers. Is that right?

12 SAMUEL: Yes, sir.

13 REESE: Today is the 6th of August.

14 SAMUEL: Yes, sir.

15 REESE: Then why has it taken you this long to tell us what
16 you've just told us?

17 SAMUEL: I didn't want to hurt Jessica. I didn't want to
18 hurt her.

19 REESE: But there was a point when you thought the police
20 thought Jessica had something to do with the death of her baby, wasn't
21 it?

22 SAMUEL: I --

23 REESE: Wasn't it?

24 SAMUEL: After she -- she would just say that you guys were
25 really mean to her. And I was like, "well, don't think they would

1 think you did it. You're the mom. You're the mom."

2 REESE: Did you at least, when she was saying that the
3 police was really mean to her, did you at least tell her then, "You
4 don't have anything to worry about because I'm responsible for this?"

5 SAMUEL: No, sir.

6 REESE: Do you feel like you're responsible for this?

7 SAMUEL: Yes, sir.

8 REESE: Well, when is it that you planned on owning up to
9 your responsibilities? If she's supposed to be your best friend --

10 SAMUEL: Yes, sir.

11 REESE: -- why have you let her go this long without
12 telling her the truth?

13 SAMUEL: I didn't know how to tell her.

14 REESE: Did you discuss this with anybody? Did you tell
15 anybody about this?

16 SAMUEL: I didn't know how to -- I -- my thing is the only
17 person I should tell is her, and I didn't know how to tell her. I
18 stuck by her side the whole entire time with this, and I just -- every
19 day, I didn't know how to tell her. I never left her side.

20 REESE: At the time when you said you first shook Aidan,
21 was he breathing then?

22 SAMUEL: Yes, sir.

23 REESE: He fell on the floor. Did he start crying? Did he
24 start crying, Kendra? when he fell on the floor, did he start crying?
25 You can't answer that, can you? He never fell on the floor, did he,

1 Kendra? He never fell on the floor, did he? No? Are you saying no?

2 SAMUEL: Yes, sir.

3 REESE: Did he fall on the floor?

4 SAMUEL: No, sir.

5 REESE: What happened, Kendra?

6 SAMUEL: He was crying, and I couldn't get him to stop
7 crying, and I shook him.

8 REESE: He was crying, and you couldn't get him to stop
9 crying, so you shook him.

10 SAMUEL: Yes, sir.

11 REESE: Where was he when he started crying?

12 SAMUEL: He was, he was in the living room.

13 REESE: He was in the living room.

14 SAMUEL: Yes, sir.

15 REESE: And when he started crying and you shook him, what
16 happened when you shook him?

17 SAMUEL: He just took a deep breath in, and he just, he
18 said, he lifted his arms up.

19 REESE: He lifted his arms up.

20 SAMUEL: Yeah, and then he put them down, slowly.

21 REESE: He lifted his arms up -- he took a deep breath, put
22 his arms up, like in the air.

23 SAMUEL: Like, like -- not up, just in front of him, and
24 then just put them down slowly.

25 REESE: And put them down slowly. And what happened with

1 him then? Did his eyes shut, or what?

2 SAMUEL: No.

3 REESE: Did he go limp, or what?

4 SAMUEL: No.

5 REESE: What --

6 SAMUEL: He was just dazed.

7 REESE: He was just dazed.

8 SAMUEL: Yeah, he was just dazed.

9 REESE: And then what happened?

10 SAMUEL: And then I was just looking at him, and I was

11 like, I said, "Aidan, I'm sorry. I didn't mean to. I didn't mean to

12 shake you. I'm sorry." And I tried talking to him a little bit more,

13 and tried to get him to look outside the window, something to get him,

14 you know, just to respond, cry, something. And he wouldn't.

15 REESE: Okay.

16 SAMUEL: So I grabbed my purse, and I just took him for a

17 walk.

18 REESE: Okay. And you took him for a walk. Was there any

19 response out of him at all while you were walking with him?

20 SAMUEL: He was just looking. He -- I had him in my arms,

21 and he was just looking.

22 REESE: He was just looking. Was his eyes moving around at

23 any time?

24 SAMUEL: No.

25 REESE: Okay. And is this the time when you left the

1 house?

2 SAMUEL: Yes.

3 REESE: Did anybody see you leave the house with him?

4 SAMUEL: There were people outside the neighborhood, and
5 there's people along where I was walking.

6 REESE: Did anybody stop and see the baby --

7 SAMUEL: Nobody stopped me.

8 REESE: -- check the baby out to say hello or anything?

9 SAMUEL: They just waved at me.

10 REESE: Okay, and where did you go?

11 SAMUEL: To the park.

12 REESE: All right. And while you were at the park, did you
13 walk around? Is that what happened?

14 SAMUEL: Yes, sir.

15 REESE: Okay. What is going through your mind while you're
16 walking around? What are you thinking?

17 SAMUEL: I was just thinking, He's gonna be all right.
18 Lord, I know I didn't just hurt him. I didn't hurt him. I didn't mean
19 to hurt him. He's gonna be all right. He's gonna be okay, and we're
20 gonna walk you. Auntie's just gonna walk you, and you're gonna be okay
21 because you know I've never done anything to hurt kids, and you're
22 gonna be okay.

23 REESE: Okay. Let me, let me take you back to the
24 apartment, okay? I'm gonna take you out of the park right now, and I'm
25 gonna give you this doll, and I want you to show us how it is that you

1 shook him when he, when he -- how long was he crying before you shook
2 him?

3 SAMUEL: Maybe about, maybe about ten minutes because I
4 always believed in -- I even tried to get Jessica to do this. If he's
5 crying, and you tried to do all you can -- feed him, change him -- and
6 nothing works, just let them cry. Just let them cry.

7 REESE: And did you do everything you can to stop him from
8 crying?

9 SAMUEL: I tried to do everything I could, and I --

10 REESE: Like what did you do to stop him from crying?

11 SAMUEL: I tried, you know, I tried to walk him, and I
12 tried to bounce him. I tried the paci. I tried the bottle. Nothing
13 was working. And his Pamper was changed. I was like, you know,
14 "There's nothing wrong with you. I'm just gonna put you back," you
15 know.

16 REESE: At one -- yeah, okay. And at one point, you shoved
17 the bottle or the pacifier in his mouth --

18 SAMUEL: No, that nick was already there.

19 REESE: Okay, that nick was --

20 SAMUEL: That nick was already there.

21 REESE: All right.

22 SAMUEL: I remember, you know, that nick -- you know,
23 because that -- I remember that morning, she was like, "who gave you
24 chocolate," you know.

25 REESE: Well, that's okay. So you can account for that

1 nick.

2 SAMUEL: That nick was already there.

3 REESE: Did you, did you tap his bottom or on his leg or
4 arm or anything to get him to quiet down --

5 SAMUEL: Oh, no.

6 REESE: -- stop crying?

7 SAMUEL: No. She had told me before that she had seen a
8 rash coming up on his butt, and she was using the cream. She had
9 showed me when she was like, "Kendra," you know, "Aidan's butt," you
10 know, "I don't know how his butt is looking." That was shown to me
11 before. There's been things shown to me on Jermaine too that she
12 didn't like, you know. That was already going on. His butt was
13 already --

14 REESE: Okay. Um, so he's crying, and he's laying in the
15 car seat, the child seat.

16 SAMUEL: Yes, he's sitting in the child's seat.

17 REESE: Where's the child seat? On the couch or the sofa
18 or the floor or what?

19 SAMUEL: It was on the long couch.

20 REESE: It was on the long couch.

21 SAMUEL: It was on the long couch.

22 REESE: Right where it was when, when they left to go to
23 the store.

24 SAMUEL: Yes.

25 REESE: Isn't that right?

1 SAMUEL: Yes.

2 REESE: Okay. And so he's crying, and we're gonna -- I'm
3 gonna put this -- can you put this doll on that chair over there in the
4 position that Aidan was in?

5 SAMUEL: He had got himself to the point where he was on
6 his side a little bit, crying, you know, just fussing and fussing. And
7 I just left him there for a while. I saw he had gotten down to that
8 position --

9 REESE: So he squirmed himself down.

10 SAMUEL: He squirmed himself because I let him cry for a
11 while. I was like, you know, "I did all I can for you. I'm just going
12 to let you cry," you know. "There's nothing wrong with you. Auntie's
13 just gonna let you cry."

14 REESE: Okay. At this, at this time, what's your state of
15 mind? Are you getting frustrated or what?

16 SAMUEL: I was just like -- I just -- I don't, I don't know
17 how to make him stop, you know? I'm just gonna let him cry. And I was
18 like, okay, I just -- I'm just not gonna deal with it right now. I'm
19 not gonna deal with it right now. I was, I was getting frustrated. I
20 was like, I'm just gonna sit over here, and I'm just gonna sit on this
21 recliner, and I'm just gonna let you fuss. I'm just gonna let you fuss
22 for a while.

23 REESE: okay. At any time, did you yell at him or scream
24 at him --

25 SAMUEL: NO.

1 REESE: -- or scream out or yell out or scream out or
2 anything like that?

3 SAMUEL: No, no. I just left him alone. I was like, like
4 I'm not gonna deal with --

5 REESE: Okay, so he's, he's in this position now. And
6 where were you sitting in relationship to, to Aidan? Were you on
7 another chair, or --

8 SAMUEL: Yes.

9 REESE: You were on another chair.

10 SAMUEL: I was on the single recliner by the window,
11 underneath the window. He was on the long couch. The long couch --

12 REESE: Okay, so you had to get up, you had to get up and
13 walk over to him.

14 SAMUEL: Yes.

15 REESE: All right. And I'm assuming -- well, when you got
16 up out of the chair, and you walked over to him, to Aidan --

17 SAMUEL: Yes, sir.

18 REESE: -- he's still crying, right?

19 SAMUEL: Yes, sir.

20 REESE: What did you do when you walked over there to him?

21 SAMUEL: I picked him up, and I looked at him, and I said,
22 "What is wrong with you?" And he's just fussing and fussing. And I
23 was like, "There's nothing I can do for you," and I just, I shook him.

24 REESE: Did you ever put him back down before you shook
25 him?

1 SAMUEL: No.
2 REESE: Okay. So you went over to him, you picked him up,
3 and you asked him, "what is wrong with you?"
4 SAMUEL: Yes, sir.
5 REESE: And he's still crying.
6 SAMUEL: Yes, sir.
7 REESE: And how is his crying? Is he crying hysterically --
8
9 SAMUEL: Yes, sir.
10 REESE: -- from your perspective --
11 SAMUEL: Yes, sir.
12 REESE: -- or is he crying mildly, or what?
13 SAMUEL: He's crying hysterically.
14 REESE: Hysterically.
15 SAMUEL: Yes, sir.
16 REESE: Okay.
17 SAMUEL: In that hoarse cry that he had. He had this
18 hoarse cry, but he was, you know, it was, it was just getting worse
19 with it. And I was like, "Oh, my God, what is wrong with you? Stop
20 it." I just needed him to stop. I just needed him to stop. He had
21 never acted up so bad with me.
22 REESE: okay. would you show us now how you shook him.
23 Just take us through -- this will be the chair that you were sitting on
24 underneath the window. And you got up, and you went over to Aidan.
25 And show us what you did, and talk us through this as you're showing

1 us.

2 SAMUEL: I walked over, I walked over to him, and I said,
3 "Okay, Aidan, all right"

4 REESE: Could you speak a little louder for us.

5 SAMUEL: I said, "Aidan, what is wrong with you?" I said,
6 "Stop it. Stop it." And then he just (breath sound).

7 REESE: And when you were saying, "Stop it," you were
8 shaking him.

9 SAMUEL: Yes, sir.

10 REESE: And is -- did you shaking him any harder than that
11 or lighter than that? Show me exactly how hard you shook him, if you
12 don't mind.

13 SAMUEL: I was shaking him. I was just shaking him, and
14 his head was going.

15 REESE: How long did you shake him?

16 SAMUEL: I shook him until he stopped crying.

17 REESE: Do you -- can you estimate about how long that was?

18 SAMUEL: A minute or two.

19 REESE: A minute or two.

20 SAMUEL: Yeah, just like -- "Stop it. Stop it."

21 And he was, and he was, "Nuhhhh," and then he finally
22 stopped crying. And then he's like (breath sound).

23 REESE: Did his head fall backwards or forward or any time
24 when he stopped crying?

25 SAMUEL: Forward.

1 REESE: His head fell forward. And what did you do then?

2 SAMUEL: I just kind of like, just like, "I didn't mean to
3 shake you. I just needed you to stop crying." And he was just -- and
4 I looked at him, and his stomach was still going, and his heart was
5 still beating. I could feel his little heart (indistinct). I was
6 like, Okay, he's just shocked. "I'm sorry." I was like, "I didn't
7 mean to shake you. I just needed you to stop crying. I just needed
8 you to stop crying." And I went, and I did him like this; and I went
9 over to the window, and I pulled down --

10 REESE: Okay, now tell me, now describe, when you say, "I
11 did him like this," describe what you're doing.

12 SAMUEL: I turned him over, and I put him in my arms facing
13 forward like this.

14 REESE: Okay.

15 SAMUEL: And I took him, and I pulled down the curtains,
16 and I pulled him over to the window so he could look outside and see
17 the kids was outside playing, because I've done it before. I let him
18 see outside, and he'd be all right. So I pulled down the curtain, the
19 little sheet that was up there as a curtain. I pulled it down so he
20 could see outside.

21 REESE: Do you think he saw outside, Kendra?

22 SAMUEL: No, sir.

23 REESE: And then, what did you do?

24 SAMUEL: I was like, Okay. I was like, "You're still --
25 (inaudible). I can still feel your heart beating, so I'm just, I'm

1 just gonna take you outside." And I picked up my purse, and I took him
2 outside, and I started walking.

3 REESE: Was there ever a point -- you can sit back down
4 (indistinct).

5 Was there ever a point when you realized that his heart --
6 you didn't hear the heart beating or feel any breath coming from him?

7 SAMUEL: When I got him to the park and I actually finally
8 sat down and got to the park, I noticed that his stomach wasn't moving
9 anymore.

10 REESE: Okay. Was this before the security officers
11 approached you?

12 SAMUEL: Yes, sir.

13 REESE: Okay, so by your account, then, his stomach was not
14 moving when the security officers approached you and talked to you.

15 SAMUEL: No, sir.

16 REESE: Okay.

17 SAMUEL: It was just one security guy, the community safety
18 guy.

19 REESE: All right. Now, I'm curious about the situation
20 with Jamal. Now, I need you to, I need you to understand this. Truth
21 and honesty --

22 SAMUEL: He had nothing to do with it.

23 REESE: -- is at issue.

24 SAMUEL: He didn't know.

25 REESE: Well, I'm not saying he had anything to do with

1 this.

2 SAMUEL: He didn't know.

3 REESE: Okay. And that's what I'm getting at. That's what
4 I'm trying to do.

5 SAMUEL: He didn't -- he knew absolutely nothing.

6 REESE: Okay, let's -- hear me out, now. Did you call
7 Jamal or Jamal call you?

8 SAMUEL: He called me to find out where I was because he
9 had came to visit after he got off of work.

10 REESE: And you told him where you were.

11 SAMUEL: Yes, sir. And he said, "Okay, stay there. I'm
12 gonna come get you. It looks like it's gonna rain."

13 REESE: Okay. And at some point, did he come to get you?

14 SAMUEL: Yes, sir.

15 REESE: All right. Now, you -- when he got -- picked you
16 up, I'm assuming you mean you got in his car.

17 SAMUEL: Yes.

18 REESE: You got in the front seat --

19 SAMUEL: Yes.

20 REESE: -- or the back seat?

21 SAMUEL: I got in the front seat.

22 REESE: Did Jamal look at the baby?

23 SAMUEL: He was like this. His head was -- this is
24 driver's. He was like this. His head was just here.

25 REESE: Now, you're talking about --

1 SAMUEL: Aidan.
2 REESE: -- Aidan.
3 SAMUEL: Yeah.
4 REESE: And when you say, "His head was here," describe
5 where his head was.
6 SAMUEL: It was right here on my arms and closer to my
7 chest near my armpit, like, his face was like this.
8 REESE: Okay. Are you showing us that Aidan's face was
9 facing your chest?
10 SAMUEL: Yes.
11 REESE: Was his face up against your chest?
12 SAMUEL: His nose was -- it was just slightly against my
13 chest.
14 REESE: Okay. Are you -- at this time, are you carrying on
15 a conversation with Aidan or with, with, with Jamal?
16 SAMUEL: When I got in the car, Jamal fussed at me about
17 walking in the neighborhood because he feels it's dangerous, and he's
18 like, "I don't like for you to walk in here."
19 And I said, "Okay." And that's it. And we wasn't in the
20 car long because it's a shorter ride to the, back to the house than it
21 is to walk to the park.
22 We wasn't in the car very long, and he was like -- when he
23 pulled up in front of the apartment, he said, "I want to go to
24 Anthony's. Do you want to go with me?"
25 And I said, "Okay."

1 REESE: Okay. And how long did it take y'all to get from
2 where he picked you up in the park back to the apartment?

3 SAMUEL: Three minutes.

4 REESE: Three minutes.

5 SAMUEL: Yeah, it's a shorter distance in the car than it
6 is on foot. It's very short.

7 REESE: And during that three minutes, did you mention to -
8 - first of all, let me get -- let me take you back to the park.
9 security officer approached you. Did you mention to him the
10 possibility of the child being hurt and may need some sort of medical
11 attention?

12 SAMUEL: No, I was too scared. I --

13 REESE: You was too scared.

14 SAMUEL: Yes.

15 REESE: Okay, and when you got in Jamal's car, in the
16 three-mile -- the three-minute ride from the park over to the
17 apartment, did you mention to Jamal that the child may be hurt and
18 needed some medical attention?

19 SAMUEL: I was too scared to.

20 REESE: Okay. And you didn't mention any of that. That's
21 right?

22 SAMUEL: No.

23 REESE: And when you went into the house, you still didn't
24 mention anything to anybody in the house --

25 SAMUEL: No, I was still too scared to.

1 REESE: -- because everybody was back there.

2 I understand. And you took, you took Aidan to the bedroom,
3 and you laid Aidan down.

4 SAMUEL: Yes, sir.

5 REESE: And at some point -- and at that point, you never
6 said, okay -- did you make them believe that Aidan was asleep?

7 SAMUEL: When I walked through and nobody said anything, I
8 was like, They think he's asleep. And I'm like, Good. I don't want
9 them to think that I hurt him.

10 REESE: Okay. And so you brought him into the bedroom, and
11 you laid him down.

12 SAMUEL: Yes, sir.

13 REESE: All right. And at some point -- y'all -- you
14 stayed in the house for a couple of hours before y'all left, right?

15 SAMUEL: No, a few minutes, you know, to -- a few minutes
16 to lay him down. We went to Anthony's. Then we came back, and we
17 stayed in there for a couple of hours.

18 REESE: Okay.

19 SAMUEL: And then I heard him farting that time, so I was
20 like, Okay, he's okay.

21 REESE: Okay, and at that -- but, but when you heard him
22 passing gas, you were already of the mindset that this child may have
23 been dead because his stomach wasn't moving in the park, and you were
24 getting no more movement out of him, right?

25 SAMUEL: Yes, sir.

1 REESE: So is it in your mind -- and I don't want to put
2 words in your mouth. I'm just trying to find your mindset. So is it
3 your mindset while you were in the park that because of what was going
4 on or because, in this case, what was not going on -- and I'm talking
5 about his stomach moving or him not breathing -- did you know he wasn't
6 breathing?

7 SAMUEL: Yes, sir.

8 REESE: Okay. And did you know his eyes weren't moving?

9 SAMUEL: Yes, sir.

10 REESE: Did you realize that his arms and his legs were not
11 moving?

12 SAMUEL: Yes, sir.

13 REESE: And with all that, what did -- what was your
14 conclusion?

15 SAMUEL: That he was gone.

16 REESE: That he was gone. And when you say, "He was gone,"
17 what do you mean?

18 SAMUEL: That he wasn't alive anymore.

19 REESE: That he wasn't alive anymore. And when you went --
20 when you took him to the house and you laid him down in the bed and
21 y'all went to, to Anthony's, came back, Jamal is in the house, and he's
22 eating. And at some point, you carry on a conversation with Mama out
23 there on the couch. Isn't that right?

24 SAMUEL: Yes, sir.

25 REESE: Okay. And at this time, you still didn't tell Mama

1 --

2 SAMUEL: No, sir.

3 REESE: -- because you're still scared.

4 SAMUEL: I'm still scared.

5 REESE: Okay. And later on in the night, what time is it
6 that -- because I know you and Jamal spent some time in the bedroom on
7 that air mattress that you placed on the floor.

8 SAMUEL: Yes.

9 REESE: And was -- why did you place the air mattress on
10 the floor, first of all?

11 SAMUEL: I had done it before, you know. That's not the
12 first time we've ever taken a nap in there. If there's no room in the
13 living room and there's people in there, we just put it on the floor in
14 where the crib is, and we just take a nap there.

15 REESE: And when you say "we," you're talking about you and
16 Jamal.

17 SAMUEL: Yes, sir --

18 REESE: And why --

19 SAMUEL: -- or just me by myself sometimes.

20 REESE: Okay. And have you ever slept in the room on that
21 -- took a nap on that air mattress, and Aidan is in the crib?

22 SAMUEL: Yes, sir.

23 REESE: Okay. And while you were in there on the air
24 mattress and Aidan is in the crib, did anybody ever come in that room?

25 SAMUEL: The day of or before?

1 REESE: Any time before.

2 SAMUEL: Yes. She would come in, and she would look at
3 him, and she'd look at me, or she'd throw a diaper in the diaper pail.

4 REESE: Whose suggestion was it for you and Jamal to go in
5 the room and take a nap?

6 SAMUEL: We decided together that we would go take a nap.

7 REESE: Okay. Did Jessica, Aidan's mom, ever come in the
8 room while you two were in the room on the air mattress?

9 SAMUEL: She threw a Pamper in the diaper pail.

10 REESE: Where's the diaper pail?

11 SAMUEL: Next to the crib.

12 REESE: Okay. Did she check on Aidan when she came in
13 there?

14 SAMUEL: No, she took back out.

15 REESE: All right. And so at some point, you left Jamal
16 lying on the air mattress.

17 SAMUEL: Yes, sir --

18 REESE: Did he fall asleep?

19 SAMUEL: -- after I heard him pass gas. Yes, he fell
20 asleep.

21 REESE: Okay, after you heard him pass gas.

22 SAMUEL: After I heard Aidan pass gas, I was like, Okay,
23 maybe he --

24 REESE: Okay, but at this, at this time, you -- I'm sorry.
25 What were you about to say?

1 SAMUEL: I was like, Okay, maybe he wasn't gone. Maybe he
2 is okay. He's passing gas.

3 REESE: Okay. So you thought maybe he's okay then.

4 SAMUEL: Yes.

5 REESE: All right. When you thought he was okay because
6 you thought he was -- you heard him pass gas, did you think that he was
7 okay enough at that point for you not to seek medical attention for him.
8 at this time?

9 SAMUEL: Yes, sir.

10 REESE: Well, given that --

11 SAMUEL: I didn't want to alarm his mom, so I was like,
12 Okay, he's passing gas. And it kind of --

13 REESE: But given the, given the circumstances of him being
14 in the park at one, 95-degree heat; two, not breathing; three, limbs,
15 legs, arms not moving; four, head rocked back, no more motor skills
16 whatsoever; five, eyes open or halfway shut, partially shut as you put
17 it, did that not send a red flag up to you that maybe, even if you
18 thought you heard him pass gas, that now is the time? Let's get the
19 paramedics over here to check him out?

20 SAMUEL: I was too scared to say that I shook him before,
21 so I just felt he was all right. When I heard him pass gas, I was
22 like, then there's no need to tell that I shook him, because I never
23 meant to shake him. I've never done that before to anybody's child nor
24 anybody else.

25 REESE: Okay. And when you came back out, you sat on the

1 couch with Mama, with Jessica --

2 SAMUEL: And I was talking to her.

3 REESE: -- for a little while. And what did y'all talk
4 about?

5 SAMUEL: We talked about finding new daycares, getting new
6 jobs, you know. She always wanted to be out of the hood. She hated
7 being on the system. And I told her I would help out in any way I
8 could. I told her I -- if she needed me to, I'd be the provider for
9 the kids. DSS could pay me to watch them. And that's what we talked
10 about.

11 REESE: And you talked about finding new daycare for --

12 SAMUEL: Both of the children.

13 REESE: Meaning Jamal -- Jermaine and Aidan.

14 SAMUEL: And Aidan.

15 REESE: And you also talked about at some point being the
16 caregiver for this child --

17 SAMUEL: Yes, about taking care of both of them.

18 REESE: -- under the auspices of DSS.

19 SAMUEL: Yeah, because there's this thing, if you want your
20 kids to be taken care of with anybody other than the daycare, the
21 voucher can go to that person. She was like, "I'm not gonna do it,
22 Kendra, because it's only gonna be \$35 a week for you. Let me see if I
23 can find somebody else to do it."

24 And I said, "Okay."

25 REESE: Okay. Now, so basically, you're talking about a

1 future with --

2 SAMUEL: Both children.

3 REESE: -- Jessica and the children.

4 SAMUEL: Yes, sir.

5 REESE: You're talking about being in their lives.

6 SAMUEL: Yes, sir.

7 REESE: At any point during this time, did you say to

8 Jessica, "Oh, by the way, Aidan might need some help. If we're talking

9 about a future, let's see whether this child's gonna be around for the

10 future." Did that not cross through your mind at all?

11 SAMUEL: I just knew he was gonna be there because he

12 farted, and I was like, Okay, he's got to be okay. He farted. He's

13 all right. I'm gonna make sure that I do everything in my power to,

14 you know, to never do that again, and I'm just gonna make sure his

15 future and him and his brother are going to be okay if I have anything

16 to do with it.

17 REESE: All right. Okay. And so at some point, you went

18 back around in the room with Jamal.

19 SAMUEL: Yes.

20 REESE: Did y'all lay down again? Did you lay down again?

21 SAMUEL: For a few seconds, and then we got up real quick.

22 I just got down there enough just to tell him that, you know, you know,

23 you've been asleep for a minute.

24 He was like --

25 REESE: did you turn the light on?

1 SAMUEL: We turned the light on after we pulled the
2 mattress up. And before we left, I wanted to -- there's a basket right
3 there near the door. I wanted to grab something out of it real quick.
4 and turn it off real quick. I didn't want to leave it on too long.
5 REESE: Okay.
6 SAMUEL: I didn't want to wake him up.
7 REESE: So you turned the light on, right?
8 SAMUEL: Yes, sir.
9 REESE: And when you turned the light on, did you go over
10 there to check on him then?
11 SAMUEL: No, sir.
12 REESE: NOT --
13 SAMUEL: No, sir.
14 REESE: All right.
15 SAMUEL: I didn't want to go bother him.
16 REESE: But you, but you, okay, but you mentioned to Jamal
17 at some point -- and I know that you did -- Jamal you are trying to
18 protect because you think --
19 SAMUEL: NO.
20 REESE: -- you pulled him in this -- hear me out -- because
21 you think you pulled him into this. But some of the very same things
22 that you have said to us today -- and I notice in your statement some
23 of the same things you've said to Investigator Thomas and Agent
24 Shockley -- were some of the very same things that Jamal said to us.
25 So you mentioned to Jamal -- Jamal knew what was going on,

1 didn't he?

2 SAMUEL: NO.

3 REESE: And in fact about it, Jamal is trying to keep you
4 out of trouble. He's trying to protect you, isn't he?

5 SAMUEL: I swear he did not know anything about Aidan. He
6 knew nothing about Aidan. He knew nothing. I was the only one, the
7 sole one who knew about Aidan. That's it. I'm not trying to protect
8 him. He's not trying to protect me. I was the only one who knew about
9 Aidan.

10 REESE: Okay.

11 SAMUEL: That's it. That's it. He only -- Jamal only goes
12 blow-by-blow of what he knows because that's all he knew from that
13 point is when he came to pick me up. That's it. He didn't know
14 anything about Aidan being in the position he was when he picked me up
15 or how he was. He knew nothing. He just thought Aidan was fine. He
16 was placed in a crib. We took a nap underneath him. This was -- this
17 has nothing to do with him. It's just me. It's just me being too
18 scared to tell Jessica that I shook her baby.

19 REESE: Then I've got one final question for you. Does
20 anybody else in the whole scheme of things, in this, in this whole
21 equation -- Jessica, Jamal, Jermaine, grandmamma -- does anybody else
22 bear responsibility for the death of Aidan other than you?

23 SAMUEL: NO, sir.

24 REESE: Thank you.

25 Y'all got anymore questions y'all need to ask?

1 HURT: Mm-mm.

2 THOMAS: NO.

3 REESE: All right.

4 At this time, we're going to end the interview --

5 I'm sorry. Kendra, do you have anything else you wanted to
6 say?

7 SAMUEL: Yes, sir. I'm so sorry I shook him. I was too
8 scared to say anything to anybody. I had never done that before, you
9 know. I had never shaken anybody's kid before. That was -- it was new
10 to me. It shocked me when I did it. I'd never done anything to hurt
11 anybody. A 4.0 student. This is the first time I've ever been in
12 trouble with anything. I would never do anything to intentionally hurt
13 anybody.

14 REESE: Okay.

15 SAMUEL: I don't want to jail for something I did
16 accidentally out of frustration. I didn't do it to hurt him. I didn't
17 mean to hurt him. I was too scared to tell anybody what was going on,
18 too scared. I'd never been in this situation where I had to be in any
19 of this, and I was too scared and didn't know how to react in any of
20 this situation.

21 REESE: Okay. Is there anything else?

22 SAMUEL: Yes, sir.

23 REESE: What? I mean, is there anything else you want to
24 say?

25 SAMUEL: Not pertaining to the case. NO, sir.

1 REESE: Okay. Anything else you want to say at all?
2 SAMUEL: Yes, sir.
3 REESE: Okay; what?
4 SAMUEL: I'm sorry that I didn't tell you guys at the
5 beginning. I was just too scared to say anything.
6 REESE: Okay. I understand.
7 We'll end the interview with Jessica (sic) now, and the
8 time is 5:17.
9 --- end of audio file ---
10 --- end of transcript ---
11
12

CERTIFICATE OF TRANSCRIPTIONIST

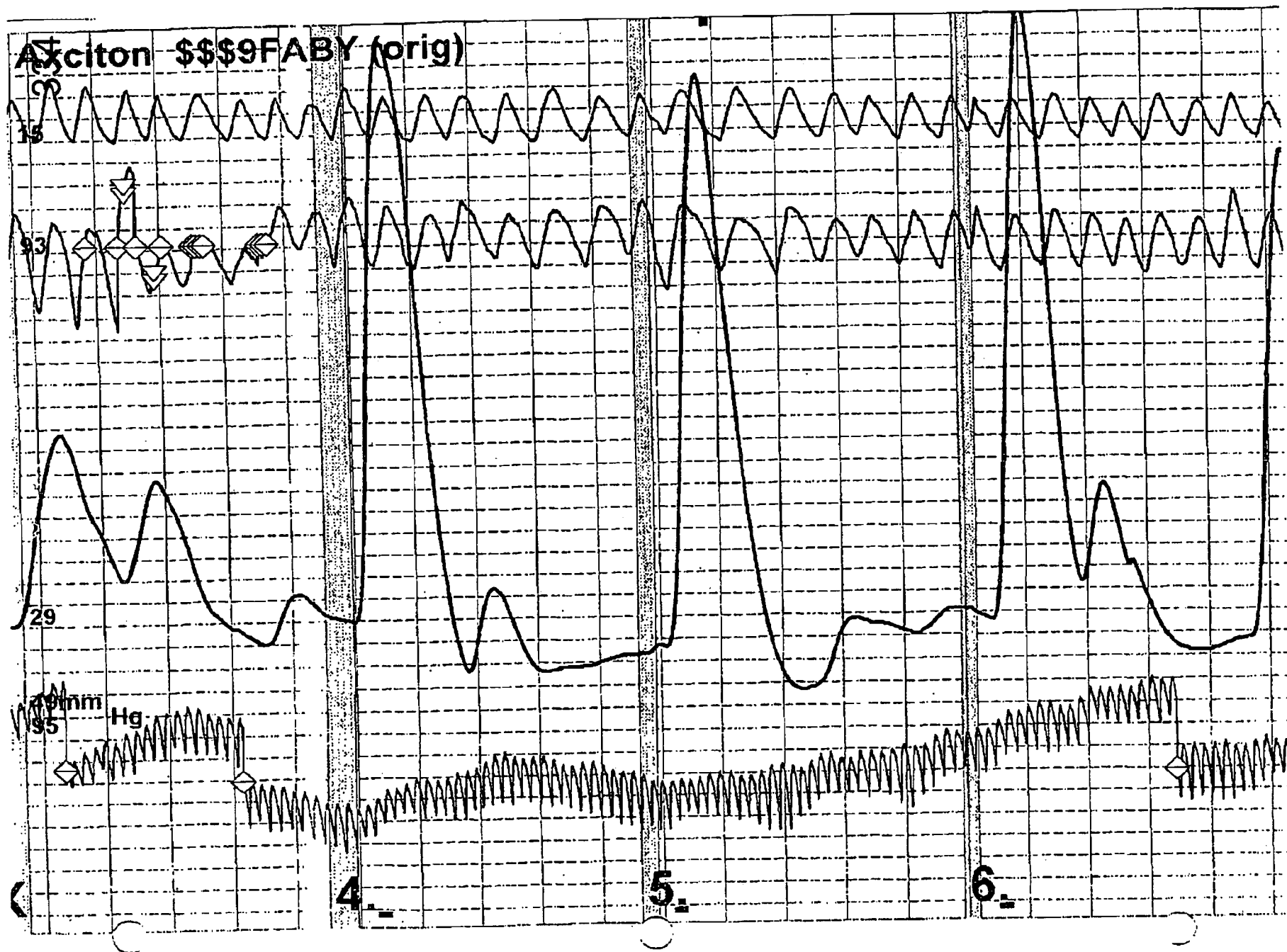
I, Carroll Anne Boutahar, do hereby certify:

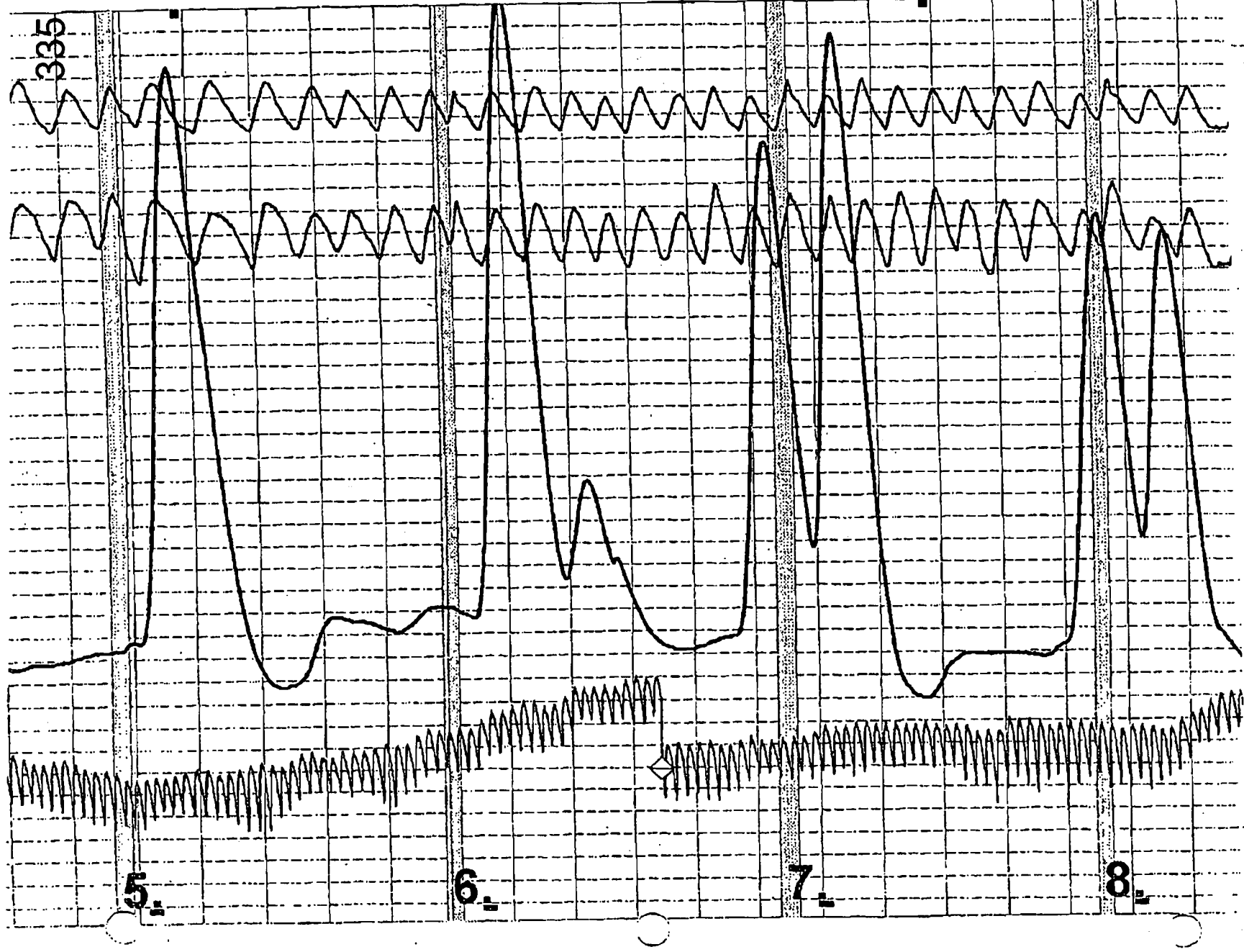
That the foregoing audio files entitled "01 Track 1," "02 Track 2," and "08-24408 Samuel Interview" were transcribed; that the foregoing transcript as typed is a true, accurate and complete record of the audio files to the best of my ability under the prevailing circumstances.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

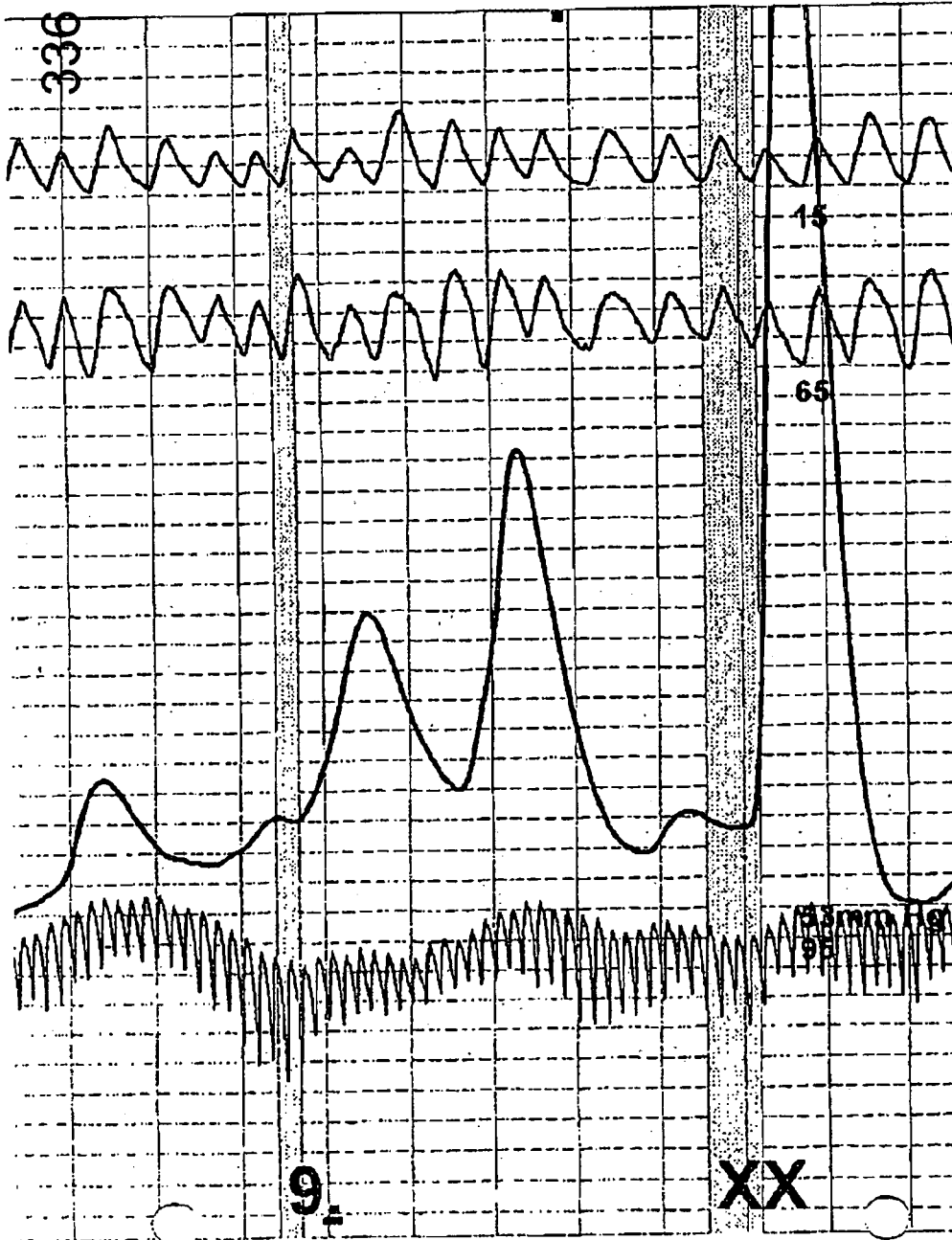
Carroll Anne Boutahar
April 22, 2009 .

- X Please remain still, the test is about to begin.
- I1 Is your name Kendra Samuel?
- SR2 Regarding whether or not you hurt that child, do you intend to answer each question truthfully?
- C3 Before July, did you ever say anything to hurt someone's feelings?
- R4 Do you know how that child was hurt?
- C5 Before last month, did you ever hurt anyone?
- R6 Did you do anything to hurt that child?
- C7 Prior to July 2008, did you ever hurt someone because you were angry?
- R8 Do you know who hurt that child?
- C9 Before July, did you ever hurt someone you cared for?
- XX The test is now over, please remain still while I close out the instrument.
- 1A Are you now in SC?
- 1B Is this the month of August?





Harpoonian 0805



Session : \$\$\$9FABY

Chart : 1

Examinee :
Samuel, Kendra

Examiner :
Gray, Joe R. Jr.

Date/Time :
Start : 11:48:09 08/06/2008
Stop : 11:51:33 08/06/2008

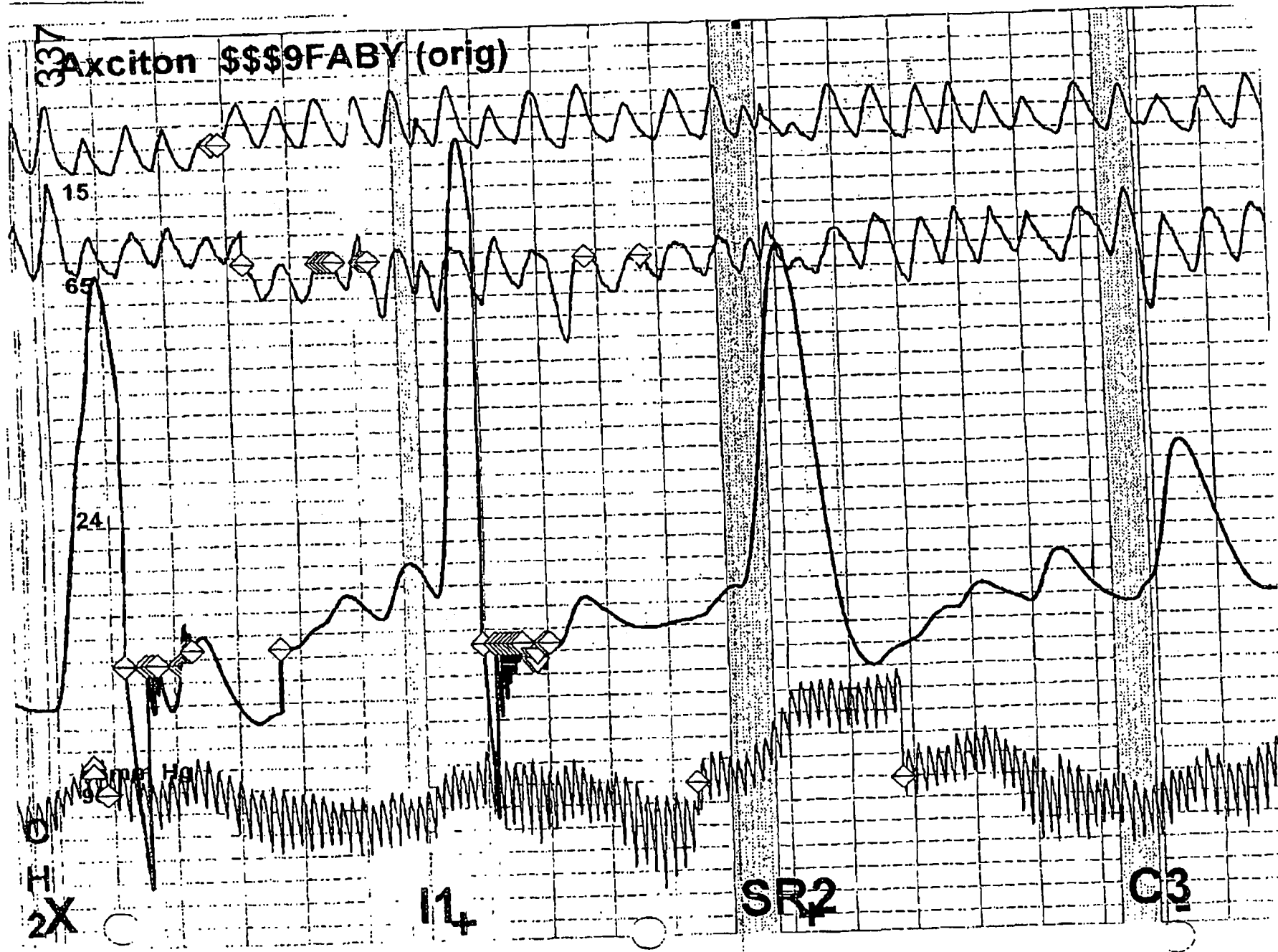
Duration : 00:03:24

Status : (orig)

Channels (Start Stop)

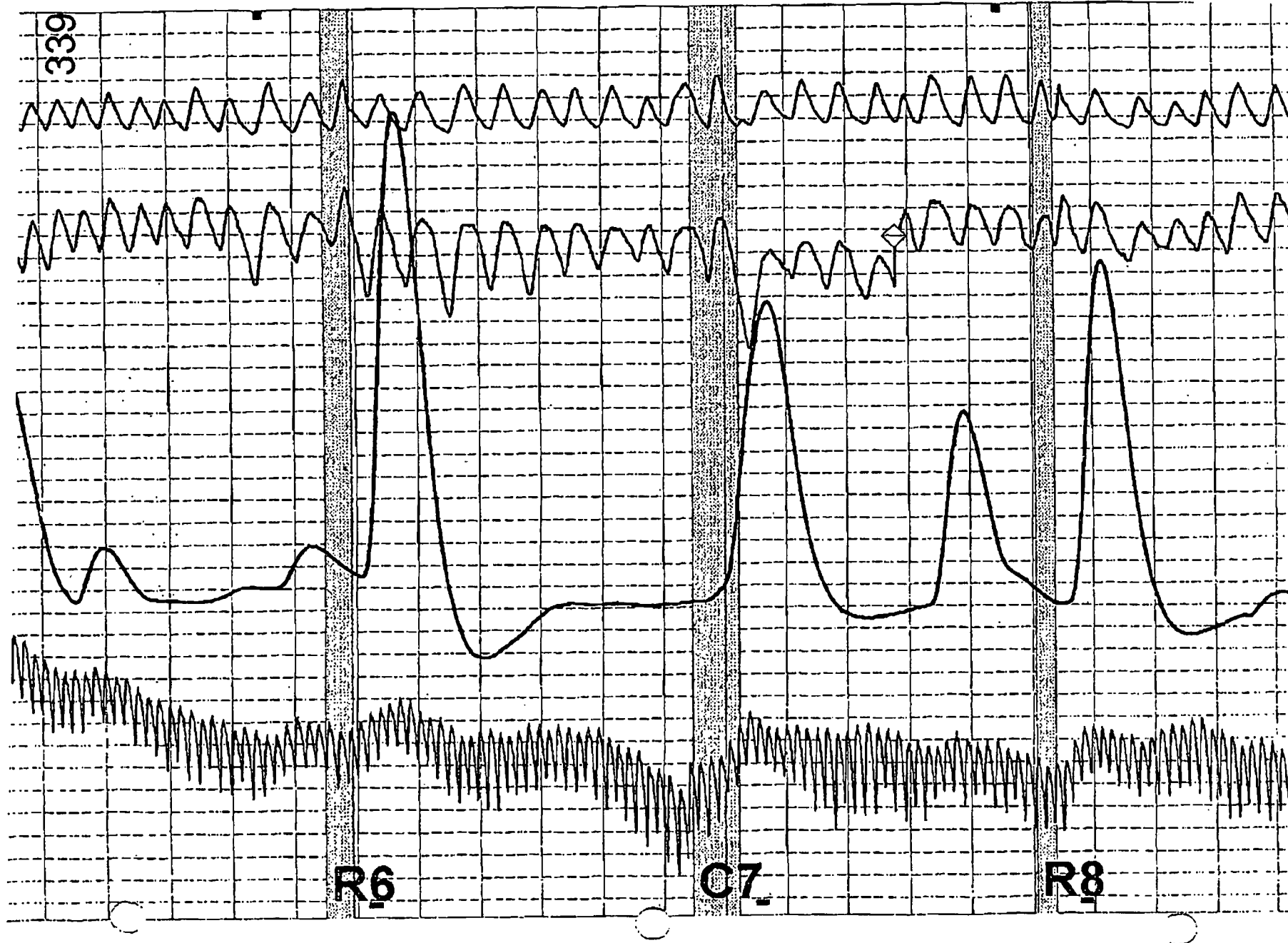
P1	15	15
P2	93	65
BP	95	95
SC	29	29

mm Hg 49 53



Harpootian 0807





Harpoonian 0809



Session : \$\$\$9FABY

Chart : 2

Examinee :
Samuel, Kendra

Examiner :
Gray, Joe R. Jr.

Date/Time :
Start : 11:53:32 08/06/2008
Stop : 11:58:48 08/06/2008

Duration : 00:05:16

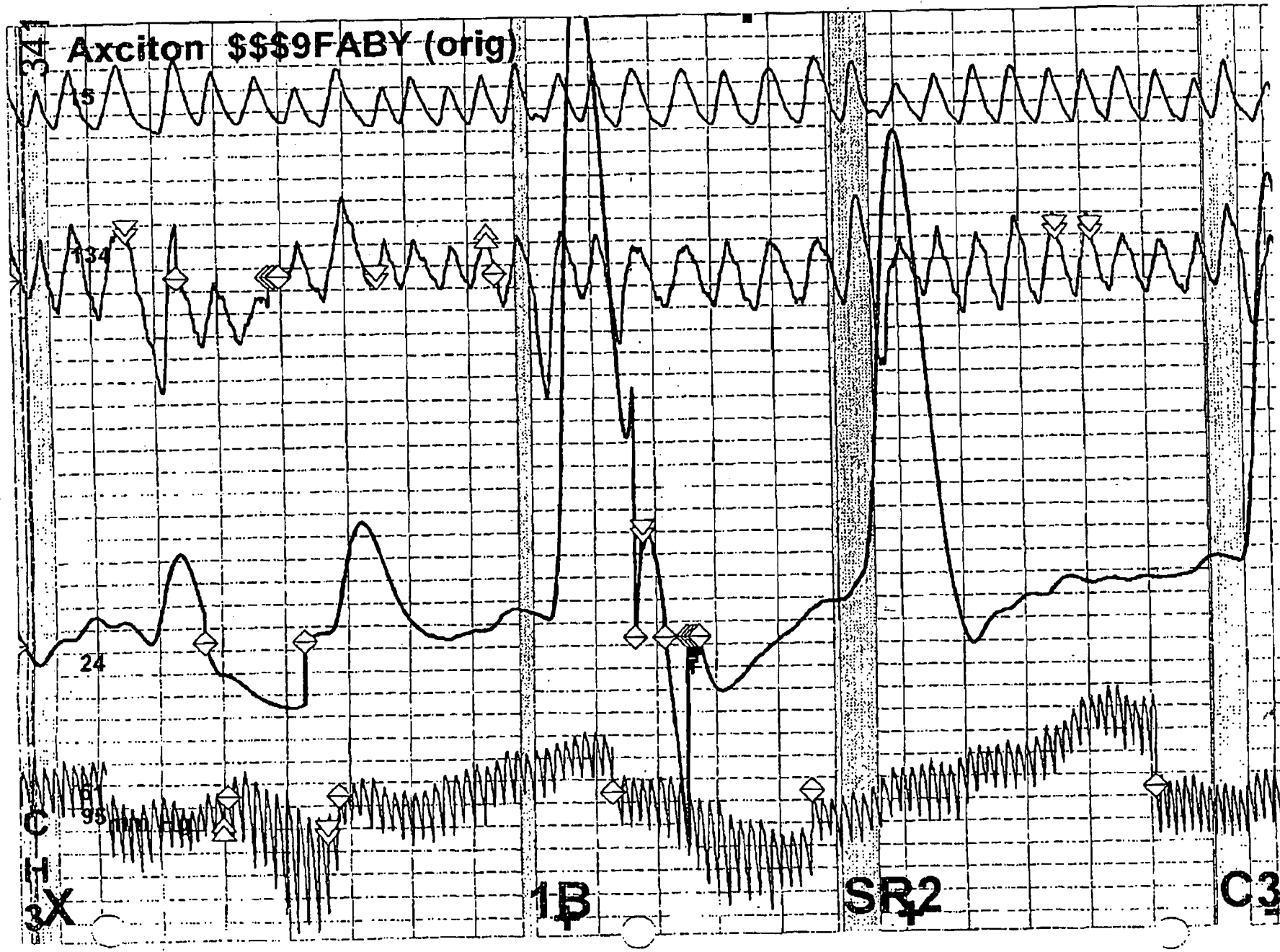
Status : (orig)

Channels (Start Stop)

P1	15	15
P2	65	65
BP	95	114
SC	24	17

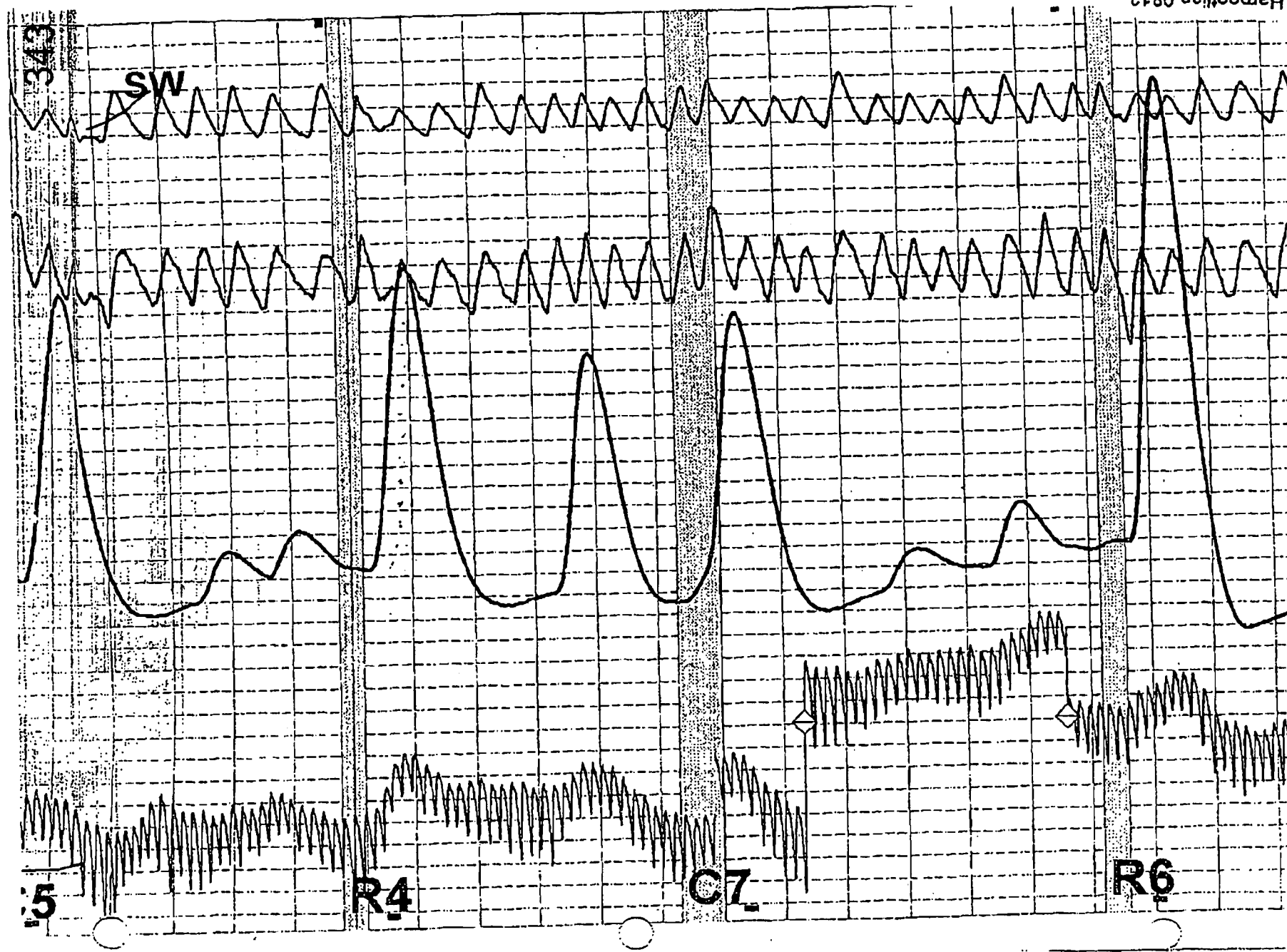
mm Hg 46 46

Harpoottian 0810



Harpootlian 0811







Session : \$\$\$9FABY

Chart : 3

Examinee :
Samuel, Kendra

Examiner :
Gray, Joe R. Jr.

Date/Time :
Start : 12:03:25 08/06/2008
Stop : 12:08:43 08/06/2008

Duration : 00:05:18

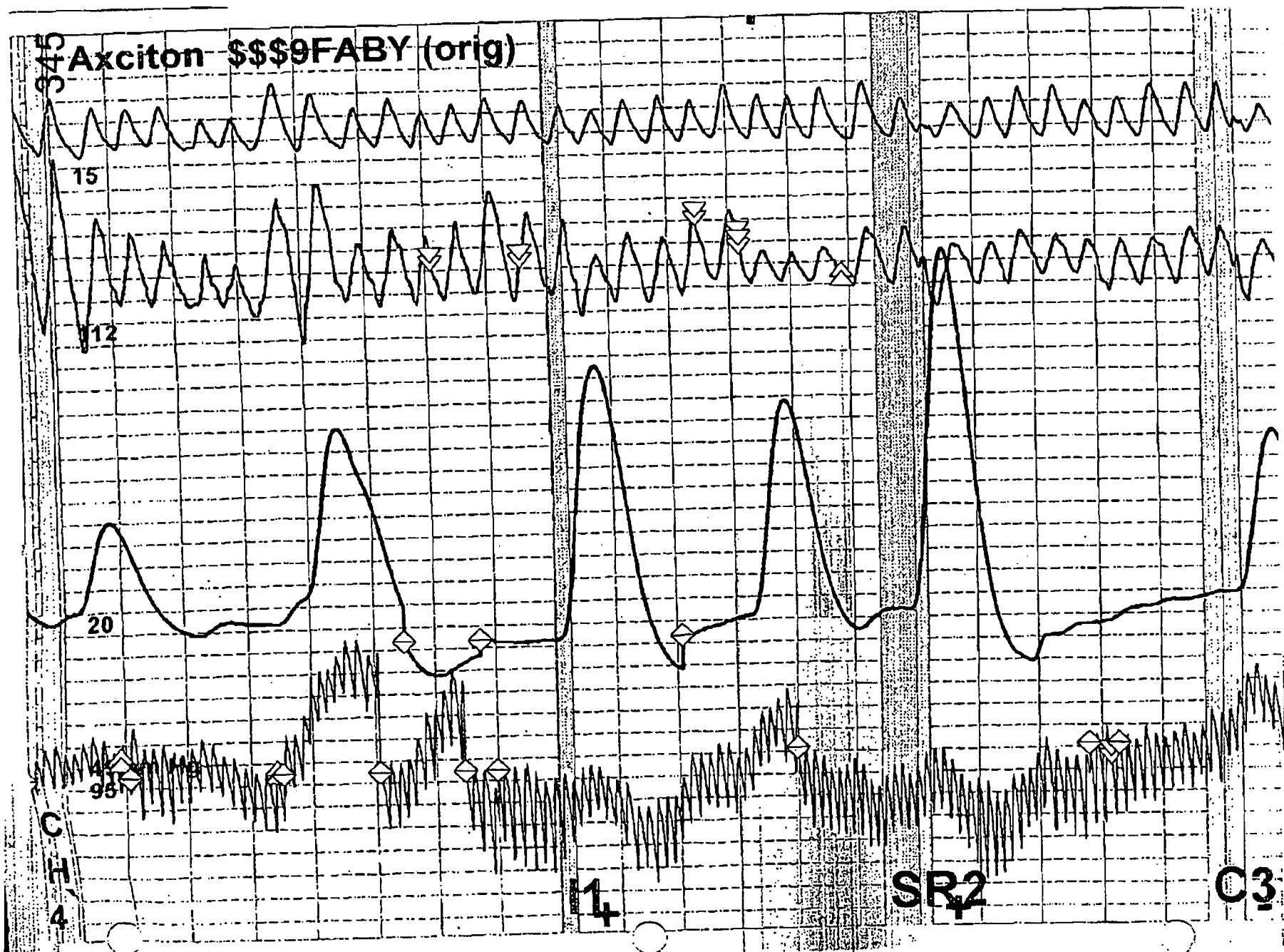
Status : (orig)

Channels (Start Stop)

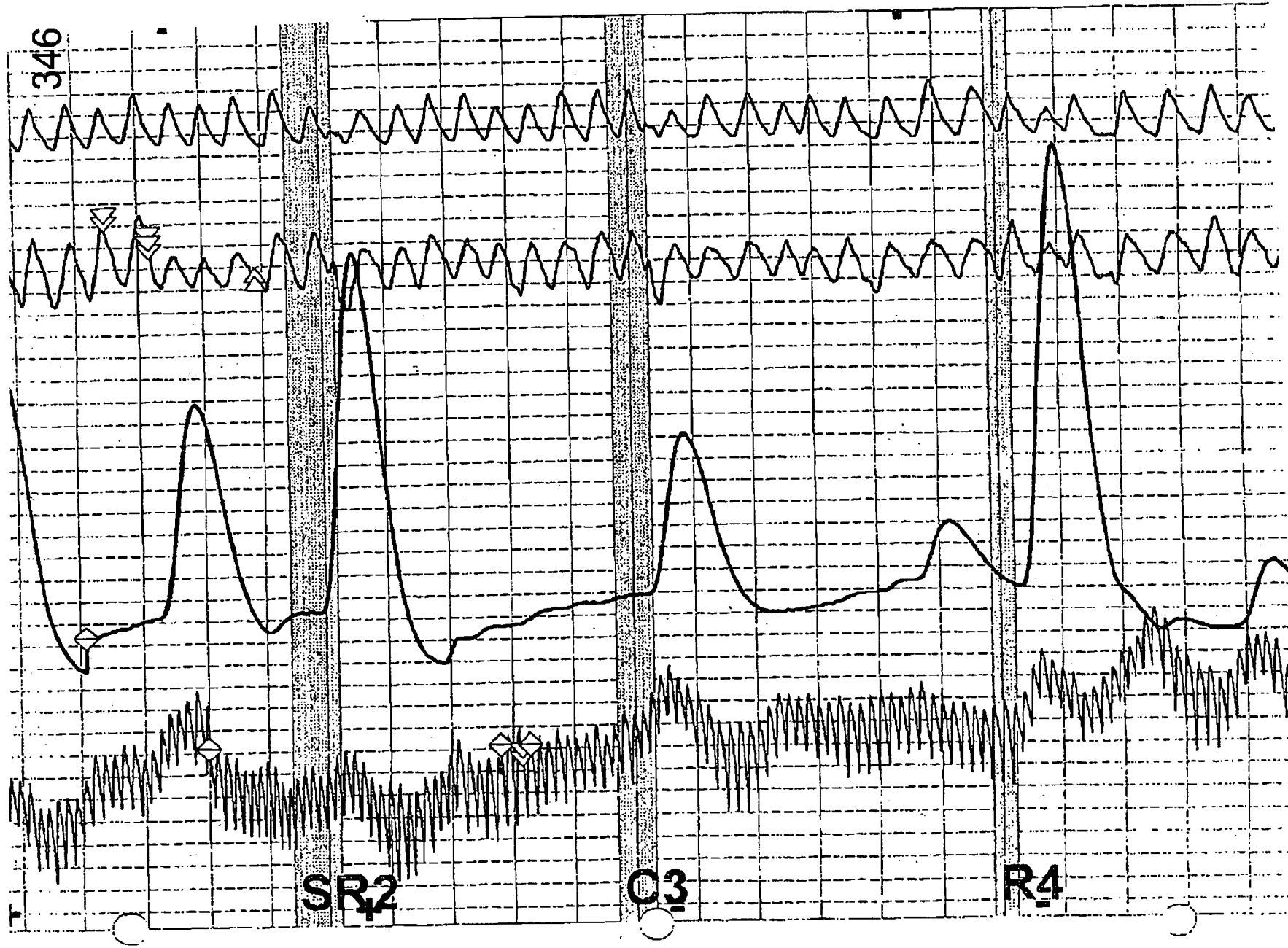
P1	15	15
P2	134	78
BP	95	95
SC	24	20

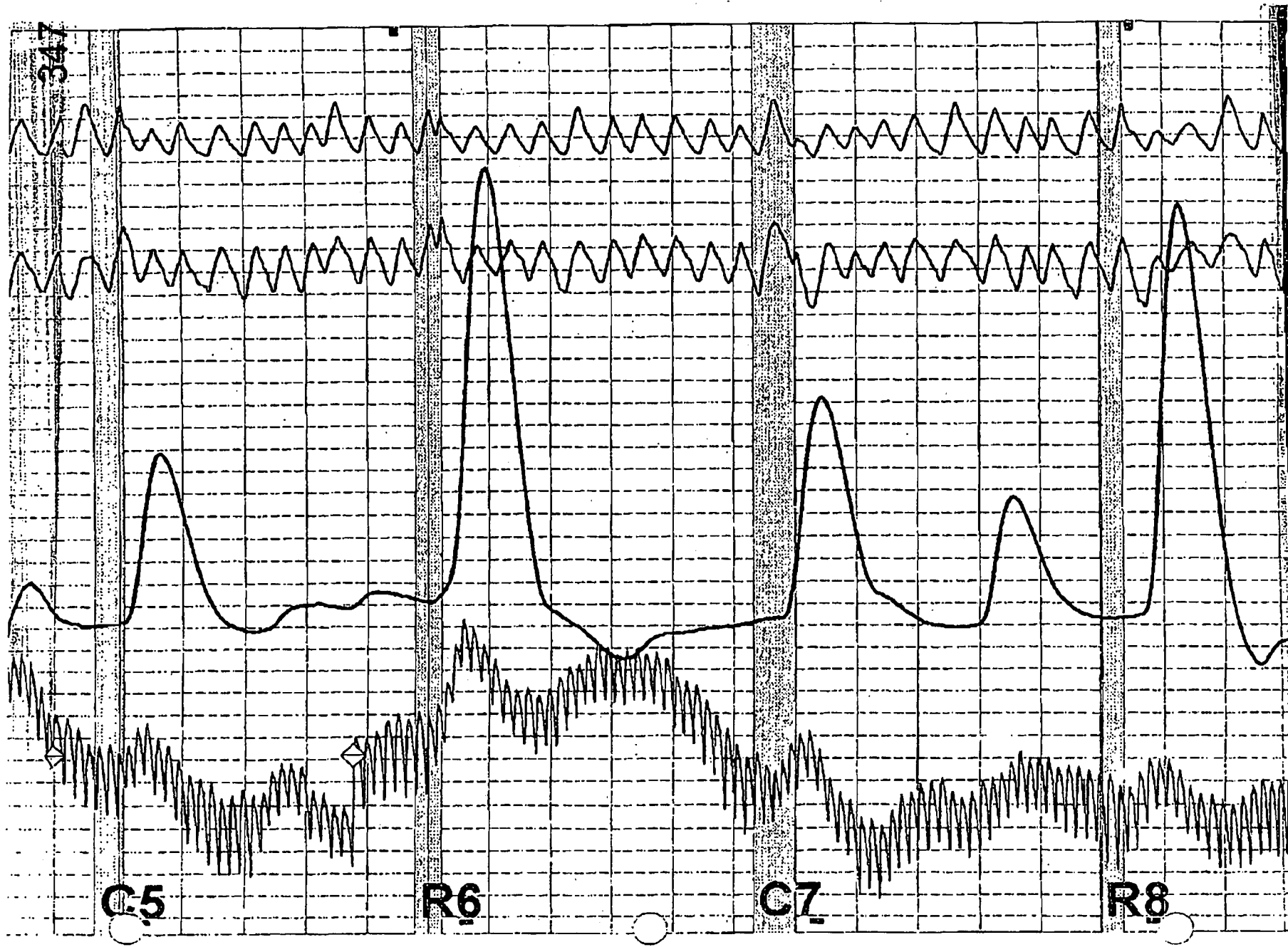
mm Hg 51 50

Harpootlian 0814



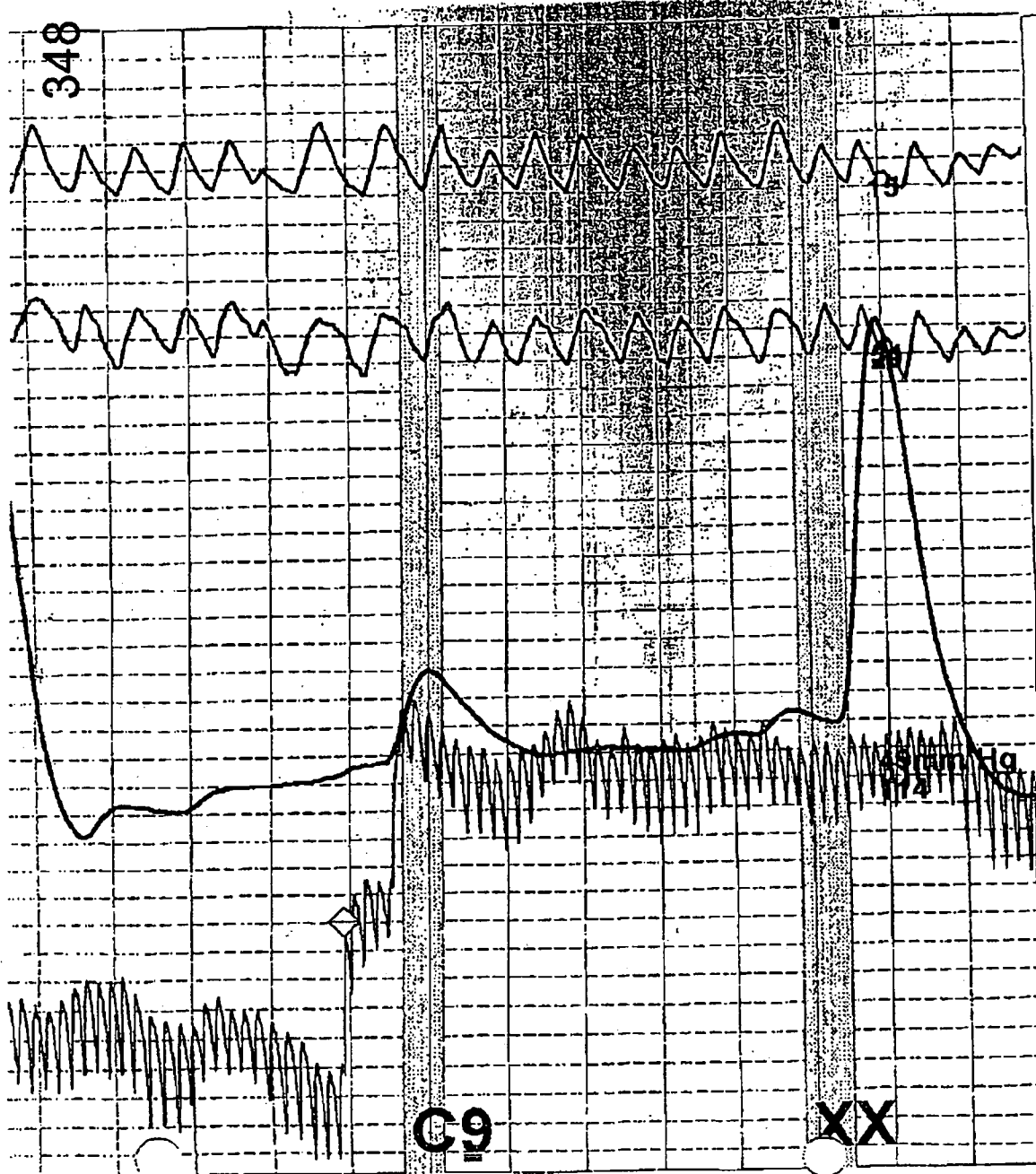
Harpoottian 0815





Harpootlian 0817

348



Session : \$\$\$9FABY

Chart : 4

Examinee :
Samuel, KendraExaminer :
Gray, Joe R. Jr.Date/Time :
Start : 12:10:52 08/06/2008
Stop : 12:16:04 08/06/2008

Duration : 00:05:12

Status : (orig)

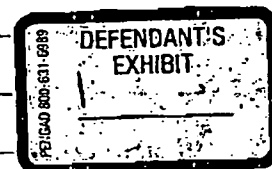
Channels (Start Stop)

P1	15	15
P2	112	54
BP	95	114
SC	20	20

mm Hg 49 49

Harpoonian 0818

31	Final Kendrick Boy died
Jessica - mother	
Kendra - baby sister	
11:30 - Fall Rigor	
6? - Rigor	
	Rectum - Hemorrhage
	Front - ^{cupule} of ^{foam} death
Type of Injury	Subdural & Injury
Shaking?	
Dropped?	4:30 child picked up
	Child at Day & C.
Jessica Home	@ Home child normal
4:55	Child normal until 1
Left of G. mother	Kendra recovered
5:30	Very Active
5:30-7:00 Kendra	Prior to Kendra
alone w/ Baby	
Mother arrived Home - 6:50	
Kendra & child not Home	
5-10 minutes later found looking for Kendra	



7:00 - Kendra arrived
 Held baby close to body.
 Kendra said baby asleep.
 Wides dresser when she left
 upon arrival child in deeper
 no movement or crying of
 baby upon arrival -
 - Baby was breathing.

8 - Mother > Kendra took
 baby to bedroom & said she
 would come back.

Final picture of Kendra from
 park - no movement.
 - Officer saw to 3 parks
 holding baby -
 seeing small child leg
 hanging -

① P.D. Kendra came back 2
 Kendra saw top of some
 cones back of road.
 - saw into room of road.
 Kendra came out 2 hours later.

Samuel said Kendra only
 stayed in room for 10
 minutes then she left &
 took up mother.

Nesting - baby 2-3 hours
 if fed.

After K. & L. left. mother
 checked baby called Kendra
 then 7/10

Not Kendra - Took
 child out of air conditioning
 apartment to 75° outside
 temperature.

ARREST WARRANT

K- 358151

STATE OF SOUTH CAROLINA

County/ ☒ Municipality of
COLUMBIATHE STATE
against

KENDRA P. SAMUEL

Address: #1 GRANARY CT
COLUMBIA SC 29202

Phone: _____ SSN: _____
 Sex: F Race: B Height: 5'06 Weight: 140
 DL State: _____ DL#: _____
 DOB: 08/01/1987 Agency ORI#: SC0400100
 Prosecuting Agency: CITY OF COLUMBIA
 Prosecuting Officer: REESE INV K E/ W BRYANT
 Offense: HOMICIDE BY CHILD ABUSE
 Offense Code: MAC
 Code/Ordinance Sec: 16-3-85

This Warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☒ Municipality of
 COLUMBIA. The accused
 is to be arrested and brought before me to be
 dealt with according to law.

 Signature of Judge (L.S.)

Date: _____

RETURN

A copy of this arrest warrant was delivered to
defendant Kendra P. Samuel

on 8/31/2008
 Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

CITY OF COLUMBIA
 MUNICIPAL COURT
 P.O. BOX 644
 COLUMBIA, SC 29202

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
 COLUMBIA

AFFIDAVIT

Form Approved by
 S.C. Attorney General
 April 21, 2003
 SCCA 618

Personally appeared before me the affiant INV. K. E. REESE who
 being duly sworn deposes and says that defendant KENDRA P. SAMUEL
 did within this county and state on 07/31/2008 violate the criminal laws of the
 State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of COLUMBIA)
 in the following particulars:
 DESCRIPTION OF OFFENSE: HOMICIDE BY CHILD ABUSE 16-3-85

I further state that there is probable cause to believe that the defendant named above did commit
 the crime set forth and that probable cause is based on the following facts:

ON 07/31/08 RICHLAND CTY EMT WORKERS RESPONDED TO 2131 SLIGHS AVE
 IN THE CITY LIMITS OF COLUMBIA, SC WHILE THERE THEY WERE TOLD BY
 JESSICA DAVIS, MOTHER OF THE VICTIM 2 1/2 MONTH OLD AIDEN HARLING
 THAT SHE HAD FOUND HER CHILD NOT BREATHING AND UNRESPONSIVE. THE
 VICTIM WAS TRANSPORTED TO PALMETTO RICHLAND HOSPITAL WHERE HE WAS
 PRONOUNCED DEAD. A SUBSEQUENT AUTOPSY REVEALED THE VICTIM DIED AS
 RESULT OF SHAKEN BABY SYNDROME. ON 08/06/08 THE DEF. AFTER BEING AD
 VISED OF HER RIGHTS GAVE A CONFESSION STATEMENT THAT ON 07/31/08

Signature of Affiant

Affiant's Address

COLUMBIA, SC 29201

Affiant's Telephone

5453000

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of
 COLUMBIA

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that
 on 07/31/2008 defendant KENDRA P. SAMUEL
 did violate the criminal laws of the State of South Carolina (or ordinance of

☐ County/ ☒ Municipality of COLUMBIA) as set forth below:

DESCRIPTION OF OFFENSE: HOMICIDE BY CHILD ABUSE 16-3-85

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
 defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to
 the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me

on 08/31/2008

Signature of Judge (L.S.)

Judge Code: 16303

Judge's Address

MUNICIPAL COURT, P.O. BOX 644, 29202

Judge's Telephone

Issuing Court:

☐ Magistrate☒ Municipal☐ Circuit

ORIGINAL

BAIL set by

Judge CHILDS

on Aug 14, 2008

Type and Amount: DENIED

Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____

on _____

Defense Attorney: _____

Decision: _____

DISPOSITION before

Judge _____

on _____

by _____

(indicate jury trial, bench trial, plea, not, pros., etc.)

Disposition: _____

Sentence: _____

JURORS

WITNESSES

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

Name: _____

Address: _____

Telephone: _____

CODEFENDANTS

354

WITNESSES

(S) Inv. Kevin Reese - CPD

✓ (s) INV A L THOMAS CPD

ARREST WARRANT NUMBER

K-358151

ACTION OF GRAND JURY
TRUE BILL

Foreperson of Grand Jury
Date:

SEP 19 2008

VERDICT

Foreperson of Petit Jury
Date:

DOCKET NO. 2008-GS-40-7372

The State of South Carolina

County of Richland

42

COURT OF GENERAL SESSIONS

SEPTEMBER TERM 2008

THE STATE
vs.

KENDRA P. SAMUEL

Indictment for
HOMICIDE BY CHILD ABUSE

SC Code: 16-3-85(A)(1)(B)(1)

CDR Code: 2356

Class: FEL/(EX)(V)

After being fully advised as to my
legal rights, I hereby waive presentment
to the Grand Jury.

Defendant

I
hereby appear in my own proper person and plead
guilty to the within indictment or to

Defendant

Witness:

C.C.C. PLS. AND G.S.

356

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

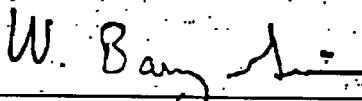
INDICTMENT

At a Court of General Sessions, convened on September 17, 2008, the Grand Jurors of Richland County present upon their oath:

HOMICIDE BY CHILD ABUSE

That KENDRA P. SAMUEL did in Richland County on or about July 31, 2008, cause the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life, in violation of §16-3-85(A)(1)B(1) of the *South Carolina Code of Laws*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


WARREN B. GIESE, SOLICITOR

356

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM RICHLAND COUNTY
Court of General Sessions
G. Thomas Cooper, Circuit Court Judge**

Case No. 2008-GS-40-07372

The State,

Appellant.

v.

Kendra Samuel,

Respondent,

RECEIVED
DEC 01 2010
SC Court of Appeals

NOTICE OF APPEAL

The State of South Carolina appeals the order of the Honorable G. Thomas Cooper issued on November 30, 2010, which granted the respondent's motion to suppress statement(s) given by the respondent. The State contends that suppression substantially impairs the State's ability to prosecute this case.

November 30, 2010



**Kathryn Luck Campbell (Bar #13009)
Senior Assistant Solicitor
Fifth Judicial Circuit
1701 Main Street
Columbia, South Carolina 29201
803-576-1800
Attorney for Appellant**

Other Counsel of Record:

357

Richard Harpootlian
PO Box 1090
Columbia, South Carolina 29202
803-252-4848
Attorney for Respondent

PS-358 8/10
PM-12/8/10

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED
DEC 08 2010
SC Court of Appeals

Case No. 2008-GS-40-07372

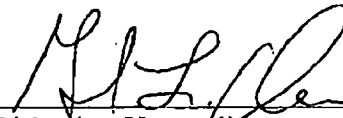
State of South Carolina..... Appellant/Respondent,

vs.

Kendra Samuel..... Respondent/Appellant.

NOTICE OF CROSS-APPEAL

Respondent/Appellant Kendra Samuel notices the appeal of the order of Circuit Court Judge G. Thomas Cooper, Jr. denying the Respondent/Appellant's motion to exclude various statements made to law enforcement. The order giving rise to this ruling was issued on November 30, 2010 and has not yet been reduced to writing. Respondent/Appellant received the State's notice of appeal on similar issues in this case on December 1, 2010 and, as a result, this notice is filed within the parameters of Rule 203(c), SCACR.


Richard A. Harpoottlian
Graham L. Newman
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street

359

Post Office Box 1090
Columbia, South Carolina 29202
Telephone (803) 252-4848
Facsimile (803) 252-4810

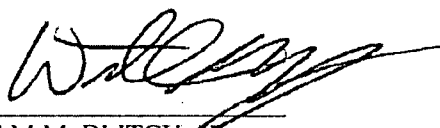
ATTORNEYS FOR RESPONDENT/APPELLANT

Other Counsel of Record:

Kathryn Luck Campbell
Daniel R. Goldberg
Dolly Justice Garfield
Fifth Circuit Solicitor's Office
1701 Main Street
Columbia, South Carolina 29201
(803) 576-1800

CERTIFICATE OF COUNSEL

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By: 

WILLIAM M. BLITCH, JR.
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR APPELLANT/RESPONDENT

April 30, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

THE STATE,

Appellant/Respondent,

vs.

KENDRA SAMUEL,

Respondent/Appellant.

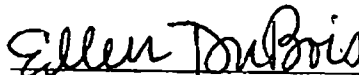
PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Record on Appeal on Respondent/Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Richard A. Harpootlian, Esquire
Graham L. Newman, Esquire
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848

I further certify that all parties required by Rule to be served have been served.

This 30th day of April, 2012.


ELLEN DUBOIS
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2008-GS-40-07372

State of South Carolina.....Appellant/Respondent,

vs.

Kendra Samuel.....Respondent/Appellant.

APPELLANT'S FINAL BRIEF OF RESPONDENT/APPELLANT

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ATTORNEYS FOR RESPONDENT/APPELLANT

RECEIVED
MAY 21 2012
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2008-GS-40-07372

State of South Carolina.....Appellant/Respondent,

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Kendra Samuel.....Respondent/Appellant.

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ATTORNEYS FOR RESPONDENT/APPELLANT

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TABLE OF AUTHORITIES

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<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602 (1966).....	<i>passim</i>
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<u>United States v. Helmelt</u> , 769 F.2d 1306 (8th Cir. 1985).....	8
<u>U.S. v. Patane</u> , 542 U.S. 630, 639, 124 S.Ct. 2620, 2627 (2004).....	6

Other State cases

<u>State v. Bradshaw</u> , 457 S.E.2d 456 (W. Va. 1995).....	<i>passim</i>

STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court err in failing to suppress statements given to law enforcement when the Respondent/Appellant was not advised of her *Miranda* rights subsequent to being taken into custody?**

STATEMENT OF THE CASE

On August 6, 2008, the Richland County Sheriff's Department arrested and charged twenty-one year old Kendra Samuel with Homicide by Child Abuse. (R. pp. 352-53). The allegations stemmed from the July 31, 2008 death of two month old Aiden Harling. (R. pp. 352-53). The Richland County Grand Jury indicted Samuel with this offense on September 19, 2008. (R. pp. 354-55).

Prior to trial, Samuel moved to exclude five statements given to law enforcement from admission into evidence and submitted a memorandum of law in support thereof. (R. p. 199; pp. 200-12). The State of South Carolina called Samuel's case to trial on November 29, 2010. (R. p. 5, lines 6-8). After drawing the jury, the trial court considered Samuel's motion to exclude statements to law enforcement. (R. p. 18).

Following extensive pre-trial testimony, the trial court ruled upon the pending motion, granting Samuel's motion to exclude as to one statement but denying the motion as to the four remaining statements. (R. p. 183, line 8-p. 189, line 11). Rather than proceeding with trial, the State opted to suspend its prosecution pending an appeal of the trial court's exclusion from evidence of one statement. (R. p. 191, lines 3-20).

The State's Notice of Appeal as to the one excluded statement was filed on December 1, 2010. (R. pp. 356-57). Samuel filed her Notice of Cross-Appeal as to the four statements allowed into evidence on December 8, 2010. (R. pp. 358-59).

STATEMENT OF FACTS

The central allegations of the present case—which have yet to be tried to a jury—are that on July 31, 2008 the Respondent/Appellant caused or contributed to the death of Aiden Harling, the infant child of her roommate. In the days subsequent to the child's death, Samuel, Harling's mother, and numerous other witnesses cooperated with the investigation of the City of Columbia Police Department. (R. p. 70, line 14-p. 72 line 25; p. 104, line 5-p. 106, line 25).

On the morning of August 6, 2008, Kendra Samuel voluntarily traveled to the City of Columbia Police Department to discuss with authorities the circumstances of Aiden Harling's death. (R. p. 24, lines 8-18). Samuel was met at the Department by Investigator Joe Gray who informed her that he wished to perform a polygraph examination upon her, explained the different steps of the polygraph examination, and advised that she would be presented with several forms pertaining to the examination. (R. p. 25, lines 3-9). After this initial discussion ended, Investigator Gray accompanied Samuel to the polygraph room. (R. p. 25, lines 9-11).

At 10:30 am, Investigator Gray presented Samuel with the Department's standard advice of rights form and reviewed it with her. (R. p. 25, lines 12-18; p. 213). At 10:31 am, Samuel signed the advice of rights form. (R. p. 27, line 16-p. 28, line 10; p. 213). Thereafter Investigator Gray spoke with Samuel for approximately 20 minutes about her medical history, her educational background, and her employment history. (R. p. 29, line 12-p. 31, line 10). After the review of this personal history, Investigator Gray again explained the polygraph process and began to discuss the death of Aiden Harling while reviewing a written statement Samuel previously provided to law enforcement. (R. p. 31,

lines 20-24; p. 47, line 19- p. 48, line 6). At the close of this discussion, Investigator Gray formulated the questions for the polygraph examination, reviewed every question with Samuel, and suggested that the two take a break before the testing began. (R. p. 31, line 25-p. 32, line 6). During the break, Investigator Gray permitted Samuel to use the restroom and wash her hands before beginning the examination. (R. p. 32 lines, 4-6; p. 48, lines 10-13).

Investigator Gray began conducting the polygraph examination on Kendra Samuel at 11:53 am. (R. pp. 333-48). The examination consisted of eleven questions asked of Samuel in three rounds. (R. pp. 333-48). The third and final round of questioning concluded at 12:16 pm. (R. pp. 333-34; p. 48, lines 17-20). Following the conclusion of the questioning, Investigator Gray left Samuel to review the charts produced by the examination. Gray's review of the examination results lasted approximately 15 minutes. (R. p. 48, line 17-p. 49, line 8).

At approximately 12:31 pm, Gray testified that he "went back into the room and confronted [Samuel] with the test results," (R. p. 49, lines 7-8) "told her there were some problems on the examination which indicated deception ... [and] pulled my chair up in front of her." (R. p. 51, lines 20-25). As Investigator Gray confronted Samuel with the results of her polygraph examination he began to interrogate her further and Samuel relayed to him a statement pertaining to the date of Aiden Harling's death. (R. p. 52, line 2-p. 53, line 4). Samuel's statement given to Investigator Gray during the course of the polygraph examination and review (hereinafter "**Statement I**") ended at approximately 1:00 pm. (R. p. 53, lines 13-15).

At the conclusion of the polygraph examination and related interrogation, Investigator Gray relayed to Investigator Kevin Reese—the chief investigator in the Aiden Harling death—the contents of the statement obtained via polygraph. (R. p. 53, lines 5-12). Reese then ushered Samuel to a different room where she was interrogated by City of Columbia Investigator Thomas and SLED Agent Greg Shockley. (R. p. 73, lines 7-22). This interrogation was partially taped (**Statement II**) and partially written (**Statement III**) (R. pp. 214-16), lasting from approximately 1:27 pm until 2:30 pm.

After the interrogation that led to Statements II and III, officers led Samuel to yet another room where she was interrogated by Columbia Investigator Reese, Investigator Thomas, and SLED Agent Hurt. Like Statement II, this interrogation was only partially taped (**Statement IV**). The third interrogation lasted from approximately 3:30 pm until 5:30 pm, ending with a written “Q & A.” (**Statement V**) (R. p. 82, line 2-p. 85, line 25; p. 217-21). At the conclusion of Statement V, Columbia police placed Samuel under arrest.

ARGUMENT

Kendra Samuel appeals the trial court’s refusal to exclude from evidence four statements provided to law enforcement on August 6, 2008. It is axiomatic that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966). Other jurisdictions have noted that “where police have given *Miranda* warnings outside the context of custodial

interrogation, these warnings must be repeated once custodial interrogation begins.” *State v. Bradshaw*, 457 S.E.2d 456, 467 (W. Va. 1995).

In this case, law enforcement violated the “procedural safeguards” required by *Miranda* and its progeny in one fundamental respect: though Samuel signed a written waiver of rights two hours before being taken into custody, law enforcement failed to repeat this advice once the custodial interrogation began. As a result, the trial court’s refusal to exclude from evidence four statements provided to law enforcement subsequent to Samuel being taken into custody should be reversed.

I. **The trial court erred by failing to suppress statements obtained from the Respondent/Appellant where law enforcement failed to advise Respondent/Appellant of her *Miranda* rights after taking her into custody**

“When seeking to introduce a confession, the State must prove that the statement was voluntary and taken in compliance with *Miranda*.” *State v. Middleton*, 288 S.C. 21, 25, 339 S.E.2d 692, 694 (1986). “To protect against this danger, the *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution’s case in chief.” *U.S. v. Patane*, 542 U.S. 630, 639, 124 S.Ct. 2620, 2627 (2004). Even in the presence of *Miranda* warnings, however, “[a] confession is not admissible unless it was voluntarily made. A determination of whether a confession was given voluntarily requires an examination of the totality of the circumstances.” *State v. White*, 311 S.C. 289, 294, 428 S.E.2d 740, 743 (Ct. App. 1993)(internal citations omitted). “This voluntariness requirement is in addition to the intelligent waiver mandate of *Miranda*.” *State v. Miller*, 375 S.C. 370, 379-380, 652 S.E.2d 444, 449 (Ct. App. 2007). “The trial judge’s resolution of [the voluntariness of a

statement] will not be disturbed absent an error of law.” *State v. Franklin*, 299 S.C. 133, 138, 382 S.E.2d 911, 914 (1989).

The trial court committed an error of law by finding Kendra Samuel effectively waived her *Miranda* rights via the 10:31 Advice of Rights form despite the fact that law enforcement failed to advise her of such rights subsequent to taking Samuel into custody. “*Miranda* warnings are required for official interrogations only when a suspect ‘has been taken into custody or otherwise deprived of his freedom of action in any significant way.’” *State v. Easler*, 327 S.C. 121, 127, 489 S.E.2d 617, 621 (1997) quoting *Miranda*, 384 U.S. 436, 444, 86 S.Ct. 1602 (1966). In this case, the nature of Samuel’s interaction with police became custodial at 12:31 pm, the moment she was confronted with what officers alleged to be a failed polygraph. Thus, in order to advise Samuel of her rights in compliance with *Miranda*, officers were required to communicate these rights in the custodial setting. See *Bradshaw* at 530, 457 S.E.2d at 467. Whereas this did not occur, *Miranda*’s presumption of coercion of Samuel’s statements applies and the trial court erred in failing to suppress the subsequently obtained statements.

a. The *Miranda* protections of Respondent/Appellant were triggered at the moment of confrontation with law enforcement

For the purposes of a *Miranda* analysis, “custody is determined by an objective analysis of ‘whether a reasonable man in the suspect’s position would have understood himself to be in custody.’” *State v. Ledford*, 351 S.C. 83, 88, 567 S.E.2d 904, 907 (Ct. App. 2002), quoting *Easler* at 128, 489 S.E.2d 617, 621. “The initial determination of whether an individual was in custody depends on the objective circumstances of the interrogation, not the subjective views harbored by either the interrogating officers or the

person being questioned.” *State v. Sprouse*, 325 S.C. 275, 282, 478 S.E.2d 871, 875 (Ct. App. 1996), citing *Stansbury v. California*, 511 U.S. 318, 114 S.Ct. 1526 (1994).

Determination of a declarant’s “custodial” status is a totality of the circumstances analysis which must include consideration of “the individual’s freedom to leave the scene and the purpose, place and length of the questioning.” *Easler* at 127, 489 S.E.2d at 621, citing *United States v. Helmle*, 769 F.2d 1306 (8th Cir. 1985). The South Carolina Supreme Court applied this criteria while considering a very similar police department confession in *State v. Evans*, 354 S.C. 579, 582 S.E.2d 407 (2003).

We believe that the trial judge’s order provides abundant justification for his determination that Evans was in police custody. First, he found Evans was not *free to leave*. When Evans went to the restroom, Agent Edwards accompanied her at all times and waited outside the restroom. Also, the officers would not permit Evans’ cousin to go back to the interview room. Second, the *place* where the agents interviewed Evans also concerned the judge in that it was in a back office in the police station. Third, the judge noted that the interview was *lengthy*, as it lasted three hours. Finally, the judge was most concerned with the agent’s *purpose*. He said:

What really turns it for me was that when ... That her story was challenged and once that was challenged, that changes from just a routine inquiry to name, rank and serial number. They (Alexander and Ross), in fact, put it to her that they did not believe her. As soon as that occurred, then the switch over to the female officer (Edwards) occurred.

Id. at 584, 582 S.E.2d at 410.

The immediate similarity between the interrogation of Kendra Samuel and that of the *Evans* defendant lies in the confrontation of the declarant with the officer’s belief that they were lying. As Investigator Gray testified during the hearing, subsequent to

Samuel's polygraph examination he "went back into the room and confronted [Samuel] with the test results," (R. p. 49, lines 7-8) "told her there were some problems on the examination which indicated deception ... [and] pulled my chair up in front of her." (R. 51, lines 24-25). At that precise moment, a reasonable person—no matter what their intention was in initially traveling to the police station—would have understood themselves to have been accused by the police of a heinous crime and, as a necessary corollary, not free to leave. As a result of the foregoing, Samuel was in police custody at the time Investigator Gray chose to confront her with the results of her polygraph: 12:31 pm.

The line of questioning Investigator Gray utilized in "confronting" Samuel also constituted "interrogation" for *Miranda* purposes. "Interrogation is either express questioning or its functional equivalent. It includes words or actions on the part of police that the police ... should know are reasonably likely to elicit an incriminating response." *State v. Kennedy*, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998). Gray described his prologue to the follow-up questioning of Samuel as follows: "I confronted her with the test results, told her there were some problems on the examination which indicated deception." (R. p. 51, lines 20-22). "After that I sat—I pulled my chair up in front of her. She was still seating in the chair unrestrained, and I began just talking to her." (R. p. 51, line 24-p. 52, line 1). Though Gray testified he did not recall "specifically what I said," the subject manner and tenor of questioning was as follows:

- "[A]fter additional questions, she admitted she had accidentally dropped the child..." (R. p. 52, lines 7-8).

- “She was asked what part of that child’s body hit the floor, and she pointed with her hand to the back of her head and began crying.” (R. p. 52, lines 11-13).
- “She was asked why she left the apartment.” (R. p. 52, lines 20-21).
- “I then asked her why she had clutched the baby to her chest...”. (R. p. 53, lines 1-2).

As shown above, Investigator Gray designed the questions asked of Samuel specifically to address her culpability for the death of “the child,” Aiden Harling. Thus these questions constituted an “interrogation” for the purposes of *Miranda*. Furthermore, even to the extent that the polygraph itself was not an “interrogation,” Gray’s confrontation of Samuel about her supposed failure of the polygraph exam was calculated to elicit a response that amounted to an admission of guilt.

Because the substance of the polygraph and its follow-up questioning constituted an interrogation and because the totality of the circumstances surrounding Samuel’s presence and questioning subsequent to the polygraph constituted “custody,” all questioning of Kendra Samuel from the moment police chose to confront her with the results of the polygraph constituted “custodial interrogation.”

b. The 10:31 am “Advice of Rights” form, signed prior to the initiation of any polygraph, interrogation, or custodial setting, did not constitute a valid waiver of rights

Having determined that Samuel enjoyed the protections of *Miranda* from the moment she was confronted with the polygraph results, we must now address whether the 10:31 am advice of rights satisfied law enforcement’s duties under *Miranda*. For one primary reason, the 10:31 waiver was insufficient: the advice of rights was non-custodial and thus ineffectual.

Testifying under oath during the *Jackson v. Denno* hearing, all officers for the State insisted that Samuel was not in police custody at the time she agreed to participate in the polygraph and signed the written waiver of her *Miranda* rights. Investigator Gray, who conducted the polygraph, stated that Samuel was never in custody throughout the entire polygraph process. (R. p. 65, lines 5-22). Investigator Reese insisted that Samuel was not in custody until she provided the recorded confession within Statement IV. (R. p. 114, line 3-p. 119, line 11). Agent Shockly, meanwhile, felt as if Samuel was in custody subsequent to the recorded confession within Statement II. (R. p. 128, line 1-p. 130, line 8). Despite these varying opinions, what all parties to this case agree upon is that Samuel was not in custody when she signed the 10:31 am advice of rights form. This is fatal to the efficacy of the advice of rights.

Quoting *Miranda* itself, the South Carolina Supreme Court has observed that “[l]aw enforcement must state the *Miranda* warnings ‘after a person has been taken into custody or otherwise deprived of his freedom of action in any way.’” *State v. Evans*, 354 S.C. 579, 583, 582 S.E.2d 407, 410 (2003)(emphasis supplied), quoting *Miranda* at 444, 86 S.Ct. at 1612. The South Carolina Supreme Court has not had occasion to opine whether a non-custodial advice of rights remains effective when the otherwise-casual setting transforms into one of custodial interrogation. The Supreme Court of West Virginia has done so, however, and rejects prosecutors’ attempts to rely upon non-custodial *Miranda* readings.

[T]he *Miranda* right to counsel has no applicability outside the context of custodial interrogation. Therefore, until the defendant was taken into custody, any effort on his part to invoke his *Miranda* rights was, legally speaking, an empty gesture. We believe the “window of opportunity” for the

assertion of *Miranda* rights comes into existence only when that right is available.

State v. Bradshaw at 530, 457 S.E.2d at 467.

The *Bradshaw* opinion relied upon the United States Supreme Court opinion of *McNeil v. Wisconsin*, 501 U.S. 171, 189, 111 S. Ct. 2204, 2215 (1991), which observed as follows.

We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than "custodial interrogation".... Most rights must be asserted when the government seeks to take the action they protect against. The fact that we have allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation does not necessarily mean that we will allow it to be asserted initially outside the context of custodial interrogation, with similar future effect.

Id. at 189, 111 S. Ct. 2204, 2215 (1991).

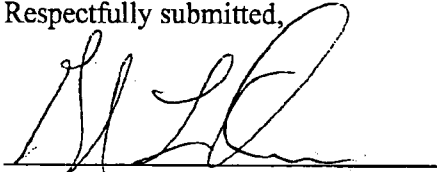
McNeil's holding, as applied to the instant matter, begs the following questions: if, in fact, Kendra Samuel was not in custody at the time her *Miranda* rights were read to her, how was Samuel supposed to have invoked such rights? If, in fact, Samuel was not in custody at the time her *Miranda* rights were read to her, of what exactly was she being advised? The United States Supreme Court has specifically rejected the notion that *Miranda* rights might "be asserted initially outside the context of custodial interrogation." *Id.* Because Samuel possessed no *Miranda* rights at 10:31 am, her signing of the *Miranda* waiver was, in the words of the West Virginia Supreme Court, "an empty gesture." *Bradshaw* at 530, 457 S.E.2d at 467. As a result, law enforcement's failure to advise

Samuel of her rights subsequent to taking her into custody renders Statements I through V inadmissible.¹

CONCLUSION

For the reasons stated herein, the statements provided by Kendra Samuel to police on August 6, 2008 should be suppressed from admission into evidence.

Respectfully submitted,



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May 21, 2012
Columbia, South Carolina

¹ The trial court ruled Statement I inadmissible based upon a Rule 403, SCRE analysis. The analysis contained within this brief constitutes alternative grounds for sustaining that ruling.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2008-GS-40-07372

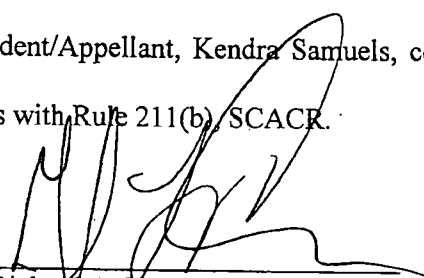
State of South Carolina..... Appellant/Respondent,

vs.

Kendra Samuel.....Respondent/Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent/Appellant, Kendra Samuels, certifies that the
Final Brief of Respondent/Appellant complies with Rule 211(b), SCACR.



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May 21, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
Hon. G. Thomas Cooper, Jr., Circuit Court Judge

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The State,

Appellant/Respondent,

v.

Kendra Samuel,

Respondent/Appellant.

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STATEMENT OF ISSUES ON APPEAL

The trial court did not err in finding Samuel's statements knowingly and voluntarily given upon full advice of rights.

STATEMENT OF THE CASE

The Richland County Grand Jury indicted Respondent/Appellant Kendra Samuel (Samuel) on one count of homicide by child abuse. She proceeded to trial before the Honorable G. Thomas Cooper, Jr. on November 29 and 30, 2010. During pretrial motions and after finding the statement voluntarily given, the trial court suppressed a statement by Samuel. The State timely served the Notice of Appeal from the oral order on December 1, 2010.¹ Samuel served a cross-appeal on December 8, 2010.

¹See State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) (“A pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976).”); State v. Henry, 313 S.C. 106, 108, 432 S.E.2d 489, 490 (Ct. App. 1993) (same).

STATEMENT OF FACTS

On July 31, 2008, Jessica Davis entrusted the care of her two-year-old son to Samuel. Davis and her grandmother left at around 5:30p.m. leaving Samuel alone with her son. Samuel placed the child in his crib as if he were asleep when she returned with him from the park at around 7p.m. Davis checked on her son some time after 11p.m. and found he was not breathing.

Samuel and Davis each gave witness statements on August 1, 2008 at the Columbia Police Department (CPD). At the time, neither was considered a suspect of a crime. After further investigation, Investigators Reese and Thomas asked Samuel to come back to CPD to give additional statements. She returned on August 6. (T.101; R. 33).

Samuel was met by Investigator Gray, who read Samuel her Miranda² rights and had her sign an Advice of Rights form prior to conducting a polygraph examination. (T. 92-94; State's Exhibit I; R. 24-26; 213). Investigator Gray indicated Samuel was free to leave at any time before, during or after his examination of her. (T.133-135; R.201-203). After informing Samuel the exam indicated deception, Gray asked her some follow-up questions.(T.115-117; 119; R. 47-49; 51). He began talking with her and she gave him a statement of the events that transpired with the child. (T.119-121; R. 51-53). Investigator Gray notified Investigators Reese and Thomas that Samuel gave an additional statement. (T.121; R. 53).

Investigator Thomas stated there were indications from the statement given to Investigator Gray that Samuel had changed her story regarding the events that resulted in the

²Miranda v. Arizona, 384 U.S. 436 (1966).

child's death. She indicated injuries occurring to the child. As a result, he and Agent Shockley with SLED's Child Fatality Task Force conducted an interview with Samuel. (T.140-141; R. 72-73). He indicated she was free to leave and not in custody. Further, he knew she had been advised of her Miranda rights. (T.141-142; R. 73-74). They began an interview with Samuel and concluded the interview after having to delete some files off the digital recorder in order to have more memory to store her entire statement. (T.143; Court's Exhibit 2-3; R. 75; 222-236). Samuel provided a statement similar to the one given Investigator Gray. She was allowed to provide a written statement, and then answered some questions in her handwriting. (T.145-147; State's Exhibit 2 pages 1-6; R. 77-79; 214).

Investigator Thomas and Investigator Reese then conferred and after discussing the autopsy results and information received from Davis, they determined Samuel's story was not corroborated by the evidence. (T.149-150; R. 81-82). Samuel was not handcuffed and was free to leave if she chose. (T.149; 155-157; R. 81; 87-89).

Investigator Reese then conducted an interview with Samuel. (T.174-175; Court's Exhibit 4; R. 106-107; 259). Investigator Reese reminded Samuel she had been advised of her rights and asked if she still wished to talk with them. She agreed. (T.175; Court's Exhibit 4; R. 107; 259). Samuel gave another statement to the Investigators and again answered several follow-up questions in her own handwriting after giving the statement. (T.175-176; Court's Exhibit 4; State's Exhibit 2 pages 7-8; R. 107-108; 259; 220-221). Investigator Reese testified she was free to leave and they could not stop her until the time she was placed under arrest. (T.179-181; 184; R.111-113; 116).

In her last statement to the Investigators, Samuel admitted shaking the baby. She stated the baby began crying hysterically while in her care, and she could not get him to stop fussing. Samuel picked the child up, and shook him for one to two minutes until he stopped crying. After shaking him, the child was unresponsive and instead of calling for help, Samuel left the house and went to the park carrying the child. Her boyfriend picked her up from the park and brought her home. Davis was home and instead of letting anyone know the child needed help, Samuel placed the child in the crib as if it were asleep. (Court Exhibit 4; R. 259).

Prior to trial, the court conducted a Jackson v. Denno hearing to determine whether the multiple statements given by Samuel were knowing, voluntary, and admissible. After hearing from all the officers involved, the trial court concluded all statements made by Samuel were knowing and voluntary. (T.251-257; R. 183-189). The court concluded all the statements were admissible into evidence at trial. (T.257; R. 189).

Counsel for Samuel then indicated he intended to bring in the polygraph examination at trial as it relates to the statement given to Investigator Gray. Samuel moved to exclude the statement because she could not reference the fact she failed the polygraph. The trial court agreed to exclude without providing any reasoning. The State served and filed an appeal as did Samuel. (T.257-258; 263; R. 189-190; 195).

ARGUMENT

I. The trial court did not err in finding Samuel's statements knowingly and voluntarily given upon full advice of rights.

Samuel contends the trial court erred in finding statements made to investigators were knowing and voluntary. Further, Samuel contends the Miranda³ warnings given by the officers were ineffective in establishing the procedural safeguards necessary to secure the privilege against self-incrimination. Samuel argues she was entitled to be re-advised of her Miranda rights after her interrogation became custodial, and because those warnings were not re-administered, her inculpatory statements should have been suppressed. Samuel was properly Mirandized, and she knowingly and voluntarily waived her rights in giving statements to investigators. As a result, the trial court properly found her statements admissible.⁴

A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to constitute an abuse of discretion. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004).

³ Miranda v. Arizona, 384 U.S. 436 (1966).

⁴ The statement suppressed by the trial court, and the subject of the State's appeal, was found to be voluntarily made and admissible under Miranda.

To determine the voluntariness of a statement, the circuit court must first conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence. State v. Simmons, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct. App. 2009). "The trial judge's determination of the voluntariness of a statement must be made on the basis of the totality of the circumstances, including the background, experience, and conduct of the accused." State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) (citing Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). The appellate court does not reevaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the circuit court's ruling is supported by any evidence. Simmons, 384 S.C. 145, 162, 682 S.E.2d 19, 28.

In Miranda v. Arizona, the United States Supreme Court (USSC) created procedural safeguards to protect an individual's right against compelled self-incrimination, holding:

[W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning . . . [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Miranda, 384 U.S. 436, 478–79. Failure to comply with these constitutional safeguards renders the person's statements inadmissible against that person. Id.

The USSC has embraced a flexible approach regarding Miranda warnings whereby courts consider the totality of the circumstances. See Wyrick v. Fields, 459 U.S. 42, 47–49 (1982) (rejecting a *per se* rule that Miranda rights be readministered before questioning a

suspect about the results of a polygraph examination, and reiterating that the proper framework is a totality of the circumstances inquiry).

While it is true under Miranda that pre-custodial warnings are not required, it does not mean the warnings would not be effective to satisfy the procedural safeguards established by the USSC. Miranda and its progeny require only that the warnings be given at some time "prior to any [custodial] questioning." Miranda, 384 U.S. at 478-79. Further, every jurisdiction, except West Virginia, which has considered this issue has found that earlier, pre-custodial Miranda warnings may remain effective when the individual's status changes to being in custody.

It appears only State v. Bradshaw, 193 W.Va. 519, 457 S.E.2d 456 (1995), cited by Samuel, stands for the proposition an individual must be re-mirandized when the person is placed in custody. Samuel tries to tie this holding to the USSC holding in McNeil v. Wisconsin, 501 U.S. 171 (1991). While McNeil holds an individual may not anticipatorily invoke the Miranda rights, it does not stand for the proposition U warnings given pre-custody are *per se* ineffective post-custody. See McNeil, 501 U.S. at 182 n. 3.

This Court should join the overwhelming majority of courts which have addressed this issue and find that warnings given pre-custody may remain effective based on the totality of the circumstances after the individual is placed into custody. See, Guam v. Dela Pena, 72 F.3d 767, 770 (9th Cir.1995) (holding pre-custodial Miranda warnings were sufficient when the defendant confessed 15 hours later and did not allege that anything diminished the effectiveness of the warnings other than the passage of time); Jarrell v. Balkcom, 735 F.2d 1242, 1253-54 (11th Cir.1984) (holding pre-custodial Miranda warnings were sufficient

when the defendant confessed less than four hours after the warnings and there was no evidence that the defendant was unaware of his rights, that he was pressured, or that he did not understand the interrogation process); Upton v. State, 36 S.W.3d 740, 743–44 (Ark. 2001) (holding pre-custodial Miranda warnings were sufficient when the defendant was questioned by the same officer after arrest, confessed within two hours of being given the warnings, and there was no evidence that the defendant did not understand the warnings); State v. Burge, 487 A.2d 532, 542–43 (Conn. 1985) (holding pre-custodial Miranda warnings were sufficient when the defendant was mentally aware, “continuously in the company of the police, questioned on the same subject by the same officers throughout that time, and confessed within four hours of having been given the warnings”); State v. Tolbert, 850 A.2d 1192, 1200 (Md. 2004) (holding the pre-custodial Miranda warnings were “sufficiently proximate in time and place to custodial status to inform” the defendant of his constitutional privilege against self-incrimination, and thus re-administration of the rights was not required); Commonwealth v. Colby, 663 N.E.2d 808, 810–11 (Mass. 1996) (holding pre-custodial Miranda warnings were sufficient when given less than two hours prior to the defendant’s confession and there was no break in the interrogation process); State v. Monroe, 711 A.2d 878, 886–87 (N.H. 1998) (holding defendant’s pre-polygraph, pre-custodial Miranda warnings sufficiently safeguarded his rights where defendant’s “conduct gave no indication that his comprehension and volition had been affected so as to render the warning ineffective,” and where interrogation did not become significantly more coercive); State v. Dispoto, 913 A.2d 791, 801 (N.J. 2007) (holding no further warnings were required when “precustodial warnings have been given to a defendant as part of a continuing pattern of

interactions between the defendant and the police, and during that continuing sequence of events nothing of an intervening nature occurs that would dilute the effectiveness of the warnings that had been given”); State v. Mitchell, 543 S.E.2d 830 (N.C. 2001) (holding Miranda warnings had not become stale at time defendant’s status changed from non-custodial to custodial); Dunkle v. State, 139 P.3d 228 (Okla. Crim. App. 2006) (holding prior waiver of Miranda rights remained in effect even after placed into custody and during interrogation by different investigators); State v. Rogers, 188 S.W.3d 593, 606–08 (Tenn. 2006) (holding no new administration of Miranda rights was required when there was a five-hour lapse between defendant’s waiver of his Miranda rights and the confession, where the same two officers conducted the pre-custodial and post-custodial questioning, where the subject matter remained the same throughout, where the defendant was familiar with the criminal justice system, and where nothing indicates the confession was involuntary); State v. Rupe, 683 P.2d 571, 581 (Wash. 1984) (holding pre-custodial Miranda warnings were sufficient in light of the short period of time between advisement of his rights and being placed in custody); see also, 2 Wayne R. LaFare, Criminal Procedure § 6.8(b), at 807 nn. 62–63 (3d ed. 2007) (citing Burge and other cases for the proposition that pre-custodial Miranda warnings may be sufficient).

The facts of this case justify the trial court’s determinations the statements were made voluntarily and upon a knowing and voluntary waiver of Samuels’ Miranda rights. “Appellate entities in South Carolina have recognized that appropriate factors to consider in the totality-of-circumstances analysis include: background, experience, and conduct of the accused; age; length of custody; police misrepresentations; isolation of a minor from his or

her parent; threats of violence; and promises of leniency." State v. Miller, 375 S.C. 370, 386, 652 S.E.2d 444, 452 (Ct. App. 2007).

In the instant case, Samuel voluntarily arrived and agreed to take a polygraph exam. Prior to the polygraph, she was read her Miranda rights and signed a waiver of rights form. (State's Exhibit 1; R. 213). At the beginning of subsequent interrogations, she was reminded of the fact she was read her rights. Samuel never indicated otherwise, nor did she change her prior waiver and indicate she wished to invoke her rights. (Court Exhibit 2, page 1; Court Exhibit 4, page 1; R. 222; 259). Specifically, at the beginning of the second interview with Agent Thomas, he indicated: "Kendra has already been advised of her rights and is giving this statement freely." (Court Exhibit 2, page 1; R. 222). She did not correct or change her waiver.

At the beginning of the fourth and final statement, given approximately five and a half hours after she signed the waiver of rights form, Samuel was again reminded of her waiver of rights. Investigator Reese stated: "Okay, Kendra, I'm going to ask you - - you are - - you have been advised of your rights earlier today. Is that correct?" She responds: "Yes, sir." Investigator Reese asks: "Okay. Is there anything you want to change right now about those rights? Do you want to continue talking with us?" Again she responds, "Yes, sir." (Court Exhibit 4, page 1; R. 259).

The totality of the circumstances indicate she was made aware of her Miranda rights, reminded of her rights several times, and had no problem understanding the rights read to her. At no time did she indicate she wished to rescind her prior waiver of her rights. Finally, her background, including the fact she was a 4.0 student (Court Exhibit 4; R. 259), indicates

she could understand the rights and her waiver of those rights. As a result, the trial court properly concluded the statements were made voluntarily and after a knowing and voluntary waiver of Samuel's Miranda rights.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted the trial court's determination the statements were knowing and voluntary should be affirmed, and the statements should be found admissible when this Court remands for trial.

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IN THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

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PROOF OF SERVICE

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STATEMENT OF ISSUES ON APPEAL

The trial court erred in suppressing a knowing and voluntary statement made by Samuel based either on Rule 403, SCRE, or because the defense sought to bring out the fact it was made after she failed a polygraph.

STATEMENT OF THE CASE

The Richland County Grand Jury indicted Respondent/Appellant Kendra Samuel (Samuel) on one count of homicide by child abuse. She proceeded to trial before the Honorable G. Thomas Cooper, Jr. on November 29 and 30, 2010. During pretrial motions and after finding the statement voluntarily given, the trial court suppressed a statement by Samuel. The circuit court's ruling substantially impairs the State's ability to prosecute the homicide by child abuse charge, and the State timely served the Notice of Appeal from the oral order on December 1, 2010.¹ Samuel served a cross-appeal on December 8, 2010.

¹See State v. McKnight, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) ("A pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976)."); State v. Henry, 313 S.C. 106, 108, 432 S.E.2d 489, 490 (Ct. App. 1993) (same).

STATEMENT OF FACTS

On July 31, 2008, Jessica Davis entrusted the care of her two-year-old son to Samuel. Davis and her grandmother left at around 5:30p.m. leaving Samuel alone with her son. Samuel placed the child in his crib as if he were asleep when she returned with him from the park at around 7p.m. Davis checked on her son some time after 11p.m. and found he was not breathing.

Samuel and Davis each gave witness statements on August 1, 2008 at the Columbia Police Department (CPD). At the time, neither was considered a suspect of a crime. After further investigation, Investigators Reese and Thomas asked Samuel to come back to CPD to give additional statements. She returned on August 6. (T.101; R.33).

Samuel was met by Investigator Gray, who read Samuel her Miranda² rights and had her sign an Advice of Rights form prior to conducting a polygraph examination. (T. 92-94; State's Exhibit 1; R.24-26; 213). Investigator Gray indicated Samuel was free to leave at any time before, during or after his examination of her. (T.133-135; R. 65-67). After informing Samuel the exam indicated deception, Gray asked her some follow-up questions.(T.115-117; 119; R. 47-49; 51). He began talking with her and she gave him a statement of the events that transpired with the child. (T.119-121; R. 51-53). Investigator Gray notified Investigators Reese and Thomas that Samuel gave an additional statement. (T.121; R. 53).

Investigator Thomas stated there were indications from the statement given to Investigator Gray that Samuel had changed her story regarding the events that resulted in the

²Miranda v. Arizona, 384 U.S. 436 (1966).

child's death. She indicated injuries occurring to the child. As a result, he and Agent Shockley with SLED's Child Fatality Task Force conducted an interview with Samuel. (T.140-141; R. 72-73). He indicated she was free to leave and not in custody. Further, he knew she had been advised of her Miranda rights. (T.141-142; R. 73-74). They began an interview with Samuel and concluded the interview after having to delete some files off the digital recorder in order to have more memory to store her entire statement. (T.143; Court's Exhibit 2-3; R. 75; 222-236). Samuel provided a statement similar to the one given Investigator Gray. She was allowed to provide a written statement, and then answered some questions in her handwriting. (T.145-147; State's Exhibit 2 pages 1-6; R. 77-79; 214).

Investigator Thomas and Investigator Reese then conferred and after discussing the autopsy results and information received from Davis determined Samuel's story was not corroborated by the evidence. (T.149-150; R. 81-82). Samuel was not handcuffed or in custody at this time and was free to leave if she chose. (T.149; 155-157; R. 81; 87-89).

Investigator Reese then conducted an interview on Samuel. (T.174-175; Court's Exhibit 4; R. 106-107; 259). Investigator Reese reminded Samuel she had been advised of her rights and asked if she still wished to talk with them. She agreed. (T.175; Court's Exhibit 4; R.107; 259). Samuel gave another statement to the Investigators and again answered several follow-up questions in her own handwriting after giving the statement. (T.175-176; Court's Exhibit 4; State's Exhibit 2 pages 7-8; R.107-108; 259; 220-221). Investigator Reese testified she was free to leave and they could not stop her until the time she was placed under arrest. (T.179-181; 184; R.111-113; 116).

In her last statement to the Investigators, Samuel admitted shaking the baby. She stated the baby began crying hysterically while in her care, and she could not get him to stop fussing. Samuel picked the child up, and shook him for one to two minutes until he stopped crying. After shaking him, the child was unresponsive so instead of calling for help, Samuel left the house and went to the park carrying the child. Her boyfriend picked her up from the park and brought her home. Davis was home and instead of letting anyone know the child needed help, Samuel placed the child in the crib as if it were asleep. (Court Exhibit 4; R. 259).

Prior to trial, the court conducted a Jackson v. Denno hearing to determine whether the multiple statements given by Samuel were knowing, voluntary, and admissible. After hearing from all the officers involved, the trial court concluded all statements made by Samuel were knowing and voluntary. (T.251-257; R.183-189). The court concluded all the statements were admissible into evidence at trial. (T.257; R.189).

Counsel for Samuel then indicated he intended to bring in the polygraph examination at trial as it relates to the statement given to Investigator Gray. Samuel moved to exclude the statement because she could not reference the fact she failed the polygraph. The trial court agreed to exclude without providing any reasoning. The State served and filed this appeal from the trial court's oral suppression ruling. (T.257-258; 263; R.189-190; 195).

ARGUMENT

- I. The trial court erred in suppressing a knowing and voluntary statement made by Samuel based either on Rule 403, SCRE, or because the defense sought to bring out the fact it was made after she failed a polygraph.

The trial court abused its discretion in suppressing the statement Samuel made to Investigator Gray. The court properly found the statement knowing and voluntary, properly found Investigator Gray could discuss his reading of the Miranda rights to Samuel, and properly found there could be no mention of the polygraph examination. The trial court then erred in suppressing the statement to Investigator Gray and allowing him only to state he had read Samuel her Miranda rights.

The court abused its discretion in suppressing the statement without a legal or factual basis for suppression. Assuming the trial court accepted the argument of Samuel's counsel, the court erred in finding the statement was prejudicial under Rule 403, SCRE, or that the statement should be suppressed because the defense desired to bring out the fact it was made after Samuel failed a polygraph. The court abused his discretion in suppressing the statement.

The trial court's ruling suppressing the statement made to Investigator Gray is without a stated factual or legal basis, and at best confusing. The court never explained the basis for the suppression, especially in light of the fact the statement was found to be knowing and voluntary. The trial court found the statement, along with all other statements given by Samuel, to be admissible.

Counsel for Samuel then stated:

We want the polygraph. We want to show that he says to her, "You lie". Now, how can we do that when the Supreme Court has prohibited the mention of the polygraph?

The 403 analysis on this, Judge, we would submit, Gray's statement, we submit, dictates that that statement be excluded, at least that statement ought to be excluded.

He can testify that he Mirandized her; but anything that comes after - - he says, "I gave you a polygraph exam and you lie." Then - - (T.257-258; R.189-190).

The trial court responds: "I agree with you." The court provides no statement regarding what aspect of the argument he agrees with or what the specific grounds for suppressing the statement may have been. "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). As a result, he abused his discretion by suppressing the statement without a legal or factual basis.

Even if one assumes the basis for suppression was either or both of the arguments presented by counsel for Samuel—Rule 403, SCRE, and/or the inability to mention the polygraph—the court abused its discretion in suppressing the statement by Samuel to Gray. The admission of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law. Id.

The South Carolina Supreme Court has held "the results of polygraph examinations are generally inadmissible because the reliability of the test is questionable." State v. McHoney, 344 S.C. 85, 96, 544 S.E.2d 30, 35 (2001). The Court, however, refused to set

a *per se* rule that no mention of a polygraph examination or its results may be made before the jury. See State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Instead, the Court found the “admissibility of this type of scientific evidence should be analyzed under Rules 702 and 403, SCRE and the Jones factors.” Id. at 24, 515 S.E.2d at 520.

In the instant case, if the trial court determined the statement was inadmissible solely based on defense counsel’s desire to mention the polygraph examination, it was an abuse of discretion. The trial court failed to consider the relevant factors as required by Council and instead determined the admissibility under a bright-line, *per se* rule that was specifically rejected by Council. The failure to exercise discretion, however, is itself an abuse of discretion. State v. Mansfield, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000).

Further, defense counsel never provided the trial court with any basis for suppressing the statement based on the polygraph examination. The court found the statement knowing and voluntary, and thus, admissible. The admission of the statement did not require admission of any information regarding the polygraph examination and counsel’s bootstrapping of a claimed desire to raise the issue of the polygraph is simply a means to force the exclusion of the statement. See e.g., State v. Rochester, 301 S.C. 196, 201, 391 S.E.2d 244, 247 (1990) (finding a statement made after being given a polygraph examination is still admissible).

Samuel’s counsel could have waived the error associated with addressing the polygraph by raising it as part of his defense. See State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984); State v. Gillis, 73 S.C. 318, 53 S.E. 487, 488 (1906) (all rights, including constitutional rights may be waived). Furthermore, the mention of a polygraph is

not *per se* prejudicial as counsel may have a valid trial strategy to allow its admission. See Ellenburg v. State, 367 S.C. 66, 69, 625 S.E.2d 224, 226 (2006).

Samuel's counsel could have raised the polygraph examination during his examination of Investigator Gray or of his client. There is no *per se* exclusion of the testimony, and the trial court erred in making a *per se* ruling. Samuel's counsel made it clear he intended to use the polygraph and Investigator Gray's finding of deception to show Samuel was coerced into changing her story and giving a new statement. (T.257; R.189). This appears to be a valid trial strategy for the use of the polygraph. Accordingly, the trial court abused its discretion in suppressing the statement if it did so based on the bootstrapped ground that Samuel's counsel sought to admit information about the polygraph if the statement were admitted.

Additionally, the trial court abused his discretion in excluding the statement under Rule 403, SCRE. Rule 403, SCRE, states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" "Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)); see also, State v. Dickerson, 341 S.C. 391, 400, 535 S.E.2d 119, 123 (2000); United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir.1989) ("[A]ll evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided.").

In this case, the trial court did not conduct any balancing test. There was never a discussion of what prejudicial impact the statement may have had and certainly no finding any prejudice substantially outweighed the statement's significant probative value. The probative value of the statement is significant because it sets the stage for the two following statements including the one in which she admits shaking the child. Further, it establishes part of what takes place during the time she is at CPD from when she is given her Miranda rights until the recorded statements are made.

In this case, there is no prejudice other than the usual prejudice from admitting evidence against a defendant. Even if the possible prejudice was the inability to cross-examine about the polygraph, counsel could have elicited testimony that Investigator Gray only received the second statement from Samuel after accusing her of lying. The result has the same impeachment value without mentioning the polygraph and allows the admission of a clearly probative statement. As a result, there is no prejudice whatsoever from the admission of the statement and the exclusion of any mention of the polygraph. The lack of prejudice is especially true if the trial court admitted the mention of the polygraph because there is no *per se* rule barring its admission.

Accordingly, the trial court suppressed the statement given to Investigator Gray without any factual or legal basis for his decision. Further, the court did not conduct a proper Rule 403 balancing test, but even if he had he abused his discretion in excluding the statement because any prejudice from the admission of the statement certainly did not substantially outweigh the statement's probative value. Finally, if the court accepted counsel's attempt to bootstrap a request to discuss the polygraph onto a determination of the

admissibility of the statement, the court abused its discretion in excluding the statement. As a result, this Court should reverse the suppression of the statement and remand for a trial in which the State can present the entirety of statements given by Samuel.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the trial court's order suppressing the statement made to Investigator Gray should be reversed and the case remanded for a trial in which the State may present all statements found knowing and voluntary by the trial court.

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Court of General Sessions

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2008-GS-40-07372

State of South Carolina.....Appellant/Respondent,

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Kendra Samuel.....Respondent/Appellant.

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in suppressing the admission of Kendra Samuel's statement to Investigator Joe Gray because, pursuant to Rule 403, SCRE, the danger of unfair prejudice associated with the admission of the statement substantially outweighs its probative value where Samuel is prohibited from arguing to the jury the totality of the circumstances pertaining to the voluntariness of her confession

STATEMENT OF THE CASE

On August 6, 2008, the Richland County Sheriff's Department arrested and charged twenty-one year old Kendra Samuel with Homicide by Child Abuse. (R. pp. 352-53). The allegations stemmed from the July 31, 2008 death of two month old Aiden Harling. (R. pp. 352-53). The Richland County Grand Jury indicted Samuel with this offense on September 19, 2008. (R. pp. 354-55).

Prior to trial, Samuel moved to exclude five statements given to law enforcement from admission into evidence and submitted a memorandum of law in support thereof. (R. p. 199; pp. 200-12). The State of South Carolina called Samuel's case to trial on November 29, 2010. (R. p. 5, lines 6-8). After drawing the jury, the trial court considered Samuel's motion to exclude statements to law enforcement. (R. p. 18).

Following extensive pre-trial testimony, the trial court ruled upon the pending motion, granting Samuel's motion to exclude as to one statement but denying the motion as to the four remaining statements. (R. p. 183, line 1-p. 189, line 11). Rather than proceeding with trial, the State opted to suspend its prosecution pending an appeal of the trial court's exclusion from evidence of one statement. (R. p. 191, lines 3-20).

The State's Notice of Appeal as to the one excluded statement was filed on December 1, 2010. (R. pp. 356-57). Samuel filed her Notice of Cross-Appeal as to all

statements allowed into evidence on December 8, 2010. (R. pp. 358-59). This brief pertains to the State's appeal of the one excluded statement.

STATEMENT OF FACTS

The central allegations of the present case—which have yet to be tried to a jury—are that on July 31, 2008 the Respondent/Appellant caused or contributed to the death of Aiden Harling, the infant child of her roommate. In the days subsequent to the child's death, Samuel, Harling's mother, and numerous other witnesses cooperated with the investigation of the City of Columbia Police Department. (R. p. 70, line 14-p. 72, line 25; p. 104, line 5-p. 106, line 25).

On the morning of August 6, 2008, Kendra Samuel voluntarily traveled to the City of Columbia Police Department to discuss with authorities the circumstances of Aiden Harling's death. (R. p. 24, lines 8-18). Samuel was met at the Department by Investigator Joe Gray who informed her that he wished to perform a polygraph examination upon her, explained the different steps of the polygraph examination, and advised that she would be presented with several forms pertaining to the examination. (R. p. 25, lines 3-9). After this initial discussion ended, Investigator Gray accompanied Samuel to the polygraph room. (R. p. 25, lines 9-11).

At 10:30 am, Investigator Gray presented Samuel with the Department's standard advice of rights form and reviewed it with her. (R. p. 25, lines 14-18; p. 213). At 10:31 am, Samuel signed the advice of rights form. (R. p. 27, line 16 -p. 28, line 10; p. 213). Thereafter Investigator Gray spoke with Samuel for approximately 20 minutes about her medical history, her educational background, and her employment history. (R. p. 29, line 12-p. 31, line 10). After the review of this personal history, Investigator Gray again explained the polygraph process and began to discuss the death of Aiden Harling while

reviewing a written statement Samuel previously provided to law enforcement. (R. p. 31, lines 20-24; p. 47, line 19- p. 48, line 6). At the close of this discussion, Investigator Gray formulated the questions for the polygraph examination, reviewed every question with Samuel, and suggested that the two take a break before the testing began. (R. p. 31, line 25-p. 32, line 6).

Investigator Gray began conducting the polygraph examination on Kendra Samuel at 11:53 am. (R. pp. 333-48). The examination consisted of eleven questions asked of Samuel in three rounds of identical questioning. (R. pp. 333-48). Gray testified that the "relevant questions" of the polygraph were as follows.

Do you know how that child was hurt?

Did you do anything to hurt that child?

Do you know who hurt that child?

(R. p. 50, line 2-p. 51, line 3; pp. 333-48). Samuel answered "no" to each of these questions and, according to Gray, the polygraph indicated deception as to each of these answers. (R. p. 50, line 19-p. 51, line 3; pp. 333-48).

Upon cross-examination, Samuel's attorney directly questioned Gray about the vague nature of his relevant questions.

Q. "That child." Why didn't you use the child's name?

A. That's the proper procedure in this type of question.

Q. To not make it specific?

A. Yes, sir.

(R. p. 57, lines 19-22). Even though the specific questions directed to Samuel were of this highly general nature, Gray insisted that no confusion or problems with the polygraph

might have arisen because "when I reviewed the questions with her prior to the test, I told her, 'When I ask that question during the test, I'm talking about Aiden and no one else.'" (R. p. 58, lines 14-17). Gray provided no explanation as to why the actual relevant questions did not specifically refer to Aiden Harling beyond his insistence that "that's the proper procedure." (R. p. 57, line 20).

The third and final round of questioning concluded at 12:16 pm. (R. pp. 333-48; p. 48, lines 17-20). Following the conclusion of the questioning, Investigator Gray left Samuel to review the charts produced by the examination. Gray's review of the examination results lasted approximately 15 minutes. (R. p. 48, line 17-p. 49, line 8). At approximately 12:31 pm, Gray testified that he "went back into the room and confronted [Samuel] with the test results," (R. p. 49, lines 7-8) "told her there were some problems on the examination which indicated deception ... [and] pulled my chair up in front of her." (R. p. 51, lines 20-25). As Investigator Gray confronted Samuel with the results of her polygraph examination, he began to interrogate her further and Samuel relayed to him a statement pertaining to the date of Aiden Harling's death. (R. p. 52, line 2-p. 53, line 4). The substance of Samuel's statement, which was never recorded or written down by Investigator Gray, was as follows.

...[S]he initially said the child had—accidentally hit the child's head on a car seat safety bar as she tried to remove the child from the seat. ...[S]he admitted she had accidentally dropped the child from a standing position as she removed the child from the seat which was on the floor in Jessica's room. ...She said the child gasped when she picked him up, and he was unresponsive, though his eyes were open. She said she held him in her lap and shook his arms. She may have grabbed his torso and shook him in an attempt to revive him. [She] said the child was then unconscious. ... Ms. Samuels said she didn't know what to do.

(R. p. 52, lines 3-22). Samuel's statement given to Investigator Gray during the course of the polygraph examination and review (hereinafter "Statement I") ended at approximately 1:00 pm. (R. p. 53, lines 13-15).

At the conclusion of the polygraph examination and related interrogation, Investigator Gray relayed to Investigator Kevin Reese—the chief investigator in the Aiden Harling death—the contents of the statement obtained via polygraph. (R. p. 53, lines 5-12). Reese then ushered Samuel to a different room where she was interrogated by City of Columbia Investigator Thomas and SLED Agent Greg Shockley. (R. p. 73, lines 7-22). This interrogation was partially taped (Statement II) and partially written (Statement III) (R. pp. 214-16), lasting from approximately 1:27 pm until 2:30 pm.

After the interrogation that led to Statements II and III, officers led Samuel to yet another room where she was interrogated by Columbia Investigator Reese, Investigator Thomas, and SLED Agent Hurt. Like Statement II, this interrogation was only partially taped (Statement IV). The third interrogation lasted from approximately 3:30 pm until 5:30 pm, ending with a written "Q & A." (Statement V) (R. p. 82, line 2-p. 85, line 25; pp. 217-21).¹ At the conclusion of Statement V, Columbia police placed Samuel under arrest.

¹ The admissibility of Statements I through V on Miranda grounds is the subject of Samuel's cross-appeal. Though related to the issues addressed within this brief, the admissibility of Statements II through V is not addressed herein. The Respondent/Appellant incorporates her arguments contained within her cross-appeal, however, in order to clarify that she is not waiving those issues..

ARGUMENT

- I. **The Trial Court did not err in excluding Statement I pursuant to Rule 403, SCRE, because the basis of the trial court's ruling is clear from the record and the prejudicial effect of the admission of the statement substantially outweighs its probative value where Samuel is prohibited from arguing to the jury the totality of the circumstances pertaining to the voluntariness of her confession**

The State argues that the trial court erred in excluding Statement I for two reasons: first, the trial court failed to set forth an adequate legal and factual basis for its ruling; and second, a Rule 403 analysis does not require the exclusion of Statement I.² An appellant bears a heavy burden when seeking to overturn a trial court's Rule 403 ruling.

A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in "exceptional circumstances." ... We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment.

State v. Lyles, 379 S.C. 328, 338-39, 665 S.E.2d 201, 207 (Ct. App. 2008)(internal citations omitted). As will be shown below, not only is the record clear as to the legal and factual basis of the trial court's disputed ruling, but the State failed to raise this initial issue at trial and thus did not preserve the question for appeal. Also, Rule 403, SCRE mandates the exclusion of Statement I because the danger of unfair prejudice associated with the admission of the statement into evidence substantially outweighs its probative value.

a. The Legal and Factual Basis for the Trial Court's Ruling

² The State misapprehends the question of the admissibility of Samuel's polygraph examination results as an independent basis for exclusion of Statement I. As will be shown in Section I.b, below, this issue is a subpart of the Rule 403, SCRE analysis.

The State argues that the trial judge “abused his discretion by suppressing the statement without a legal or factual basis.” (Appellant’s Brief of Appellant/Respondent at 7). As an initial matter, the State is prohibited from arguing this issue on appeal because it did not request a clarification of the trial court’s ruling or otherwise raise this issue before the trial court. Secondly, the record clearly establishes the legal and factual basis for the trial court’s ruling. “The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal.” State v. Porter, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010), citing State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003). At no time during the pertinent argument or subsequent to the trial court’s ruling upon Statement I did the State request clarification of the factual and legal basis upon which the Court was relying. The issue preservation requirement itself, however, “is meant to enable the trial court to rule properly after it has considered all the relevant facts, law, and arguments.” Id., citing On v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 725 (2000). Whereas the State did not raise this issue before the trial court, it is precluded from doing so in this appeal.

Even if the State has preserved this issue for appeal, the basis for the Court’s ruling is clear. While arguing the pertinent motion, Samuel’s attorney set forth the specific grounds for her Rule 403 objection to the admissibility of Statement I based upon her inability to present to the jury the important circumstance that the statement was procured after she was told she failed a polygraph examination.

We want to bring in the polygraph. ... We want to show that he says to her, “You lie.” Now, how can we do that when the Supreme Court has prohibited the mention of the polygraph?

The 403 analysis on this, Judge, we would submit, Gray's statement, we submit, dictates that statement be excluded, at least that statement ought to be excluded.

He can testify that he Mirandized her, but anything that comes after—he says, “I gave you a polygraph exam and you lie” ...

(R. p. 189, line 23-p. 190, line 8). Ruling upon this specific objection, the trial court replied, “I agree with you.” (R. p. 190, line 9). The solicitor immediately sought clarification as to the substance of the Court's ruling (though not its factual and legal basis): “[s]o all he would be allowed to, under your ruling, Judge, is to say that he advised her of the Miranda rights at 10:30 and then turned her over to the other officers at 1:30?” (R. p. 190, lines 14-17). The trial court confirmed that this was its ruling. (R. p. 190, line 18).

The State argues that the trial court's ruling is inadequate and an abuse of discretion because “[t]he court provides no statement regarding what aspect of the argument he agrees with or what the specific grounds for suppressing the statement may have been.” (Appellant's Brief of Appellant/Respondent at 7). The State presents no authority, however, mandating the Court provide additional analysis in the context of Rule 403 considerations beyond referring to the grounds set forth by Samuel's attorneys. In contrast, the authority the State does present—Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987)—stems from a circuit court's discretion to consider additional testimony in an appeal from a municipal zoning board. In Fontaine, the trial judge incorrectly ruled as a matter of law that he had no such discretion. Thus the factual and legal sufficiency of the basis of the trial court's ruling was never at issue.

Because the State failed to raise this issue before the trial court, the question of whether the court's ruling adequately set forth its legal and factual basis is not preserved

for appeal. But should the issue be preserved, the record competently sets forth the basis for the Court's exclusion of Statement I from admission into evidence.

b. Rule 403 Analysis

The State appeals the substance of the trial court's ruling, arguing that the court erred in finding that Rule 403, SCRE mandates the exclusion of Statement I.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403, SCRE.

Again as an initial matter, however, the State has failed to preserve for appeal its position as to the trial court's Rule 403 analysis. Samuel's attorneys presented her Rule 403 argument to the trial court and the court quickly ruled upon the issue. (R. p. 189, line 21-p. 190, line 13). The State never voiced opposition to this motion and never placed its position as to the appropriate Rule 403 analysis upon the record. (R. p. 190, line 14-p. 261, line 1). Rather the State immediately requested a recess and, upon reconvening, announced that it would file an interlocutory appeal of the Court's ruling. (R. p. 190, line 19-p. 191, line 20). As noted above, "if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." Porter at 37, 698 S.E.2d at 242. Whereas the State failed to raise its position as to the Rule 403 analysis before the trial court, it has not preserved this matter for appeal.

Should the State's position be preserved, however, the Court did not err in excluding Statement I from admission into evidence under Rule 403, SCRE. As shown below, the probative value of Statement I is very small. In contrast, the admission of the statement creates a substantial danger of unfair prejudice because South Carolina's laws

prohibiting reference to polygraph details and results prevent the jury from considering the “totality of the circumstances” of Statement I in violation of Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). As a result, because the probative value of the statement is substantially outweighed by the danger of unfair prejudice posed by its admission into evidence, the trial court did not err in excluding Statement I under Rule 403, SCRE.

i. Probative Value of Statement I

For the purposes of a Rule 403 analysis, South Carolina courts generally look upon “probative value” of evidence in terms of its bearing upon relevant matters.

Evidence is admissible if ‘logically relevant’ to establish a material fact or element of the crime; it need not be ‘necessary’ to the State’s case in order to be admitted. Relevant evidence may be excluded where its probative value is substantially outweighed by the danger of unfair prejudice.

State v. Caldwell, 378 S.C. 268, 287, 662 S.E.2d 474, 484 (Ct. App. 2008).

The State asserts that the probative value of Statement I “is significant because it sets the stage for the two following statements including the one in which she admits shaking the child” and “it establishes part of what takes place during the time she is at CPD from when she is given her Miranda rights until the recorded statements are made.” (Appellant’s Brief of Appellant/Respondent at 10). It is unclear what exactly the probative value of “setting the stage” may be, and the State did not set forth any more detail before the trial court. The State does not allege that the contents of Statement I go to proving the criminal allegations leveled against Samuel. As to establishing “part of what takes place during the time [Samuel] is at CPD,” the fact that Statement I establishes only “part” of what takes place—rather than the totality of the circumstances

(including the details of the polygraph examination and results)—is more demonstrative of unfair prejudice.

ii. The Danger of Unfair Prejudice

In contrast to the very limited probative value of Statement I, the admission of the statement into evidence without the corresponding circumstances in which it was elicited—in the midst of a potentially flawed polygraph examination subject to producing a “false positive” result—will violate the due process rights of Kendra Samuel as set forth within Jackson v. Denno. “Unfair prejudice means an undue tendency to suggest a decision on an improper basis.” Lyles at 338, 665 S.E.2d at 206. With regard to Statement I, though the trial court has issued its preliminary ruling on the voluntariness of the statement, the jury may not consider the statement without first determining it to be voluntary, beyond a reasonable doubt, under the totality of the circumstances.

Although the court must make the initial determination of admissibility, the trial court must instruct the jury that it cannot consider any confession unless it finds beyond a reasonable doubt that the accused gave his statement freely and voluntarily under the totality of the circumstances.

State v. Goodwin, 384 S.C. 588, 602, 683 S.E.2d 500, 507 (Ct. App. 2009). Because a jury cannot consider the details of the polygraph examination, its results, and the effect they may have had on the voluntariness of Statement I, there is a substantial tendency (if not a guarantee) “to suggest a decision on an improper basis” because the jury will not consider the “totality of the circumstances” as required by law.

The United States Supreme Court frames the totality of circumstances analysis in terms of due process.

The due process test takes into consideration “the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” ... The

determination “depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing.”

Dickerson v. United States, 530 U.S. 428, 434, 120 S. Ct. 2326, 2331, 147 L. Ed. 2d 405 (2000)(internal citations omitted). And South Carolina courts have emphasized the importance of the full “totality of the circumstances” analysis. “A jury *must* consider the totality of the circumstances under which a statement was given to determine whether it was voluntarily made.” State v. Miller, 375 S.C. 370, 385, 652 S.E.2d 444, 452 (Ct. App. 2007)(emphasis added)(string citation omitted).

The major circumstance of Statement I, however—the polygraph examination, its results, and their effect upon the voluntariness of the statement—cannot be revealed to the jury under the present state of South Carolina law. “Evidence regarding the results of a polygraph test or the defendant’s willingness or refusal to submit to one is inadmissible.” State v. Pressley, 290 S.C. 251, 252, 349 S.E.2d 403, 404 (1986). In State v. Wright, the Defendant sought to admit the fact that his confession was obtained as the result of a polygraph in order to argue coercion to the jury. Despite the fact that this request came from the Defendant himself, the trial judge found evidence of the polygraph test to be inadmissible and the Supreme Court affirmed.

The trial judge did not abuse his discretion in prohibiting any mention of the polygraph considering the authority against admitting evidence of polygraph examinations and the potential prejudice to appellant. Appellant sought to disclose the polygraph examiner’s misinformation to show the jury that the confession was not given voluntarily. However, appellant did not suggest at trial nor on appeal what limitation could have been placed on the disclosure to limit prejudice to appellant. Without some limitation, the only inference the jury could reasonably have drawn from learning appellant’s confession followed closely after a deceptive polygraph was that the confession was truthful and the answers given to the polygraph exam were

untruthful. This would serve to bolster the confession rather than persuade the jury to believe the alleged coercion.

State v. Wright, 322 S.C. 253, 256, 471 S.E.2d 700, 702 (1996)(footnote excluded).³

In fact, our courts have observed that “the results of a polygraph test are not admissible as evidence where the parties, as here, *expressly stipulated* to their admissibility.” Rutledge v. St. Paul Fire & Marine Ins. Co., 286 S.C. 360, 370, 334 S.E.2d 131, 137 (Ct. App. 1985)(emphasis supplied). The Rutledge court noted that it “agree[d] with the Supreme Court of North Carolina for the reasons stated in [State v. Grier, 307 N.C. 628, 645, 300 S.E.2d 351, 360 (N.C. 1983)].” Id. Within that opinion, the North Carolina court observed as follows.

[T]he admission by stipulation approach does not resolve some of the more perplexing problems attendant to the use of polygraph evidence. The validity of the polygraphic process is dependent upon such a large number of variable factors, many of which are extremely difficult, if not impossible, to assess, that we feel the stipulation simply cannot adequately deal with all situations which might arise affecting the accuracy of any particular test.

Id. at 645, 300 S.E.2d at 360.

Citing Ellenburg v. State, 367 S.C. 66, 625 S.E.2d 224 (2006), the State contends that Samuel’s counsel could have “mentioin[ed]” the polygraph as a valid trial strategy.⁴

³ Though Wright raised the “totality of the circumstances” argument in an attempt to offer the polygraph examination and results into evidence, he did not raise the issue at hand here: whether, in the absence of the polygraph statement, the jury’s consideration of the voluntariness of the associated confession would be unfairly prejudicial under Rule 403, SCRE.

⁴ The State also argues that Samuel’s argument pertaining to the inadmissibility of the details of her polygraph examination—and, correspondingly, the trial court’s Rule 403 analysis—ignore South Carolina law under State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). However, Council expressly found polygraph results to be inadmissible. In fact, under the Council analysis, two years later the South Carolina Supreme Court again found polygraph results to be inadmissible. State v. McHoney, 344 S.C. 85, 97, 544

But the Ellenburg court was careful to note that “the mere mention of a polygraph during testimony is not prejudicial *where, as here, no results are introduced into evidence.*” Id. at 69, 625 S.E.2d at 226, citing Bruno v. State, 347 S.C. 446, 556 S.E.2d 393 (2001)(emphasis added). Here, the results of Samuel’s alledged “failed” polygraph are absolutely essential to proving the involuntary nature of the Statement I. Scientific research has demonstrated the overbearing effects polygraph results may have on the will of a witness.

If the suspect is innocent, being told that their body language gives away their deceit may be an unnerving experience if the suspect believes in the interviewer’s diagnostic powers. In many of the documented cases involving false confessions (e.g., Gudjonsson & Lebegue, 1989), the initial uncertainty of a suspect concerning an incident was replaced with a false belief that they had committed an offence. In many of these cases the polygraph was instrumental in convincing the suspect that their “lies” had been detected and thus revealing their guilt. Telling a suspect that his lies have been uncovered by “trained observations” may be similarly “effective” in eliciting false statements.

Davies, Graham, Psychology, Law, and Criminal Justice: International Developments in Research and Practice, 94 (Walter de Gruyter & Co. 1995).

The relationship between polygraph examinations and false confessions is particularly important in that scientific studies of polygraphs have revealed widely-varying “false positive” ratios, ranging from 2% to 50.7%. Saxe, Dougherty, and Cross, The Validity of Polygraph Testing: Scientific Analysis and Public Controversy,

S.E.2d 30, 36 (2001). The State suggests the trial court erred in failing to conduct a full-blown Council analysis of polygraph testing yet again, but fails to point to any scientific advances that would somehow render this otherwise rejected evidence admissible under present authority.

American Psychologist, Vo. 40, No. 3, 355, 362 (1985). The factors leading to those disturbing ratios of “false positives” are also widely varying. “What appear to be very important are the conditions of the test. These probably include, at a minimum, *a narrowly focused question*, an experienced examiner/investigator, and a subject who believes in the efficacy of the test.” *Id.* at 364 (emphasis added). In this case, the “relevant questions” posed to Kendra Samuel during the polygraph examination clearly were not “narrowly focused.” Furthermore, Investigator Gray wrongly believed his strategy of vague questioning to be “the proper procedure.” Thus both the quality of the questioning and the knowledge of the investigator call into question the reliability of the polygraph examination and raise the distinct likelihood that the results presented to Kendra Samuel were, in fact, a “false positive.”

As shown above, however, current South Carolina law prohibits arguing any of the foregoing circumstances of the polygraph examination and results to the jury. *Wright* at 256, 471 S.E.2d at 702.⁵ Likewise, *Jackson v. Denno* requires the jury to consider the “totality of the circumstances” surrounding a confession, the trial court correctly excluded Statement I from admission into evidence. *Miller* at 385, 652 S.E.2d at 452. As a result, were the trial court to admit Statement I into evidence, it would be forced to violate the mandate of the South Carolina Supreme Court as to the admissibility of polygraph examination details and results set forth in *Wright* or the mandate of the

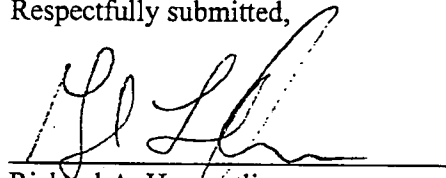
⁵ It should be noted that South Carolina courts, previous to *Wright*, *Council*, and other decisions holding polygraph evidence inadmissible, considered the role polygraphs played in the voluntariness of a confession. See *State v. Cannon*, 260 S.C. 537, 544-45, 197 S.E.2d 678, 681 (1973) (“The fact that a polygraph examination was used is another valid consideration in the totality of circumstances.”) Since the courts resolved upon excluding such evidence, however, the *Jackson v. Denno* consideration of “totality of the circumstances” has not been reconciled with the prohibition of polygraph evidence.

United States Supreme Court as to the consideration of the totality of the circumstances of a confession set forth in Jackson v. Denno. Because the admission into evidence of a statement procured in the course of a polygraph examination constitutes a Hobson's choice that inevitably leads to "an undue tendency to suggest a decision on an improper basis," Lyles at 338, the trial court correctly ruled that Statement I was inadmissible under Rule 403, SCRE.

CONCLUSION

For the reasons stated above, the trial court did not err in excluding the admission of Statement I into evidence pursuant to Rule 403, SCRE. As to this issue, the trial court's ruling should be affirmed.

Respectfully submitted,



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May 21, 2012
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2008-GS-40-07372

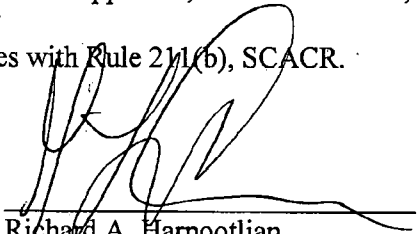
State of South Carolina..... Appellant/Respondent,

vs.

Kendra Samuel.....Respondent/Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel for Respondent/Appellant, Kendra Samuels, certifies that the
Final Brief of Respondent/Appellant complies with Rule 211(b), SCACR.



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May 21, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Richard A. Harpootlian, P.A.
Calendared

Nov. 2012

The State, Appellant/Respondent,

v.

Kendra Samuel, Respondent/Appellant.

Appellate Case No. 2010-180226

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5046
Heard October 16, 2012 – Filed November 14, 2012

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Salley W. Elliott, Assistant Attorney
General William M. Blich, Jr., and Solicitor Daniel E.
Johnson, all of Columbia, for the State.

Richard A. Harpootlian and Graham L. Newman, both of
Richard A. Harpootlian, P.A., of Columbia, for Kendra
Samuel.

LOCKEMY, J.: In this appeal, the State argues the trial court erred in suppressing one of Kendra Samuel's statements to law enforcement. The State claims the record contains no basis for the trial court's decision, and the trial court's failure to exercise any discretion constituted an abuse of discretion. Alternatively,

the State claims the trial court erred in excluding the statement pursuant to a Rule 403, SCRE analysis. Samuel cross-appeals the trial court's denial of her motion to suppress her statements to law enforcement. She maintains the statements were taken in violation of her *Miranda*¹ rights because her pre-custodial *Miranda* warning and waiver was not effective after custody was established. We affirm in part, reverse in part, and remand.

FACTS

On July 31, 2008, Samuel babysat Jessica Davis's two-year-old son. Samuel took the child to the park and returned home around 7 p.m., at which time she placed the child in his crib. When Davis checked on her son at some time after 11 p.m., she discovered he was not breathing and had passed away.

When Samuel and Davis gave their initial statements at the Columbia Police Department (CPD) on August 1, 2008, they were not considered suspects of a crime. After further investigation, Investigators Kevin Reese and A.L. Thomas requested additional statements from Samuel and Davis, and they voluntarily returned to the CPD on August 6, 2008.

Samuel was first interviewed by Investigator Joe Gray, who read Samuel her *Miranda* rights and had her sign an "Advice of Rights" form prior to conducting a polygraph examination. This occurred at approximately 10:30 a.m. Investigator Gray indicated Samuel was free to leave at any time before, during, or after his examination. Around 12:16 p.m., after conducting the polygraph examination, Investigator Gray informed Samuel the results showed deception in some of her answers. He then pulled his chair in front of Samuel, who was still seated and unrestrained in her chair, and continued to question her. These follow-up questions were not part of the polygraph examination, but were done as a result of the polygraph examination. She proceeded to give a statement of the events that transpired on July 31 (Statement 1), in which she discussed injuries occurring to the child, which was a change from the story she initially gave law enforcement. Investigator Gray subsequently notified Investigators Reese and Thomas that Samuel had provided an additional statement and concluded his interview with Samuel at about 1 p.m.

Investigator Thomas testified that because there were indications Samuel had changed her story, he and Agent Greg Shockley, who was with the South Carolina

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Law Enforcement Department's (SLED) Child Fatality Task Force, conducted an interview with Samuel in a different room from where her polygraph examination and first interview were administered. He testified Samuel was free to leave and not in custody, but he never explicitly told Samuel she was free to leave. He was also aware she had previously been advised of her *Miranda* rights. A portion of their interview with Samuel was recorded on a digital recorder (Statement 2). The digital recorder stopped recording due to memory shortage, so they continued memorializing her answers by having her write the remainder of her statement. She also answered some questions in her written statement (Statement 3). The interview with Investigator Thomas and Agent Shockley was concluded around 2:30 p.m. Investigator Thomas's opinion was that Samuel was free to leave until approximately 5:40 p.m., when he contended she was taken into custody.

Investigators Thomas and Reese conferred with each other following the second interview, and after discussing the child autopsy results and information provided by Davis, they determined the evidence did not corroborate Samuel's story. They concluded it was necessary to ask Samuel some additional questions. Samuel was asked if she needed a break to use the restroom or get some water or food. Further, Investigator Reese asked Samuel if she had been advised of her rights and if she still wished to speak with them. She confirmed that she had been advised of her rights and indicated she was willing to continue talking. Samuel gave another taped statement (Statement 4), as well as handwritten answers to Investigator Reese's follow-up questions (Statement 5). In her final statements, Samuel admitted the child would not stop crying while in her care, so she picked him up and shook him until he stopped. After shaking him, the child was unresponsive. Instead of calling for help, Samuel left the house with the child and went to the park. She explained that her boyfriend picked them up from the park and brought them home. Davis was at the home when Samuel returned, but Samuel did not alert anyone to the child's condition and placed him in the crib. Investigator Reese testified Samuel had been free to leave and they could not have stopped her until her confession at some point between 3:58 p.m. and 5:17 p.m. This interview ended at 5:30 p.m.

On November 29, 2010, a pre-trial, *Jackson v. Denno*² hearing was held to determine whether Samuel's multiple statements to law enforcement were given knowingly and voluntarily. Samuel cited *State v. Bradshaw*, 457 S.E.2d 456 (W. Va. 1995), to support her argument that because she was not re-advised of her *Miranda* rights after custody was established, any statements made during

² 378 U.S. 368 (1964).

custodial interrogation were not voluntary or admissible in trial. Samuel conceded that staleness of her waiver was not an issue under these facts. The trial court held that by the preponderance of the evidence, Samuel was fully advised of her *Miranda* rights before any interrogation, and the constitutional safeguards were sufficiently met. Further, it found South Carolina case law supported the position that statements given after a polygraph examination are voluntary and admissible under certain circumstances, and in the present situation, the police were not "excessive or overbearing." After determining that all of Samuel's statements were given knowingly and voluntarily, the trial court held they were admissible into evidence.

Following the trial court's *Denno* ruling, the State assured the trial court Investigator Gray would not reference the polygraph in any manner, and he would only testify about advising Samuel of her rights and her post-*Miranda* statements to him. At that point, Samuel interjected and stated she wanted to bring in the polygraph, but maintained she was not allowed to do so under case law. Specifically, defense counsel said, "We want to bring in the polygraph. . . . We want the polygraph. We want to show that he says to her, 'You lie'. Now how can we do that when the Supreme Court has prohibited the mention of the polygraph?" She then argued a Rule 403 analysis dictated Statement 1 should be excluded. She contended that "[Investigator Gray] can testify that he Mirandized her, but anything that comes after – he says, 'I gave you a polygraph exam and you lie,' at which time the trial court interrupted Samuel and agreed with her. It ruled that Investigator Gray would only be allowed to testify that he advised Samuel of her *Miranda* rights at 10:30 a.m. and then 'turned her over to the other officers at 1:30.'" The State immediately stopped the hearing and requested the opportunity to file an appeal because Investigator Gray's testimony was "crucial" in explaining the three-hour time period in which he interviewed Samuel.

On December 1, 2010, the State served a notice of appeal from the trial court's oral order,³ and Samuel served a cross-appeal on December 8, 2010.

³ See *State v. McKnight*, 287 S.C. 167, 168, 337 S.E.2d 208, 209 (1985) ("A pre-trial order granting the suppression of evidence which significantly impairs the prosecution of a criminal case is directly appealable under S.C. Code Ann. § 14-3-330(2)(a) (1976).").

THE STATE'S APPEAL

Did the trial court err in finding a knowing and voluntary confession must be excluded based on a Rule 403, SCRE analysis?

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." *State v. Wills*, 390 S.C. 139, 142, 700 S.E.2d 266, 267 (Ct. App. 2010) (citing *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). "An abuse of discretion occurs when the trial court's conclusions either lack evidentiary support or are controlled by an error of law." *Id.* (citing *Pagan*, 369 S.C. at 208, 631 S.E.2d at 265).

LAW/ANALYSIS

The State asserts the trial court correctly found Statement 1 was given knowingly and voluntarily but abused its discretion in subsequently suppressing it and only allowing Investigator Gray to testify he read Samuel her *Miranda* rights. Specifically, the State maintains the trial court did not provide a legal or factual basis for the statement's suppression, or alternatively, the trial court erred in excluding the statement under Rule 403, SCRE. We agree the trial court erred in finding Statement 1 should be suppressed based on the improper belief that polygraph evidence is *per se* inadmissible.

As a threshold matter, Samuel contends the State did not preserve its argument regarding the lack of a legal or factual basis for suppression of Statement 1. *See State v. Porter*, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal."); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006) ("Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law and arguments." (citing *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004))). The record establishes the State's only argument was that the statements made to Investigator Gray were "crucial" to the State's case, and thus, it wanted to appeal the decision immediately. This statement did not preserve the State's appellate argument regarding the trial court's lack of a legal or factual basis for suppression. The State had the opportunity to request a more specific basis for the trial court's ruling, thereby preserving the argument, but the State only said,

"based on your ruling, as I understand it that Investigator Gray would only be allowed to testify to the *Miranda* rights and none of the statement she made to him would be admissible, we would respectfully choose to appeal that at this time." Accordingly, we find the State did not preserve this particular argument.

We now analyze whether the trial court erred in suppressing the statement pursuant to Rule 403, SCRE. Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The record does not contain a significant Rule 403 analysis. It consisted of the trial court agreeing with Samuel that Statement 1 is prejudicial because Samuel could not present the polygraph to the jury, improperly preventing her from showing the full circumstances surrounding the voluntariness of Statement 1. See *State v. Miller*, 375 S.C. 370, 379, 383, 652 S.E.2d 444, 451 (Ct. App. 2007) ("Once the trial judge determines [by the preponderance of the evidence] that the statement [was given voluntarily and] is admissible, it is up to the jury to ultimately determine, beyond a reasonable doubt, whether the statement was voluntarily made."); see also *State v. Pressley*, 290 S.C. 251, 252, 349 S.E.2d 403, 404 (1986) ("Evidence regarding the results of a polygraph test or the defendant's willingness or refusal to submit to one is inadmissible.").

We find error in the trial court's reliance upon Samuel's assertion that polygraph evidence is *per se* inadmissible. Samuel cites *Pressley* on appeal in support of her argument that polygraph results are not admissible in trial, but we disagree with her reliance on that case. 290 S.C. at 252, 349 S.E.2d at 404.

Following its decision in *Pressley*, our supreme court found in *State v. Wright*, 322 S.C. 253, 256, 471 S.E.2d 700, 702 (1996),⁴ that a trial court did not abuse its discretion in admitting the post-polygraph confession into evidence while prohibiting the appellant from mentioning the polygraph. Although the appellant's polygraph results showed deception, he wanted to admit it to show the jury his post-polygraph confession was not voluntary beyond a reasonable doubt. *Id.* at 254-55, 471 S.E.2d at 701. While recognizing "the authority against admitting evidence of polygraph examinations and the potential prejudice to appellant," the

⁴ This case was decided before our supreme court's decision in *State v. Council*, 335 S.C. 1, 23-24, 515 S.E.2d 508, 519-20 (1999), which clarified further that polygraph evidence was not *per se* inadmissible, and outlined the analysis required when determining whether polygraph evidence can be admitted into trial.

court indicated some flexibility to the general rule and stated the "appellant did not suggest at trial nor on appeal what limitation could have been placed on the disclosure to limit prejudice to appellant." *Id.* at 256, 471 S.E.2d at 702. "Without some limitation, the only inference the jury could reasonably have drawn from learning appellant's confession followed closely after a deceptive polygraph was that the confession was truthful and the answers given to the polygraph exam were untruthful." *Id.* That would have served "to bolster [the appellant's] confession rather than persuade the jury to believe the alleged coercion." *Id.*

After suggesting in *Wright* that polygraph evidence could potentially be admissible in trial, if sufficient safeguards were in place to limit the possible prejudice to the defendant, our supreme court further explained in *Council*, 335 S.C. at 23-24, 515 S.E.2d at 519-20, that "the results of polygraph examinations are *generally* not admissible because the reliability of the tests is questionable," but that "in light of the adoption of the SCRE, admissibility of [polygraph evidence] should be analyzed under Rules 702 and 403, SCRE and the *Jones* factors." Upon review of these cases, we find Samuel's statement that polygraph evidence is *per se* inadmissible is incorrect. The trial court could have conducted an analysis pursuant to *Council* to determine what evidence, if any, regarding the polygraph examination was admissible in the present case.

Because the trial court based its decision to suppress Statement 1 on the erroneous belief that polygraph evidence was *per se* inadmissible, we reverse and remand this issue to the trial court in accordance with this decision.

SAMUEL'S CROSS-APPEAL

Did the trial court err in determining Samuel's statements were voluntarily given when a law enforcement officer administered pre-custodial *Miranda* rights but failed to re-advise Samuel of her *Miranda* rights after being taken into custody?

STANDARD OF REVIEW

"The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence." *State v. Miller*, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007) (citing *State v. Washington*, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988); *State v. Smith*, 268 S.C. 349, 353-54, 234 S.E.2d 19, 21 (1977)). "The jury must determine whether the statement was freely and voluntarily given beyond a reasonable doubt." *Id.* (citing *Washington*, 296 S.C. at 55-56, 370 S.E.2d at 612). "On appeal, the conclusion of the trial judge as to the

voluntariness of a statement will not be reversed unless so erroneous as to show an abuse of discretion." *Id.* (citing *State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996)). "When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence." *Id.* at 378-79, 652 S.E.2d at 448 (citing *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001)).

LAW/ANALYSIS

Samuel argues that a law enforcement officer's pre-custodial advisement of her *Miranda* rights was not sufficient for the subsequent custodial interrogation, and law enforcement should have re-advised her of them when she was taken into custody. She maintains that because *Miranda* rights are only applicable during custodial interrogation, the failure to administer them again once she was in custody renders her statements inadmissible. We disagree.

South Carolina has not directly addressed the issue of whether a pre-custodial *Miranda* waiver is *per se* ineffective when applied to confessions made after custody was established. However, several other states have addressed this issue, and all but one determined that instead of a bright-line approach to the issue, it is more appropriate to apply a totality-of-the-circumstances assessment. *See Upton v. State*, 36 S.W.3d 740, 743 (Ark. 2001) ("When the police are conducting a good faith [pre-custodial] investigation at police headquarters, they may have difficulty in determining the precise moment when questioning turns into custodial interrogation and *Miranda* warnings are required. Although the uncertain line between questioning and custodial interrogation does not excuse late warnings, it does provide a justification for the validity of good faith early warnings[,] which are sufficiently proximate to formal custody to alert the person being questioned to the importance of these constitutional rights." (quoting *State v. Burge*, 487 A.2d 532, 543 (Conn. 1985))); *State v. Disposito*, 913 A.2d 791, 800-01 (N.J. 2007) (stating that instead of finding that pre-custodial *Miranda* waivers are *per se* ineffective, a totality-of-the-circumstances approach "is preferable in that it encourages warnings when police question a suspect and allows law enforcement officials to pursue their investigations, subject to later review by a neutral court"); *State v. Grady*, 766 N.W.2d 729, 734-36 (Wis. 2009) (finding that "a sound interpretation of *Miranda* and sound public policy require the application of the [totality-of-the-circumstances test rather than a bright-line rule]"; *but see State v. Bradshaw*, 457 S.E.2d 456, 466-67 (W.Va. 1995) (finding a defendant cannot anticipatorily invoke his *Miranda* rights, because the "window of opportunity" for

the assertion of *Miranda* rights comes into existence only when that right is available during a custodial interrogation; however, to avoid a significant burden on the defendant, when police have given *Miranda* rights outside the context of custodial interrogation, those warnings must be repeated once custodial interrogation begins).

The majority view is convincing, and we find pre-custodial *Miranda* warnings and waivers may be sufficiently effective during a subsequent custodial interrogation without the need for re-advisement, but a totality-of-the-circumstances assessment should be applied to each case. In the present case, evidence in the record supports the trial court's finding that Samuel's statements were voluntary and admissible at trial.⁵ For the forgoing reasons, we affirm the trial court.

CONCLUSION

In conclusion, we reverse the trial court's exclusion of Statement 1 based upon its inaccurate assessment that polygraph evidence is *per se* inadmissible.

Additionally, we affirm the trial court's ruling that Samuel's statements to law enforcement were voluntary and admissible pursuant to *Jackson v. Denno*.

Finally, we remand this case in accordance with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and KONDUROS, JJ., concur.

⁵ Samuel conceded to the trial court that staleness was not an issue under these facts, and the sole argument on appeal is that pre-custodial *Miranda* rights and waivers are not effective once custody is subsequently established. We also note Samuel was asked whether she had been given her rights, to which she responded affirmatively and indicated she was willing to continue with the interview.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2008-GS-40-07372

RECEIVED
NOV 29 2012
SC Court of Appeals

State of South Carolina.....Appellant/Respondent,

vs.

Kendra Samuel.....Respondent/Appellant.

PETITION FOR REHEARING OF RESPONDENT/APPELLANT

Pursuant to Rule 221, SCACR, Respondent Kendra Samuel petitions the Court of Appeals for rehearing of this appeal. The Court's opinion, State v. Samuel, Op. No. 5046 (S.C. Ct. App. filed Nov. 14, 2012) (Shearouse Adv. Sh. No. 41 at 26) misapprehends critical points of law pertaining to the admissibility of polygraph evidence. The Court's misapprehension is more fully set forth below.

The central holding of Samuel is as follows.

Because the trial court based its decision to suppress Statement 1 on the erroneous belief that polygraph evidence was per se inadmissible, we reverse and remand this issue to the trial court in accordance with this decision.

Id. at 32. Whether polygraph evidence is “per se” inadmissible, however, is of no importance to the Rule 403 analysis of the admissibility of Statement 1. So long as polygraph evidence is inadmissible in *this single case*, Samuel cannot present the totality of the circumstances of her statement and thus is denied her due process rights under Jackson v. Denno, 84 S.Ct. 1774 (1964), and its progeny.

Furthermore, the Samuel analysis of the potential admissibility of polygraph evidence is flawed. The Court recognized the authority of State v. Pressley, 290 S.C. 251, 252, 349 S.E.2d 403, 404 (1986), which held that “evidence regarding the results of a polygraph test or the defendant’s willingness or refusal to submit to one is inadmissible.” Id. at 252, 349 S.E.2d at 404. The Court did not note its own precedent, however, set forth within Rutledge v. St. Paul Fire & Marine Ins. Co., 286 S.C. 360, 334 S.E.2d 131 (Ct. App. 1985). There the Court held that polygraph examination evidence is “inadmissible in its entirety.” Id. at 371, 334 S.E.2d at 138. This Court reached this conclusion in spite of two crucial points. First, the trial court admitted the polygraph evidence, “but he limited its consideration to the issue of a bad faith refusal ... to pay insurance benefits.” Id. at 370, 334 S.E.2d at 137. Thus the jury was not permitted to infer truth or falsity stemming from the polygraph results, but whether the defendant insurance company acted in good faith in denying a claim in conjunction with the results. Second, the Rutledge parties stipulated to the admissibility of the polygraph results. Id. at 369.

The Rutledge court noted that it “agree[d] with the Supreme Court of North Carolina for the reasons stated in [State v. Grier, 307 N.C. 628, 645, 300 S.E.2d 351, 360 (N.C. 1983)].” Id. Within that opinion, the North Carolina court observed as follows.

[T]he admission by stipulation approach does not resolve some of the more perplexing problems attendant to the use of polygraph evidence. The validity of the polygraphic process is dependent upon such a large number of variable factors, many of which are

extremely difficult, if not impossible, to assess, that we feel the stipulation simply cannot adequately deal with all situations which might arise affecting the accuracy of any particular test.

Id. at 645, 300 S.E.2d at 360. Grier specifically rejected the use of “cautionary instructions” to permit limited use of polygraph evidence at trial. Id. at 644, 300 S.E.2d at 360. At the heart of the North Carolina court’s ruling was its deep concern over improper influencing of the jury, and that any proposed limitations “provide no safeguards to protect against the spectre of trial by polygraph.” Id. at 643, 300 S.E.2d at 360.

State v. Samuel does not address any of the concerns raised by this Court in Rutledge or by the North Carolina case upon which Rutledge relies. Rather the Samuel opinion argues that our supreme court suggests in State v. Wright, 322 S.C. 253, 471 S.E.2d 700 (1996) “that polygraph evidence could potentially be admissible in trial, if sufficient safeguards were in place to limit the possible prejudice to the defendant.” Samuel at 32. Of course, any such suggestion would run directly counter to the Rutledge and Grier holdings. Nowhere within the Wright opinion, however, does our supreme court hold that polygraph results are admissible upon the establishment of certain limitations designed to ward off prejudice. In fact, the ultimate holding was the affirming of the trial court’s refusal to permit the polygraph into evidence.

The Samuel opinion critically errs, however, in creating a logical bridge between the perceived suggestion within Wright and the later scientific reliability analysis of the polygraph in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Samuel accurately quotes Council in that our supreme court “has consistently held the results of polygraph examinations are generally not admissible because the reliability of the tests is questionable.” Council at 23, 515 S.E.2d at 519. But scientific reliability of the polygraph (now viewed within the spectrum of Rule 703, SCRE)

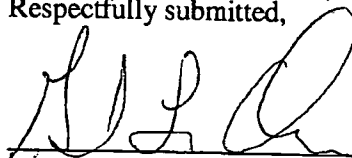
is not the only framework within which the admissibility of the polygraph must be viewed. In

fact, Council itself also rejects the admissibility of polygraph evidence under the probative/prejudicial analysis of Rule 403, SCRE.¹

The Samuel opinion's invitation to apply the "analysis pursuant to Council to determine what evidence, if any, regarding the polygraph examination was admissible in the present case," Samuel at 32, is the legal equivalent of fool's gold. Neither before the trial court nor the Court of Appeals has the State argued that scientific advances in polygraph examination since the filing of Council in 1999 have rendered polygraph results reliable and admissible under Rule 703, SCRE. Nor has the State suggested that adequate "safeguards" may be erected to counteract other Rule 403 concerns such as those set forth within Rutledge and Grier. At the end of the day—without the establishment of clear "procedural safeguards" allowing for the admission of polygraph evidence—the polygraph evidence in this case is inadmissible regardless of whether the trial court analyzes it from a case-by-case or *per se* perspective.

The inevitable choice that this Court must make is whether 1) to hold that a statement procured from inadmissible polygraph evidence is inadmissible under Jackson v. Denno, or 2) to set forth procedural safeguards sufficient to eliminate Rule 403 concerns pertaining to the admission of polygraph results into evidence so that the totality of the circumstances of Statement 1 may be presented to the jury. Because the Samuel opinion does not confront this choice, this Petition for Rehearing should be granted.

Respectfully submitted,



Richard A. Harpootlian

¹ "[B]ecause it would only confuse and mislead the jury, any probative value of this evidence would be outweighed by its prejudicial effect. Council at 24, 515 S.E.2d at 520.

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ATTORNEYS FOR RESPONDENT/APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of General Sessions

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2008-GS-40-07372

State of South Carolina..... Appellant/Respondent,

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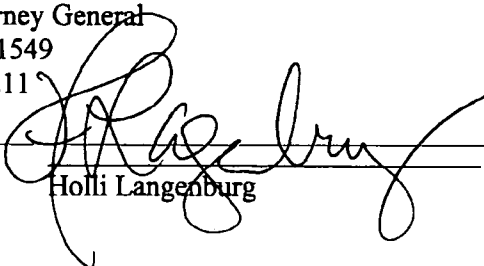
Kendra Samuel.....Respondent/Appellant.

CERTIFICATE OF SERVICE

I, Holli Langenburg, paralegal to the attorney for the Respondent/Appellant, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on November 29, 2012, served by U.S. Mail, the following document to the below mentioned person(s):

Document: Petition for Rehearing of Respondent/Appellant

Served: William M. Blich, Jr.
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Columbia, SC 29211


Holli Langenburg

The South Carolina Court of Appeals

The State, Appellant/Respondent

v.

Kendra Samuel, Respondent/Appellant.

Appellate Case No. 2010-180226

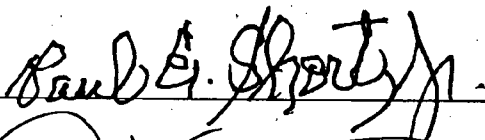
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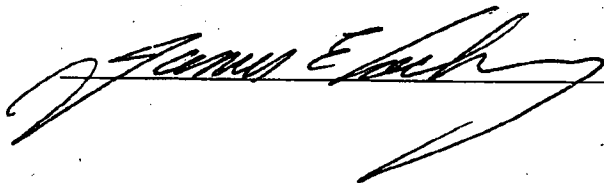
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ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 J.

 J.

 J.

Columbia, South Carolina

cc:

Richard A. Harpootlian

William M. Blich, Jr.

Graham L. Newman

FILED

18 December 2012