

VOLUME I OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Clifton Newman, Circuit Court Judge

RECEIVED

NOV - 1 2013

S.C. Supreme Court

JEFFERY T. LUCAS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000455

APPENDIX

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

JOHN WALT WHITMIRE
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....	i
TRIAL TRANSCRIPT.....	1
TRIAL EXHIBITS	342
APPLICATION FOR POST-CONVICTION RELIEF	375
MEMORANDUM OF LAW IN SUPPORT IF POST- CONVICTION RELIEF	382
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	390
RETURN	412
AMENDED APPLICATION FOR POST-CONVICTION RELIEF	416
AMENDED RETURN.....	426
POST-CONVICTION RELIEF HEARING TRANSCRIPT	432
ORDER OF DISMISSAL	492
INDICTMENT	504
SENTENCE SHEET	506

COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON

STATE

TRANSCRIPT OF RECORD

v.

2009-GS-32-0536

JEFFREY THOMAS LUCAS.

DEFENDANT.)

MARCH 16 - 18, 2009
LEXINGTON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE WILLIAM P. KEESLEY, JUDGE; AND A
JURY.

A P P E A R A N C E S:

LAWRENCE G. WEDEKIND ASSIST. SOLICITOR
SARA MCMAHON, ASSIST. SOLICITOR
MICHAEL D. ROSS, ASSIST. SOLICITOR
ATTORNEYS FOR THE STATE

H. WAYNE FLOYD, ESQUIRE
ATTORNEY FOR THE DEFENDANT

STACY L. SHEPPARD, RPR
CIRCUIT COURT REPORTER

1	I N D E X	
2	<u>WITNESS</u>	<u>PAGE</u>
3	David Pritchard (In Camera)	
	Direct Examination By Mr. Wedekind	59
4	Cross-Examination By Mr. Floyd	84
	Redirect Examination By Mr. Wedekind	88
5	Opening Statements	
	By Ms. McMahon	102
6	By Mr. Floyd	105
	David Pritchard	
7	Direct Examination By Mr. Wedekind	107
	Cross-Examination By Mr. Floyd	145
8	Redirect Examination By Mr. Wedekind	149
	Recross-Examination By Mr. Floyd	153
9	Susan Luberoff	
	Direct Examination By Mr. Wedekind	156
10	In Camera By Mr. Wedekind	164
	Direct Continued By Mr. Wedekind	168
11	Cross-Examination By Mr. Floyd	199
	Redirect Examination By Mr. Wedekind	211
12	Recross-Examination By Mr. Floyd	216
	Richard J. Cartie	
13	Direct Examination By Ms. McMahon	227
	Cross-Examination By Mr. Floyd	258
14	Redirect Examination By Ms. McMahon	268
	Recross-Examination By Mr. Floyd	270
15	Closing Arguments	
	By Mr. Wedekind	286
16	By Mr. Floyd	296
17	Charge of the Court	308
18	Verdict of the Jury	334
19	Sentence of the Court	341
20	Certificate of Reporter	343
21		
22		
23		
24		
25		

1	E X H I B I T S			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
3	S-1	Photograph	41	
4	S-2	Photograph	41	226
5	S-3	Photograph	41	
6	S-4	Photograph	41	
7	S-5	Photograph	41	179
8	S-6	Photograph	41	130
9	S-7	Photograph	52	179
10	S-8	Photograph	52	179
11	S-9	Photograph	53	179
12	S-10	Photograph	53	179
13	S-11	Photograph	53	179
14	S-12	Photograph	58	122
15	S-13	Photograph	58	122
16	S-14	Photograph	58	122
17	S-15	Photograph	58	179
18	S-16	Photograph	58	179
19	S-17	Photograph	58	179
20	S-18	Photograph	58	179
21	S-19	Photograph	58	179
22	S-20	Photograph	58	110
23	S-21	Photograph	58	
24	S-22	Statement dated 5/24/06	68	116
25	S-23	Statement dated 5/26/06	74	141

1	E X H I B I T S			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
3	C-1	Mental health report	40	
4	C-2	Jury Note	221	
5	C-3	Jury note	333	
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20				
21				
22				
23				
24				
25				

1 (The following proceedings were held on
2 March 16, 2009.)

3 **THE COURT:** Is the State ready for the jury?

4 **MR. WEDEKIND:** Yes, sir. Just to put on the
5 record, we have served Mr. Lucas and Mr. Floyd with
6 a copy of straight indictments so they have copies,
7 both of them, respectively, in their possession.

8 **THE COURT:** What straight indictment?

9 **MR. WEDEKIND:** Straight indictment number
10 2009-GS-32-0536 charged with infliction of great
11 bodily injury upon a child. He was originally
12 charged with assault and battery with intent to kill
13 and I think there was an additional charge which --
14 unlawful neglect of the child and we are not
15 utilizing those indictments against him. We're
16 solely proceeding on the great bodily injury upon a
17 child.

18 **THE COURT:** Mr. Floyd, does your client waive
19 arraignment?

20 **MR. FLOYD:** Yes, Your Honor.

21 **THE COURT:** Are you ready to proceed?

22 **MR. FLOYD:** We're ready to proceed.

23 **THE COURT:** Are you ready for the jury?

24 **MR. FLOYD:** Ready for the jury, Your Honor.

25 (The jury panel enters the courtroom.)

1 THE COURT: Ladies and gentlemen of the jury,
2 my name is Billy Keesley. I live in Edgefield and
3 I'm a resident judge of our circuit. Our circuit
4 consists of Lexington, McCormick, Saluda and
5 Edgefield Counties. And the Chief Justice has
6 assigned me to preside over a term of general
7 sessions court in Lexington this week.

8 You've been brought here to serve as potential
9 jurors on a case and I'm going to explain that to
10 you in more detail shortly. Before I do, I want to
11 go over some things with you. And if I repeat
12 anything that you've already been told upstairs with
13 Judge McMahon, I apologize to you, but I was not up
14 there and I need to make sure all of these things
15 are covered.

16 What's going to happen is that I'm going to be
17 asking you some questions. And the purpose for
18 these questions is to gain from you any possible
19 interest you may have in the case, bias you may have
20 related to the case, any connection you may have to
21 the case or anybody in it, anything that might
22 affect your ability to be a fair and impartial juror
23 in this case.

24 Now, you need to understand that it's very
25 important that if you have any doubt about whether

1 any of these things apply to you, you need to
2 discuss it with me and let me resolve the doubt.

3 If I ever ask you anything that you would
4 prefer to discuss more privately, just let me know
5 that you want to come down front and we'll talk
6 about it over here on the side.

7 You do need to understand that this is a court
8 of record, which means that Ms. Sheppard down there
9 is taking down everything we say. So if you're
10 going to speak, the first thing I have to do is
11 identify who is speaking, so I'm going to get you to
12 identify yourself by your name and by your juror
13 number.

14 We're going to be using a numbering system that
15 has an additional set of numbers than the ones you
16 were given earlier, so you tell me the number that
17 you were assigned earlier and we'll look it up on
18 our list. If you don't know the number, don't worry
19 about it, we'll find you.

20 Now, ladies and gentlemen, you have an
21 obligation to be completely truthful and honest with
22 me, that's very important. Please understand that.
23 Did they place you under oath upstairs?

24 (Jurors indicate in the affirmative.)

25 **THE COURT:** Okay. You're still under oath

1 which will follow you throughout the time that
2 you're on jury duty.

3 What we will do is we'll go through this
4 process of qualification and we'll determine who's
5 qualified to serve on this jury. And after that, we
6 will select the jury and somewhere between 12 and 14
7 of you will stay with me and the rest of you, I
8 assume, will be put on a telephone standby system.

9 I do think that after we draw the jury, those
10 12 to 14 who stay with me will only be here a short
11 time today. We have some legal issues that I've got
12 to work through that don't require the jury to be
13 present and, also, they've got other cases that I've
14 been doing before you came down here and that I'll
15 be doing after you leave once I finish with these
16 legal issues on this case.

17 Tomorrow there is a scheduling conflict with
18 the witnesses and so I don't think that those 12 to
19 14 folks will start back in the trial until tomorrow
20 afternoon. We'll be working, but I think that's
21 what the schedule will be for those of you who will
22 be staying with me.

23 All right. The case that you have been called
24 to serve potentially as jurors is captioned the
25 State versus Jeffery Thomas Lucas. Mr. Lucas is

1 charged in an indictment with the offense of
2 inflicting great bodily injury upon a child.

3 The indictment alleges that Jeffery Thomas
4 Lucas did in Lexington County, South Carolina, on or
5 about May 24, 2006, inflict great bodily injury upon
6 a child. Specifically, it's alleged that the
7 defendant through application of physical acts
8 caused permanent damage to a two-year-old child,
9 Child [REDACTED] inflicting injuries to his head,
10 spine, intestines and genitals and allegedly causing
11 life threatening injuries. Those things are alleged
12 to be in violation of a code section 16-3-95 of the
13 code of laws of South Carolina, 1976, as amended.

14 Mr. Lucas has entered a plea of not guilty. He
15 is presumed to be innocent. It is incumbent upon
16 the State of South Carolina having brought this
17 charge to prove the guilt of Mr. Lucas beyond a
18 reasonable doubt.

19 An indictment is not a charging paper. An
20 indictment is nothing more than the formal means by
21 which someone -- I said that wrong -- an indictment
22 is a charging paper. That's all that it is. It's
23 not evidence. It is the formal means by which
24 someone is charged and brought to trial. You cannot
25 give any evidentiary value to an indictment. It is

1 not evidence.

2 Now, I'm going to be asking you a series of
3 questions. If any of them apply to you or you have
4 doubt about whether they apply to you, please stand
5 and listen carefully to the question I ask you and
6 answer that question.

7 Is Jeffery Thomas Lucas in the courtroom?

8 MR. FLOYD: Yes, he is, Your Honor.

9 THE COURT: Mr. Floyd, would you have your
10 client stand and face the jury?

11 Thank you, Mr. Lucas. You may be seated.

12 Is there any member of the jury panel who is
13 related by blood or marriage or connected by
14 employment with the defendant in this case, Jeffery
15 Thomas Lucas; if so, please stand?

16 (There was no response.)

17 THE COURT: Mr. Lucas, will be represented by
18 Mr. Wayne Floyd.

19 (Mr. Floyd stands.)

20 THE COURT: Thank you, Mr. Floyd.

21 The following persons have been identified as
22 potential witnesses. I don't think any of them are
23 here today, but if I call out a name and you need
24 more identifying information, let me know and I'll
25 try to get that from the attorneys. The potential

1 witnesses are listed as Dr. Susan Luberoth,
2 L-u-b-e-r-o-t-h; Dr. Richard Cartie, C-a-r-t-i-e;
3 and Detective David Pritchard.

4 Are any of you related by blood or marriage or
5 connected by employment with any of the potential
6 witnesses for the State; if so, please stand?

7 JUROR: Melba Carter.

8 THE COURT: Ms. Carter is juror number 29.
9 She's 17 on our list.

10 And what's your situation, ma'am?

11 JUROR: I work for the Department of Mental
12 Health, which is a division of William S. Hall
13 Psychiatric Institute is where I currently work in
14 that area. Dr. Luberoth is part of the ARC, the
15 Abuse Recovery Center. I just know her by name. I
16 don't know her personally or have any relationship
17 with her.

18 THE COURT: Was the child treated there?

19 MR. WEDEKIND: No, sir.

20 THE COURT: Ms. Carter, does Dr. Luberoth have
21 any say-so about your job?

22 JUROR: No. No, sir.

23 THE COURT: You don't report in any way to her?
24 She doesn't have any supervisory control over you
25 whatsoever?

1 JUROR: No, sir.

2 THE COURT: Is there anything at all about your
3 relationship with her that would in any way affect
4 your ability to be a fair and impartial juror in the
5 case?

6 JUROR: No, sir.

7 THE COURT: Can you decide the case without
8 regard to what she may think of your decision?

9 JUROR: Yes, sir.

10 THE COURT: Do you have any doubt whatsoever
11 about your ability to be a fair and impartial juror
12 in this case?

13 JUROR: No, sir.

14 THE COURT: Thank you, ma'am.

15 Ms. Carter's juror number 29. She's eligible
16 to serve.

17 The State will be represented by Mr. Larry
18 Wedekind. He works with the Solicitor's Office of
19 the Eleventh Judicial Circuit.

20 (Mr. Wedekind stands.)

21 THE COURT: Thank you, sir.

22 Sara McMahon is also listed as a possible
23 State's attorney. Ms. McMahon's got the flu, so I
24 don't know...

25 MR. WEDEKIND: She's expected to be back

1 tomorrow and Mr. Ross is ably going to help me
2 select the jury.

3 THE COURT: I'm sorry. Okay. Mr. Ross, good
4 to have you with us.

5 MR. ROSS: Good to be here, sir.

6 THE COURT: Now, ladies and gentlemen, are any
7 of you related by blood or marriage or connected by
8 employment with Child [REDACTED] if so, please stand?
9 That's the person identified as the two-year-old
10 child, Child [REDACTED]

11 (There was no response.)

12 THE COURT: Do any of you know anything at all
13 about this matter? Has anybody talked to you about
14 it? Have you heard, seen or read anything about it
15 through any media outlet? Do you have any knowledge
16 whatsoever about this situation; if so, please
17 stand?

18 (There was no response.)

19 THE COURT: If any of you have any association
20 or relationship with anybody in this case that you
21 have not been asked about, have not disclosed, you
22 need to let us know about it.

23 So, for example, if you are friends, neighbors,
24 attend the same church or civic clubs, if you are
25 current or former attorney -- excuse me -- current

1 or former clients of one of these attorneys or
2 anyone with whom they're affiliated, current or
3 former patients of any of the doctors, if you've
4 ever been involved in a case that was represented by
5 the Solicitor's office, if you've ever been
6 represented by Mr. Floyd or on the opposite side of
7 a case represented by Mr. Floyd, if you've got any
8 connection of any kind with anybody in this case,
9 you need to let us know about it, please stand.

10 (Juror stands.)

11 JUROR: Regina Jackson.

12 THE COURT: Ms. Jackson is juror number 84.
13 She's 18 on our list.

14 What's your situation, ma'am?

15 JUROR: I just wanted to disclose that some
16 years ago Mr. Floyd represented my husband in court.

17 THE COURT: Okay. That matter has ended?

18 JUROR: Yes, sir.

19 THE COURT: Is there anything at all about your
20 relationship with Mr. Floyd or that experience that
21 would in any way affect your ability to be a fair
22 and impartial juror in this case?

23 JUROR: No, sir.

24 THE COURT: Any doubt in your mind about that?

25 JUROR: No, sir.

1 THE COURT: Thank you.

2 Ms. Jackson's juror number 84. She's eligible
3 to serve.

4 Are any of you members of or financial
5 contributors to any organization that has as one of
6 its primary purposes, the enforcement or the support
7 of law enforcement or assistance of victims or
8 furtherance of victim's rights?

9 Those would include organizations such as any
10 type of shelter for abused or battered people. It
11 would include being a member of or financial
12 contributor to organizations such as Citizens
13 Against Violent Crime, the sheriff's association,
14 any organization of that type, please stand.

15 (Juror stands.)

16 THE COURT: Your name, sir?

17 JUROR: Ronnie Cumbee.

18 THE COURT: Juror number 46, number 29 on the
19 list.

20 What's your situation, Mr. Cumbee?

21 JUROR: I'm just a contributor to the sheriff's
22 association.

23 THE COURT: Anything about that that would in
24 any way affect your ability to be a fair and
25 impartial juror in this case?

1 JUROR: No, sir.

2 THE COURT: Any doubt in your mind?

3 JUROR: No, sir.

4 THE COURT: Thank you.

5 Mr. Cumbee's juror number 46. He's eligible to
6 serve.

7 All right. I'm going to pose a question. It's
8 going to have multiple parts to it and we're going
9 to discuss it down front. So if the question
10 applies to you or you have doubt about whether it
11 applies to you, you need to stand and then we'll
12 talk about it down here.

13 If any of you, any of your immediate family
14 members or any of your close, personal friends have
15 ever been the victim of any type of child abuse, or
16 ever been accused of committing any type of child
17 abuse, you need to talk to me, please stand.

18 (Jurors stand.)

19 THE COURT: Come down front, please.

20 The attorneys may join me on the side.

21 Mr. Lucas may as well, if he likes.

22 (Whereupon, the following bench conferences
23 were held on the record.)

24 THE COURT: Mr. Cumbee.

25 JUROR: Yes, sir.

1 THE COURT: 46, 29 on our list.
2 What's your situation, Mr. Cumbee?
3 JUROR: In 1996, my children were victims of
4 sexual abuse.
5 THE COURT: Was anybody prosecuted?
6 JUROR: Yes, sir.
7 THE COURT: What happened?
8 JUROR: We settled.
9 THE COURT: Did he go to jail?
10 JUROR: Yes, sir.
11 THE COURT: Is there anything at all about that
12 experience that affects your ability to be fair and
13 impartial in this case?
14 JUROR: No, sir.
15 THE COURT: Any doubt in your mind?
16 JUROR: No, sir.
17 THE COURT: Was that in Lexington County?
18 JUROR: Yes, sir.
19 THE COURT: Do you know who prosecuted the
20 case?
21 JUROR: I want to say McMahon.
22 THE COURT: In '96?
23 JUROR: Yes, sir.
24 THE COURT: All right. Thank you very much,
25 Mr. Cumbee.

1 Juror number 46, Mr. Cumbee's eligible to
2 serve.

3 Yes, ma'am.

4 JUROR: 144, Karen Rhinehart.

5 THE COURT: Did you say Rhinehart?

6 JUROR: Yes.

7 THE COURT: Ms. Rhinehart's juror number 144
8 she's 10 on our list.

9 What's your situation, ma'am?

10 JUROR: My husband and his siblings were
11 physically abused during their entire childhood by
12 their father.

13 THE COURT: Was he ever charged?

14 JUROR: No. The one time there was an
15 opportunity, his sister decided not to press
16 charges.

17 THE COURT: Anything about that relationship or
18 experience that affects your ability to be fair and
19 impartial as a juror?

20 JUROR: I don't think I could be very impartial
21 knowing what he did to my husband.

22 THE COURT: I understand. Don't discuss any of
23 that with your fellow jurors, please. You'll be set
24 aside on this case.

25 (Whereupon, the bench conferences were

1 concluded.)

2 THE COURT: Ms. Rhinehart's juror 144. She's
3 10 on our list.. She's set aside in this trial.

4 Anybody else?

5 (There was no response.)

6 THE COURT: Mr. Wedekind, what's the
7 prosecuting agency?

8 MR. WEDEKIND: The Lexington County Sheriff's
9 Office, sir.

10 THE COURT: Ladies and gentlemen, do any of you
11 have any connection of any kind with the Lexington
12 County Sheriff's Office that you haven't disclosed
13 to us; if so, please stand?

14 (There was no response.)

15 THE COURT: Do any of you have any connection
16 of any kind with the Eleventh Circuit Solicitor's
17 Office that you haven't disclosed to us; if so,
18 please stand?

19 (Juror stands.)

20 THE COURT: Yes, sir, what's your name?

21 JUROR: David Griffith.

22 THE COURT: Mr. Griffith is juror number 68.
23 He's number 7 on our list.

24 What's your situation, please?

25 JUROR: Your Honor, I am close, personal

1 friends with Sheriff Metts and -- I guess that's it.

2 THE COURT: You understand that his agency is
3 the one prosecuting this case or brought this case?

4 JUROR: Yes, sir.

5 THE COURT: Is there anything at all about your
6 relationship with Sheriff Metts that would in any
7 way affect your ability to be a fair and impartial
8 juror in this case?

9 JUROR: No, sir.

10 THE COURT: Can you decide the case without
11 regard to what he may think of your decision?

12 JUROR: I believe so.

13 THE COURT: Do you have any doubt?

14 JUROR: No, sir.

15 THE COURT: All right. So you're confident you
16 can decide this case without regard to the next time
17 you see Sheriff Metts?

18 JUROR: To be honest with you, Your Honor, I'm
19 not sure I can answer that question very honestly.

20 THE COURT: Okay. Well, that's all I want is
21 an honest answer and I think the best thing for me
22 to do is set you aside. Just have a seat and stay
23 with us, but I'll set you aside on the case.

24 Mr. Griffith is juror number 68. He's 7 on our
25 list. Set him aside from this trial, please.

1 Have any of you formed or expressed any
2 opinions about the case; if so, please stand?

3 (There was no response.)

4 **THE COURT:** Is there anything at all about the
5 nature of the allegations in this case that would
6 affect your ability to be a fair and impartial
7 juror; if so, please stand?

8 (There was no response.)

9 **THE COURT:** Are any of you aware of any
10 interest, bias or prejudice that you might have for
11 or against the State, for or against Mr. Lucas, for
12 or against anyone or any entity involved in the
13 case; if so, please stand?

14 (There was no response.)

15 **THE COURT:** Can each of you give both the State
16 of South Carolina and the defendant, Jeffery Thomas
17 Lucas, a fair and impartial trial? If you know of
18 any reason why you cannot, please stand now.

19 (There was no response.)

20 **THE COURT:** Further questions from the State?

21 **MR. WEDEKIND:** No questions.

22 **THE COURT:** Further questions from the defense?

23 **MR. FLOYD:** No, Your Honor.

24 **THE COURT:** Thank you very much. The jury
25 panel is qualified.

1 Now, ladies and gentlemen, the way we draw
2 juries in General Sessions Court is that the clerk's
3 going to call one name at a time. If it is your
4 name, gather your personal belongings please and
5 come down front. I need you to come down -- show
6 them where to stand.

7 **BAILIFF:** Come down front and stand like this.

8 **THE COURT:** When you get down here, the clerk
9 is going to ask questions of the State's attorney
10 and the defense attorney and based on their
11 responses, you'll be told whether to have a seat in
12 the jury box or return to your seat in the
13 courtroom. That's why you need to bring your
14 personal belongings because the next stop may be
15 over here.

16 The strikes are five and five?

17 **MR. WEDEKIND:** That's my understanding, sir.

18 **MR. FLOYD:** I think so, Your Honor.

19 **THE COURT:** All right. The strikes are five
20 for the State and five for the defense.

21 Madame Clerk, give us a jury, please.

22 (During the jury selection process, the
23 jurors were called forward and peremptory strikes
24 were exercised as reflected by the attached voir
25 dire sheet made a part of this record at page 5.)

1 THE COURT: Are there any matters to take up
2 including composition of the jury panel prior to the
3 jury being sworn, from the State?

4 MR. WEDEKIND: Not from the State, sir.

5 THE COURT: From the defense?

6 MR. FLOYD: No, Your Honor.

7 THE COURT: What's your name, sir, in the
8 white?

9 JUROR: Ken Dawkins.

10 THE COURT: Mr. Dawkins, you're in the foreman
11 seat. It looks good on you. You stay there and be
12 a foreman, okay.

13 Juror number 50, Mr. Dawkins, will be the
14 foreman of the jury.

15 Ladies and gentlemen, I'm going to send you
16 back into the jury room while I get my bearings from
17 the attorneys. The prosecutor's office in South
18 Carolina controls the calling of the cases, so I
19 need to get a little bit of information from them.
20 We got some last week and I need to make sure I'm
21 still up with them on how the case is going to be
22 expected to proceed.

23 So I'll talk to the attorney for the State and
24 the attorney for the defense and then I'll bring you
25 back out here and I have to give you a few

1 instructions before I can let you go for the day.

2 Don't discuss this case in any way. Don't talk
3 about the people involved in it. Don't talk about
4 the type of case it's alleged to be. Don't talk
5 about this case at all during this break. You can
6 talk about other things, but don't talk about this
7 case.

8 If you'll follow the bailiff, he'll show you
9 where the jury room is.

10 (The jury retires to the jury room.)

11 **THE COURT:** Did they explain the call-in system
12 to you upstairs, the telephone call-in system?

13 (Jurors indicate in the affirmative.)

14 **THE COURT:** Well, what did they tell you, to
15 call after 6:00?

16 (Jurors indicate in the affirmative.)

17 **THE COURT:** Well, that's what you need to do.

18 Folks, you're going to be through for the day.
19 You need to call that number tonight after 6:00. I
20 think Judge McMahon has a short trial. I think he's
21 going to do trials all week. I'm expected to do
22 this trial and then whenever I finish, I'm going to
23 do guilty pleas and probation matters the rest of
24 the week. That was the schedule as of Friday.

25 They do have a transfer court trial that's

1 scheduled for Wednesday so my guess is you're going
2 to be brought back in. I just don't know when.
3 Judge McMahon will be in charge of that and he will
4 coordinate with the clerk and the Solicitor's office
5 and work all of that out.

6 If I don't see you again, thank you very much
7 for your service. Call tonight after 6:00 and
8 follow the instructions. You're free to go. Thank
9 you.

10 (The remaining jury panel was excused.)

11 **THE COURT:** What pretrial issues am I going to
12 have to address?

13 **MR. WEDEKIND:** Sir, there's an issue of a Blair
14 hearing. I think at one time, Mr. Floyd had raised
15 the mental competence as an allegation of his
16 client. We had taken this measure, there was a
17 motion to that affect, the State consented to an
18 evaluation at the Department of Mental Health.

19 And I'll pass up to the Court, Mr. Floyd has a
20 copy of this, this is a letter dated February 5th,
21 2009 from the Department of Mental Health reflecting
22 the competence and the ability to assist
23 meaningfully in the defense. And the findings are
24 made by Dr. Kepler of the DMH.

25 **MR. FLOYD:** We do not raise the issue at this

1 time, Your Honor.

2 THE COURT: I've still got to do a Blair
3 hearing.

4 All right. What other hearings?

5 MR. WEDEKIND: A Denno hearing, sir. There
6 will be oral statements made by the defendant to
7 Detective Pritchard. And there will be two
8 statements that are going to be sought to be
9 admitted by the State.

10 Detective Pritchard, as I already told the
11 Court earlier, is involved in a trial upstairs, but
12 as soon as that's concluded, we will bring him down
13 and engage in that.

14 And I believe there will be some questions
15 about some photographs. I have not gone item by
16 item with Mr. Floyd, but they have been provided to
17 him in discovery.

18 THE COURT: Mr. Floyd, what issues do we have?

19 MR. FLOYD: At this point, I don't know any
20 other than what he's just said, Your Honor.

21 THE COURT: What are the issues with the
22 photographs? Have you got an in limine motion?

23 MR. FLOYD: There could be, Your Honor. I'd
24 like to see the ones he's going to try to introduce.
25 There may be some questions on prejudicial value

1 outweighing probative value.

2 THE COURT: All right. What about -- the Denno
3 hearing, I've got to wait until the trial upstairs
4 is finished?

5 MR. WEDEKIND: Yes, sir. And that should be,
6 my understanding, some time today or tomorrow
7 morning.

8 THE COURT: So you want this jury to come back
9 at 2:00?

10 MR. WEDEKIND: Yes, sir, tomorrow.

11 THE COURT: Okay. Bring them back in, please.

12 (The jury returns to the courtroom.)

13 THE COURT: All right. Ladies and gentlemen,
14 from what I'm told, I'm going to need you here
15 tomorrow at two o'clock. What I want you to do,
16 though, is to call that number that you were given
17 upstairs, that call-in system, and follow the
18 instructions that are given on there for the case of
19 the State versus Lucas.

20 It will probably be identified that way as the
21 Lucas case. They may say, my name is Keesley, Judge
22 Keesley, but anyway, they usually go out of their
23 way to make sure you know the identification of the
24 case, but it's State versus Lucas is the case that
25 you're sitting on.

1 I don't expect any problems with bringing you
2 in at 2:00, but if you'll call and just verify that,
3 I would say to call after 11 o'clock tomorrow. You
4 can call tonight after 6:00, but call tomorrow after
5 11:00 and that'll give us a chance if anything comes
6 up in the morning to change that.

7 I've kind of got a situation where I can't do
8 part of what I have to do because the person I have
9 to do it with is in another trial somewhere else and
10 there's nothing anybody can do about that. There's
11 court going on all over the state and we just have
12 to work around it. Sometimes I have their's and
13 sometimes they have mine.

14 Now, so in a few minutes, I'm going to let you
15 go home, but I have to give you some instructions
16 before you go. Do not discuss this case in any way
17 among yourselves until I tell you to, that'll be at
18 the very end of the trial. Do not discuss this case
19 with anybody else until the week is over and you've
20 been seated on any jury you might possibly be seated
21 on.

22 So to give you an example of what I mean by
23 that instruction, it's okay for you to tell a spouse
24 or a friend that you're on a jury, but you cannot
25 tell them anything about the type of case it's

1 alleged to be, who's in it, anything about the case.
2 You cannot discuss the case with them in any way at
3 all.

4 If anybody attempts to contact you and discuss
5 the case with you, report that to me so that I can
6 deal with it.

7 Do not let yourselves be exposed to any media
8 coverage of the trial. I don't expect any media
9 coverage of this trial, but if there is any and
10 you're exposed to it, get away from it and don't let
11 yourselves be exposed to it any further and then
12 report to me at the first opportunity what you may
13 have seen, heard or read through the media.

14 Do not do any independent investigation. When
15 you take your oath tomorrow, you're going to be
16 promising us that you will decide the case based on
17 the evidence and the law. And those things are
18 going to come to you in this courtroom.

19 Now, we're going to ask you to use your common
20 sense, but you're going to decide the case based on
21 the evidence that's presented in this courtroom and
22 the law that I will tell to you. So, for example,
23 don't go on the Internet and try to look up law.
24 There's no need for you to do that.

25 There's an old adage that a little knowledge is

1 a dangerous thing. It will create all kinds of
2 problems at best and, at worst, it'll cause us to
3 have to stop the trial completely. So please don't
4 do any independent investigation. You're perfectly
5 equipped to do the job that you'll be called upon to
6 do. You don't need any outside influences.

7 I don't know if there -- one of the things that
8 we've had problems with other than the Internet in
9 the past is if there is a scene somewhere, sometimes
10 a juror will go out and drive to the scene and stop
11 and look around. That's the kind of thing I'm
12 saying by don't do any independent investigation.

13 Now, ladies and gentlemen, if you have some
14 true emergency that arises that prevents you from
15 being here, please have somebody call and let us
16 know what's going on. Because at two o'clock
17 tomorrow if we're ready to start and you're not
18 here, I can't start. I have to find you or at least
19 find out what's going on with you if you're not
20 here. So please let us know if you have some true
21 emergency that arises that prevents you from being
22 here. Call the clerk's office, they'll get word to
23 us.

24 Any question before I let you go?

25 JUROR: Do we come to this courtroom?

1 THE COURT: Yes, sir. I should have told you
2 that.

3 You come directly to the jury room. It's best,
4 when you get to the courthouse, that you not wait
5 around in the common areas, just come straight up to
6 the jury room. The bailiffs will be here to see to
7 your comfort. They will show you when you leave,
8 how you get back there.

9 Anything else?

10 JUROR: Should we go back to work now? I mean,
11 how does that work?

12 THE COURT: What time do you get off?

13 JUROR: 4:30.

14 THE COURT: That's fine. That's up to you. We
15 won't need you until the earliest will be two
16 o'clock tomorrow.

17 JUROR: But if I don't go back to work, that's
18 still...

19 THE COURT: That's between you and your boss.
20 You will have an excuse that will say that you were
21 here today. It won't say the hours.

22 Anything else?

23 (There was no response.)

24 THE COURT: All right. Folks, well, I haven't
25 been given an estimate as to how long the case is

1 expected to try -- to take to try. My guess will be
2 a couple of days.

3 We do have some things that we have to work
4 around that don't have anything to do with this
5 case. You've probably read or heard that South
6 Carolina judges handle more cases than any other
7 state in the country and that's no joke. So in
8 order for us to do that, we have to schedule things
9 without knowing what we're going to be in as far as
10 trials in a particular day. So I'll do my very best
11 not to inconvenience you and not to waste your time.

12 I do know that on Wednesday morning at 9:30,
13 I've got a hearing from a civil trial I did a long
14 time ago, but it shouldn't take more than 30
15 minutes. So Wednesday I'll probably have you come
16 in at 9:30.

17 (Pause.)

18 **THE COURT:** Okay. Let's say 2:15 tomorrow.
19 She just reminded me of something I've got tomorrow.
20 But call and verify the time, okay. No other
21 questions?

22 (There was no response.)

23 **THE COURT:** Thank you very much, folks. If
24 you'll follow the bailiff, he'll show you how to get
25 to the secured area back there.

1 (The jury was excused for the day.)

2 THE COURT: All right. I'm going to go back
3 here and read the report from the Department of
4 Mental Health. It may not take long to do this
5 Blair hearing, but I do have to have some hearing.

6 In the meantime, if you all would talk about
7 these photographs so I'll know whether it's going to
8 be an issue or not, I'd appreciate it.

9 MR. WEDEKIND: Yes, sir.

10 THE COURT: Mr. Lucas, you need to stay close
11 by, all right? Thank you.

12 We're at ease for a few minutes.

13 (Brief recess.)

14 THE COURT: Mr. Lucas, anytime a judge orders
15 somebody to be evaluated, when that report comes
16 back and before we can do the trial on that person,
17 I have to have a hearing and it's called a Blair
18 hearing. And Blair was just a name of some person
19 in some case that established that we had to have
20 these types of hearings.

21 And I've read your report and so I'm going to
22 need to ask you some questions. And these questions
23 are related to if you understand what's going on,
24 okay?

25 DEFENDANT LUCAS: Yes, sir.

1 **THE COURT:** Now, this lady over here, she takes
2 down everything we say. Your lawyer's there, if I
3 were to ask anything improper, I'm sure he'd let me
4 know it. And then if there's any questions they
5 want to ask, they can ask them, too, but usually
6 this is pretty routine stuff. It involves a
7 person's life, in this case yours, so it's not a
8 trivial matter, but it's fairly routine.

9 I need your responses under oath. Would you
10 raise your right hand for me?

11 **JEFFREY LUCAS,**
12 having been duly sworn, testified as follows:

13 **THE COURT:** Do you understand why you're here
14 today?

15 **DEFENDANT LUCAS:** Yes, sir.

16 **THE COURT:** What are you charged with?

17 **DEFENDANT LUCAS:** Well, I did know at one time
18 because it was changed, but it's right here on this
19 paper, infliction of great bodily injury upon a
20 child.

21 **THE COURT:** Do you know who that is to your
22 left?

23 **DEFENDANT LUCAS:** That's my attorney, Wayne
24 Floyd.

25 **THE COURT:** Right. What's his job?

1 DEFENDANT LUCAS: We discussed it in the -- at
2 the mental health thing that he's my attorney to
3 represent me.

4 THE COURT: Mr. Wedekind over there, do you
5 know what his job is?

6 DEFENDANT LUCAS: Not really. To be honest, I
7 don't.

8 THE COURT: All right. They said, in this
9 report, they mentioned about you were not familiar
10 with the term Solicitor, but you knew what a
11 prosecutor is.

12 DEFENDANT LUCAS: Yes, sir.

13 THE COURT: He works for the prosecutor's
14 office. Do you understand what his job is now?

15 DEFENDANT LUCAS: Yes, sir.

16 THE COURT: What is it?

17 DEFENDANT LUCAS: To, I guess, make sure
18 somebody's guilty or not guilty.

19 THE COURT: Do you know what a jury is?

20 DEFENDANT LUCAS: The people that's going to
21 get the evidence.

22 THE COURT: Right. And what are they going to
23 do with the evidence?

24 DEFENDANT LUCAS: They'll discuss it and reach
25 their agreements.

1 THE COURT: Okay. Do you know what my job is?

2 DEFENDANT LUCAS: There again, we discussed it
3 at the mental health. It's to seek out the term I
4 will be serving.

5 THE COURT: If you're guilty, yes, sir. If
6 they find you guilty, I would sentence you. If --
7 during the trial, do you understand what I do?

8 DEFENDANT LUCAS: (No response.)

9 THE COURT: Do you ever watch T.V. shows that
10 have courtroom scenes in it?

11 DEFENDANT LUCAS: I watch some of it, but I
12 don't really watch a whole lot of T.V.

13 THE COURT: Okay. Well, I try to make sure
14 that you get a fair trial and they get a fair trial,
15 the other side gets a fair trial. So I preside. Do
16 you know what I mean by the term preside?

17 DEFENDANT LUCAS: Keep the peace.

18 THE COURT: That's right. That's exactly
19 right.

20 And if there's a dispute between what can be
21 offered and given to the jury and what cannot be
22 offered and given to the jury, do you know who
23 decides that?

24 DEFENDANT LUCAS: What was that question again?

25 THE COURT: If one side wants to give something

1 to the jury and the other side thinks the jury can't
2 see that, do you know who decides that?

3 DEFENDANT LUCAS: I know that much from a
4 little bit of T.V., the judge.

5 THE COURT: That's right.

6 Now, they've got in here that you're taking
7 some medications and they've got in here that you
8 seem to be doing well on those.

9 DEFENDANT LUCAS: Yes, sir.

10 THE COURT: Are you taking those medicines now?

11 DEFENDANT LUCAS: Yes, sir.

12 THE COURT: Did you take them like you're
13 supposed to for today?

14 DEFENDANT LUCAS: Yes, sir.

15 THE COURT: You took them in the dosage the
16 doctor prescribed for you?

17 DEFENDANT LUCAS: Yes, sir.

18 THE COURT: And at the time the doctor
19 prescribed for you to take them?

20 DEFENDANT LUCAS: Yes, sir.

21 THE COURT: You need to keep doing that now
22 throughout this trial, okay?

23 DEFENDANT LUCAS: Yes, sir.

24 THE COURT: All right. It sounds like that's
25 been a big help to you.

1 DEFENDANT LUCAS: Yes, sir.

2 THE COURT: Does the State have anything else
3 related to competency?

4 MR. WEDEKIND: No, sir. The State stands by
5 that report. And we would request that it be made a
6 court's exhibit, sir.

7 THE COURT: Mr. Floyd, do you have anything
8 else related to competency?

9 MR. FLOYD: No, Your Honor.

10 THE COURT: All right. Based upon the Court's
11 review of the report and my questioning of Mr. Lucas
12 and observation of him, I find beyond a reasonable
13 doubt that he's competent. He's capable of
14 assisting counsel in his own defense and capable of
15 making rational choices concerning the charge
16 against him.

17 (Court's Exhibit Number 1, mental health
18 report, was marked for identification.)

19 THE COURT: Was there any disagreement over any
20 exhibits?

21 MR. WEDEKIND: We have an, I believe, agreement
22 on 15 photographs, sir. And there's five -- six
23 photographs that we had in dispute, sir.

24 THE COURT: Are they marked?

25 MR. WEDEKIND: They have not been marked yet.

1 THE COURT: Mark those for I.D. so I can talk
2 about them.

3 (State's Exhibit Numbers 1 through 6,
4 photographs, were marked for identification.)

5 THE COURT: Since I don't know anything about
6 the case and not supposed to, can you all enlighten
7 me as to what it is the State intends to prove?

8 MR. WEDEKIND: Sir, the allegations are that
9 Detective Pritchard was called in to investigate a
10 case in which there was suspected child physical
11 abuse had taken place. A 9-1-1 call had gone in to
12 the ambulance service here in Lexington County that
13 an infant child had -- a young child had been
14 injured in an accident and was not breathing well.

15 So the boy's mother had been informed of this
16 and was leaving her work place in Columbia driving
17 to the home in Gaston. As she was en route, she
18 called 9-1-1. Apparently, the ambulance just beat
19 her to the residence and care was being administered
20 to the child. The woman related a story that her
21 child had gotten his neck hung up on some pickets in
22 a handrailing on the outside porch of the home.

23 When they took the child to Lexington Medical
24 Center, they performed some emergency life care
25 trying to stabilize the child. They did a CAT scan

1 and found there to be intercranial damage to the
2 brain of the child. There was damage to the child's
3 spine. There was -- his intestines had been severed
4 internally. He had air in his body cavity and his
5 scrotum had been ruptured and one of his testicles
6 was distended and exposed when they removed his
7 diapers.

8 They then realized that they did not have
9 adequate facilities at the Lexington Center. There
10 were better facilities at the Palmetto Children's
11 Hospital, so they evacuated the child from Lexington
12 Medical E.R. to Palmetto.

13 At that point, Mr. Lucas was present at the
14 Lexington E.R. and had a discussion. The nurses
15 became very suspicious of the story of how the
16 accident occurred that they had had related to them
17 did not seem to correlate to the injuries that they
18 observed on the child. They called law enforcement.

19 Detective Pritchard responded. He began to
20 talk informally with Mr. Lucas who then related a
21 story to him as to how this had transpired.
22 Detective Pritchard listened to that. And then the
23 child -- the information the child was going to
24 Palmetto took place and Mr. Lucas said that he was
25 needing to accompany the child and the baby's mother

1 to Palmetto.

2 Detective Pritchard got him to commit to write
3 a statement down as to what happened and he did
4 that. And in addition, Detective Pritchard got
5 permission for a consent to search the home that
6 Mr. Lucas said he owned and he signed that consent.
7 And Detective Pritchard said he was going to the
8 house.

9 Mr. Lucas volunteered that a Mr. Harrison, I
10 believe his name was, would probably be present
11 there and Detective Pritchard asked if he would
12 inform Mr. Harrison that Detective Pritchard was
13 coming out there to search the home and it was okay.
14 He complied with that.

15 Then Detective Pritchard went out to the scene
16 and started looking around, investigating, taking
17 measurements, checking the scene out as described by
18 Mr. Lucas.

19 Some time after that, Detective Pritchard
20 didn't have a camera with him and he requested a
21 deputy who would have a photographic capability to
22 come out there and that officer did. At that time,
23 Mr. Lucas showed up, had departed supposedly from
24 Palmetto Richland, showed up at the scene and
25 started describing in graphic detail where he found

1 the child, how he was laying, how his head was stuck
2 between the rails.

3 In fact, according to Detective Pritchard, he
4 even inserted his head between the handrails and
5 laid his body down in a fashion to demonstrate how
6 he found the child laying in an injured state that
7 he talked about in his story.

8 At that point, Detective Pritchard did not have
9 the camera, did not take a picture. And later on,
10 just last week, you're going to see a photograph
11 that depicts Detective Pritchard's adult head in
12 between the handrails at the location described by
13 Mr. Lucas to him and demonstrated by Mr. Lucas, but
14 not photographed. So, basically, Detective
15 Pritchard is reenacting that positioning.

16 And I think, at that point, Mr. Lucas was left
17 at home. Detective Pritchard departed, came back
18 the next day or later that night and took pictures
19 with Mr. Hickman, Crime Scene Investigator Hickman.
20 Then the officers departed the scene.

21 Detectives Palkowski and Medford interrogated
22 the mother of the child who was at Palmetto Richland
23 and she volunteered to come in later along with
24 Mr. Lucas and they gave statements. At which time,
25 he was mirandized and provided advisement of his

1 rights. And he signed a statement acknowledging the
2 advisement of his rights and gave a second written
3 statement in which he changed some of the materials
4 that took place in the first written statement that
5 he gave the night at the E.R.

6 Then, at that point, he departed again, was not
7 placed under arrest. And I think it was not until
8 about four days later that he was actually -- a
9 warrant was obtained for his arrest and he was
10 placed into custody. And that would be the
11 substance of the direct allegations.

12 We have Doctors Cartie and Dr. Luberoth who
13 will be testifying as to the extent of the injuries
14 and as to the possibilities of its relationship to
15 the story given by Mr. Lucas and how the injuries he
16 says occurred and how they do not think that that's
17 consistent with the story that he told. And that
18 would be the case, sir.

19 **THE COURT:** Thank you.

20 And, Mr. Floyd, I've been handed six
21 photographs. I'm going to ask you -- you have
22 motions in limine related to these six?

23 **MR. FLOYD:** Yes, Your Honor.

24 **THE COURT:** If you'll just start with -- you
25 can take them and start with Number 1 and tell me

1 what the problem is.

2 **MR. FLOYD:** Your Honor, Number 1 and Number 2
3 are close-ups of the scrotum, genital area, of the
4 child. About a week to ten days before this
5 incident, the child had surgery. At which time, the
6 -- they had to have the surgery to make the -- they
7 pull the testicles out of the body, you know, his
8 testicles are not descended, so they performed this
9 surgery on him. So he was in a postrecovery stage
10 from that surgery and we think it would be
11 misleading to show that this is a result of
12 something the defendant did when he was recovering
13 at the time.

14 In fact, according to the notes in the hospital
15 records, the mother said that he picked at where the
16 surgery was. He'd been picking at it. And the
17 doctor had told them it might open up again, which
18 is what it did. So that's our objection to Numbers
19 1 and 2.

20 **THE COURT:** Mr. Wedekind.

21 **MR. WEDEKIND:** Sir, the allegations are going
22 to be, we're stipulating that the child did have
23 operative surgery ten days prior to this occurring,
24 but that our doctors are going to testify that this
25 rupture of the scrotum with the testicle protruding

1 was a direct result of the abuse that took place to
2 this child.

3 And, in fact, it was such a violent force,
4 apparently the doctors are going to describe that it
5 was caused by a severe blow to the abdomen of the
6 child which forced the lower region below that blow
7 to push downward and reaction to the blow, that it
8 was so violent to the abdominal area that it pushed
9 the intestines against the spine severing them and
10 caused the organs below that to shift downward.

11 And, of course, the lowest point on the
12 abdominal cavity for a male child would be his
13 testicles and scrotum and that caused the rupture.

14 They're going to say that it was contributed to
15 the fact that it did pop out was because of this
16 weakness that had occurred ten days earlier, but
17 there's no way that that child could have picked at
18 that and caused that kind of injury to himself. So
19 because that's going to be precisely a point in
20 dispute, that's why we wanted those photographs to
21 depict the injury to the child that's going to tie
22 in directly with the medical evidence testimony from
23 the doctor describing how violent this was.

24 There's allegations by Mr. Lucas that he was
25 administering badly performed CPR to the child and

1 that caused it. So to counteract that, our
2 anticipation is we're going to need to show those
3 photographs to show that pressing on the child's
4 chest in an attempt to administer CPR, whether it
5 was good or bad, I've asked those doctors directly
6 and they said that, no, that's not consistent with
7 any attempt to do CPR.

8 **THE COURT:** Anything else on 1 and 2, Mr.
9 Floyd?

10 **MR. FLOYD:** No, Your Honor.

11 **THE COURT:** If a sufficient foundation is
12 established, the Court would deny the motion in
13 limine as to these photographs.

14 Now, I will tell you that I think you're going
15 to have a problem with them being duplicative and
16 subject to a 403 analysis. In which case, I would
17 say that you use Exhibit 2. I may exclude Exhibit 1
18 if there's a 403 issue.

19 **MR. WEDEKIND:** Yes, sir. I think I would
20 consent to that. We've tried to limit the showing
21 of the IVs and the external tubing and this would
22 still accomplish that. The State would consent to
23 the elimination of 1.

24 **THE COURT:** But you've got to lay a sufficient
25 foundation, obviously, for any photograph not just

1 these.

2 All right. What's next?

3 MR. FLOYD: Your Honor, 3, 4 and 5 show the
4 child in various tubal confrontation -- I mean,
5 configurations.

6 Your Honor, we object. We think that's highly
7 prejudicial. And this child had cerebral palsy so
8 the child had serious breathing issues before this
9 incident. And it's our position that those
10 photographs exaggerate the extent of any injuries
11 that the victim received in this alleged incident.

12 THE COURT: Mr. Wedekind.

13 MR. WEDEKIND: And, sir, may I view them?

14 THE COURT: Oh, I'm sorry. I apologize.

15 MR. WEDEKIND: The depictions of these
16 photographs, one of the elements that we feel that
17 we're going to have to prove is great bodily injury
18 to the extent that it was life threatening. And I
19 think depictions in 3 and 4 show clearly that these
20 were a life threatening nature.

21 And we, of course, anticipate that there would
22 be discussion of his premature -- surgeries that had
23 resulted as a premature birth. There was a scar on
24 his chest, which I understand from talking with Dr.
25 Cartie is fairly common. As soon as he looked at

1 the photographs, he said, this was a premature
2 child, because he said it's common that they have to
3 insert a tube into the lung area of the child. So
4 he immediately identified that.

5 But to prove that to the jury if -- these
6 allegations about prior surgeries and jeopardy and
7 injuries that the child had had as a result of his
8 cerebral palsy and premature birth, we'd have to
9 show that these injuries occurred post that surgery
10 and were the direct result of the physical abuse
11 that we attribute to Mr. Lucas and that these were
12 not just scrapes and bruises caused from a fall or
13 from a momentary dangling on a -- an accident on a
14 front porch, that these were the result of very
15 severe and intentional blows delivered to this child
16 to his -- the area of the back of his head, to his
17 abdominal area.

18 And it can't really be seen internally, but the
19 fact that the intestines were broken and that it was
20 so violent that the shifting of the lower organs had
21 forced the testicle to come out. That's why we
22 would say that the depiction in 3 shows that the
23 abdominal region, the bruising and the fact that it
24 led to, that blow being delivered in this area,
25 according to the doctors, where the bruises you can

1 see in the photograph led to the extension of the
2 testicle from the lower cavity.

3 Item 4 we put that up potentially to see if you
4 can see the scar that's from the side angle of the
5 child. It's more clearly depicted than it is in 3
6 because the IV entry point, the little blue-green
7 cap kind of holds -- covers the scar. So to
8 differentiate, that's why we put item 4 in there
9 rather than just stick alone with item 3.

10 It is somewhat duplicative, but you can see the
11 divot, as I would say, of the scar tissue on the
12 chest cavity a lot more clearly in 4 than you can in
13 3.

14 Now, then number 5, sir, the reason we were
15 seeking to introduce this, it shows some bruising to
16 the upper shoulder blade. And, also, I think if you
17 look closely at one of the eyes of the child, you
18 can see some ruptured blood vessels in there that
19 would have been consistent, according to the
20 doctors, with strangulation. And, apparently,
21 that's something that happens when somebody's being
22 hung by their neck or wrung -- their neck is being
23 wrung.

24 **THE COURT:** Do you have any other photographs
25 that show these bruises to the abdomen and others

1 that don't have the child intubated?

2 MR. WEDEKIND: Yes, sir. There are some
3 close-ups and these were not objected to by
4 Mr. Floyd. I have not marked it, but I can have
5 that done right now. It's the one I think we're in
6 agreement on.

7 Do you want me to have them all marked, sir?

8 THE COURT: Let's just -- just mark one of
9 them, the ones you want to show me.

10 MR. WEDEKIND: Okay. On the precise issue of
11 the abdominal, we'll have these two photographs
12 marked, sir.

13 (State's Exhibit Numbers 7 and 8,
14 photographs, were marked for identification.)

15 MR. WEDEKIND: And these are marked as I.D. 7
16 and 8, sir.

17 THE COURT: What about the eyes?

18 MR. WEDEKIND: Regarding the eyes, the only
19 close-up we have of the eyes showing that or
20 depicted in that, the one you have before you, sir,
21 we have nothing depicting that as a close-up.

22 We have a couple of the child's upper neck and
23 chest lower -- or upper chest and lower -- or the
24 neck region. And then there's one about the -- a
25 shot taken from a lower angle looking upward at his

1 chin at some bruises that occur there. I'll have
2 those marked too, sir.

3 But I think Mr. Floyd's in agreement that
4 those, the ones that we're talking about now, would
5 come in without, subject to the foundation being
6 laid.

7 (State's Exhibit Numbers 9 through 11,
8 photographs, were marked for identification.)

9 THE COURT: Let me see those.

10 MR. WEDEKIND: These are 10, 11 and 9, sir.

11 THE COURT: Thank you.

12 All right. I've looked at ones that will not
13 be subject to objection, 7, 8, 9, 10 and 11 for
14 identification, and compared those to Exhibits 3, 4
15 and 5 for identification. There's been an
16 explanation related to Number 5 that would require
17 the Court to deny the motion in limine.

18 As to 3 and 4, while I don't really question
19 the State's position, I'm probably going to have to
20 exclude them based on a 403 analysis. They seem to
21 show things that are shown in other photographs in a
22 less emotional context.

23 Now, it may be that as I get into the trial and
24 I understand a little bit better or some issue's
25 raised, then I might have a different ruling. But

1 right now the motion as to 3 and 4 will be sustained
2 and 5 will be denied.

3 MR. WEDEKIND: Yes, sir. And just respectively
4 for the record, sir, regarding those sort of -- the
5 shots, I think Numbers 3 and 4, we would go with
6 either one of those, but it kind of -- the State's
7 position is it kind of shows the totality of the
8 circumstances because it shows the entire torso of
9 the child so that the doctors, when they testify,
10 would be able to put it into perspective as to how
11 the nature of the injuries occurred in a totality,
12 and also that it was very life threatening.

13 THE COURT: Okay. Well --

14 MR. WEDEKIND: And that was the only reason we
15 were proceeding on, sir.

16 THE COURT: I understand. If you feel during
17 the trial that you have to use these photographs,
18 just tell me that you have a matter of law to take
19 up and I'll send the jury out and we'll hear from
20 the doctors.

21 MR. WEDEKIND: Yes, sir. So 3 and 4 are out, 5
22 is subject --

23 THE COURT: As long as a foundation is laid, 5
24 will come in.

25 MR. WEDEKIND: Yes, sir.

1 THE COURT: Is that all of the issues on the
2 photographs?

3 MR. FLOYD: Your Honor, there was one other
4 one. This is Number 6, Your Honor. That's a
5 photograph of Detective Pritchard sticking his head
6 through the railing.

7 THE COURT: And the objection is what?

8 MR. FLOYD: I think it's misleading, Your
9 Honor. All it shows is it's kind of -- I don't know
10 what it's for, to convey something to the jury
11 that's not accurate. All it shows is he can stick
12 his head to the jury (sic) at that angle. It
13 doesn't show what angles he could stick it in. It
14 doesn't show if he turned his head sideways and
15 couldn't get it back out.

16 THE COURT: That's all subject to
17 cross-examination. There's nothing wrong with
18 Number 6 if a foundation is laid, assuming, again, a
19 foundation is laid that makes those particular --

20 MR. WEDEKIND: Issues relevant.

21 THE COURT: -- issues relevant, yes. The
22 decking, the pickets, the location, all of those
23 sorts of things.

24 MR. WEDEKIND: Yes, sir.

25 THE COURT: And establishing that that's who

1 that is that has their head in those pickets.

2 All right. So what time do you think we can
3 get the detective here tomorrow?

4 MR. WEDEKIND: That's going to be dependent on
5 how the trial progresses upstairs, sir. My best
6 guess right now would be, I'm told by Mr. Stumbo
7 there's four witnesses in the case and he said that
8 it would be, potentially, they could wrap up by
9 close of business today and maybe do charging in the
10 morning, but subject to that, that's why we pushed
11 it back to the afternoon to be safe.

12 THE COURT: Okay.

13 All right. Mr. Lucas, I have to go over
14 certain things with everybody who's on trial whether
15 they're on trial for driving without a license or
16 they're on trial for murder. And one of the things
17 I have to decide is whether somebody is taken into
18 custody or not during a trial.

19 Now, at this point, I'm not going to take you
20 into custody, but I always want to make sure that
21 the people understand what that means. We've drawn
22 a jury and we intend to continue with your trial
23 whether you're here or not. Do you understand that?

24 DEFENDANT LUCAS: Yes, sir.

25 THE COURT: So what I'm going to tell you to do

1 is to stay in touch with Mr. Floyd, but I want you
2 to be here in the morning at ten o'clock.

3 **DEFENDANT LUCAS:** Yes, sir.

4 **THE COURT:** Now, if we don't need you at 10:00
5 and we see it's going to be a lot longer, then we'll
6 tell you maybe another time to be here. But you be
7 here in the morning at ten o'clock with Mr. Floyd so
8 we can go ahead with that hearing I need to do.
9 Make sure you're here, all right?

10 **DEFENDANT:** Yes, sir.

11 **THE COURT:** And you do understand that if
12 you're not here, I'm going to continue the case
13 without you; you understand?

14 **DEFENDANT LUCAS:** I'll be here.

15 **THE COURT:** I'm not saying you won't. You
16 understand that if you're not here, I will continue
17 the case without you?

18 **DEFENDANT LUCAS:** Yes, sir.

19 **THE COURT:** If I thought you weren't going to
20 be here, you wouldn't be walking out that door,
21 you'd be walking out this door, okay.

22 **DEFENDANT LUCAS:** Yes, sir.

23 **THE COURT:** I just have to put all this stuff
24 on the record, all right. So make absolutely
25 certain that if you have some problem like a flat

1 tire or something that goes on, that you call and
2 let us know what's going on. I'm not saying we'll
3 stop the trial, but at least we'll have some idea
4 and maybe I can accommodate you, all right?

5 **DEFENDANT LUCAS:** All right.

6 **THE COURT:** All right. Thank you very much.
7 Court's in recess until 2:30.

8 (State's Exhibit Numbers 12 through 21,
9 photographs, were marked for identification.)

10 (The proceedings were concluded for March
11 16, 2009.)

12 (The following proceedings were held on
13 March 17, 2009.)

14 **THE COURT:** We're back on the record on State
15 versus Lucas. Mr. Lucas is present with his
16 attorney and Mr. Wedekind and Ms. McMahon are
17 present.

18 We have to have a Jackson versus Denno hearing
19 as I understand it?

20 **MR. WEDEKIND:** Yes, sir. There will be four
21 issues, I think, of statements given by the
22 defendant that the State would seek to admit.

23 **THE COURT:** Call your witness.

24 **MR. WEDEKIND:** The State would call Detective
25 Pritchard.

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

59

1 DAVID PRITCHARD,
2 having been duly sworn, testified as follows:
3 **THE CLERK:** If you'll have a seat and state
4 your name for the record, please.

5 **THE WITNESS:** David Pritchard,
6 P-r-i-t-c-h-a-r-d.

7 DIRECT EXAMINATION

8 BY MR. WEDEKIND:

9 **Q** And, Detective Pritchard, would you tell the
10 Court who you're currently employed by?

11 **A** Lexington County Sheriff's Office.

12 **Q** And in what capacity do you work at the
13 sheriff's office?

14 **A** Currently, I'm a training sergeant in our
15 training division.

16 **Q** Now, were you doing that same job back in 2006?

17 **A** No, sir.

18 **Q** What was your job function at that time?

19 **A** Criminal investigator.

20 **Q** And were you working on the evening of May 24,
21 2006?

22 **A** That is correct.

23 **Q** Were you called to investigate a case involving
24 some injuries inflicted upon a child at the
25 Lexington E.R.?

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

60

1 A Yes, sir.

2 Q Tell the Court exactly what you determined when
3 you got out there.

4 A Basically, I responded to the Lexington Medical
5 Center Emergency Room in reference to a child that
6 had been injured. And when I arrived there, I made
7 contact with one of the nurses to get a status of
8 the child and she advised me at that point that
9 the -- because of the injuries, the child was being
10 transported to Palmetto Richland.

11 Q And were any of the child's parents notified of
12 the injuries to the child?

13 A Yes.

14 Q And who were they?

15 A The mother of the child is a Ms. Deese and then
16 also a Mr. Lucas was also there. My understanding
17 he's not the actual parent.

18 Q Okay. So there was a Candice Deese. Is that
19 who you were referring to is the mother?

20 A Correct.

21 Q And you said that she had a boyfriend. Did you
22 determine that?

23 A Yes, sir.

24 Q And who would that be?

25 A That would be Jeffery Lucas.

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

61

1 Q Okay. And is he present in the courtroom
2 today?

3 A Yes, that would be the defendant.

4 Q And was he present that night at the Lexington
5 E.R.?

6 A Correct.

7 Q And did you have occasion to approach
8 Mr. Jeffery Lucas?

9 A Yes, sir, I did.

10 Q And what were you wearing at the time when you
11 approached and spoke with him?

12 A Probably I had on a shirt with a logo,
13 Lexington County Sheriff's Department, and dress
14 pants and badge and gun.

15 Q Is that the normal attire of a detective?

16 A Yes, sir.

17 Q You don't wear the blue uniforms that you see
18 the deputies wear with a badge and --

19 A No, sir, not normally.

20 Q Were you wearing what we call a golf shirt with
21 an embroidered patch on it?

22 A Yes, sir, that's correct.

23 Q Okay. And did you -- why did you have a
24 conversation with Mr. Lucas? What happened?

25 A The information that I received was that he was

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

62

1 the one that was with the child when the child
2 received the injuries.

3 Q Okay. And did he give you a statement at that
4 time? Did you speak with him orally?

5 A Yes, sir.

6 Q Did he respond to your questions?

7 A Yes, sir, he did.

8 Q Did you perceive that he had any difficulty
9 understanding what you were saying to him?

10 A No, sir. We had a conversation just like you
11 and I are having right now.

12 Q He spoke English?

13 A Yes, sir.

14 Q He was responsive to the questions that you
15 posed to him?

16 A Yes, sir.

17 Q And they were coherent, rational replies to
18 your questions?

19 A Yes, sir.

20 Q And did you make any threats of arrest or
21 coercion at that time?

22 A No, sir.

23 Q What were you seeking when you spoke with him?

24 A At that point, I was just trying to determine
25 how the child had gotten injured.

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

63

1 Q And what did he tell you at that time?

2 A He told me that the child had gotten injured
3 from falling.

4 Q Did you advise him of his rights in any way,
5 shape or form at that particular time?

6 A At this point, no, sir.

7 Q Did you make a determination that you were
8 going to arrest him at that time?

9 A No, sir.

10 Q And had he sought to terminate the
11 conversation, would you have had any reason to stop
12 him or force him to talk to you?

13 A Not at that point, no, sir.

14 Q And you said he talked to you about an
15 accident. What exactly did he convey to you?

16 A I'll refer to my report if you don't mind.

17 Q Please do.

18 A He stated that he and the child were alone at
19 the house when this happened. And this was a house
20 located at in the Gaston area of
21 Lexington County, South Carolina. And he stated
22 that he was the one that was taking care of him.

23 And they had both been out on the front porch
24 and Mr. Lucas went to check the mail at the mailbox
25 and had left the child there on the porch. Also

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

64

1 mentioned that the child could not walk by itself so
2 it was kind of walking around on the porch going
3 from chair to chair from rail to rail, whatever.

4 And as he went up to the mailbox to check the
5 mail, when he was coming back from the mailbox
6 toward the porch, he couldn't see the child. And
7 then he said when he got closer to the porch, he saw
8 the child and seen that the child had fallen and
9 gotten its head stuck between the pickets of the
10 handrail that led up the stairs to the porch.

11 Q So that's like a normal stair guardrail, hand
12 holding -- handrail?

13 A Yes, sir. It was a deck that had been put on
14 the front of the house.

15 Q Okay. So he said that child -- he perceived
16 the child was in danger because he was strangling or
17 caught between the handrails?

18 A Yes, sir.

19 Q And then what did he convey?

20 A He said that when he got to the child, the
21 child was not moving and that the child had gone
22 unconscious.

23 Q And did he do anything at that point, called
24 9-1-1 or --

25 A He said he took the child inside the house and

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

65

1 laid it on the living room floor and proceeded to
2 perform CPR on the child?

3 Q And then what happened?

4 A Then, at that point, he called the mother who
5 was apparently at work and explained to her what had
6 happened. And then my understanding from him, he
7 waited on the mother to get there.

8 Q Okay. And was there any other extent to the
9 conversation at that point?

10 A At this point, he was just talking about how
11 the child had gotten his head stuck in between the
12 pickets of the railing. As I recall, that's about
13 it.

14 Q Okay. Now, was there -- is that how your
15 conversation ended or did you undertake any other
16 actions after that?

17 A Well, at this point, the child was getting
18 ready to be transported to another hospital and
19 Mr. Lucas wanted to get with the mother and the
20 child.

21 Q Do you know what hospital he was transported
22 from -- this was at Lexington E.R.?

23 A Correct.

24 Q And, again, was Mr. Lucas placed under arrest
25 at that point?

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

66

1 A No, sir.

2 Q So the child was being taken, do you know
3 where, to what hospital?

4 A Palmetto Richland.

5 Q So while that was going on, what did he say, if
6 anything, to you?

7 A He wanted to go and be with the mother at the
8 hospital. So, at that point, we pretty much stopped
9 the interview. I felt like I had what I needed at
10 that point to determine what had happened to the
11 child.

12 I advised Mr. Lucas that I would like to see
13 the porch and see the handrails so I can get a good
14 idea of what may have happened with the child. And
15 he told me that I was welcome to go to the house at
16 . He said that there was -- would
17 probably be a Mr. Hinson there and he gave me
18 permission -- Mr. Lucas gave me permission to go to
19 the house.

20 I had him sign a consent to search form which
21 basically gives me permission to go on his property
22 and to look at the porch. And I asked him to call
23 Mr. Hinson to let him know that I was coming over
24 and explain to him what was going on.

25 Q So you said you obtained a handwritten or a

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

67

- 1 written consent to search?
- 2 A Yes, sir.
- 3 Q And that was signed by Mr. Lucas?
- 4 A Yes, sir.
- 5 Q And did he identify himself as the owner of
- 6 that residence?
- 7 A Yes, sir, he did.
- 8 Q ?
- 9 A Correct.
- 10 Q Okay. And did you obtain anything else from
- 11 him at that time?
- 12 A At that point, no, sir.
- 13 Q And he was allowed -- was he allowed to leave
- 14 to go to the Palmetto Hospital in pursuit of the
- 15 child?
- 16 A Right. After the statement that he gave, the
- 17 verbal statement, I did ask him to reduce it to
- 18 writing. So he did give me a written statement
- 19 which pretty much mirrored the verbal statement that
- 20 he had given.
- 21 Q So at that time at the Lexington E.R., he gave
- 22 you a written statement?
- 23 A That's correct.
- 24 Q How many pages was that?
- 25 A A little more than half a page.

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

68 /

1 Q Do you happen to have that with you?

2 A Yes, sir, I do.

3 (State's Exhibit Number 22, statement dated
4 5/24/06, was marked for identification.)

5 Q Detective, I'm showing you what's marked for
6 identification as State's Exhibit 22. And it's
7 captioned Lexington County Sheriff's Department
8 voluntary statement. Do you recognize that
9 document?

10 A Yes, sir, I do.

11 Q Is that the document that you were referencing
12 that you obtained at the Lexington E.R. from
13 Mr. Jeffrey Lucas?

14 A That is correct.

15 MR. WEDEKIND: Your Honor, I'm going to place
16 this on the viewer so the Court can see it.

17 Q Have there been any changes to that document
18 since the time that you took it?

19 A No, sir.

20 Q And it's dated Jeffery Thomas -- or it says at
21 the top, I, Jeffery Thomas Lucas, and it's dated

22 . . . What is --

23 A That's his date of birth.

24 Q Date of birth right there, okay. And you took
25 this statement from him. There's an X at the very

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

69

1 beginning and what appears to be some letters. What
2 is that?

3 A This is his initials at the beginning of the
4 statement.

5 Q And does this indicate the start of the
6 statement?

7 A Yes, sir.

8 Q And where it says, The end of statement, just
9 preceding that, what is that?

10 A That would be Mr. Lucas' initials.

11 Q So at the beginning, at the end, that's the
12 totality of his statement. What's evidenced by the
13 lines at the bottom of those handwritten statements?

14 A That nothing follows.

15 Q Okay. All right. Would you please read for
16 the Court what he reduced to writing and gave to
17 you?

18 A It says: I was taking care of Child on the
19 porch in the front yard. I went to get the mail
20 from mailbox. I heard a loud noise that didn't
21 sound right. I started to the porch and saw Child
22 with his head stuck between the porch rails. I then
23 ran and picked him up. He was like a wet dish rag.
24 He was not -- I think it's -- breathing. I took him
25 inside and tried CPR and called Candice at work.

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

70

1 She called 9-1-1 and came home from work. The
2 ambulance got there just before she got there. Then
3 Candice was there and they left in the ambulance.
4 Q And right in the middle that I'm pointing to
5 right there, what is that?
6 A That is a correction that Mr. Lucas made and
7 his initials beside it indicating that he made that
8 correction.
9 Q And was this done by you bringing it out and
10 him signing it or did he touch paper to pen?
11 A That is his handwriting, yes, sir.
12 Q Now, after you obtained that statement, you say
13 he left your presence?
14 A Yes, sir.
15 Q And do you know where he went after that?
16 A My assumption was that he was going to the
17 hospital in Richland County, that's where he said he
18 was going.
19 Q And where did you go?
20 A I went to
21 Q And did you, in fact, make contact with a
22 Mr. Harrison?
23 A Mr. Hinson, yes, sir.
24 Q Or Hinson, I'm sorry. Mr. Hinson, okay. And
25 did you search the premises?

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

71

1 A The only thing I did at that point was just
2 looked at the railing on the front porch.

3 Q And while you were undergoing that look-see of
4 the property, what happened?

5 A I just looked at the porch and how it was laid
6 out and the railing and looked at the distance
7 between the porch and the mailbox and the layout of
8 that. I wanted to take some photographs, however, I
9 did not have a camera. So I called one of our road
10 units who had a digital camera and requested that he
11 come by and take some photographs.

12 Q Now, did the descriptions given to you at the
13 hospital match up with what you were finding at the
14 scene?

15 A Pretty much.

16 Q Okay. And at some time later, did you have
17 occasion to meet again with Mr. Lucas?

18 A Yes, sir.

19 Q And tell the Court what happened then.

20 A Later on that evening after the officer had
21 gone by there and taken some pictures, I found out
22 that the injuries to the child were fairly
23 significant so I decided to go out and take some
24 more pictures of the railing with my crime scene
25 unit. And so Crime Scene Officer Hickman met me out

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

72

1 there later that evening. Matter of fact, I believe
2 it was after dark.

3 When we both arrived back out there on the
4 scene, Mr. Lucas was home at that point. So we made
5 contact with him and asked him specifically which
6 two rails that the child had gotten its head stuck
7 in between. At which point Mr. Lucas specifically
8 pointed out the rails and then he actually got down
9 and demonstrated by sticking his head through the
10 rails to show how the child, according to his story,
11 had gotten hung up there in the railing.

12 Q So he actually showed you the precise handrail
13 position and location of the handrails that the baby
14 was supposedly hanging from when he came up to
15 rescue it?

16 A Yes, sir.

17 Q Okay. When he made these statements, did you
18 advise him of his rights?

19 A No, sir.

20 Q Was he placed under arrest?

21 A No, sir.

22 Q Any threats or coercion made against him?

23 A No, sir.

24 Q Was he free to leave?

25 A Yes, sir.

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

73

1 Q Was that, in fact, his property?
2 A Yes, sir, it was.
3 Q Okay. And upon conclusion of that, did he
4 offer to make any other statements?
5 A At that point, no, sir.
6 Q Orally?
7 A No, sir.
8 Q In writing?
9 A No, sir.
10 Q Okay. Then what happened? You left the area?
11 A Then we left.
12 Q And after that, did -- a couple days passed,
13 did you have an occasion to reestablish contact with
14 Mr. Lucas?
15 A Yes, sir, I did.
16 Q And how did you go about doing that?
17 A The reason for the reestablishment of the
18 contact was based on the report of the injuries to
19 the child. So I felt like that the story and the
20 injuries weren't consistent, so I had Mr. Lucas come
21 back to the sheriff's department in Lexington for a
22 second interview.
23 Q So you had -- in the intervening time frame
24 from leaving his house, you had talked with the
25 doctors; is that correct?

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

74

- 1 A Yes, sir.
- 2 Q And because of that, you sought to speak with
- 3 Mr. Lucas some more?
- 4 A Correct.
- 5 Q And what was the intent of that conversation?
- 6 Where did it take place?
- 7 A Where did it take place?
- 8 Q Yes.
- 9 A It took place at the Lexington County Sheriff's
- 10 Office.
- 11 Q And at that point, did you take a second
- 12 written statement?
- 13 A Yes, sir, I did.
- 14 Q Okay. Do you have that with you?
- 15 A Yes, sir, I do.
- 16 (State's Exhibit Number 23, statement dated
- 17 5/26/06, was marked for identification.)
- 18 Q Okay. I'm showing you a two page document
- 19 that's marked for identification as State's I.D.
- 20 Number 23 and captioned at the top is Lexington
- 21 County Sheriff's Department Statement Form. Do you
- 22 recognize that?
- 23 A Yes, sir.
- 24 Q And does that fairly and accurately depict the
- 25 statement that you took at the second meeting with

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

75

1 Mr. Lucas?

2 A Yes, sir, it does.

3 Q Have there been any changes or alterations to
4 it since you took it?

5 A No, sir.

6 Q This is the original document?

7 A That is the original.

8 MR. WEDEKIND: Your Honor, I've shown this to
9 Mr. Floyd and I'm going to put this up on the
10 viewer, the first page of two.

11 Q At the top of this one, it's dated May 26th.
12 Is that the date that you took the statement?

13 A Correct.

14 Q And this took place at what location?

15 A Lexington County Sheriff's Office.

16 Q And at the top, this form's different than the
17 previous one that we looked at. What's the
18 difference?

19 A This one actually has the advisements of rights
20 attached to it.

21 Q Okay. And at that point you took this
22 statement, you felt that you needed to advise him of
23 his rights, did you go through those Miranda
24 warnings with him?

25 A Yes, sir.

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

76

1 Q And how did you go about doing that?

2 A Present the form to him, fill out the top
3 portion of the form, the date, the location and also
4 the time, which is up there, write his name, all
5 this is my handwriting up top, his name, his age,
6 his date of birth, , and his
7 location of birth or place of birth, which is
8 Lexington, South Carolina.

9 His present address is located there. Then it
10 has a question asking about how many grades they
11 have completed. I asked him, he said he had
12 completed 12 grades.

13 Then it has another place right here where it
14 asks if you can read or write and then he placed his
15 initials there indicating that he could read or
16 write.

17 And then, of course, this is my name and this
18 is my title at this point.

19 Q And you had met with him previously, but did
20 you reidentify yourself?

21 A Yes, sir.

22 Q And what were you wearing at that time?

23 A Probably the same sort of outfit.

24 Q Did you have your pistol belt on at that point?

25 A Always.

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

77

1 Q And you had this at the sheriff's office. What
2 room did you conduct this in at the sheriff's
3 office?

4 A One of our interview rooms that's designated
5 for interviews.

6 Q And was Mr. Lucas placed under arrest at this
7 time when he gave a statement?

8 A No, sir.

9 Q Okay. And did you -- it says here, Duly warned
10 and advised me that, and it begins with five
11 questions below that. What do those evidence?

12 A Those would be his Miranda warnings. The way I
13 do it, once we finish the top part up here, I tell
14 them that I've got some things I want to read them
15 and I read each one of them. And then what I will
16 do is have them read them along with me and then ask
17 them if they would -- if they've got any questions
18 to ask. If not, if they would just initial beside
19 each one, and there's a location by each one. And
20 that just signifies that they have had those rights
21 read to them and that they understand those rights.

22 Q Okay. So next to one, it says, J.T.L., what
23 does that evidence?

24 A That would be Mr. Lucas' initials.

25 Q And that's next to two, three, four and five;

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

- 78

1 is that correct?

2 A That is correct.

3 Q Would you go over specifically the advisement
4 that you gave the defendant that day, items one
5 through five?

6 A Number one says: I have the right to remain
7 silent, in which he initialed that one.

8 Number two says: Anything I say can and will
9 be used against me in a court of law. Mr. Lucas
10 initialed that one.

11 Number three: I have the right to talk to a
12 lawyer for advice before I ask (sic) any questions
13 and to have him or her present with me during
14 questioning. Mr. Lucas initialed that one.

15 Number four: If I have no money for lawyer's
16 fees, the court will appoint one to represent me
17 without cost to me if I wish. Mr. Lucas initialed
18 that one.

19 Number five: If I decide to answer questions
20 now without a lawyer present, I will still have the
21 right to stop answering questions at any time. I
22 also have the right to stop answering questions at
23 any time until I talk with a lawyer. Mr. Lucas
24 initialed that one.

25 Q Okay. Now, in response to that, not only did

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

79

- 1 you read that to him, did he acknowledge, you said
2 by signing his initials, he understood that?
- 3 A Yes, sir.
- 4 Q At any time, did he have any questions of you
5 about those rights?
- 6 A No, sir.
- 7 Q Did he ever seek to invoke his right to legal
8 counsel?
- 9 A No, sir.
- 10 Q Did he say he wished to not answer questions
11 and just remain silent?
- 12 A No, sir.
- 13 Q Okay. And after you began the conversations,
14 did he ever interrupt it and say, I'm not
15 comfortable with making any further statements, I
16 wish to stop?
- 17 A No, sir.
- 18 Q And, again, you had not placed him into
19 custody?
- 20 A That's correct.
- 21 Q Was he free to leave?
- 22 A Yes, sir.
- 23 Q Had he told you he had a lawyer?
- 24 A No, sir.
- 25 Q And what happened after you advised him of

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

80

1 these rights?

2 A Well, then what I did was I asked him if he
3 would make a statement as to what happened. We
4 started talking about the injuries and the
5 inconsistencies of the injuries with his story. And
6 I told him that he needed to be honest and tell me
7 what really happened.

8 Q Did he seem impaired or in any way unable to
9 understand what you were talking to him about that
10 day?

11 A No, sir. It was just like the two days prior.

12 Q He seemed coherent?

13 A Yes, sir.

14 Q And was he under the influence of any drugs or
15 alcohol at that point to your perception?

16 A It was not apparent that he was.

17 Q Did he -- had he asked for a break or needed to
18 go to the bathroom, would you have allowed him to do
19 so?

20 A Yes, sir.

21 Q Did he ever make any such request of you?

22 A I don't recall.

23 Q How long did the interview the second time
24 take?

25 A Probably from start to finish, maybe 30, 40

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

81

1 minutes.

2 Q And would you, right where it says printed on
3 the form, I have read this statement and my rights
4 and I understand what these rights are, I make the
5 following statement, would you please elaborate for
6 the Court what was written on that statement in your
7 reading of it?

8 A You want me to read his writing?

9 Q Yes, please.

10 A It says: This is in addition to my first
11 statement. I left Child on the porch to go check
12 the mail, looked through some mail and walked to my,
13 I think he says -- papa's trailer to see if he was
14 home. It took about 15 minutes to do so.

15 When walked from down the road, I saw Child on
16 the porch, I took off running to help him. I picked
17 him up and took inside to do CPR while my -- with my
18 fist hitting him in the chest and stomach area for a
19 long period of times, blew in his mouth until he
20 started to breathe on his own for me. I then left
21 lay -- I then left laying on his side with a pillow
22 behind his back. I went across --

23 Q And reading on page two.

24 A -- the street and called Candice and she called
25 9-1-1. While doing CPR, I was using all the force

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

82

1 that I had in me until I got tired and he started
2 breathing. I lied in my first statement to the
3 officer because scared and didn't want to look bad
4 to Candice.

5 Q Is that where the statement ended?

6 A Yes, sir.

7 Q Now, subsequent to taking this statement that
8 we just talked about on State's I.D. Number 23, was
9 Mr. Lucas placed under arrest at that time?

10 A No, sir.

11 Q How long did it take before you actually placed
12 him under arrest?

13 A It was a few days later.

14 THE COURT: Y'all excuse me a second. I need
15 to take a break.

16 Don't discuss your testimony.

17 (Pause.)

18 THE COURT: I'm sorry. Go ahead.

19 BY MR. WEDEKIND:

20 Q Detective Pritchard, you say you -- it was -- a
21 period of time would have been like a week, two
22 weeks that you actually arrested him after this?

23 A Yes, sir.

24 Q Okay. And you let him walk out of the
25 sheriff's office unencumbered at that time?

DAVID PRITCHARD (IN CAMERA) - DIRECT BY MR. WEDEKIND

83

- 1 A Correct.
- 2 Q Were there any other written statements that
- 3 you took from the defendant Mr. Lucas?
- 4 A No, sir.
- 5 Q Did he make any other phone calls to you?
- 6 A I don't recall.
- 7 Q Did you ever call him?
- 8 A I don't think there's any other contact.
- 9 Q So this is the final contact that you made with
- 10 him until the day he was served with the arrest
- 11 warrants?
- 12 A As I recall, yes, sir.
- 13 Q Okay. One thing I wanted to touch back on.
- 14 When you had the initial conversation with him -- or
- 15 the second conversation with him at the house, you
- 16 said he had been walking on the porch. Did he
- 17 describe to you that the child was walking on the
- 18 porch?
- 19 A Right, going from -- yeah, going from like
- 20 chair to chair supporting himself.
- 21 Q Did he give you a reason why the child was
- 22 moving -- or why he was letting the child do that,
- 23 why he wasn't in a crib or anything like that?
- 24 A He said they had been out on the porch outside.
- 25 Q Was there a purpose to it, like, to develop

DAVID PRITCHARD (IN CAMERA) - CROSS BY MR. FLOYD

84

1 muscle control?

2 A Well, the child had cerebral palsy and that's
3 one reason why the child couldn't, at that age, walk
4 on its own.

5 Q Okay. And he did mention that to you?

6 A Correct.

7 MR. WEDEKIND: I believe that will conclude my
8 questions. Please answer any that Mr. Floyd may
9 have of you.

10 THE COURT: Cross?

11 CROSS-EXAMINATION

12 BY MR. FLOYD:

13 Q Detective Pritchard -- or Sergeant Pritchard,
14 the first time you spoke to Mr. Lucas, did you
15 suspect him of wrongdoing?

16 A No, sir.

17 Q When did you come to the decision in your mind
18 that the injuries received by this young child were
19 of a criminal nature?

20 A I don't know if I can give you an exact time
21 when that happened. Obviously, after the initial
22 interview and then the following day getting the
23 reports from the doctors and looking at the pictures
24 and the doctors saying that the injuries were not
25 consistent with the way that Mr. Lucas said the

DAVID PRITCHARD (IN CAMERA) - CROSS BY MR. FLOYD

85

1 child had received them, at that point, obviously I
2 was thinking that maybe there was more to it, but as
3 far as giving you an exact time, I can't.

4 Q The second statement -- the first written
5 statement was at the Lexington Medical Center; is
6 that correct?

7 A Yes, sir.

8 Q And then, of course, there was also an oral
9 statement made at that time?

10 A Right.

11 Q And the second statement was made at the house
12 or --

13 A Are you talking about the second written
14 statement?

15 Q Uh-huh.

16 A No, sir, that was done at the sheriff's office.

17 Q When you went back to his house and you had him
18 show you around, was that -- did you call that a
19 statement? Was that a statement at that point in
20 time?

21 A My only intention at that point was to get
22 better pictures of the railing. And to be honest
23 with you, I didn't even know he was going to be
24 there, but he happened to have gotten home from the
25 hospital, so we just talked in general at that

1 point.

2 Q When you saw him there at the house on that
3 night, were you suspicious of criminal activity at
4 that point?

5 A I don't recall at that point.

6 Q You had already talked -- had you already
7 talked to the doctor at that point?

8 A The only information I had received was that
9 the child was in a real bad condition, but as far as
10 the types of injuries and whether or not the
11 injuries would have been consistent with Mr. Lucas'
12 story, I did not have that information at that
13 point.

14 Q When he came to the sheriff's department for
15 the last statement, did you tell him at that time
16 that he was a suspect in criminal activity?

17 A No, sir.

18 Q Was he?

19 A The reason I brought him back was to try to
20 figure out the inconsistencies in his story as far
21 as his story and the injuries. And I let him know
22 right up front that that's why he was there.

23 Q But you never told him that you were planning
24 to charge him with criminal activity?

25 A At that point, it was still too early. I

DAVID PRITCHARD (IN CAMERA) - CROSS BY MR. FLOYD

87

1 didn't even know if I was going to charge him.

2 Q Well, you already had the doctor's opinion that
3 it was criminal, did you not?

4 A At one point, I know the doctor told me that he
5 thought it was that, but I don't remember if it was
6 before or after this. I'd have to go back and
7 actually lay down a time line to see.

8 Q But you had a reason to bring him to the
9 sheriff's department because you felt that his
10 statements were not consistent with what the doctor
11 said the injuries were; is that correct?

12 A That wasn't the specific reason for calling him
13 to the sheriff's office, that was just common
14 practice.

15 Q Why did you call him back then?

16 A Why did I specifically call him to the
17 sheriff's office or why did I call him back for a
18 second interview?

19 Q Either one.

20 A Called him back for a second interview is
21 because of the inconsistencies with the story and
22 the injuries. And the reason I called him to the
23 sheriff's department is that's usually where I have
24 people come to talk to me.

25 Q Would you agree then that you were suspicious

DAVID PRITCHARD (IN CAMERA) - REDIRECT BY MR. WEDEKIND

88

1 that these injuries were criminal in nature at the
2 second interview?

3 A I was suspicious that they had not occurred
4 exactly how they said they happened.

5 Q Well, didn't the doctor opine to you that the
6 injuries had to be intentional in his opinion?

7 A Again, at that point, I'm not sure because I
8 talked to the doctors on several different
9 occasions.

10 Q But before you talked to him in the sheriff's
11 department, you did not tell him he was a suspect,
12 did you?

13 A No, sir.

14 MR. FLOYD: Thank you. No further questions.

15 THE COURT: Redirect?

16 REDIRECT EXAMINATION

17 BY MR. WEDEKIND:

18 Q Just very briefly, Detective Pritchard. Was
19 there any discussion about a childcare seat and why
20 he had not taken the child immediately to seek
21 medical treatment and instead waited to make the
22 call to the mother? Did he offer an explanation for
23 that?

24 A Yes, sir. When he mentioned that he had laid
25 the child over on its side and that he had went to

DAVID PRITCHARD (IN CAMERA) - REDIRECT BY MR. WEDEKIND

89

1 call the mother, I asked him where he had made the
2 phone call from because they did not have a phone
3 there at the residence and he indicated he did not
4 have a cell phone available to him. He said he had
5 to actually get in his car and drive up the road,
6 like, across the street to, I guess, a service
7 station or something like that.

8 So I asked him what he had done with the child
9 while he was driving up there to make a phone call
10 and he said he had left the child there at the house
11 on the living room floor. And I asked him why he
12 had done that and why did he not take the child with
13 him. And he indicated that the reason he didn't
14 take the child with him is because he didn't have a
15 car seat and he didn't want to have the child not in
16 a car seat and the potential of getting stopped and
17 getting charged for not having the child in a car
18 seat.

19 MR. WEDEKIND: Okay. Thank you. No further
20 questions.

21 THE COURT: Recross?

22 MR. FLOYD: Nothing further, Your Honor.

23 THE COURT: Thank you, sir. You may step down.

24 MR. WEDEKIND: The State would have no other
25 witnesses nor any other statement, sir.

1 **THE COURT:** Do you have a motion, Mr. Floyd?

2 **MR. FLOYD:** Your Honor, we would move to
3 suppress the statement given by -- allegedly given
4 by Mr. Lucas at the Lexington County Sheriff's
5 Department. I think it's clear from the evidence
6 that, at that point in time, he was, in Sergeant
7 Pritchard's mind, a suspect in criminal activity.
8 He neglected to inform him of that situation. And
9 had he so informed him, then it's our position that
10 Mr. Lucas would have been able to contact an
11 attorney at that time before he would have spoken
12 with him.

13 **THE COURT:** All right. Based on what's been
14 presented, the Court finds that the State has met
15 the requisite degree of proof for the introduction
16 of these alleged oral and written statements.

17 With regard to the statements that are alleged
18 to have been made by this defendant on May 24, 2006,
19 at the emergency room at the Lexington County
20 Hospital and at the house later that same evening,
21 the Court finds that those were not the product of
22 any incustodial interrogation, were not subject to
23 Miranda requirements. Moreover, they were given
24 freely and voluntarily by the defendant, were not
25 the product of any type of improper action on the

1 behalf of law enforcement, they were not in response
2 to any type of threats or coercion of any kind.

3 With regard to the written statement that was
4 given at the Lexington Medical Center, that also was
5 not the product of any incustodial interrogation,
6 was not subject to Miranda requirements and was
7 freely and voluntarily given, not the product of any
8 type of coercion or improper action or threat by the
9 law enforcement officials or anyone else.

10 With regard to the written statement given on
11 May the 26th, 2006, which was in an incustodial
12 setting, the Court finds that the State has
13 established by the requisite degree of proof, that
14 the defendant was properly advised of his rights
15 under the Fifth and Sixth amendment, including
16 Miranda warnings.

17 He was specifically advised that he had the
18 right to remain silent, that any statement he did
19 make would be used against him in a court of law,
20 that he had the right to an attorney, if he could
21 not afford an attorney, one would be appointed for
22 him without cost, that he could stop at any time and
23 request an attorney or stop answering questions at
24 any time, that the defendant understood his rights
25 and made a free, knowing voluntary and intelligent

1 decision to waive those rights.

2 He did not invoke a right to silence or a right
3 to an attorney. He did not indicate any desire to
4 stop. He was cogent -- his responses were cogent.
5 He was, to all appearances, not impaired in any way,
6 appeared to understand. There were no threats, no
7 coercion, no improper action on the part of police
8 of any kind.

9 If the foundation is properly established in
10 the presence of the jury, the Court's ruling is that
11 the statements would be admissible, oral and
12 written.

13 MR. WEDEKIND: Thank you, sir.

14 THE COURT: As well as the nonverbal act of
15 demonstrating which pickets in the railing were
16 involved in how the child's head was positioned in
17 the railing.

18 All right. Anything else I need to do before
19 the jury gets here?

20 MR. WEDEKIND: I don't believe so from the
21 State, sir.

22 MR. FLOYD: Nothing from defense, Your Honor.

23 THE COURT: Mr. Lucas, we're going to start
24 back at 2:15, make sure you're here no later than
25 2:15 or such sooner time as Mr. Floyd tells you to

1 be here, all right?

2 **DEFENDANT LUCAS:** Yes, sir.

3 **THE COURT:** Thank you.

4 Court's in recess until 2:15.

5 (Whereupon, there was a luncheon recess.)

6 **THE COURT:** Is the State ready for the jury?

7 **MR. WEDEKIND:** The State's ready, sir.

8 **THE COURT:** Defense?

9 **MR. FLOYD:** The defense is ready, Your Honor.

10 **THE COURT:** Thank you.

11 Bring in the jury.

12 **MR. FLOYD:** Your Honor, one little matter. We

13 would ask that any witnesses be excluded.

14 **MR. WEDEKIND:** Sequestration, sir? No problem

15 with that. We do have the victim's family here and

16 the victim, Child ██████████ is there. And we do have

17 one witness I just sent out, Dr. Cartie, I don't

18 think he's gotten the word yet about the

19 sequestration. So if he comes in --

20 **THE COURT:** Just have somebody tell him.

21 The victims can stay in the courtroom, the

22 family of the victim can stay in the courtroom.

23 (The jury enters the courtroom at 3:00 p.m.)

24 **THE COURT:** All right. Ladies and gentlemen, I

25 want to begin by explaining to you about your wait.

1 As I told you briefly, each county, each circuit has
2 a chief judge designated to do the administrative
3 work, one for civil and one for criminal and I do
4 the civil side. It's a great deal of extra work.
5 And as part of that, we control the running of the
6 court. And to do that, I have to meet and have
7 these conferences. The conferences typically take
8 about 15 minutes. So a request comes into my law
9 clerk, she sets it up.

10 Well, we had a request. We set it up at two
11 o'clock, that's why I told you to be here at 2:15.
12 Today we found out that they were flying in lawyers
13 from Minnesota. And this case has been -- it's
14 actually two separate cases and it's been up and
15 down to federal courts.

16 And, anyway, we started a little bit before
17 2:00 and I just walked down the steps, so I'm sorry
18 as I can be. These folks have been here. They've
19 been waiting just like you have. It's my fault. I
20 messed up. I didn't set aside enough time. If I'd
21 known it was going to take that long, I would not
22 have set it during a term of court.

23 All right. Now, the first thing I have to do
24 is to put you under a different oath, the oath of a
25 trial jury. So I need you to stand and raise your

1 right hand and the clerk will administer your oath.

2 (The jury was duly sworn by the Clerk of
3 Court at 3:02 p.m.)

4 THE COURT: If anybody could not take the oath,
5 please raise your right hand.

6 No hands are raised.

7 All right. Folks, I'm going to spend about 12
8 minutes talking to you about some preliminary
9 things. I'm going to tell you in general terms how
10 we operate court with a jury, then I'm going to tell
11 you how I expect the case to begin. I won't go
12 through the whole process, but I'll tell you how
13 we're going to get started. And then I'm going to
14 give you some instructions that you have to follow
15 throughout the trial.

16 Now, I usually will bring you folks in at
17 around 9:30 or 10:00 in the morning. Generally, we
18 go until about one o'clock and break for lunch.
19 Usually the lunch hour is an hour, but sometimes
20 with a jury, I give a little bit more time to run
21 errands, make phone calls, things like that. So
22 it's usually an hour to an hour and a half with the
23 jury.

24 So we generally start back at about 2:30 and go
25 until 5:00 to 5:30 with the jury. That doesn't end

1 our day, but that's usually what the jury does.

2 Once you get a case to decide, we typically
3 will wait on you to decide the case. We have to
4 vary that schedule sometimes to work around matters
5 and conflicts and things like that, but you now know
6 as much as I know about how your day is likely to
7 go.

8 The way the case will begin is that the
9 attorneys will first be recognized to make their
10 opening statements to you. In opening statements,
11 the attorneys are not permitted to engage in what we
12 call argument. An opening statement can be an
13 introduction, an outline, an overview, but it can't
14 extend into what we would classify as being
15 argument.

16 Once the opening statements are finished, then
17 I will call upon the State's attorney, the
18 prosecutor, to present the evidence that the State
19 claims to have against the defendant. The State
20 brought this charge and the State has the entire
21 burden of proof.

22 Mr. Lucas is presumed to be innocent. The
23 State has got to prove to you beyond a reasonable
24 doubt every essential element of the offense charged
25 against the defendant. So I will recognize the

1 prosecutor, the Solicitor's office, to present
2 evidence in an attempt to meet that burden.

3 When the State finishes with its case in chief,
4 one of the Solicitors will inform me that the State
5 rests. And at that point, I'll have to send you out
6 of the courtroom and discuss some legal issues. I
7 told you we worked on legal issues yesterday and
8 again this morning. It'll be another one of those
9 times when we'll have to work on legal issues
10 outside your presence.

11 When you come back in after that, I'll tell you
12 where we go from there, but that's what you can look
13 for as we get started. Those are the steps we're
14 going to be taking.

15 It's really important that you understand some
16 things. First, that oath that you just took was one
17 in which you've promised us that you're going to
18 decide the case based on the evidence and the law.
19 So you need to know where those things come from.

20 The evidence comes from the sworn testimony of
21 witnesses. Evidence also can come in the form of
22 exhibits. An exhibit can be anything tangible
23 that's marked in the record. It can be something
24 like a photograph, a map, a chart, anything
25 tangible.

1 If something is an exhibit, you will have it
2 with you in the jury room when you decide the case.
3 And the reason I'm telling you that is because it's
4 not at all unusual, I see they've got a display
5 system set up here so hopefully what I'm about to
6 tell you won't be as much of a problem, but in a lot
7 of trials, the attorney may have something like a
8 photograph and show it to you from a distance or
9 hand it into the jury box and ask you to circulate
10 it around so you're trying to look at this thing
11 while you're also trying to pay attention to what's
12 going on up here at the witness stand. So just
13 understand that all of the exhibits go back with you
14 in the jury room when it comes time to decide the
15 case.

16 You need to understand that what the lawyers
17 say is not evidence. I want you to pay close
18 attention to what they tell you, but understand that
19 what comes out of their mouths is not evidence. The
20 evidence comes from the witnesses and the exhibits.

21 Now, there is one exception to that rule about
22 what the lawyers saying not being evidence and if we
23 come upon it, I'll tell you about it, otherwise I
24 won't burden you with it. So you know where the
25 evidence comes from.

1 The law comes from me. It's my job to decide
2 what law applies to this case and tell it to you at
3 the end of the trial.

4 Now, it's also very important that you
5 understand that there are two judges in this
6 courtroom. I'm the judge of the law. As I just
7 told you, I'm going to tell you the law at the end
8 of the trial. I'll rule on legal issues as they
9 arise. I'll preside over the case. That's my job.

10 You're the other judge. You have to understand
11 that you are the only judge of the facts. Only you
12 get to decide such things as whether or not evidence
13 is believable. Only you get to decide what weight,
14 if any, should be placed on evidence. That's
15 entirely your prerogative. You're the only judge of
16 the facts and I will not invade your province.

17 Now, while you've promised us that you're going
18 to decide the case based on the evidence and the law
19 and you must do that, as I mentioned to you
20 yesterday, please don't leave your common sense at
21 home. We want you to use your common sense, use
22 your sense of logic and reason and your good
23 judgment.

24 It just makes good common sense that you keep
25 an open mind about this case and you don't make up

1 your mind until you've heard all of the evidence and
2 you know what law applies to the case. So there's a
3 rule that I've already mentioned to you. I have to
4 repeat it now. And this rule is very hard to
5 follow, but you must follow it. And that rule is
6 that you are not to discuss this case in any way
7 among yourselves until I tell you to.

8 Now, the reason that's hard to follow is
9 because you 14 folks may feel like you've got very
10 little in common except you all live in Lexington
11 County and you all got picked on the case, so the
12 logical thing you're going to want to talk about
13 during any break is what just happened in the
14 courtroom, what somebody just said, what you think
15 about something. You have to resist that temptation
16 until the trial is given to you, the case is given
17 to you, and you're told to deliberate and then we
18 wait on you, but don't discuss it until then.

19 Now, once again, quickly to hit the highlights
20 of what I told you yesterday, if anybody attempts to
21 contact you and discuss the case with you, report it
22 to me so that I can deal with it. If there's any
23 media coverage of this trial, get away from it,
24 don't allow yourselves to be exposed to it further
25 and report to me what you saw, heard or read through

1 the media. And don't do any independent
2 investigation related to the trial in any way.

3 Now, the final thing I want to say is I want to
4 thank you. I know very well that you all have other
5 places to be and other things to do. And despite
6 the fact that we got off to a rousing start of
7 having you 45 minutes late coming in here, I promise
8 you that it drives me crazy when I know I've got a
9 jury waiting.

10 I tried to find out if you all were here and
11 then I tried to send word down to you and it wound
12 up even taking longer than I thought it would then.

13 I'll do everything in my power not to waste
14 your time. I can't promise you there won't be hurry
15 up and wait, but I promise you that if you're ever
16 waiting, we're working. It won't be for us sitting
17 around telling jokes and drinking coffee that you're
18 waiting, that won't happen. We're working.

19 So I thank you very much. I invite your close
20 attention to the opening statements.

21 Ms. McMahon, you're recognized.

22 **MS. MCMAHON:** May it please the Court, Your
23 Honor.

24 **THE COURT:** Yes, ma'am.

25 *****

1 OPENING STATEMENTS

2 MS. MCMAHON: Brutal, that's the only word that
3 can describe this case because the defendant,
4 Jeffrey Lucas, brutally beat a two-year-old
5 handicapped child almost to death.

6 On May 24th of 2006, Child [REDACTED] went to the
7 emergency room. He had bleeding on his brain. He
8 had bleeding in his spinal column. He had bruising
9 on the front and the back of his ears, along his
10 chest, on his stomach, on his back. He was
11 critically ill. Had he not gone to the emergency
12 room at that time, he would have died because
13 Jeffrey Lucas brutally beat him.

14 Ladies and gentlemen, Child [REDACTED] has been
15 fighting for his life ever since he was born. He
16 was born premature, four months premature. And he's
17 had to overcome a lot. He was born with cerebral
18 palsy. And at two years old, he still couldn't walk
19 without being assisted. He had nowhere to go,
20 nowhere to run and he was left in Mr. Lucas' care.

21 You're going to hear from Detective David
22 Pritchard from the Lexington County Sheriff's
23 Department. He's the one that investigated this
24 case. He went to the emergency room. He spoke with
25 the defendant. The defendant gave him a statement.

1 He gave him a written statement. And then Detective
2 Pritchard went to his house to look and see if the
3 story that Mr. Lucas was telling him was true.

4 Mr. Lucas' story is that Child fell down the
5 steps and got his head caught in the railing.

6 Now, when Child went to the emergency room at
7 Lexington, his injuries were so severe, they
8 couldn't take care of him. They had to transport
9 him to the Children's Hospital at Palmetto Richland.

10 Now, Detective Pritchard spoke with the
11 defendant at the emergency room in Lexington while
12 Child was being transported over to the other
13 hospital. When Detective Pritchard gets word from
14 the doctors that there's some inconsistencies here,
15 the injuries that Child had was not consistent with
16 falling down the stairs and get his head caught in a
17 railing, he goes to the home to look at the stairs.
18 And, actually, Mr. Lucas is home.

19 Mr. Lucas actually shows him the railing, the
20 exact railing, that he says that Child gets his
21 head caught in. It's so wide that he puts his own
22 head through it. There's no way that a child could
23 have had his head caught in the railing. You're
24 going to hear from Detective Pritchard.

25 You're going to hear from Dr. Susan Luberoff

1 who also took care of Child at Palmetto Richland.
2 She'll testify that the injuries were not consistent
3 with a child getting his head caught in a railing.

4 You're also going to hear from Dr. Richard
5 Cartie, who treated Child. He, again, will tell
6 you that the injuries are not consistent with a
7 child getting his head caught in a railing.

8 Now, the defendant is charged with infliction
9 of great bodily injury to a child. And Mr. Wedekind
10 is going to get up here at the end at the closing
11 arguments and tell you exactly what that is and show
12 you what the definition of great bodily injury is,
13 but basically under the law, if someone commits an
14 injury against a child that is a substantial risk of
15 death, that's great bodily injury.

16 Both of the doctors will testify, again, that
17 Child was critically ill when he came into the
18 emergency room. He had to immediately be placed on
19 life support.

20 Now, ladies and gentlemen, this case is very
21 important. It's very important to Child and his
22 family. And it's important to Mr. Lucas and his
23 family. And we know that you will make the right
24 decision, given all of the evidence that you will
25 hear from the witness stand, the pictures that you

1 will see, that the defendant is guilty of great
2 bodily injury upon a child.

3 THE COURT: Thank you very much.

4 Mr. Floyd, you're recognized for your opening
5 statement.

6 MR. FLOYD: Thank you, Your Honor.

7 THE COURT: Yes, sir.

8 MR. FLOYD: Members of the jury, this is Jeff
9 Lucas. Jeff is the defendant in this case. Jeff's
10 a man about whom you're going to make one of the
11 most important decisions you ever made and you just
12 now met him because you're going to decide whether,
13 based upon the evidence you hear in this room,
14 whether or not Jeff should be branded a criminal,
15 whether he should be branded a criminal by one of
16 the most atrocious crimes we have in our society,
17 committing a great bodily injury upon a child.

18 Now, if you've never served on a criminal jury
19 before, well, you'd almost have to set aside human
20 nature because some of you may have the thought in
21 your mind, because Jeff Lucas has been arrested and
22 charged with this crime, because he now sits before
23 you to be judged for this crime, well, that he must
24 be guilty.

25 Well, if you've got that kind of thought,

1 you've got to erase it because what the law says is
2 when you look at Jeff Lucas, you must say in your
3 mind and in your heart, Jeff Lucas is innocent. And
4 Jeff Lucas remains innocent unless the State proves
5 his guilt to each one of your satisfactions beyond a
6 reasonable doubt.

7 Now, this is a most unfortunate incident.
8 There's no question about that. This is an innocent
9 child who suffered injury, but we ask that you
10 listen closely. We think you will conclude that the
11 only reason the State has charged Mr. Lucas is based
12 upon a speculation, speculation.

13 All we ask is that you keep an open mind. And
14 we think if you'll do that and you look closely and
15 listen closely to the evidence in this case, you'll
16 conclude, when it's all over, that the only fair and
17 just verdict is one of not guilty.

18 I thank you very much for your attention here.
19 Thank you.

20 **THE COURT:** Thank you, Mr. Floyd.

21 Solicitor, call your first witness, please.

22 **MR. WEDEKIND:** Yes, sir. The State would call
23 Detective Pritchard.

24 **THE COURT:** Would you come around and be sworn,
25 sir?

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

107

1 DAVID PRITCHARD,
2 having been duly sworn, testified as follows:
3 THE CLERK: If you'll have a seat. State your
4 name and spell your last for the record, please.

5 THE WITNESS: David Pritchard,
6 P-r-i-t-c-h-a-r-d.

7 DIRECT EXAMINATION

8 BY MR. WEDEKIND:

9 Q Detective Pritchard, would you please tell the
10 jury some of your background, who you're currently
11 employed by and how long you've been there?

12 A Currently employed by the Lexington County
13 Sheriff's Department, been there for approximately
14 12 years. I started out as a road deputy. And
15 after about three and a half, four years, I got into
16 criminal investigations, did that for around six
17 years.

18 Q What do you currently do for the sheriff's
19 office?

20 A Currently, I'm a sergeant in the training
21 division.

22 Q And were you also working in training or were
23 you doing investigations in 2006?

24 A My primary function was investigations, but I
25 was doing training as an adjunct instructor.

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

108

1 Q And what do you do as an investigator when you
2 were performing those functions?

3 A Pretty much did all kind of investigations, we
4 called them major crime investigations that had to
5 do with crimes against persons. My primary
6 investigative cases were dealing with child abuse
7 and things of that nature.

8 Q And were you working as an investigator on the
9 evening and the afternoon of May 24th, 2006?

10 A That's correct.

11 Q And did you have an occasion to be called in on
12 that particular day to investigate a case of an
13 injured child?

14 A Yes, sir.

15 Q Would you please tell the jury what your
16 initial call was?

17 A I was called and asked to respond to the
18 Lexington Medical Center Emergency Room in reference
19 to a child that had been injured.

20 Q And did you report to the hospital to begin
21 your investigation?

22 A Yes, sir, I did.

23 Q And once you got there, did you obtain the
24 address where the, obviously the injury didn't occur
25 at the hospital, but where the original location was

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

109

- 1 supposed to have taken place?
- 2 A Yes, sir, I did.
- 3 Q And what address was that?
- 4 A That was at in the Gaston area
- 5 of Lexington, South Carolina.
- 6 Q So when you say the Lexington area, is that in
- 7 Lexington County?
- 8 A In Lexington County, yes, sir.
- 9 Q Did you have an occasion to go out and visit
- 10 that address as part of your investigation?
- 11 A Yes, sir, I did.
- 12 Q Let me show you what's marked for
- 13 identification as State's I.D. Number 20. Do you
- 14 recognize this?
- 15 A Yes, sir.
- 16 Q And what does that depict?
- 17 A That's an aerial photograph of the incident
- 18 location at
- 19 Q And that is the home of the defendant,
- 20 Mr. Jeffrey Lucas?
- 21 A That's correct.
- 22 Q And this is in Lexington County you said?
- 23 A Yes, sir, Lexington County.
- 24 MR. WEDEKIND: Your Honor, at this time, the
- 25 State would move in State's I.D. Number 20 into

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

110

1 evidence.

2 THE COURT: It's in evidence without objection.

3 (State's Exhibit Number 20, photograph,
4 admitted into evidence.)

5 BY MR. WEDEKIND:

6 Q So you said you were at the hospital is where
7 you started the investigation. When you got there,
8 was the victim, Child [REDACTED] present at the
9 hospital in the E.R.?

10 A Yes, sir, he was.

11 Q And what was his status? Were you informed of
12 that?

13 A I was informed of that. I don't recall
14 actually seeing him because they were busy trying to
15 treat him at the moment. I was informed that he had
16 some injuries that were --

17 MR. FLOYD: Your Honor, I'm going to object to
18 any hearsay.

19 THE COURT: Do you have an exception to the
20 hearsay rule?

21 MR. WEDEKIND: No, sir. I'll withdraw that
22 question.

23 THE COURT: Don't say what anybody told you
24 unless you're talking about the defendant.

25 BY MR. WEDEKIND:

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

111

1 Q So while you were at the hospital, did you talk
2 to any of the parents of the victim, Child
3 at that time?

4 A I think I just spoke with the mother and then I
5 made contact with Mr. Lucas.

6 Q Okay. Now, what was the mother's name?

7 A Candice Deese.

8 Q And she was present at the hospital?

9 A Yes, sir.

10 Q And to your knowledge, the baby was there, but
11 he was being treated for his injuries?

12 A Correct.

13 Q And was that baby later transferred from that
14 hospital to another?

15 A Yes, sir.

16 Q Do you know where that hospital was?

17 A Palmetto Richland.

18 Q And you said that you also noted the presence
19 of the defendant, Mr. Jeffrey Lucas, was present at
20 the E.R.; is that correct?

21 A That's correct.

22 Q Okay. Did you have an occasion to speak with
23 him at that time?

24 A Yes, sir, I did.

25 Q And once you did that, what exactly did you do

1 with Mr. Lucas? Did you have a conversation with
2 him?

3 A Yes, sir.

4 Q Tell the jury please what you discussed with
5 Mr. Lucas.

6 A I found out that Mr. Lucas had been at the home
7 with the child whenever the child got injured, so I
8 asked Mr. Lucas if I could talk with him to try to
9 get some details on what had happened to the child.
10 So Mr. Lucas and I went into a, I believe it was a
11 vacant office and I basically conducted an interview
12 with Mr. Lucas.

13 Q And what was the substance of the conversation?
14 Did he give you any information about how the child
15 was injured -- or let me hold you up there. Did he
16 tell you how old the child was?

17 A I believe he told me the child was like two.

18 Q And what did he tell you happened to the child
19 how he -- did he tell him (sic) he was injured and
20 how he was hurt?

21 A Yes. He said that both he and the child were
22 alone at the home and that they had been out on the
23 front porch and that he had, he being Mr. Lucas, was
24 going to go to the mailbox to check his mail. So he
25 walked to the mailbox to check his mail and he left

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

113

1 the child on the porch by itself.

2 Mr. Lucas said once he got to the mailbox, it
3 was so oriented in a way that he could not see the
4 child from the mailbox, but as he got closer back to
5 the porch after getting his mail, he saw that the
6 child had fallen down the steps and had gotten his
7 head stuck in between the railings.

8 Q And that was how he told you the child was
9 injured. Did he tell you why he was alone with the
10 child?

11 A He said he was taking care of the child for the
12 mother. The child was -- said approximately two
13 years of age and the child had been out on the front
14 porch with him. And he also mentioned that the
15 child had cerebral palsy and could not really walk
16 on its own without some sort of assistance and that
17 the child was walking around on the porch area
18 basically supporting itself by the chairs and by the
19 rail and so forth.

20 Q So the mother whose name is Candice Deese; is
21 that correct?

22 A Correct.

23 Q So do you know where she was -- did he tell you
24 where she was at the time?

25 A He said she was at work.

1 Q And then he says he's watching the child alone.
2 He's solely responsible for the welfare of the
3 child, according to the defendant's own mouth?

4 A That's the impression he gave me.

5 Q Okay. And how did he explain that the child
6 was injured?

7 A Said that apparently while he had walked to the
8 mailbox, the child had fallen down the steps of the
9 porch and had gotten its head stuck in between a
10 couple of the railings of the handrail.

11 Q And, at this time, were you in uniform when you
12 were talking to him?

13 A I was in my detective uniform.

14 Q And describe that to the jury.

15 A Usually what we wear, depending on when it was,
16 and as I recall, I was on what we call our evening
17 shift that week, so on evening shift, what we wear
18 is basically a polo shirt, a golf shirt, with a --
19 what we call a logo which has a star and the
20 Lexington County Sheriff's Department badge on it,
21 that and dress pants, badge and gun on my belt.
22 That's the way I was dressed.

23 Q So it wasn't like you were just pretending to
24 be his buddy hanging out in the E.R. chitchatting
25 with him, he knew that you were a detective; is that

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

115

1 correct?

2 A That's correct. I did identify myself as such.

3 Q Now, you said you spoke with him and he gave
4 you these statements. Did you later learn that the
5 child was being moved to a different location?

6 A Yes, sir.

7 Q Where was that?

8 A Palmetto Richland.

9 Q When that occurred, did you end your
10 conversation with Mr. Lucas or did he offer to do
11 anything else?

12 A He said that he wanted to go with the mother to
13 be with the child at the hospital. So I asked him
14 if he wouldn't mind writing out a statement before
15 he left.

16 Q Did he have any objection to doing that?

17 A No, sir, he did not.

18 Q So did he write out a statement?

19 A Yes, sir, he did.

20 Q Let me show you what's marked for
21 identification as State's I.D. 22. And that's
22 entitled Lexington County Sheriff's Department
23 Voluntary Statement. Do you recognize that, sir?

24 A Yes, sir.

25 Q And, in fact, does your signature appear on it?

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

116

1 A That is correct.

2 Q And what exactly is that? Tell the jury what
3 22 is.

4 A This is a form that we use at our sheriff's
5 office to get voluntary statements from individuals,
6 basically their story as to what happened or their
7 account of what happened.

8 Q Had there been any alterations or changes to
9 this document?

10 A No, sir.

11 MR. WEDEKIND: Your Honor, at this time, the
12 State would move into evidence State's I.D. Number
13 22.

14 THE COURT: Subject to previous objection?

15 MR. FLOYD: Yes, Your Honor.

16 THE COURT: Anything else?

17 MR. FLOYD: Nothing further, Your Honor.

18 THE COURT: Mark it in evidence, please, ma'am.

19 (State's Exhibit Number 22, statement dated
20 5/24/06, admitted into evidence.)

21 MR. WEDEKIND: Your Honor, we'd like to publish
22 this to the jury.

23 THE COURT: Sure.

24 BY MR. WEDEKIND:

25 Q Okay. Detective Pritchard, is this the

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

117

1 statement that Mr. Lucas filled out for you?

2 A Yes, sir.

3 Q Okay. And at the top here, it says, I, whose
4 name is that?

5 A Mr. Lucas.

6 Q And what do these numbers up here, what do they
7 represent?

8 A His date of birth.

9 Q Okay. And then you put your name on that form?

10 A Correct.

11 Q Now, did you fill out this top portion of it
12 with that information yourself?

13 A Yes, sir.

14 Q And where did you get the raw data as to the
15 address that you see there?

16 A From Mr. Lucas.

17 Q And at the middle of the page, you see some
18 text right here. Who put that pen to paper to make
19 those marks on the page?

20 A Mr. Lucas did.

21 Q In his own hand?

22 A Correct.

23 Q And what do these markings right here
24 represent?

25 A Those are his initials.

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

118

1 Q At the beginning and the end?

2 A Yes, sir.

3 Q Okay. What is indicated by this X across the
4 bottom?

5 A That there is nothing else added to the
6 statement.

7 Q And then the same applies for the end of
8 statement, correct?

9 A Correct.

10 Q Would you please read to the jury what
11 Mr. Lucas wrote for you?

12 MR. FLOYD: Your Honor, I object. The
13 statement speaks for itself. The jury can read it.
14 I don't think it's up to the detective to read if
15 there's any kind of question of what the words are.
16 It's up to the jury to determine that.

17 THE COURT: Overruled. It's on the screen.
18 They can look at it as he's reading it. They can
19 compare that.

20 Go ahead.

21 BY MR. WEDEKIND:

22 Q Okay. Detective Pritchard, so based on this
23 information, did you feel that that correlated with
24 what he had told you orally?

25 A Yes, sir, pretty much.

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

119

1 Q So, at this point, did you have any reason to
2 suspect any -- or have any doubt about what you had
3 been told by Mr. Lucas as to how the child became
4 injured?

5 A Not at this point.

6 THE COURT: You know I overruled his objection,
7 don't you?

8 MR. WEDEKIND: Oh, he can read it, sir?

9 THE COURT: Yes. I overruled his objection,
10 but what I was saying was it is on the screen, the
11 jury can compare it if he were to misstate anything.

12 MR. WEDEKIND: I'm sorry, sir.

13 BY MR. WEDEKIND:

14 Q Okay. Detective Pritchard, would you please
15 read that out?

16 A As I was taking care of Child on the porch in
17 the front yard, I went to get the mail from mailbox,
18 I heard a loud noise that didn't sound right. I
19 started to the porch and saw Child with his head
20 stuck between the porch rails. I then ran and
21 picked him up. He was like a wet dish rag. He was
22 not breathing.

23 I took him inside and tried CPR and called
24 Candice at work. She called 9-1-1 and came home
25 from work. The ambulance got there just before she

1 got there. Then Candice was there and they left in
2 the ambulance.

3 Q Okay. Thank you. So after you obtained that,
4 did you place Mr. Lucas under arrest or do anything
5 to him at that point?

6 A No, sir.

7 Q So he was free to go?

8 A Yes, sir.

9 Q And did he, in fact, go?

10 A Yes, sir.

11 Q You don't know exactly where, though, do you?

12 A I just assume where he went.

13 Q Okay. And had you asked him if you could look
14 around on his piece of property at that time?

15 A Yes, sir.

16 Q And what was his response?

17 A He said I could.

18 Q Okay. Did you obtain anything from him to
19 substantiate to him granting you that permission?

20 A Yes, sir. I asked him whose property that was
21 and he told me it was his property. So we have
22 another form that we use at the sheriff's office
23 that's referred to a consent to search form, which
24 basically allows the property owner to give us
25 permission, they sign saying that they are giving

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

121

1 officers from the Lexington County Sheriff's
2 Department permission to look on their property. I
3 presented that form to him, explained it to him and
4 he agreed to sign it giving me permission to go on
5 his property.

6 Q And did he tell you anything specific about any
7 problems or difficulties you might run into if you
8 tried to go out to that property?

9 A No, sir. He just mentioned that a Mr. Hinson
10 may be on the property, may be actually inside the
11 house, and told me I may run into him while I was
12 out there.

13 Q Okay. And did you, in fact, bump into Mr.
14 Hinson?

15 A That's correct.

16 Q Did you ask, before you departed company with
17 Mr. Lucas, ask him to do anything regarding Mr.
18 Hinson?

19 A I think I asked him to contact Mr. Hinson just
20 to let him know we're coming.

21 Q And did Mr. Hinson register any objections when
22 you got there?

23 A Didn't have a bit of problem.

24 Q And after you got there, what did you do?

25 A Once I got there and explained to Mr. Hinson

1 why I was there, I just mainly wanted to look at the
2 porch and the railings to see where **Child** may have
3 gotten hurt, the child may have gotten hurt, in
4 reference to the story that Mr. Lucas had given.

5 Q And when you first got there and were looking
6 around, did you take any photographs?

7 A I didn't have a camera with me. I wanted to
8 take photographs, so I made contact with one of our
9 road units that had a digital camera and asked him
10 to come out to the house, take pictures of the
11 house, of the porch and also of the mailbox and its
12 relation to the house.

13 Q Now, these photographs were they taken in the
14 daytime or the nighttime?

15 A Those photographs that the road officer took
16 would have been daytime, yes, sir.

17 Q Let me show you what's marked for
18 identification as State's I.D. Number 12, 13 and 14.
19 Do you recognize these photographs?

20 A Yes, sir.

21 MR. FLOYD: No objection, Your Honor.

22 THE COURT: Mark those without objection,
23 please, ma'am.

24 (State's Exhibit Numbers 12 through 14,
25 photographs, admitted into evidence.)

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

123

1 BY MR. WEDEKIND:

2 Q I want to show you State's Number 12 and does
3 that fairly and accurately depict the home as you
4 saw it that afternoon with the road deputy?

5 A Yes, sir, it does.

6 Q And is that, in fact, the photograph that he
7 took at your request?

8 A That is correct.

9 Q And Number 13, what is that a depiction of?

10 A That is a close-up of the porch and the stairs
11 with the railings.

12 Q And Number 14?

13 A That is a further view of the porch which
14 basically covers the whole front porch as its
15 related to the railings and also the front door.

16 MR. WEDEKIND: Your Honor, I'd like to publish
17 these too, please.

18 THE COURT: Yes, sir.

19 BY MR. WEDEKIND:

20 Q Okay. Detective Pritchard, you said this was
21 at what address?

22 A

23 Q And where -- would you put your marker on the
24 front porch area that Mr. Lucas described to you as
25 the location where the child was left by him?

1 A He said he would have been just right there on
2 the front porch.

3 Q And then according to the story he initially
4 gave you at the Lexington Medical Center, where did
5 he go to leave that child?

6 A He would have walked out this way to the
7 mailbox.

8 Q Now, I want to ask you, I know it's a little
9 dark in here, but how far from -- you walked that
10 ground, correct?

11 A Correct.

12 Q How far is it from that porch location to this
13 mailbox? I'm going to step back from you and I
14 would ask you to tell me about how far it is because
15 the photo might not give you a two, three
16 dimensional representation, so just tell me to stop.
17 Or if you have to double the distance or anything,
18 let me know.

19 A I would say just slightly further than where
20 you are right now.

21 Q Okay. So would you give an estimate, yards,
22 how far that is?

23 A Twenty-five, 30 yards.

24 Q Okay. And how long would you estimate it takes
25 for you to walk from that front porch to that

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

125

- 1 mailbox?
- 2 A I would say just walking from the porch to the
- 3 mailbox, no more than 20 seconds.
- 4 Q So the time it would take to get from there to
- 5 there (indicating) and back would be about under a
- 6 minute, if that?
- 7 A Right, depending on how much time you spent at
- 8 the mailbox.
- 9 Q So you walked this ground and you took these
- 10 photographs. And the next one, what does that photo
- 11 represent?
- 12 A That's the front porch.
- 13 Q Same house?
- 14 A Yes, sir.
- 15 Q Okay. And this is what (indicating)?
- 16 A Those are the railings of the deck there.
- 17 Q Okay. And these are the steps?
- 18 A Correct.
- 19 Q Is that the steps that you thought at that time
- 20 were the ones that he would have fallen down?
- 21 A Yes, sir.
- 22 Q Or he claimed that the child had fallen down
- 23 and got injured on?
- 24 A Yes, sir.
- 25 Q And then State's Number 13, what does that

1 represent?

2 A That would have been a close-up of the railings
3 of the steps.

4 Q Now, you said you were talking with the
5 defendant at the hospital and he gave you a written
6 statement.

7 A Yes, sir.

8 Q Then you went out there. That's the sequence
9 of events, correct?

10 A Correct.

11 Q You met Mr. Hinson?

12 A Yes, sir.

13 Q And then, at any time, did you take these
14 photos, did you depart?

15 A When I went out there the first time and made
16 contact with Mr. Hinson and I looked around, looked
17 at the porch, looked at a railing, looked at the
18 distance between the mailbox and the front porch, I
19 didn't have a camera. So I left and was able to
20 make contact with someone who had a camera. They
21 came back, took the pictures. And then I came back
22 later after I received more information on the child
23 and brought our -- one of our crime scene units out
24 there to take even more detailed pictures.

25 Q Okay. And did you take any measurements when

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

127

1 those were done? Was that the reason you went out
2 there?

3 A Yes, sir.

4 Q Now, after that when you were there the second
5 time with the crime scene investigator, did you have
6 occasion to meet with Mr. Lucas a second time that
7 day?

8 A Yes, sir. When we went back out there,
9 Mr. Lucas had already gotten home.

10 Q And did you have a follow-up conversation with
11 Mr. Lucas at that time?

12 A Yes, sir.

13 Q Okay. Tell the jury what you all talked about.

14 A When we got back out there to take some more
15 detailed photographs, I really wasn't sure if
16 Mr. Lucas was going to be home or not, but he was
17 there. So I explained to him why we had come back
18 out there, we needed some additional photographs.
19 He said that was fine, not a problem.

20 So I felt like since we were both there at the
21 house now, he could probably give me a more vivid
22 description of what had happened. So I asked him to
23 show me exactly how the child was laying on the
24 steps or had his head caught in the steps.

25 So, at that point, Mr. Lucas basically

- 1 reiterated his story as to what had happened and
2 then he showed me that it was between these
3 (indicating) two slats or railings on the handrail
4 that the child had gotten his head stuck. And while
5 we were talking, Mr. Lucas demonstrated by getting
6 on his knees on the steps and actually sticking his
7 head all the way through between these steps so that
8 the slats were actually around his neck.
- 9 Q And when he did that, was he attempting to
10 reenact the position that the child was in according
11 to him?
- 12 A Yes, sir.
- 13 Q And would you describe for the jury where his
14 body was positioned on these stairs when he was
15 reenacting that?
- 16 A When he was reenacting it, his head would have
17 been up in this area and his body would have been
18 out here so that his legs and feet were down in this
19 area.
- 20 Q So according to that, he's saying that the
21 child's body was actually laying feet at the bottom,
22 head towards the top, but his head was stuck in
23 between these two rails right there?
- 24 A Correct.
- 25 Q So the body would have been here laying on the

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

129

1 -- not dangling -- the head was not dangling in here
2 or the body dangling below?

3 A That's correct. They were on the steps.

4 Q Okay. Now, after that and he demonstrated his
5 head being inserted in there, what did you do after
6 that?

7 A After that, we took some photographs and also
8 took some measurements of the distance between the
9 rails.

10 Q And do you recall how wide it was?

11 A Five inches, I think. I have to look back at
12 my notes.

13 Q Would you do that and look at your notes?

14 A Actually, I may have to look at the pictures.

15 Q Well, we've move on.

16 A Yes, sir.

17 Q Now, let me show you what's marked for
18 identification as State's Number 6. Do you
19 recognize that?

20 A Yes, sir.

21 Q Would you please -- does that fairly and
22 accurately depict the photograph of you on the same
23 stairs that are depicted in State's 13?

24 A Yes, sir.

25 Q Have those stairs appeared to have changed in

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

130

1 any material fashion from the day that you had the
2 conversation with Mr. Lucas and he demonstrated his
3 head inserted through that opening?

4 A No, sir. They appear to have been the same as
5 it was back then.

6 Q And how long ago was this photograph taken?

7 A That photograph, a week ago.

8 MR. WEDEKIND: At this time, Your Honor, the
9 State would move State's Identification Number 6
10 into evidence.

11 THE COURT: Subject to previous objection?

12 MR. FLOYD: Just to previous objection, Your
13 Honor.

14 THE COURT: Mark it in evidence please, ma'am.

15 (State's Exhibit Number 6, photograph,
16 admitted into evidence.)

17 BY MR. WEDEKIND:

18 Q Detective Pritchard, is that your most
19 flattering photograph that you've ever taken?

20 A Probably not, but that's the best I can do.

21 Q Is that the one that depicts your head in the
22 same crevice that he described as the one where the
23 child's head was trapped?

24 A Yes, sir.

25 Q And is, in fact, your body in the same position

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

131

1 that he alleged that the child was lying at that
2 time?

3 A Yes, sir.

4 Q Now, after you had that conversation, did he
5 describe any attempts on his part to assist the
6 child when he said he saw him lying on the stairs?

7 A Yes, sir. He said that once he got back up to
8 the porch and saw the child laying there, he took
9 the child inside the house and attempted to perform
10 CPR.

11 Q And how did he say he went about attempting
12 that CPR? Was he a trained EMT or anything about
13 emergency treatment?

14 A No, sir, he was not. He said he just basically
15 tried to do it the best he thought he could.

16 Q Did he say anything about contacting emergency
17 services to assist this child?

18 A No, sir.

19 Q Did he say that the child was having difficulty
20 breathing?

21 A I think he mentioned that the child had gone
22 unconscious.

23 Q And how did -- what did he do after he
24 attempted to do the CPR, if anything, according to
25 him?

- 1 A He went to call the mother to tell her that the
2 child had gotten hurt.
- 3 Q How did he say he went about doing that to get
4 ahold of the mother? You said she was at work.
- 5 A Right. I asked him if he had a phone there at
6 the house. He said he did not. I asked him if he
7 had access to a cell phone. He said he did not. So
8 I asked him how did he make phone calls. He said he
9 had to go up the road to a pay phone to make a phone
10 call.
- 11 Q Did he do that on foot or use a vehicle?
- 12 A He had to get in the car and go.
- 13 Q And did he say that's how he had actually got
14 to a telephone?
- 15 A Yes, sir.
- 16 Q And, at that point, did he say who he
17 contacted?
- 18 A Said he contacted the mother.
- 19 Q Did he contact anyone else?
- 20 A No, sir.
- 21 Q And what did he then do according to his
22 statement?
- 23 A After he contacted the mother?
- 24 Q Yes.
- 25 A He came back home and waited on the mother to

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

133

1 get there.

2 Q He didn't do anything else, like -- he didn't
3 say anything else?

4 A Well, I asked him about what he had done with
5 the child while he went to make the phone call. And
6 he said he had -- after he had tried to perform CPR,
7 he had just rolled the child over on its side and
8 basically propped it up on the side and he got in
9 the car to go make the phone call. I asked him if
10 he had taken the child with him. He said he did
11 not. He said that the reason he did not was because
12 he did not have a car seat for the child and he did
13 not want to risk getting stopped by law enforcement
14 for not having a child seat.

15 And he had mentioned previously that he had, on
16 more than one occasion, taken the child to the
17 daycare without the car seat. So I questioned him
18 as to if he's done it before, why he wouldn't have
19 done it now if this was a life and death situation,
20 in which he had no response.

21 Q Now, were you able to take another statement
22 from the defendant at that time, a written statement
23 other than the oral that we just talked about? All
24 of these statements you were talking about were word
25 to mouth to your ears?

- 1 A Right. At this point, yes, sir.
- 2 Q Did you then ask him at a later point if you
- 3 could interview him?
- 4 A A couple of days later, yes, sir.
- 5 Q So did you do anything with him after he gave
- 6 you these oral statements and you took the
- 7 photographs?
- 8 A That night, no, sir.
- 9 Q So you left. He wasn't placed under arrest; is
- 10 that correct?
- 11 A Correct.
- 12 Q Okay. And then what did you do in the
- 13 investigation?
- 14 A The following day I checked the status of the
- 15 child and got the status of the child. And based on
- 16 the information that I received at that point, I
- 17 conducted another interview with Mr. Lucas.
- 18 Q And how did that second interview take place?
- 19 A I called him and asked him to come up to the
- 20 sheriff's office.
- 21 Q And what was the purpose of that interview?
- 22 A Because the information I had received, there
- 23 were some inconsistencies in his story compared to
- 24 the injuries of the child.
- 25 Q So is it fair to say things just weren't adding

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

135

- 1 up in your mind?
- 2 A Yes, sir.
- 3 Q So did he, in fact, show up at the sheriff's
- 4 office?
- 5 A Yes, sir.
- 6 Q And when he did, was he placed under arrest?
- 7 A No, sir.
- 8 Q Did you invite him in to any particular
- 9 location in the sheriff's office to have your
- 10 discussion with him?
- 11 A Yes, sir, to one of our interview rooms.
- 12 Q And tell the jury what that is. I mean, is it
- 13 some, you know, leather plush office or is it just a
- 14 regular meeting room?
- 15 A It's a fairly small room. I would say it's
- 16 probably six by eight and typically just has a small
- 17 table and a couple of chairs in there and that's
- 18 where we conduct all of our interviews.
- 19 Q And who was present in the room besides
- 20 yourself and Mr. Lucas, if anyone?
- 21 A Detective Gunter.
- 22 Q And let me show you what's marked for
- 23 identification as State's Number 23. Do you
- 24 recognize this?
- 25 A Yes, sir.

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

136

- 1 Q And that's a two page document captioned as
2 Lexington County Sheriff's Department Statement
3 Form; is that correct?
4 A Yes, sir.
5 Q Have there been any alterations or changes to
6 this document?
7 A No, sir.
8 Q Is it -- in fact; your signature appear at the
9 bottom?
10 A Yes, sir.
11 Q And does there also appear to be the signature
12 of the defendant?
13 A Yes, sir.
14 Q And that's dated 5/26/06?
15 A That's correct.
16 MR. FLOYD: Subject to my earlier objection,
17 Your Honor.
18 MR. WEDEKIND: Your Honor, at this time, the
19 State would seek to move into evidence I.D. Number
20 23.
21 THE COURT: You've got to go through it first.
22 You have to lay a foundation.
23 MR. WEDEKIND: Yes, sir.
24 BY MR. WEDEKIND:
25 Q Detective Pritchard, did you take this

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

137

1 statement from the defendant, Mr. Lucas?

2 A Yes, sir, I did.

3 Q And did you, in fact, put the information at
4 the top that's got the blocks that say between date
5 and the contact numbers?

6 A Yes, sir.

7 Q And as I said, is that your signature that
8 appears at the bottom of it?

9 A Yes, sir.

10 Q And there's a middle portion here that has some
11 verbiage written out, who put that on the paper?

12 A Mr. Lucas did.

13 Q And how many pages are in the document?

14 A A total of two pages.

15 Q And have you reviewed both of those pages?

16 A Yes, sir.

17 Q Does that appear to be the same document that
18 was taken in your presence?

19 A It is.

20 Q Have there been any changes or alterations or
21 deletions that appear on that document or is that in
22 the original form as you saw it?

23 A That is in the original form.

24 MR. WEDEKIND: Your Honor, at this time, we'd
25 move into evidence State's I.D. Number 23.

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

138

1 THE COURT: Still object?

2 MR. FLOYD: Just subject to my earlier
3 objection, Your Honor.

4 THE COURT: You have to go through all the
5 things to lay the foundation to get that document
6 in.

7 MR. WEDEKIND: All right, sir.

8 BY MR. WEDEKIND:

9 Q Did you -- at the top of the first page here in
10 the middle, it says, Items, one, two, three, four
11 and five, in fact, what are those items there?

12 A Those are what's commonly referred to as
13 Miranda warnings.

14 Q Okay. And did you, in fact, go over each of
15 those statements with the defendant, Mr. Lucas?

16 A Yes, sir.

17 Q And how did you go about appraising him of
18 those rights?

19 A I showed him the form and then I read each one
20 to him.

21 Q Okay. And just after each one of the numbers
22 there where it has a statement and a period, there's
23 a little blank space, what is indicated at the end
24 there?

25 A Those are Mr. Lucas' initials.

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

139

1 Q And did you go over each of those rights in
2 speaking with Mr. Lucas?

3 A Yes, sir.

4 Q And did he acknowledge that he had understood
5 what you were talking about?

6 A Yes, sir.

7 Q And did you go through each and every one of
8 them with him?

9 A Yes, sir.

10 Q And then how did he indicate his understanding?

11 A By initialing after each one of them.

12 Q And did he have any difficulty understanding
13 you when you were speaking with him?

14 A No, sir.

15 Q Did he appear to be under the influence of any
16 mind-altering substances that would have impeded his
17 ability to understand what you were telling him?

18 A No, sir.

19 Q And did he need to -- request to see an
20 attorney or discontinue the statements? Did he make
21 any representation to that effect?

22 A None whatsoever.

23 Q Did he have any objection to writing this
24 statement out?

25 A No, sir.

1 Q Did he appear to be under any duress?

2 A No, sir.

3 Q Did you issue any kind of threat or coercion in
4 order to make him write this statement out?

5 A No, sir.

6 Q So to the best of your understanding, he did it
7 of his own free will?

8 A That's correct.

9 Q Did he ask -- how long did it take for you to
10 undergo your interview with him and for him to put
11 this information on the paper?

12 A I would estimate from start to finish, 30, 45
13 minutes.

14 Q At that time, did he appear to be under any
15 stress or request to go to the bathroom or need a
16 drink or a break?

17 A I don't recall him asking.

18 Q If he had, would you have offered him that
19 opportunity?

20 A Yes, sir.

21 MR. WEDEKIND: At this time, sir, we'd move
22 State's I.D. 23 into evidence.

23 THE COURT: Subject to previous objection,
24 Mr. Floyd?

25 MR. FLOYD: Yes, sir.

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

141

1 **THE COURT:** Mark it in evidence please, ma'am.

2 (State's Exhibit Number 23, statement dated
3 5/26/06, admitted into evidence.)

4 **MR. WEDEKIND:** And, Your Honor, at this time,
5 we'd like to publish this for the jury, please.

6 **THE COURT:** Yes, sir.

7 **BY MR. WEDEKIND:**

8 **Q** Detective Pritchard, is that, in fact, the
9 statement that we've just been talking about?

10 **A** Yes, sir, it is.

11 **Q** Okay. And in the same manner at the top of it,
12 some data information, did you put that on the top
13 of the form?

14 **A** Yes, sir.

15 **Q** And did you also fill out this middle section
16 here?

17 **A** Yes, sir.

18 **Q** And you had told, obviously, that you had,
19 Mr. Lucas, that you had not changed employment, you
20 were still a detective and that's why you were
21 meeting with him at the sheriff's office?

22 **A** Correct.

23 **Q** Okay. Did he -- is this what you were talking
24 about, items one, two, three, four and five, are
25 those the Miranda warnings that you went over with

1 him?

2 A Yes, sir.

3 Q Okay. And he did, in fact, initial after each
4 one his understanding of his rights as you advised
5 him; is that correct?

6 A Yes, sir.

7 Q Now, this area here that has the writing, what
8 is that?

9 A Those are his initials.

10 Q And -- at the beginning and at the end?

11 A Yes, sir.

12 Q Okay. And this verbiage that's written here,
13 who actually put that pen to paper to make those
14 marks?

15 A Mr. Lucas.

16 Q Okay. And would you please read what it said,
17 what he committed to the piece of paper as his
18 statement the second time?

19 A This is an addition to my first statement. I
20 left Child on the porch to go check the mail,
21 looked through some mail and walked to my papa
22 trail -- supposed to be trailer -- see if he was
23 home. It took about 15 minutes to do so.

24 When walk from down the road, I saw Child on
25 the porch. I took off running to help him. I

DAVID PRITCHARD - DIRECT BY MR. WEDEKIND

143

1 picked him up and took inside to do CPR with my fist
2 hitting him in the chest and stomach and for a
3 long -- in the stomach area for a long period of
4 time -- I'm sorry. Blew in his mouth until he
5 started to breathe on his own for me. I then left
6 laying on his side with a pillow behind his back. I
7 went across --

8 Q Turn to page two.

9 A -- the street and called Candice and she called
10 9-1-1. While doing CPR, I was using all the force
11 that I had in me until I got tired and he started
12 breathing. I lied in my first statement to the
13 officer because scared and didn't want to look bad
14 to Candice.

15 Q And is that the end of his statement?

16 A That's correct.

17 Q Same with the markings with the X across that
18 to indicate the end of statement?

19 A Yes, sir.

20 Q As well as the words there?

21 A Yes, sir.

22 Q And on that statement at the bottom of the
23 first page, there's a signature block right there.
24 Whose signature is that?

25 A Mr. Lucas.

- 1 Q Now, at the conclusion of that interview when
2 you took this statement, did you place him under
3 arrest at that time?
- 4 A No, sir.
- 5 Q Were you in an immediate rush to make an arrest
6 in this case?
- 7 A No, sir.
- 8 Q What did you do after you took the statement
9 with Mr. Lucas?
- 10 A That night?
- 11 Q Yes.
- 12 A I advised him that unless he needed to talk
13 about something else, he was free to go.
- 14 Q And did he, in fact, leave the sheriff's
15 office?
- 16 A Yes.
- 17 Q And what did you then do as part of the
18 investigation of this case?
- 19 A Made further contact with the doctors to get
20 the status of the child and his injuries.
- 21 Q And point of fact, do you recall how long it
22 took for you to get the arrest warrants once you
23 made -- did you make a decision to arrest the
24 defendant, Mr. Lucas?
- 25 A At some point, yes, sir.

DAVID PRITCHARD - CROSS BY MR. FLOYD

145

1 Q And what charge, without going into the
2 specifics of the charge, do you recall the date that
3 the arrest warrant was served?

4 A June the 13th.

5 Q June the 13th. So how many days from the 24th
6 of May is June the 13th?

7 A I would estimate approximately six weeks -- I'm
8 sorry -- I'm thinking July. It had been a couple of
9 weeks.

10 Q Would three sound good to you?

11 A Yes.

12 Q About three weeks?

13 A I'm sorry.

14 MR. WEDEKIND: Beg the Court's indulgence, sir.

15 THE COURT: Yes, sir.

16 (Pause.)

17 MR. WEDEKIND: Thank you, sir. There will be
18 no further questions, Detective Pritchard. Please
19 answer any Mr. Floyd may have for you.

20 THE COURT: Cross-examination.

21 MR. FLOYD: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MR. FLOYD:

24 Q Detective Pritchard, when you went out to
25 Mr. Lucas' home on the evening and you say he showed

DAVID PRITCHARD - CROSS BY MR. FLOYD

146

- 1 you the porch and so forth, what time of day or
2 night was it?
- 3 A I'm guessing probably around 8:30, nine
4 o'clock.
- 5 Q Was it dark?
- 6 A Yes, sir.
- 7 Q Was he cooperative with you?
- 8 A Yes, sir.
- 9 Q The whole time, wasn't he?
- 10 A Yes, sir.
- 11 Q Now, when he showed you where on the porch he
12 saw Child stuck in the rail, did you take a picture
13 of it at that time?
- 14 A Of the porch?
- 15 Q Of the area where he said --
- 16 A Yes, sir.
- 17 Q At that time you took a picture of the area?
- 18 A Yes, sir.
- 19 Q Did you mark on that picture where he said the
20 child was laying?
- 21 A We took a photograph of the area of the two
22 rails where he said the child had gotten its head
23 stuck.
- 24 Q Those are the ones that we got into evidence
25 here?

DAVID PRITCHARD - CROSS BY MR. FLOYD

147

1 A Those are not those actual pictures, but it's
2 of the same railing -- or same area.

3 Q Did you mark it with an X or anything the
4 particular slot?

5 A No, sir. Whenever he showed us the area, we
6 specifically measured that one.

7 Q Now, I'm going to show you what's marked
8 State's Exhibit 6. This is you, right?

9 A Yes, sir.

10 Q And is this a picture of the stair rail?

11 A Of a couple of them, yes, sir.

12 Q Did you measure the distance between the next
13 two rails?

14 A Yes, sir, we did.

15 Q How much was that distance?

16 A If I recall, we measured several of them.
17 There were some inconsistencies between the rails,
18 but that's the one that he specifically mentioned
19 that Child got his head stuck between.

20 Q And now the next rail it's got a stair in
21 there, doesn't it?

22 A What do you mean?

23 Q It narrows the opening?

24 A I'm not sure I follow what you're getting at.

25 Q See (indicating)?

- 1 A Right.
- 2 Q So there's considerably less distance from that
- 3 opening down there next to the step, isn't it?
- 4 A Obviously down at the bottom, yes, sir.
- 5 Q Okay. Now, maybe I heard this wrong. Did you
- 6 testify that he said that his -- that Child head
- 7 was caught in the railing area and he was laying
- 8 down the steps?
- 9 A Yes, sir, that's the way he depicted it.
- 10 Q Now, that's not exactly the same as your
- 11 position, is it?
- 12 A It's similar. I know you can't see my entire
- 13 body, but my body's going down the steps as well.
- 14 Q It doesn't appear that way, though, does it?
- 15 A Well, you can see the direction I'm going.
- 16 Q Now, it's no question but that Mr. Lucas
- 17 answered all of your questions; is that correct?
- 18 A That's correct.
- 19 Q And when you went to the hospital, he was very
- 20 concerned about the child, wasn't he?
- 21 A He appeared to be.
- 22 Q And, in fact, he wanted to leave and go to
- 23 Richland Memorial Hospital when they transferred the
- 24 child there?
- 25 A Right.

DAVID PRITCHARD - REDIRECT BY MR. WEDEKIND

149

1 Q And, basically, what he told you was that the
2 child was in distress, he gave him aggressive CPR,
3 the child started breathing again; is that correct?

4 A Yes, sir.

5 Q And the child was breathing when the EMS
6 arrived, wasn't he?

7 A That I don't know.

8 Q And he gave you two statements. And the only
9 real difference in the statements is that on the
10 second statement, he admitted that he left the child
11 alone for a longer period of time; is that correct?

12 A Yes, sir.

13 MR. FLOYD: Thank you. I have no further
14 questions, Your Honor.

15 THE COURT: Thank you.

16 Redirect.

17 MR. WEDEKIND: Yes, sir, very briefly.

18 REDIRECT EXAMINATION

19 BY MR. WEDEKIND:

20 Q Detective Pritchard, let's focus in on this
21 photograph Number 13 that's in evidence. Looking at
22 this distance right here between this handrail and
23 that handrail, does that appear to be narrow or
24 wider, getting wider at the bottom?

25 A Appears to be a little wider at the bottom.

1 Q And is there a difference in the distance
2 between these two portions of the gap than there are
3 between these two portions of the gap?

4 A Yes, sir.

5 Q And is there any doubt in your mind whatsoever
6 that that is the gap that Mr. Lucas told you that
7 the baby's head was found stuck between?

8 A None whatsoever.

9 Q And, in fact, is that the one that he stuck his
10 head through to demonstrate the position that the
11 child was in?

12 A Yes, sir.

13 Q That is the exact one, correct?

14 A Yes, sir.

15 Q No doubt whatsoever?

16 A None whatsoever.

17 Q And is there any doubt that he described
18 himself lying down these steps here in a diagonal
19 fashion when he demonstrated it for you?

20 A Correct.

21 Q And is there any doubt in your mind that he
22 described when he was doing that, that he was
23 illustrating to you the position that the child was
24 laying with his head stuck in here and his body
25 draped down in this direction (indicating)?

DAVID PRITCHARD - REDIRECT BY MR. WEDEKIND

151

1 A No doubt.

2 Q Okay. And just so there's nothing up your
3 sleeve, is this, in fact, what you were attempting
4 to reproduce in this photograph when that was taken?

5 A Yes, sir.

6 Q Are you, in fact, reenacting the exact position
7 that the defendant was laying down and representing
8 to you that he found the child in?

9 A Pretty close.

10 Q And, in fact, your head's at that same gap that
11 you said that he described as the one?

12 A Yes, sir.

13 Q And then your body is down the steps, is it
14 not?

15 A Yes, sir.

16 Q Now, were you curious when he told you that he
17 took the child and gave him CPR and then went and
18 made a phone call?

19 A Yes, sir.

20 Q Did that cause you any concern?

21 A What he did with the child when he went and
22 made the phone call, yes, sir.

23 Q I mean, you asked him why he didn't take the
24 child directly to the hospital?

25 A Correct.

1 Q Why he paused?

2 A Right.

3 Q And did he offer you a satisfactory
4 explanation?

5 A No.

6 Q And when he said that he called the mother to
7 tell her about the child being in grave peril, but
8 he didn't do anything like call 9-1-1 at that time,
9 did you ask him about that?

10 A Yes, sir.

11 Q Did he offer you an explanation?

12 A Not really.

13 Q And is that when he talked about, Well, the
14 child seat was --

15 MR. FLOYD: Your Honor, objection, leading the
16 witness.

17 THE COURT: Don't lead.

18 BY MR. WEDEKIND:

19 Q Did he mention any concern about the presence
20 of a child care (sic) seat in his car?

21 A He mentioned at that time that that's why he
22 did not take the child with him to make the phone
23 call to the mother.

24 Q And that was his explanation as to why he
25 didn't take the child directly to the hospital for

DAVID PRITCHARD - RE CROSS BY MR. FLOYD

153

1 emergency treatment?

2 A Yes, sir.

3 Q Did you find that to be curious?

4 A Yes, sir.

5 MR. WEDEKIND: Thank you. No further
6 questions.

7 THE COURT: Redirect -- excuse me -- recross..

8 MR. FLOYD: Thank you.

9 RE CROSS-EXAMINATION

10 BY MR. FLOYD:

11 Q Detective Pritchard -- Sergeant Pritchard, when
12 Mr. Lucas showed you where he recalled the head of
13 Child did you mark it on some photograph?

14 A We immediately took a photograph of that area
15 with a measurement.

16 Q And did you take a picture of Mr. Lucas' head
17 through any particular rail?

18 A No, sir.

19 Q And this would have been a situation -- didn't
20 you say he was running toward Child to get him when
21 he saw him in that condition?

22 A He said once he was walking back up the trail
23 and saw Child in that condition, he said he started
24 running towards him.

25 Q And he grabbed him up, did he not?

- 1 A Yes, sir.
- 2 Q So he may not have even remembered the exact
- 3 rail; is that correct?
- 4 A He seemed pretty adamant that that's exactly
- 5 how he was.
- 6 Q But you didn't mark it in any way to show
- 7 anybody the particular rail he put his head through?
- 8 A With a photograph, yes, sir.
- 9 Q Can you show us the photograph with the marking
- 10 on it? Can you show us the photograph with his head
- 11 through the rail?
- 12 A I've got a photograph with the measurement.
- 13 Q But you don't have a photograph of him sticking
- 14 his head through the rail?
- 15 A No, sir.
- 16 Q Didn't he tell you that Child was laying down
- 17 the steps?
- 18 A Yes, sir.
- 19 Q So if he's laying down the steps, I don't know
- 20 how to describe this to you, but wouldn't the body,
- 21 the shoulders be turned more like this (indicating)?
- 22 A All I know is what he's telling me.
- 23 Q But he said he's going down the steps; is that
- 24 correct?
- 25 A Right. Oh, I'm not agreeing that it's

DAVID PRITCHARD - RECROSS BY MR. FLOYD

155

1 possible, I'm just going that that's his story to
2 me.

3 Q Would you agree with me that the area between
4 the step and that rail is significantly narrower
5 than between the two railings?

6 A Yes, sir.

7 MR. FLOYD: Thank you. I have no further
8 questions, Your Honor.

9 THE COURT: Anything else of this witness?

10 MR. WEDEKIND: No, sir.

11 THE COURT: You may step down. Thank you, sir.

12 Do you have a doctor here?

13 MR. WEDEKIND: Yes, sir, Dr. Luberoff.

14 THE COURT: Can we take a short break before we
15 do that?

16 MR. WEDEKIND: Yes, sir.

17 THE COURT: All right. Ladies and gentlemen,
18 we're going to take a very brief recess, five
19 minutes or so. Don't discuss the case. I'll get
20 you back in here. Follow the bailiff, please.

21 (The jury retires to the jury room.)

22 THE COURT: We're at ease.

23 (Brief Recess.)

24 THE COURT: Ready for the jury?

25 MR. WEDEKIND: Yes, sir.

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

156

1 THE COURT: Defense ready?

2 MR. FLOYD: Defense is ready, Your Honor.

3 THE COURT: Bring them in, please.

4 (The jury returns to the courtroom.)

5 THE COURT: All right. Call your next witness,
6 please.

7 MR. WEDEKIND: The State would call Dr. Susan
8 Luberoff to the stand.

9 SUSAN LUBEROFF,
10 having been duly sworn, testified as follows:

11 THE CLERK: If you'll have a seat over here.
12 State your name, spell your last for the record,
13 please.

14 THE WITNESS: I'm Susan Luberoff,
15 L-u-b-e-r-o-f-f.

16 DIRECT EXAMINATION

17 BY MR. WEDEKIND:

18 Q Dr. Luberoff, please tell the jury a little bit
19 about your background, education and some of your
20 training.

21 A I graduated from the University of South
22 Carolina and then attended the University of South
23 Carolina School of Medicine and graduated there with
24 my M.D. degree. And then I finished a three year
25 pediatric residency at Children's Hospital at

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

157

1 Richland Memorial. I finished that residency
2 training in 1986. So for about 22 years or so, I've
3 been practicing pediatrics in several different
4 venues.

5 I've been, in some capacity, with the faculty
6 of the medical school since I graduated from my
7 residency program and in about 1989 was asked by my
8 boss to begin concentrating my field in the area of
9 child abuse of helping to evaluate children's
10 injuries and evaluate for sexual abuse. I helped to
11 establish the Assessment and Resource Center, which
12 is a facility that evaluates children who are
13 suspected of having been either physically or
14 sexually abused. And it's a joint program between
15 the University of South Carolina School of Medicine,
16 the Department of Mental Health and Children's
17 Hospital of Richland Memorial.

18 And I also spent several years working as the
19 pediatrician with a program called the Medically
20 Fragile Children's Program where I was the
21 pediatrician for children with multiple medical
22 problems.

23 Over the course of my training or of my
24 professional career, I've probably evaluated around
25 4,000, probably more than 4,000 by now, children

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

158

1 suspected of having been involved in some sort of
2 abuse. And I've also practiced pediatrics in other
3 settings.

4 I was the co-director for the Pediatrics Clinic
5 at Richland Memorial, which is the clinic that sees
6 children of any sort of medical problem for a couple
7 of -- to about three years or so. And I also worked
8 with one of the large pediatric practices in
9 Columbia for a period of time.

10 So I've had a varied assortment of pediatric
11 experience, but have spent a concentrated part of my
12 professional career in the field of child abuse.

13 As far as training specific to child abuse,
14 I've attended numerous work shops and seminars on
15 different topics of child abuse. I spent a six week
16 period of time in particular at the Kempe National
17 Center of Child Abuse at Denver back in about 1990
18 as a -- it's sort of a mini-fellowship. I was
19 called a scholar in residence when I was in that
20 program.

21 And I also provide training to medical
22 professionals, as well as to other professionals,
23 law enforcement, DSS, teachers and other folks,
24 about what to look for in injuries, when to suspect
25 abuse and how to report and the things like that.

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

159

1 Q Now, being a lawyer, not having gone through as
2 much medical training, is it fair to summarize
3 everything that you were saying is that you
4 specialize in child medicine and that you have a
5 particular focus in abused children?

6 A Yes. I'm a pediatrician and I have a focus in
7 child abuse, yes.

8 Q And have you testified previously in courts of
9 record in the State of South Carolina?

10 A Yes, I have.

11 Q And have you been qualified as an expert to
12 testify in those proceedings?

13 A Yes, I have.

14 Q Approximately how many times have you testified
15 or been qualified?

16 A Well over a hundred times. I stopped counting
17 a long time ago.

18 Q And what particular expertise have you
19 previously been qualified?

20 A It's been worded several different ways, but
21 I've been qualified as an expert in pediatrics, as
22 an expert in child physical abuse, child sexual
23 abuse and some permutations on terminology there.

24 Q Well, let's focus -- well, we'll drop the sex
25 stuff and just focus on the physical abuse on

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

160

1 children. You have a particular expertise in
2 dealing with children because of their physiological
3 size is smaller, right?

4 A That's correct.

5 Q And that requires that you have to have a
6 particular set of skills to deal with smaller scale
7 persons, correct?

8 A Yes.

9 Q And that they have different metabolic rates,
10 not only smaller organs, but they're not as
11 developed in some ways as adults sitting before you
12 in the jury are; is that correct?

13 A That's right. That's why there's a whole field
14 of medicine developed for treating children,
15 pediatrics.

16 Q And through the years, you've developed a focus
17 on those particular aspects of dealing with
18 children?

19 A Yes.

20 MR. WEDEKIND: Your Honor, at this time, we
21 would move to have Dr. Luberoff recognized as an
22 expert in child pediatric, child abuse and physical
23 abuse.

24 THE COURT: Voir dire?

25 MR. FLOYD: Your Honor, we don't have any

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

161

1 objection to her being qualified as an expert in the
2 area of pediatric medicine or either the description
3 of injuries she sees. We, however, object if
4 they're trying to put her on as an expert to
5 characterize whether or not an injury is a result of
6 abuse because I think that's a question for the jury
7 and not for any expert witness.

8 THE COURT: The objection is noted, overruled.

9 You may continue. She's recognized and may
10 render opinions in that field.

11 MR. WEDEKIND: Thank you, sir.

12 BY MR. WEDEKIND:

13 Q On May 24th, 2006, Doctor, were you called to
14 examine a small child who was reportedly in a grave,
15 serious condition?

16 A Yes, I was.

17 Q And do you recall who that subject was?

18 A Child [REDACTED]

19 Q And do you recall how old that child was that
20 you examined?

21 A He was about two and a half at the time that I
22 saw him.

23 Q And how would you characterize the child that
24 you examined that night? What physical condition
25 was he on a scale of one to ten, zero being

1 excellent health, ten being gravely ill?

2 A He was critically ill. He was intubated, which
3 means that he had a tube down his throat to assist
4 him in breathing. He was in the pediatric intensive
5 care unit. At the time that I had seen him, he had
6 already undergone one surgical repair of an injury
7 that was discovered on his admission to the hospital
8 and he was gravely ill.

9 Q So on a scale of one to ten, ten being bad,
10 zero being good, how would you characterize him?

11 A He was nine or ten, depends on whether you call
12 ten still surviving or not.

13 Q Ten would be dead.

14 A Then I would characterize him as a nine.

15 Q You described some injuries. Would you tell
16 them in detail, tell the jury exactly what areas you
17 noted were particularly injured on this child?

18 A The child had numerous bruises on his body. He
19 had bruises on his chest and abdomen area, bruises
20 on his neck, bruises on and behind each ear, on his
21 shoulder, bruises on his back near the buttocks
22 area, some bruising on at least one arm and then
23 also had injuries that couldn't be seen on physical
24 exam.

25 Q And let's elaborate on those. Were there

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

163

1 injuries to the abdomen internally?

2 A Yes.

3 Q What were they?

4 A He had injury to his pancreas.

5 MR. FLOYD: Your Honor, I'm going to object
6 unless this doctor physically observed the injuries,
7 otherwise it's hearsay.

8 THE COURT: What's the basis of her knowledge?

9 MR. WEDEKIND: She treated the child that day
10 and was present when he was being examined, Your
11 Honor, and treated -- I mean, she was --

12 THE COURT: Ladies and gentlemen, I need to ask
13 you to step out briefly and let me handle this.
14 Don't discuss the case.

15 (The jury retires to the jury room.)

16 THE COURT: Yes, sir.

17 MR. FLOYD: Your Honor, I think she testified
18 that when she first saw Child he had already had a
19 surgical procedure, so unless she's -- I'm objecting
20 unless she's testifying from a personal knowledge of
21 what kind of internal injuries he had because she
22 obviously didn't participate in the surgical
23 process.

24 THE COURT: What's the basis of her knowledge,
25 Mr. Wedekind?

6. BY MR. WEDEKIND:

8 A The basis of my knowledge about his internal
9 injuries is based on laboratory results and also
10 based on a history, which I ordinarily obtain of
11 information supplied to me by, for instance, the
12 surgeon that had operated on him later that day.

15 **A** Yes.

19 A Yes, I was aware of that because of talking
20 with the physicians that treated him and reading
21 that in the chart.

24 A Well, I didn't see these photographs that
25 night, but this photograph adequately depicts what

SUSAN LUBEROFF (IN CAMERA) - EXAMINATION BY MR. WEDEKIND

165

1 was the description in the chart of the condition of
2 his testicle when he was admitted.

3 Q And did you, in fact, see that surgery had been
4 performed in that particular region of him that
5 night?

6 A Yes. I saw the repaired area on my exam.

7 Q And that's in regards to State's I.D. Number 2,
8 correct?

9 A Yes.

10 Q Okay. Number 5, does that fairly and
11 accurately depict the child as you saw him that
12 evening?

13 A Yes.

14 Q And State's Number 10, in fact, did you take
15 that photograph yourself?

16 A In fact, I assisted the photographer in doing
17 this photograph. That's --

18 Q Whose hand is in that picture holding the
19 scale?

20 A My hand is in some of the series of pictures
21 here and I'm not positive from that photograph
22 whether that's mine, but I definitely recognize
23 myself in some of these. And this is my marker.

24 Q Okay. So when you say the marker, that's
25 the --

1 A So I was there when these photographs were
2 taken.
3 Q Okay. And as to State's Number 11 for I.D.?
4 A Yes. Again, I was there when this photograph
5 was taken.
6 Q 17?
7 A Yes.
8 Q 16?
9 A Yes. And this is my hand in both of these
10 photographs.
11 Q 15?
12 A Yes, that's one of the photographs that I
13 assisted with.
14 Q 18?
15 A 18, I assisted with.
16 Q 8?
17 A I assisted with this.
18 Q 7?
19 A And with this.
20 Q 19?
21 A And with this..
22 Q And 9?
23 A And with this.
24 Q So you examined the medical records of this
25 child. And you -- in addition to your own physical

SUSAN LUBEROFF (IN CAMERA) - EXAMINATION BY MR. WEDEKIND

167

1 observations, you were a treating physician on this
2 child?

3 A No. I was a consulting physician. I didn't
4 assist in his ongoing treatment, but I did discuss
5 him with the physician that was treating him at the
6 time.

7 MR. WEDEKIND: Thank you, Your Honor. That
8 would be what we would proffer. We wanted to offer
9 the doctor in to authenticate these photographs as
10 to the physical condition of the child and lay their
11 foundation through --

12 THE COURT: Your objection -- I'm sorry. I
13 didn't mean to cut you off, Mr. Wedekind.

14 MR. WEDEKIND: No, sir, that was it.

15 THE COURT: Your objection is hearsay?

16 MR. FLOYD: Yes, Your Honor. She can testify
17 as to what she saw. I mean, I've got no problem
18 with that, but when she starts to talk about
19 internal injuries, she's getting that only from
20 hearsay. She has no personal knowledge of that.

21 THE COURT: All right. An expert witness can
22 testify using hearsay if it is used as a basis for
23 an opinion and if it is the type of information that
24 is typically used by experts in that field for the
25 formation of such opinions. If that foundation is

1 established, it doesn't matter whether it's hearsay
2 or not.

3 MR. FLOYD: I understand that.

4 THE COURT: So she said lab results and
5 history, you need to flesh that out, but --

6 MR. WEDEKIND: And, Doctor, did you --

7 THE COURT: You don't need to flesh it out now.
8 All right. Bring in the jury.

9 (The jury returns to the courtroom.)

10 THE COURT: All right. The objection is on
11 hearsay and if a proper foundation is established,
12 then hearsay may be admissible. I have to hear the
13 foundation.

14 You may continue.

15 MR. WEDEKIND: Thank you, sir.

16 BY MR. WEDEKIND:

17 Q Dr. Luberoff, let me hand you some documents
18 here that have been provided previously to
19 Mr. Floyd. I'll ask you to review these. Do you
20 have copies of the treatment records of the child?
21 Have you seen these before?

22 A Well, this is a copy of the note that I wrote.
23 I do have a copy of that. And I don't have in my
24 possession the rest of his treatment record, but I
25 am familiar with it. And what you've handed me is

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

169

1 my consult note, the operative report done by Dr.
2 Ready, an MRI report of the spine, another spine
3 MRI, a pathology report, and a page out of order,
4 and all of these are part of the child's medical
5 record from that admission.

6 Q So those are the medical records of treatment
7 that occurred to Child [REDACTED] on that evening in
8 question of the 24th of May 2006?

9 A During that admission. Some of this didn't
10 occur on that very same day, but it's treatment
11 records and investigative -- or medical assessment
12 records involved with that admission.

13 Q And you've reviewed those materials, correct?

14 A Yes, I have.

15 Q And you consulted with the other physicians
16 that were attending to this child, it wasn't just
17 your show alone, was it, that night?

18 A Oh, no. I consulted with the physicians and
19 the nurses caring for the child.

20 Q And in the circumstances of a child who's -- is
21 injured as you were talking about, is it just common
22 for one doctor and one doctor alone to be dealing
23 with an infant who's that gravely injured?

24 A No. That kind of care and assessment is done
25 by a team of many people.

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

170

1 Q And by being mentioned as a team, were you a
2 member of that team?

3 A Yes, I was.

4 Q And did you interplay with those attending
5 physicians in the treatment of that child that
6 night?

7 A Yes, I did.

8 Q And throughout the course of his recovery?

9 A Yes. I actually, just to be real specific, I
10 saw the child on the 25th, the next day following
11 his admission.

12 Q And as part of that, did you -- were you made
13 aware, did you review the CAT scans and the x-rays
14 and the medical, pathology reports, the blood work,
15 all of those things pertaining to the treatment of
16 this child?

17 A Yes, I did.

18 Q And were you able to formulate an opinion based
19 on your medical training and knowledge and expertise
20 in pediatric treatment as to the condition of that
21 child?

22 A Yes, using all of those pieces of information.

23 Q And at this time would you be able to elaborate
24 as to any intestinal or internal injuries to the
25 child?

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

171

1 A Yes. [Child] had evidence of internal injury
2 that included laboratory evidence of injury to his
3 pancreas, injury to his liver, and then later,
4 surgical evidence of injury to his intestine, which
5 was torn into. He also had radiographic or MRI
6 evidence of injury to around his spinal cord. He
7 had bleeding around his spinal cord. There also was
8 a thin layer of blood around his brain and --

9 Q And what is that indicative of?

10 A Of injury involving his head.

11 Q Is that like just would come from a head cold
12 or would it be from physical force?

13 A It would be from force applied to the head.

14 Q So that was present --

15 A And those are the injuries that I recall that
16 were internal injuries.

17 Q Did you notice anything to the extremities, the
18 legs, arms?

19 A As I recall, there were some small bruises on
20 one arm that didn't have a particular pattern to
21 them for me to be able to evaluate what it was that
22 caused those bruises. The majority of the bruises
23 that I recall were the ones more centrally located
24 involving his neck and ears and chest and abdomen.

25 Q How would you characterize the severity of

1 those neck bruises?

2 A They were very noticeable and severe bruises.

3 Q On a scale of one to ten again?

4 A Well, I don't really know how to put that on a
5 scale, but they were quite noticeable and quite
6 significant.

7 Q You mentioned the intestines were injured. How
8 would you characterize that? Would you describe the
9 nature of that injury?

10 A Child had a complete tear through his small
11 intestine, the part of the small intestine called
12 the jejunum and that's the, if you kind of look at
13 the whole stomach intestine complex, you have the
14 stomach and then the duodenum and the jejunum is the
15 first part of the small valve that comes off of the
16 stomach. It sort of lies across the middle of the
17 abdomen. And that was completely severed,
18 completely torn into.

19 Q And when you say severed, would that be, if I'm
20 holding this pen up, would it be a tear that would
21 go along the long access of the intestines or would
22 it go straight across like somebody had cut it with
23 a knife?

24 A Well, it wasn't a sharp cut like with a knife,
25 but it was torn across the intestines so that it was

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

173

- 1 separated into two pieces.
- 2 Q Like if I'd taken a sausage link and pulled it
- 3 from end to end, it would snap in the middle?
- 4 A That's a good way to describe it.
- 5 Q Okay. Did you observe any injury to the
- 6 genitalia of young Child [REDACTED]
- 7 A Well, when I saw him, he had had a surgical
- 8 repair in the genital area, so I saw the repair
- 9 line.
- 10 Q Okay. And what was the injury and the extent
- 11 of that injury according to your observations?
- 12 A Well, when I examined him, it was a suture
- 13 line, but from review of the chart, it was an area
- 14 where the child's testicle had been outside of his
- 15 body, outside of the scrotum when he first arrived
- 16 at the hospital.
- 17 Q So it had ruptured through the scrotum and was
- 18 laying out in the open?
- 19 A Correct.
- 20 Q Now, are you aware from a review of his medical
- 21 record, that he was a premature baby?
- 22 A Yes.
- 23 Q And had there been any surgery that resulted in
- 24 association with that premature birth?
- 25 A Yes. He had had several surgeries prior to

1 this admission. He had had a hernia operation. He
2 had had, at some point in his life, had had a
3 feeding tube placed in his abdomen. And I can't
4 recall what all of his previous surgeries were, but
5 he had had abdominal surgery and a hernia surgery at
6 least.

7 Q Were you aware that at about ten days prior, he
8 had had surgery on an undescended testicle?

9 A Yes.

10 Q Now, in your observations of the conditions
11 that pertain to the night of the 24th, the 25th, the
12 reason why he was admitted to the hospital, were
13 those injuries as a result of the prior surgeries
14 that -- were they affiliated with the premature
15 birth or were they affiliated with some kind of
16 traumatic event that occurred very recently?

17 A No. The injuries that I saw and that I knew
18 about on this admission were not related to his
19 prematurity or to procedures that he had already
20 had. They were related to immediately preceding
21 injury.

22 Q And what type of injuries would these have been
23 caused by? Would they have been caused by the
24 child's own misconduct or the child's ability to
25 harm himself?

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

175

1 A No. The major amount of his injury was the
2 injury involving the abdomen and the spine. And
3 that injury required a tremendous amount of force
4 being slammed into his abdomen to rupture the small
5 bowel into and to cause bleeding around the spine
6 and injury to the liver and the pancreas, that's a
7 tremendous amount of force that's applied suddenly
8 to the abdomen.

9 Q When you say tremendous amount of force, is
10 that something that a two-year-old child who was
11 with cerebral palsy and incapable of walking, would
12 they have been able to achieve the velocity or force
13 to inflict those injuries on themselves?

14 A The only way that a two-year-old child could
15 inflict those injuries on himself would be if he
16 were at a great height, say, on top of a tall house
17 and fell off on to, for instance, a pole sticking up
18 out of the ground that was rigid. It requires a
19 great amount of force and simply moving in space,
20 moving around the heights that are associated with
21 the inside of a household, a child cannot achieve
22 the kind of force that causes these injuries.

23 Q Showing you State's Number 13 and that -- would
24 you describe that for the jury, please?

25 A This is a photograph that shows some wooden

1 stairs with a wooden railing and a dog.

2 Q And if you were told that this child had been
3 at the top of these stairs and had fallen to the
4 bottom, would that indicate enough velocity or force
5 to have caused the injuries that you saw on the
6 child?

7 A There is not only not enough force to cause the
8 injuries, but there's no protruding object to
9 account for the concentration of that force into his
10 abdomen. All of the surfaces that are shown in this
11 photograph are broad surfaces or edges. There's
12 nothing -- there's nothing protruding for this child
13 to have slammed against with his abdomen.

14 Q And if the child's head had been inserted in
15 the gap that you see depicted right there, would
16 there -- and the child was laying down the steps,
17 would that have caused the type of injuries that you
18 saw?

19 A No.

20 Q What would have been the discrepancy between
21 that description of that event and what you saw on
22 the child?

23 A There's just -- there's simply no way to get
24 those injuries from being suspended along the side
25 of these stairs.

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

177

- 1 Q Let me show you what's marked for
2 identification as State's I.D. Number 2. Do you
3 recognize that?
- 4 A Yes. This is a photograph of his presenting
5 genital injury.
- 6 Q And State's I.D. Number 5, do you recognize
7 that?
- 8 A Yes. This is a photograph of Child with the
9 tubes in his nose and his mouth shortly after he was
10 admitted to the hospital.
- 11 Q State's Number 10, do you recognize that?
- 12 A Yes.
- 13 Q 11?
- 14 A Yes.
- 15 Q 17?
- 16 A Yes.
- 17 Q 16?
- 18 A Yes.
- 19 Q 15?
- 20 A Yes.
- 21 Q 18?
- 22 A Yes.
- 23 Q 8?
- 24 A Yes.
- 25 Q 7?

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

178

1 A Yes.

2 Q 19?

3 A Yes.

4 Q And 9?

5 A Yes, I do.

6 Q And do those all fairly -- are these
7 photographs, do they fairly and accurately depict
8 the condition of the child as it appeared to you
9 that evening?

10 A Yes, with the exception of the first picture
11 which was -- had already been repaired by the time I
12 saw him, but that does depict the description of it
13 and the injury is in the area where I saw the
14 surgical repair.

15 MR. WEDEKIND: Your Honor, at this time, the
16 State would move into evidence State's 2, 5, 10, 11,
17 9, 19, 7, 8, 18, 15, 16, and 17.

18 THE COURT: Let me see them, please.

19 All right. As I understood it, there's no
20 objection to 9, 10, 11?

21 MR. FLOYD: That's correct, Your Honor.

22 THE COURT: There's no objection to 16, 17, 18,
23 19 and 15; is that right?

24 MR. FLOYD: That's correct, Your Honor.

25 THE COURT: I don't think there was an

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

179

1 objection to 8?

2 MR. FLOYD: That's correct, Your Honor.

3 THE COURT: 8 and above are in.

4 (State's Exhibit Numbers 8 through 11 and 15
5 through 19, photographs, admitted into evidence.)

6 THE COURT: Was there an objection to 7?

7 MR. FLOYD: No, Your Honor, I didn't object to
8 that one.

9 THE COURT: Mark that one, too.

10 (State's Exhibit Number 7, photograph,
11 admitted into evidence.)

12 THE COURT: There was an objection to 5?

13 MR. FLOYD: That's correct, Your Honor.

14 THE COURT: That objection's overruled. Mark
15 that in evidence.

16 (State's Exhibit Number 5, photograph,
17 admitted into evidence.)

18 THE COURT: On Exhibit Number 2, this witness
19 has not laid a sufficient foundation to introduce
20 this photograph.

21 Now, I realize there may be some other
22 photographs that we talked about earlier. And I
23 don't know if those could come in or not, I can't
24 remember them.

25 I don't know if you have some other witness

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

180

1 that can get that in or not, Mr. Wedekind, or if one
2 of the other photographs would show something that
3 this witness would be able to identify, I don't
4 know, but she said that by the time she saw that
5 part of his body, it had already been surgically
6 repaired, so I have to sustain that objection at
7 this point.

8 MR. WEDEKIND: All right, sir. Your Honor, at
9 this time, we'd like to publish these photographs.

10 THE COURT: Yes, you may.

11 MR. WEDEKIND: Sir, if I may, could I ask that
12 the jury step out for a moment, sir?

13 THE COURT: Sure.

14 Folks, I need you to step out just a second.
15 I'll bring you back in. Don't discuss the case.

16 (The jury retires to the jury room.)

17 MR. WEDEKIND: In the power point, we had put
18 the photos in there because there was more clarity
19 and I think the first photo is that one, so we're
20 going to remove that.

21 THE COURT: Okay.

22 (Pause.)

23 THE COURT: Are you ready, Mr. Wedekind?

24 MR. WEDEKIND: Yes, sir.

25 THE COURT: Mr. Floyd, are you ready?

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

181

1 MR. FLOYD: Ready, Your Honor.

2 THE COURT: Bring them in, Mr. Carte.

3 (The jury returns to the courtroom.)

4 THE COURT: All right. You may continue.

5 MR. WEDEKIND: Thank you, sir.

6 BY MR. WEDEKIND:

7 Q Dr. Cartie, observing the photograph that's on
8 the screen, what is that a picture of?

9 A Just to correct, I'm Dr. Luberoff.

10 Q Dr. Luberoff. I'm sorry.

11 A That's okay. That's a picture of Child in the
12 pediatric intensive care unit.

13 Q And is that the condition you observed him in
14 that night?

15 A On the next day, yes.

16 Q Okay. The next day, I'm sorry. And what does
17 that depict?

18 A That depicts bruising about the child's neck.

19 Q Let's go back to the last one for a moment.
20 What is the purpose of these tubes in the mouth and
21 in the nostrils?

22 A The one in the mouth is a tube that actually
23 goes down the child's trachea and it helps him to
24 breathe. It's attached to a machine that's
25 breathing for him. The tube in his nose, it goes

1 into his stomach and it's used to keep air from
2 accumulating in the stomach, to take air out of the
3 stomach so that it doesn't become a problem.

4 Q And was there any -- will you describe the
5 condition of the inside of his skull at that time?

6 A He had a small rim of blood along the surface
7 of his brain.

8 Q What is the purpose of this yellow device right
9 there?

10 A That's called a cervical collar, that's to keep
11 his head and neck still so that if he has any sort
12 of a broken neck or an injury to his spine that he's
13 not injured further by being moved.

14 Q And did he have an injury to his spine that was
15 part of his treatment?

16 A He did not, as I recall, have an injury to the
17 upper part of his spine.

18 Q Was there blood accumulated in the spinal
19 column?

20 A Yes, it was lower down. It was in the same
21 area as the abdominal injury.

22 Q And what does this photo depict?

23 A That depicts bruising of the upper part of his
24 chest and also small bruises on the neck.

25 Q Okay. When you talk about, what is this dark

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND.

183

1 area indicative of right here (indicating)?

2 A It might help if I could use the pointer.

3 Q Sure.

4 A Thank you. This is clearly bruising on this
5 portion of his chest. There's several areas of what
6 we call petechia or small little broken blood
7 vessels in the skin here, here (indicating). This
8 line just represents pressure from the cervical
9 collar, that's not actually a bruise there.

10 Q But this collection of dark area, that's
11 unrelated to the collar, correct?

12 A This here is unrelated to the collar, correct.

13 Q And you said there was bruising along the neck
14 here. What was that indicative of to you as the
15 expert in child physical abuse?

16 A That injury was consistent with a strangulation
17 injury with force being applied around the child's
18 neck.

19 Q And by strangulation, do you mean like somebody
20 putting their hands around the neck and trying to
21 choke you?

22 A That would be one mechanism of strangulation.

23 Q And what are these two areas right here
24 indicative of that?

25 A This is a better view of the injuries to his

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

184

1 neck. That's -- this is one bruise here and another
2 part of a bruise that again is consistent with a
3 strangulation type injury to the neck or a force
4 being applied against the neck.

5 Q And if you were a -- looking at this child and
6 had seen that depiction of the handrails earlier in
7 the first photograph that I showed you, is that
8 consistent with what you would expect to see if a
9 child had been -- had their head lodged in that
10 handrail?

11 A If the head got lodged in that handrail and the
12 child's neck were laying up along the edge of that
13 step, then you could see a bruise like this from the
14 edge, yes.

15 Q And if you saw that, would you expect to see
16 bruising on the side of the head too if the gap was
17 wider than the child's head?

18 A Well, if the gap is wider than the child's
19 head, then I certainly wouldn't expect the child to
20 become entrapped between those rails in the first
21 place.

22 Q So then that would not have been a -- it would
23 have been a remote possibility that these bruises
24 could have come from those handrails?

25 A Well, I don't know what the distance is between

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

185

1 those handrails or the width of the child's head,
2 that was a piece for the investigator to look at,
3 but if those handrails are too wide to entrap the
4 child's head, then you wouldn't see these bruises
5 from being entrapped between those handrails.

6 Q So if you had the proven fact that an adult
7 male's head was able to be inserted and removed from
8 that gap space, would you expect that that would be
9 wide enough to allow a child's head to freely pass
10 back and forth and not result in these injuries?

11 A I would.

12 MR. WEDEKIND: Detective Pritchard, would you
13 step up towards the witness stand, please?

14 (Detective Pritchard complies.)

15 Q And looking at Detective Pritchard, I know the
16 light's a bit limited, if I told you his head was
17 able to insert from inside of those handrails, would
18 you expect that that child, from your observations
19 that night, that his head would have gotten hung up
20 between those handrails?

21 A I would not.

22 MR. WEDEKIND: Thank you. Please take your
23 seat.

24 (Detective Pritchard complies.)

25 Q What does this photograph depict, Doctor?

- 1 A This is bruising under and in front of and also
2 involving the lower part of the child's ear.
- 3 Q And these --
- 4 A Left ear.
- 5 Q -- particular things right here, what is this
6 area here?
- 7 A Well, it's bruising. A lot of the bruising
8 there is bruising that we would characterize as
9 petechial type of bruising, which means little tiny
10 pinpoint broken blood vessels.
- 11 Q Is that consistent with what you would have
12 expected to see from strangulation or from the
13 alleged injuries from hanging up on a handrail?
- 14 A You can see this from strangulation. You could
15 possibly see it if the child had been hung up in a
16 space small enough to be hung up in, but that space
17 wouldn't qualify if Detective Pritchard's head fit
18 in that space.
- 19 Q Thank you. And what does this photo depict
20 right there?
- 21 A Similar injuries to the other ear, bruising
22 behind, beneath and also involving the ear itself.
- 23 Q So this is the right ear of Child [REDACTED]
- 24 A Yes.
- 25 Q Same bruise pattern there along the ear and

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

187

1 below it?

2 A Yes. It's very similar to the other side. You
3 can also see some bruising on the child's shoulder
4 in this photograph.

5 Q That photo?

6 A That's the right ear folded back against the
7 head. And there you can see injury to the lower
8 part of the ear and also injury to the upper part of
9 the ear as well, bruising injury.

10 Q And is this -- what is this particular area?

11 A That area there may or may not be a bruise,
12 that could be what we call a salmon patch, which is
13 sort of a birthmark. It would depend on whether
14 that changed color over time as to whether it was a
15 bruise or not.

16 This does represent a bruise, though, on the
17 nape of the child's neck.

18 Q And that's the nape, you mean this area in the
19 back?

20 A Right just below his hairline.

21 Q Would that be consistent with a blow to the
22 back of the head and not to the side?

23 A It could be consistent with a blow to the back
24 of the head or pressure being applied on that area,
25 but it wouldn't bruise there from a force applied

- 1 from the side.
- 2 Q Such as you would find if you were suspended
3 between two handrails, the rails would hold you from
4 the sides here, but would it have been possible for
5 those handrails that you saw on the bench to apply
6 pressure points in three locations?
- 7 A No.
- 8 Q Kind of, getting a little nautical here, but
9 port, starboard and back is that possible?
- 10 A No, that doesn't make any sense.
- 11 Q What does this photograph depict?
- 12 A These are injuries on [Child] abdomen, several
13 bruised areas. This represents an old scar from a
14 surgery that he had had in the past and this also.
15 And that's his belly button.
- 16 Q Okay. So this is the lower abdominal and this
17 is the upper chest area?
- 18 A Correct.
- 19 Q And these bruises across the abdomen, the
20 intestinal area that was injured, where was that
21 located?
- 22 A In the same area as these bruises.
- 23 Q And that would have been consistent with what
24 type of application of force to cause the internal
25 injuries in that location you said?

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

189

1 A With a tremendous amount of force.

2 Q And tremendous, how would that usually be
3 delivered if another person were to inflict that on
4 another individual?

5 A It would be the type of force required, for
6 instance, to kick a soccer ball a great distance or
7 to -- if it were inflicted by a fist, for instance,
8 a very hard punch such as might knock out another
9 person if it were applied to the head. It's a
10 tremendous amount of force.

11 Q Would that have been consistent with an injury
12 from a failed attempt to administer CPR? Would you
13 expect to see that cutting of the intestines from an
14 attempt to administer CPR?

15 A No.

16 Q And why is that, Doctor?

17 A We just don't see that kind of injury even in
18 unskilled CPR application. It requires a great
19 amount of force and directed at the abdomen not at
20 the chest area where CPR is directed.

21 Q Would you expect to see as a result of the
22 application of failed CPR, result in the rupturing
23 of a testicle through a scrotum?

24 A No.

25 Q Would you expect to see the intestines be

1 severed by the application of that pressure?

2 A From CPR?

3 Q Right.

4 A No.

5 Q Would you expect, from an attempt to administer
6 CPR, to see strangulation bruising around the neck?

7 A No.

8 Q Would you expect to see bruising on the back of
9 the neck and the back of the head in an ill-fated
10 attempt to administer CPR?

11 A No.

12 Q What about to the arms of a child in an attempt
13 to administer CPR, would you expect to see bruising
14 as a result of that?

15 A No.

16 Q And this photograph, Doctor?

17 A That's another angle looking at the same part
18 of the child's body, the bruising on the abdomen,
19 surgical scars. And you can see, for landmarks,
20 this is the child's umbilicus or belly button and
21 this is a nipple, so his head's up this way.

22 Q And this scale right here that's depicted in
23 all of these photographs, is that yours?

24 A Yes.

25 Q Were you present when all of these photos were

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

191

1 taken?

2 A Yes, I was.

3 Q And were you, in fact -- the hands that's seen
4 from another individual, are some of those your
5 fingers?

6 A That's my hand, yes, sir.

7 Q What does this photograph depict?

8 A This is the child laying on his side and these
9 are his buttocks and this is showing bruising just
10 above his buttocks at the lower spine.

11 Q Okay. And you had mentioned that there was
12 some bleeding internally to the spinal column. Is
13 that what you would expect to see the manifestation
14 of?

15 A No. That injury was higher on the spine. The
16 internal bleeding that was associated with the spine
17 was further up the back.

18 Q Is that an injury that you would have expected
19 to see if a child was strangling belly down with his
20 head stuck in a handrail?

21 A I can't honestly picture how that would happen.
22 I suppose if the child didn't have on a diaper and
23 were hanging down from a handrail so that the back
24 of him was against the step, then possibly the step
25 could have abraded that area. That's only --

- 1 Q But if the bruises were on the front, you
2 wouldn't expect to see some on the back. And,
3 conversely, if some were on the back, you wouldn't
4 expect to see some on the front?
- 5 A That's right.
- 6 Q And what does this photograph depict, Doctor?
- 7 A This is one of Child arms. I can't remember
8 if it's the right arm or the left arm, but that's an
9 IV in place. And this bruise appears to me to be
10 related to a previous attempt at an IV, so I don't
11 think that's related to the injuries, but this is
12 several small bruises on other parts of his arm is
13 what's shown in this picture.
- 14 Q And these bruises here would be unrelated to
15 one of these being attempted to insert, but this you
16 think was an attempt to do one of those?
- 17 A That appears to be an IV attempt site to me.
18 Dr. Cartie may know more about that than I do.
- 19 Q And these -- just as a point of interest, these
20 are little IVs that are scaled back for children; is
21 that correct?
- 22 A That's correct. Children's veins are a lot
23 smaller than adult veins, so we use much smaller
24 needles and much smaller catheters.
- 25 Q And this is representative of the subject

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

193

1 that's being treated?

2 A Yes. That's one of the identifying stickers
3 that's in the children's chart, so that gets applied
4 to all the parts of the chart that belong to that
5 child and I use it to identify who's in the
6 photographs that I'm taking.

7 Q And then this number sequence here represents
8 the date that this photo's taken; is that correct?

9 A That's correct, that's the date that the
10 photograph was taken.

11 Q I think that's it.

12 Doctor, all of these injuries that we just
13 talked about, the internal intestinal ones, the
14 testicle rupturing through the scrotum, the neck
15 bruising, the strangulation, the chest bruising, the
16 arm bruising, the spinal column bleeding, the
17 tailbone bruise, the back of the head bruise, the
18 side of the ears bruise, were those consistent with
19 any kind of, if I told you that those injuries were
20 alleged to have been related to being -- having a
21 head inserted into a handrail, would those be
22 consistent with the injuries that you saw in those
23 photographs?

24 A If the child's head had become entrapped in a
25 handrail that was spaced sufficiently close enough

1 to entrap the head, then that could explain the
2 injuries around the ears, but that would not explain
3 the rest of the injuries. And it would certainly
4 not explain, by any mechanism, the injuries to the
5 child's abdomen, the pancreas, the liver, the torn
6 intestine and the bleeding around the spinal cord.

7 And just to clarify the spinal cord issue, the
8 part of his spinal cord that had blood collected
9 around it was the part that was immediately behind
10 where his intestine and stomach and -- excuse me --
11 intestine and liver and pancreas injuries were.
12 Your spine extends all the way from your head down
13 to your tailbone.

14 Q So if this area right here (indicating) is
15 where the intestinal injury occurred, the bruise was
16 correlating to the exact back in a straight line
17 from that point is that what you're saying?

18 A Yes, but it's not a bruise, it's a hematoma.
19 It's a collection of blood around the spinal cord or
20 in the space outside of the spinal cord.

21 Q But there's a linear consistency with injury to
22 the front of the abdomen along with the blood
23 collection, the hematoma, in the back in a linear
24 alignment?

25 A Yes, so that it makes sense that that injury

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

195

1 happened with the same application of force that
2 tore the intestine and injured the liver and
3 pancreas.

4 Q So the terrific blow to the front causing the
5 intestines to be severed and then causing the
6 hematoma blood collection in the back all in one
7 line?

8 A Yes. There's not any evidence of more than one
9 of those severe blows to the abdomen. Those can all
10 line up in the same application of force.

11 Q And just to be clear, you might see the
12 explanation of the bruising on the side from being
13 hung up there, but there's no way that that would
14 have resulted in the abdominal injuries, the
15 intestine that you saw, there would not be a
16 correlation explanation of that, correct?

17 A That would not explain those injuries, no.

18 Q And the attempt to give CPR would not have
19 explained away those abdominal injuries and bruises?

20 A No.

21 Q And the rupturing of the scrotum, would that be
22 any way that that could have occurred from the child
23 inflicting that to himself by grasping or picking at
24 his scrotum and allowing his testicle to rupture?

25 A When that surgery happens when the testicle is

1 brought down from its undescended position, they
2 usually close that skin in layers. And I don't know
3 the details of exactly how that surgery was
4 performed, but certainly that surgery is performed
5 on young children frequently and it's sewn up in a
6 manner that should protect the testicle from popping
7 out from the scrotum.

8 Q Now, would that be consistent with the idea
9 that you talked about that a terrific amount of
10 force would have been applied to the abdominal area
11 to cause a displacement of the intestines southward
12 or lower of that below if it hit -- that terrific
13 force would have displaced the organ southward and
14 caused the testicle to rupture through the scrotum?

15 A When a testicle is undescended, it's up in the
16 abdomen in the lower part of the abdomen. And when
17 a surgeon corrects that, he pulls it down through
18 the muscle that's in the abdomen to the outside into
19 the scrotum and so there's a weak point there in the
20 muscle that -- between where the scrotum is and
21 deeper inside the abdomen.

22 So when the kind of force that was applied to
23 Child abdomen that caused the rupture of his
24 intestine and the damage to his liver and pancreas
25 and the injury around his spine would have been an

SUSAN LUBEROFF - DIRECT BY MR. WEDEKIND

197

1 almost explosive force and that -- the contents of
2 the abdomen are largely air in the bowel and
3 water-based materials and force applied will make
4 those things move almost like a wave and so it would
5 certainly make sense for that force to be -- to
6 track along the direction of least resistance. And
7 since there is a weakened area there where the
8 surgery has just been performed, then it certainly
9 could explain that testicle being pushed out from
10 the force applied to the abdomen.

11 Q So what you're saying is that there is almost a
12 terrific blow that caused a hydraulic shockwave to
13 just push downward and upward above that and the
14 downward portion resulted in the weak point being
15 the scrotum having been operated on ten days before,
16 it was weak, but it allowed the testicle to pop out?

17 A That's exactly what I'm trying to say.

18 Q Doctor, would you characterize any of these
19 wounds as serious?

20 A Yes. Almost all of his wounds were extremely
21 serious and could easily have resulted in his death.

22 Q And particularly in a child of such tender
23 years, would you consider this to have been life
24 threatening?

25 A Oh, yes. He was quite -- in quite peril for

1 his life when he arrived at the hospital. If he
2 hadn't had quick and comprehensive medical attention
3 and surgical attention, then he wouldn't have
4 survived those injuries.

5 Q And would you characterize these since Child
6 -- is it your understanding that Child lived as --

7 A Yes.

8 Q And would you characterize these as ones that
9 would continue throughout his life and leave scars
10 and be debilitating?

11 A Well, certainly there would be scars because he
12 had to have abdominal surgery to repair the ruptured
13 intestine. And any time you have abdominal surgery,
14 then you can develop scars later on that can cause
15 you problems later on down the road.

16 The fact that he had to be on a ventilator to
17 assist him to breathe and was in such critical
18 condition, certainly is worrisome for possibly
19 contributing to further developmental problems in

20 Child It's quite easy to have brain injury or
21 have the brain suffer from being that ill and having
22 that kind of support necessary.

23 Q And is it true that the quicker -- having had
24 these injuries inflicted, the quicker the treatment
25 would have been administered to the child, the

SUSAN LUBEROFF - CROSS BY MR. FLOYD

199

1 better off his condition would have been?

2 A Yes.

3 Q And if left untreated, had there not been the
4 administering of assistance to this child, what
5 would you say the level of certainty was of death
6 resulting?

7 A He would have died.

8 Q So life would not have continued had you not
9 intervened, or you and the other doctors not
10 intervened to assist him?

11 A Correct.

12 MR. WEDEKIND: Beg the Court's indulgence.

13 THE COURT: Yes, sir.

14 (Pause.)

15 MR. WEDEKIND: Thank you. Please answer any
16 questions Mr. Floyd may have.

17 THE COURT: Cross.

18 MR. FLOYD: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. FLOYD:

21 Q Dr. Luberoff, it was the next day, May 25th,
22 before you saw Child is that correct?

23 A That's correct.

24 Q He had already had surgery, had he not?

25 A Yes he had.

1 Q Now, he's a very small child, fragile child; is
2 that correct?

3 A Yes, sir.

4 Q Any time a child like that has surgery, during
5 the recovery period, they put breathing tubes in,
6 don't they?

7 A Yes, that's quite common.

8 Q And --

9 A And during the surgery certainly.

10 Q And they leave them in until he recuperates; is
11 that correct?

12 A Until the child is able to breathe on his own,
13 yes.

14 Q So that picture we saw of him with those tubes
15 and so forth, that would be the same of any child
16 having a surgical procedure at that age; is that
17 correct?

18 A The tubes would be common to see after surgery,
19 yes, not the cervical collar, but the tubes.

20 Q Now, I think we went -- you were asked about
21 these injuries in detail and I have a couple of
22 questions for you. You agree, do you not, that had
23 Child head got caught between some railings, they
24 were narrow enough to capture his head, that could
25 explain the bruising around the neck -- I mean,

SUSAN LUBEROFF - CROSS BY MR. FLOYD

201

1 around the ears?

2 A It could.

3 Q And the neck; is that correct?

4 A It could, yes.

5 Q Thank you. Now, how many surgeries had Child
6 had before this incident?

7 A I don't recall independently. I would have to
8 look at the record to answer that. I know he had
9 had at least the recent surgery for the undescended
10 testicle and he had had abdominal surgery with the
11 feeding tube, but I don't remember what the extent
12 of his surgeries had been.

13 Q Now, in fact, this 7 and 8, the large area kind
14 of in the middle, is that from this previous
15 surgery?

16 A Yes, it is.

17 Q So the large thing you see in there, that's
18 some previous abdominal surgery; is that correct?

19 A That's exactly right, yes.

20 Q So what I've got my finger on there, that's a
21 scar from a previous abdominal surgery. Do you know
22 what type of abdominal surgery that was?

23 A It appears that it's from a feeding tube and --
24 can I look at it one more time?

25 Q Sure.

1 A It appears that it's from a feeding tube. And
2 as I recall, he had a history of having had a
3 feeding tube when he was younger.

4 Q Do you know what type of abdominal surgery he
5 had at that time and at what time he had it, either
6 one of those questions?

7 A The original surgery?

8 Q Yes.

9 A I don't recall exactly what his surgery was. I
10 just recall he had had a feeding tube.

11 Q But that surgery is in the same area where --
12 general area where the intestine was severed; is
13 that correct?

14 A It's in the abdomen, but it's -- this surgery,
15 it goes through the skin and directly to the
16 stomach, so it's in a little bit of a different area
17 of the abdomen than where the intestine was severed.

18 Q How far in distance would it be from where the
19 intestine was severed?

20 A Depending on what part of the stomach that they
21 used for the feeding tube, it could be a matter of
22 several inches or as few as just a couple of inches.

23 Q Okay. But you don't know exactly what surgical
24 procedure was performed inside there at that time?

25 A I don't remember.

SUSAN LUBEROFF - CROSS BY MR. FLOYD

203

1 Q Now, in fact, the area of the bruising to the
2 chest and the abdomen area, the abdominal scar, the
3 hematoma in the spinal area, they're all kind of in
4 one line?

5 A Yes.

6 Q Now, let's talk about that hematoma to the
7 spine area. Basically, there was some blood there;
8 is that correct?

9 A Yes.

10 Q It wasn't life threatening, was it?

11 A An epidural hematoma is actually very
12 dangerous. It's one of the causes of sudden death
13 in children.

14 Q Did it cause any problems?

15 A It did not in him.

16 Q It didn't require any surgical procedure, did
17 it?

18 A No. The neurosurgeons assessed it not to
19 require surgery.

20 Q And it healed completely, did it not?

21 A It did.

22 Q So there was no permanent injury from that?

23 A No.

24 Q Now, there was also some talk about some blood
25 in the skull area or the brain?

- 1 A Right. Outside the brain.
- 2 Q And that didn't require surgery either, did it?
- 3 A It did not.
- 4 Q And it healed completely, didn't it?
- 5 A It did.
- 6 Q No permanent injury from that?
- 7 A Not that I know of.
- 8 Q Now, you mentioned there were some injuries.
- 9 Was it the pancreas and the liver?
- 10 A Yes, sir.
- 11 Q Bruising in that area is that what that was?
- 12 A It was from -- from the laboratory test, there
- 13 was laboratory evidence of injury to those two
- 14 organs.
- 15 Q And could that lab test tell us when those
- 16 organs were injured?
- 17 A Not precisely, not what hour they were injured,
- 18 but they did -- the lab test did indicate very, very
- 19 recent injury.
- 20 Q And those injuries did not require any surgical
- 21 procedures, did they?
- 22 A They did not.
- 23 Q And they healed, did they not?
- 24 A They did.
- 25 Q And they resulted in no permanent injury, did

SUSAN LUBEROFF - CROSS BY MR. FLOYD

205

1 they?

2 A They did not. They did result in no permanent
3 injury.

4 Q It --

5 A There was no permanent injury from the pancreas
6 and the liver part of his injury.

7 Q Now, have we covered -- let's see, pancreas,
8 liver, spinal cord, head. The bruising to the arm,
9 the neck, the ears and the chest, did they cause any
10 permanent injury?

11 A Not that I'm aware of.

12 Q Did they require any kind of surgical
13 procedure?

14 A They did not.

15 Q Basically what you've got is when force is
16 applied in some fashion to the skin, it can cause a
17 bruise or an abrasion, hematoma?

18 A Correct.

19 Q And do you know whether or not this -- Child
20 was susceptible to bruising?

21 A I'm sorry, I couldn't quite hear you.

22 Q Do you know whether or not Child was
23 susceptible to bruising?

24 A When we evaluate children that come in with
25 injuries, one of the things that we look at is how

1 much of the rest of their body is injured and how
2 much injury do they have in areas that we expect
3 children to ordinarily get injured from bumping into
4 things. And Child didn't have any injuries on his
5 knees or elbows or shins or the places that we
6 ordinarily see injuries. So he physically, himself,
7 gave me good evidence that he wasn't an easy
8 bruiser.

9 The team treating him also did some tests
10 regarding his clotting and I don't recall the
11 results of those. Dr. Cartie might could address
12 that.

13 Q Do you know -- do you even know whether or not
14 the bruising that you saw all occurred at the same
15 incident?

16 A I don't know whether it occurred at the same
17 instant, but it all occurred at the same approximate
18 time. It was all at the same -- in the same color
19 range, so there -- for instance, none of it was days
20 old.

21 Q Was any of it over two days old?

22 A Of the injuries that we've seen in the
23 photographs here today, none of those appears
24 consistent with injuries over two days old, no, but
25 they certainly could have been more than one

SUSAN LUBEROFF - CROSS BY MR. FLOYD

207

1 incident. The child could have and did have force
2 applied more than one time. The injury to the
3 stomach or the abdomen didn't happen at the same
4 moment that the injury to the ears happened, for
5 instance. It's two different applications of force.

6 Q And they could have been hours apart?

7 A They could have been hours apart.

8 Q Now, what you speculate is that there was a
9 massive force applied to the stomach?

10 A To the abdomen.

11 Q To the abdomen area?

12 A Right.

13 Q Causing the severing of the intestine and then
14 the blood on the spine and the damage to the liver
15 and the pancreas; is that correct?

16 A Yes.

17 Q Do you think that was one particular
18 application of force?

19 A Well, although it could have been more than one
20 application of force, I don't have any evidence that
21 it was more than one application of force. And they
22 do all line up together so it can be explained by a
23 single application of force.

24 Q Now, the intestine, it was repaired surgically,
25 was it not?

- 1 A It was.
- 2 Q And, in fact, there's no permanent loss of
- 3 function of that organ, is there?
- 4 A Not that I'm aware of.
- 5 Q In fact, he healed very nicely, didn't he?
- 6 A Yes, he did. He went home about, I believe,
- 7 about three weeks later.
- 8 Q And with no loss of function of anything?
- 9 A No. The only concern would be potentially
- 10 scarring down the road.
- 11 Q And he already had that concern with previous
- 12 surgeries?
- 13 A That's true.
- 14 Q Now, the surgery of the testicle descending,
- 15 that was ten days earlier or what; do you recall?
- 16 A I believe I referred to that in my note. Can I
- 17 just have a second to look at this?
- 18 Q Sure.
- 19 A Actually, I only said recently and I don't
- 20 recall how many days earlier it was. To the best of
- 21 my recollection, it was something like a week
- 22 earlier, but that's just my recollection.
- 23 Q Now, that particular surgical procedure, does
- 24 it require some type of incision?
- 25 A Yes, it does.

SUSAN LUBEROFF - CROSS BY MR. FLOYD

209

1 Q And where is that incision made?

2 A In the scrotum.

3 Q And then the testicle is pulled down through
4 that incision, is that --

5 A Pulled down through the muscle in the bottom of
6 the abdomen into the scrotum and they do that
7 through that incision.

8 Q And does a doctor also have to manufacture a
9 scrotum?

10 A No. The scrotum's already there. The
11 testicle's just not in it.

12 Q And then does that incision have to be sewn
13 back up?

14 A Sutured shut, yes.

15 Q And is that an area that can then become
16 infected?

17 A It can.

18 Q And it's an area which often kind of compels
19 the person receiving that surgery to scratch it,
20 give their attention to it, does it not?

21 A If it itches, then they'll scratch it.

22 Q And it's in a sensitive area, is it not?

23 A It's not uncommon at all to have itching
24 following that surgery or any other surgery.

25 Q And it's not uncommon for the incision to open

1 back up, is it?

2 A I think it's actually quite uncommon for the
3 incision to open back up, but it is common for kids
4 to pick at it or scratch at it.

5 Q Now, Child is only a couple years old?

6 A He was about two and a half when I saw him.

7 Q How much does he weigh, if you know?

8 A I don't recall.

9 Q Or did he weigh at the time?

10 A I don't recall and I didn't reference that in
11 this note.

12 Q Now, were you -- you were asked about the
13 performance of CPR on him; is that correct? Now, a
14 grown man with adrenaline flowing and being
15 unskilled in that procedure could apply a tremendous
16 amount of force to that abdomen area in an attempt
17 to do CPR, could he not?

18 A Most people doing CPR have adrenaline flowing
19 and it's an unusual thing to have to do, but it's --
20 we don't see this kind of injury even from unskilled
21 attempts at CPR. It requires a lot more force than
22 what a reasonable person would try to apply in an
23 attempt at CPR.

24 Q Do you see lots of small children that CPR's
25 been applied to by people?

SUSAN LUBEROFF - REDIRECT BY MR. WEDEKIND

211

1 A Do I personally? Not a lot, no.

2 MR. FLOYD: Thank you, Dr. Luberoff.

3 THE COURT: Redirect.

4 MR. WEDEKIND: Yes, sir. Your Honor, if we may
5 approach?

6 THE COURT: Sure.

7 (Whereupon, a bench conference was held off
8 the record, in the presence of the jury, but out of
9 the hearing of the jury.)

10 REDIRECT EXAMINATION

11 BY MR. WEDEKIND:

12 Q Doctor, you said that the hematoma was
13 dangerous when Mr. Floyd asked you that question.
14 Why exactly would that be particularly risky?

15 A The epidural hematoma, the epidural hematomas
16 are -- they're dangerous because of the way that
17 they form for one thing. They usually involve a
18 tear in an artery and so they involve a forceful
19 collection of blood. And because of the area, the
20 epidural space kind of confines that blood and they
21 end up, as the hematoma grows, it exerts what we
22 call a mass effect in whatever space.

23 Like if it's in the head, it can cause enough
24 of a mass effect to cause the brain to push down out
25 of the skull. If it's in the spinal cord area, then

1 it can cause enough of a mass effect that it's
2 almost like a baseball or a mass pressing on the
3 spinal cord and so it can cause paralysis or, you
4 know, direct injury to the spinal cord. Fortunately
5 in Child case, that didn't happen, but it's quite
6 a high risk.

7 Q So it's like the brain is the computer control
8 of our body. If that's damaged, it can shut down
9 organ function, correct?

10 A Yes.

11 Q And if the mechanism, the wiring that allows
12 the brain to send the signals to the organs is the
13 spinal column, correct?

14 A That's correct.

15 Q And if that line is cut or portions of that
16 line are broken or that communications link is
17 interrupted, those organs can cease to function and
18 result in death or paralysis; is that correct?

19 A That's correct.

20 Q And in this case, it was a miraculous recovery.
21 It didn't result in any of those things, but it
22 still did not mean it wasn't dangerous or life
23 threatening?

24 A That's correct.

25 Q The questions about the feeding tube surgery

SUSAN LUBEROFF - REDIRECT BY MR. WEDEKIND

213

1 and the intestinal injuries, is there -- let's be
2 perfectly clear about that. Is there any doubt in
3 your mind that the intestine was severed as a result
4 of the feeding tube on a surgery that would have
5 happened weeks in advance?

6 A Well, the feeding tube surgery happened months
7 to years in advance, that was an old, old scar on
8 the child's abdomen. And there's no relation
9 between that and this acute injury that he had in
10 his abdomen. They're unrelated.

11 Q And would that be because the scar, the divot
12 in the chest was well healed --

13 A Well, I know that. And also at the time that I
14 evaluated the child, I did know when it was that he
15 had his surgery, I just don't have that note with
16 me, but it was a well, well, healed, mature scar.

17 Q And any injuries to those intestine as a result
18 of that feeding tube would have manifested long in
19 advance of that, correct?

20 A Well, the feeding tube wouldn't have --
21 wouldn't have caused any injury to the intestine
22 anyway because even though it's a matter of only
23 inches away from the intestine, it is away from the
24 intestine.

25 The feeding tube when it's placed, the stomach,

1 if my hand is the stomach and you've got a small
2 layer of muscle and then skin over that, the feeding
3 tube goes just straight through the skin and into
4 the stomach. It doesn't pass through anything else
5 except for another little bit of abdominal muscle.
6 And the intestine is down here below the stomach.

7 Q Not a shadow of doubt in your mind that those
8 two were unrelated?

9 A They are unrelated.

10 Q Would you characterize these injuries that you
11 observed as fresh or old?

12 A Fresh.

13 Q And by fresh, within a 48 hour period or less?

14 A Much less than that.

15 Q The fact that you did not see a lot of bruising
16 on the knees and elbows that you would ordinarily
17 affiliate with a normal child, would you find that
18 to be remarkable in a child with cerebral palsy that
19 had difficulty in walking that he would not have
20 those normally affiliated bruises?

21 A Well, children two and a half years old whether
22 they have cerebral palsy and are just at the walking
23 around holding on stage, which is the stage that
24 Child was at, or whether they're active two and a
25 half year olds with normal motor skills, do tend to

SUSAN LUBEROFF - REDIRECT BY MR. WEDEKIND

215

1 have, you know, at least one or two little bruises
2 here and there. So the absence of any bruising in
3 the places that a child who's able to move in space
4 is expected to have bruises tells me that this was
5 not an excessively easy bruiser.

6 Q And when you said massive force, was that
7 consistent with pressing that would be affiliated
8 with attempts at CPR or a massive kick or a massive
9 punch?

10 A Well, what you just demonstrated with your
11 hands, as far as pressing with CPR, is a tempered
12 force that's a -- you actually take a little bit of
13 time to apply that force and you were doing it sort
14 of slowly the way you were doing it. Even if you
15 were doing it fast, I'm not talking about that kind
16 of time. This was an instantaneous, sudden,
17 explosive force applied to the child's abdomen that
18 caused these injuries, at least once, but possibly a
19 single application of that force.

20 Q And, again, how painful would picking at a
21 scrotum that had been operated on ten days prior be
22 to a child to the point that he would rip it open
23 and allow his testicle to escape? Would it be a
24 deterrent to a child to feel that pain and he would
25 stop or would you expect that he would continue to

1 persist in that endeavor to injure himself?

2 A The suture material that they sew those
3 incisions up with is tough and it would be really
4 hard for a child to rip through that material in the
5 first place. Children certainly do pick at things
6 that itch and so I don't have any reason to think
7 that Child [REDACTED] never picked at his wound, but it would
8 be unreasonable to explain that injury as a
9 self-inflicted picking injury.

10 Q And, I mean, Child [REDACTED] had some miraculous
11 recovery, but, again, getting back to the essential
12 point, had that child not received the treatment at
13 the hospital, it would have resulted -- that result
14 would have been what?

15 A The result would have been death and especially
16 had his mother not gotten him to the hospital as
17 quickly as she did.

18 MR. WEDEKIND: Thank you, Doctor.

19 THE COURT: Recross.

20 RECROSS-EXAMINATION

21 BY MR. FLOYD:

22 Q Just one thing. Dr. Luberoff, did you say you
23 thought these injuries were all well within 48
24 hours, is that what you just testified to?

25 A Yes.

SUSAN LUBEROFF - RECROSS BY MR. FLOYD

217

1 Q And you -- so how old would you say they were?

2 A The abdominal injury happened some time shortly
3 before the child arrived at the hospital. He
4 wouldn't have survived that injury for days.

5 The bruising, if we're talking about those
6 injuries, I can't time those down, you know, to a
7 particular hour, but certainly all of the bruising
8 that's shown in those photographs is consistent with
9 occurring within the last 48 hours or so. Thank you
10 for letting me clarify that.

11 Q Because you saw him when, on May 26th?

12 A I saw him on May 25th at noon.

13 Q May 25th at noon. And, basically, the major
14 injury, the internal injury, in your opinion, was
15 caused by force applied to the abdomen area?

16 A Correct.

17 Q And you really don't know whether or not, for
18 example, his intestine was already torn in some
19 fashion before the force was applied?

20 A Well, yes, I do know that it wasn't already
21 torn in some fashion before the force was applied.

22 Q You do know that?

23 A Yes.

24 Q Okay. And you know that how?

25 A By the child's clinical stay, by the mother's

1 description of how he was before she had left for
2 work that day. A tear in the intestine is not
3 something you can walk around with --

4 Q Well -- I didn't mean to interrupt you. I'm
5 sorry.

6 A That's okay.

7 Q But now you can have a tear that wasn't all the
8 way through and leaking air, couldn't you?

9 A Yes, but that's a grave injury. That's not
10 something that you just walk around with. It causes
11 peritonitis, swelling in the abdomen symptoms. It's
12 just not a condition that you have and carry around
13 and don't know.

14 Q But you couldn't tell us the exact force it
15 would have required to sever it?

16 A I can only tell you in a description that it's
17 -- it requires a great amount of force, a sudden and
18 explosive massive force directly at the abdomen.

19 Q Like a sudden and direct force (indicating) to
20 expel air --

21 A Into the abdomen and -- and with sufficient
22 force -- the way that the intestine tears is that
23 it's hit hard enough to actually impact against the
24 spine and it's against the spine that it tears
25 apart. So it's --

SUSAN LUBEROFF - RECROSS BY MR. FLOYD

219

1 Q And a -- I'm sorry. I didn't mean to interrupt
2 you.

3 A That's okay. The force is not only a
4 tremendous amount of force, but it goes deep into
5 the child's abdomen to result in this kind of
6 injury.

7 Q I understand. The child is very small, is he
8 not?

9 A Well, he was two and a half and premature, so
10 he --

11 Q And premature?

12 A Right.

13 Q So if an adult full of adrenaline, concerned
14 about the child, loved the child, was afraid the
15 child was dying applied maximum force to expel the,
16 whatever was keeping the child from breathing, that
17 could have done it, couldn't it?

18 A No, not with a spread hand like that.

19 Q Well, how about with these hands (indicating)?

20 A With a fist applied to the abdomen with great
21 force, then, yes.

22 Q Either way, this way, this way or this way
23 (indicating)?

24 A It would require more force than just pushing
25 down on the abdomen. It would require drawing back

1 and punching into the abdomen.

2 Q And you've done studies on that?

3 A Other people have done studies on that.

4 MR. FLOYD: Thank you. No further questions,
5 Your Honor.

6 MR. WEDEKIND: None from the State, sir.

7 THE COURT: Thank you.

8 You may step down, Doctor.

9 MR. WEDEKIND: Your Honor, we would like to
10 preserve her for any potential rebuttal, but we're
11 done for the day, sir.

12 THE COURT: Thank you. Is there any problem
13 with the other witness being here in the morning?

14 MS. MCMAHON: No, sir.

15 THE COURT: Folks, after conferring with my law
16 clerk, I think the best thing is to say 10:15 for
17 you. So I need you here at 10:15 in the morning.
18 Remember all of those admonitions about not
19 discussing the case and I hope you have a pleasant
20 evening. Please be in the jury room at 10:15.
21 Thank you.

22 (The jury was excused for the day.)

23 THE COURT: Mr. Lucas, make sure you're back
24 here in the morning no later than 10:15 in the
25 morning; you understand?

1 **DEFENDANT LUCAS:** Yes, sir.

2 **THE COURT:** Thank you. Court's in recess.

3 (The proceedings were concluded for March
4 17, 2009.)

5 (The following proceedings were held on
6 March 18, 2009.)

7 **THE COURT:** All right. I got a note from a
8 juror this morning. It's from juror number 3. I
9 think that's Tom Allen. It reads: My daughter went
10 to the doctor for an ear infection yesterday, March
11 the 17th. Her doctor was Dr. Luberoff, who is the
12 husband of the witness yesterday afternoon. I
13 wanted to disclose that this has been her doctor on
14 a few occasions, though, I have no personal
15 relationship with the doctor.

16 Do you all want to be heard on this at all?

17 **MR. WEDEKIND:** The State has no problem with
18 it, sir.

19 **MR. FLOYD:** Judge, can I check to see who this
20 Tom Allen is?

21 **THE COURT:** Sure.

22 (Pause.)

23 **MR. FLOYD:** Judge, we do not raise an issue.

24 **THE COURT:** All right. Thank you.

25 (Court's Exhibit Number 2, jury note, was

1 marked for identification.)

2 THE COURT: State ready for the jury?

3 MS. MCMAHON: Your Honor, actually we have a
4 couple of matters to take up. Based off the
5 cross-examination that was done of Dr. Luberoff,
6 there was a picture, State's I.D. Number 4, that the
7 State feels would now be relevant.

8 We think that -- the testimony was the
9 individual injuries that Child III suffered would not
10 be life threatening, but the collaborative, the
11 total number of injuries would be. This picture
12 shows how grave his condition was in totality. All
13 the pictures that we have up there are just
14 close-ups of this one picture, if you'd like to see
15 this again, Your Honor.

16 THE COURT: Sure.

17 MS. MCMAHON: And, Your Honor, it's part of the
18 great bodily injury that we have the burden of proof
19 to prove.

20 THE COURT: The jury's not allowed to just look
21 at a picture with a person with a lot of tubes in
22 them and make the conclusion that that means it's
23 great bodily injury, number one.

24 Number two, I excluded it primarily under Rule
25 403 because even if it's relevant, I thought the

1 prejudicial value was substantially outweighed by
2 the danger of unfair prejudice and confusion of the
3 issues and things of that nature.

4 I don't think they opened the door in any way
5 to allow the introduction of the picture. The
6 motion's denied.

7 **MS. MCMAHON:** Thank you, Your Honor.

8 We also have a witness that was not on our list
9 at the beginning of the trial Your Honor. We
10 thought that Dr. Luberoff, in State's Exhibit Number
11 2 for I.D., we thought that Dr. Luberoff took this
12 picture and based off the testimony yesterday, she
13 did not.

14 We have a nurse from the emergency room at
15 Lexington who can testify and authenticate this
16 picture so that we can get it into evidence. Her
17 name is Sharon Young. That name has been provided
18 to the defense through discovery so it's not a
19 surprise witness.

20 We would just ask that you inquire of the jury
21 if they know of Ms. Young, if they have any
22 relationships with her and that if they can be fair
23 and impartial. If there is a juror that could not
24 be fair and impartial based off of some relationship
25 with Ms. Young, we have Sergeant Jeff Bokowski with

1 the Lexington County Sheriff's Department that can
2 also authenticate the picture.

3 THE COURT: Does the defense wish to be heard
4 on this?

5 MR. FLOYD: Your Honor, we would object to the
6 State being allowed to call either one of these
7 witnesses since their names were not disclosed to
8 the jury. The -- so that would be our initial
9 position on point.

10 THE COURT: All right. I'll voir dire the jury
11 and see if there's any problem with Ms. Young. If
12 there is, I'll perhaps substitute an alternate.
13 We'll see what I do.

14 MS. MCMAHON: Thank you, Your Honor.

15 THE COURT: Are you ready for the jury now?

16 MR. WEDEKIND: Yes, sir, if I can just get this
17 up and running for the -- and then we'll be ready,
18 sir.

19 (Pause.)

20 THE COURT: Are you ready now?

21 MS. MCMAHON: Yes, Your Honor.

22 MR. FLOYD: Maybe we can streamline this just a
23 bit. The picture, you're calling this witness to
24 put in this picture?

25 MR. WEDEKIND: Yes, sir.

1 **MR. FLOYD:** Your Honor, subject to my
2 objection, if you're going to allow it, I'd just
3 like to make our argument about a 403 analysis. And
4 if I lose that, then we'll just stipulate they can
5 put it into evidence. We don't have to go through
6 that process if they don't want to do that.

7 **MS. MCMAHON:** Yes, that's fine, I'm ready to go
8 on that argument.

9 **MR. FLOYD:** Your Honor, this is the picture.
10 Do you need to see it again?

11 **THE COURT:** No. I remember it, State's Exhibit
12 2.

13 **MR. FLOYD:** Your Honor, since the evidence is
14 that this did not result in any type of permanent
15 injury, we would argue that the prejudicial nature
16 of this photograph outweighs any probative value and
17 we'd move to exclude its introduction.

18 **THE COURT:** That objection's overruled. So if
19 there's no question as to its authenticity --

20 **MR. FLOYD:** That's correct, Your Honor.

21 **THE COURT:** -- you don't need Ms. Young to
22 testify to establish that that's a picture of that
23 child taken on that date.

24 **MR. WEDEKIND:** If that's the case, sir, may we
25 ask that she be excused?

1 **THE COURT:** Are you Ms. Young? Thank you very
2 much, ma'am.

3 Do y'all need her?

4 **MR. WEDEKIND:** I don't think she needs to stand
5 here to authenticate it, sir. It's in, right?

6 **THE COURT:** I understand they're stipulating to
7 the authenticity of it. Their objection is based on
8 a Rule 403 analysis and I've overruled that
9 objection if I misunderstood anything, y'all correct
10 me now. Subject to a 403 objection.

11 **MR. WEDEKIND:** Okay, sir, then she can be
12 excused.

13 **THE COURT:** I think they agree that you can go.
14 Thank you very much.

15 (State's Exhibit Number 2, photograph,
16 admitted into evidence.)

17 **THE COURT:** All right. Bring in the jury.

18 (The jury enters the courtroom at 10:53
19 a.m.)

20 **THE COURT:** All right. Ladies and gentlemen,
21 some additional legal issues arose this morning that
22 we've worked through. I didn't know they were going
23 to arise yesterday.

24 And, Mr. Allen, where are you?

25 **JUROR:** Yes, sir.

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

227

1 THE COURT: I shared your note with everyone
2 and there's no problem.

3 JUROR: Yes, sir.

4 THE COURT: All right. Call your next witness,
5 please.

6 MS. MCMAHON: The State calls Dr. Richard
7 Cartie.

8 RICHARD J. CARTIE,
9 having been duly sworn, testified as follows:

10 THE CLERK: If you'll have a seat over here.
11 State your name and spell your last for the record,
12 please.

13 THE WITNESS: My name is Dr. Richard Joseph
14 Cartie, C-a-r-t-i-e.

15 DIRECT EXAMINATION

16 BY MS. MCMAHON:

17 Q Dr. Cartie, where do you work?

18 A Currently I'm employed through the Joseph M.
19 Still Burn Center at Doctor's Hospital in Augusta,
20 Georgia.

21 Q What is your position?

22 A I'm the director of pediatric critical care
23 services for the burn center.

24 Q And as the director, what are your duties and
25 responsibilities?

1 A I oversee the care of all of the children that
2 come through our institution with burn injuries both
3 minor and severe.

4 Q Can you give the jury your background and
5 education and experience?

6 A I had graduated from the University of
7 Rochester in upstate New York with a Bachelor of
8 Arts Degree in Psychology and Biology in 1991. I
9 went on to do my medical school training at the
10 University of Rochester as well and graduated from
11 there in 1995.

12 I did my pediatric residency training from 1995
13 through 1998 at East Carolina University in
14 Greenville, North Carolina. I went on to do my
15 pediatric critical care fellowship initially at
16 Georgetown University for six months and then
17 transferred out to Children's Hospital of Los
18 Angeles and completed my fellowship training in
19 pediatric critical care in 2001.

20 I was initially employed at the University of
21 Texas Health Science Center in San Antonio as a
22 pediatric critical care physician until the year
23 2005. And then I was employed at Palmetto
24 Children's Hospital in Columbia, South Carolina
25 until October of last year when I took my current

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

229

1 position with the burn center.

2 Q While you were at the Palmetto Children's
3 Hospital, what was your position there?

4 A I was clinical associate professor of pediatric
5 critical care.

6 Q What states are you licensed in?

7 A Currently I have medical licenses in Georgia,
8 South Carolina, North Carolina and Texas.

9 Q And are you board certified?

10 A I'm board certified in pediatrics and pediatric
11 critical care.

12 Q What does it mean to be board certified?

13 A Board certified means you've completed a
14 approved certified residency or fellowship training
15 program and you have completed the requirements
16 necessary to take the certification exam and then
17 you subsequently pass the certification exam.

18 Q And you're board certified in what specialty?

19 A Pediatrics and pediatric critical care.

20 Q Have you testified in court before?

21 A I have.

22 Q And how many times?

23 A At the last count, more than a dozen, less than
24 two dozen.

25 Q Have you ever been qualified as an expert

1 before?

2 A I have.

3 Q In what fields of expertise?

4 A I've been qualified as an expert in both
5 pediatric critical care and pediatric burn critical
6 care.

7 MS. MCMAHON: Your Honor, at this time, I would
8 move to have Dr. Cartie qualified as an expert in
9 pediatric critical care.

10 THE COURT: Is there any voir dire?

11 MR. FLOYD: No voir dire, Your Honor.

12 THE COURT: Any position?

13 MR. FLOYD: Your Honor, we don't object to
14 that.

15 THE COURT: All right. He is recognized as an
16 expert in pediatric critical care and may render
17 opinions in that field. You may continue.

18 BY MS. MCMAHON:

19 Q Dr. Cartie, how is what you do different than
20 Dr. Susan Luberooff?

21 A Dr. Luberooff is a pediatric specialist trained
22 in the evaluation, diagnosis and treatment of child
23 abuse and child abuse injuries, that includes both
24 physical and sexual abuse. She sees patients in
25 both an inpatient and an outpatient setting. She

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

231

1 evaluates anything from minor bruise injuries to
2 sexual assaults to more significant injuries.

3 For me, I see kids that are very significantly
4 injured typically with imminently life threatening
5 or ongoing life threatening injuries. As a result,
6 mine tend to all be inpatient type of settings,
7 they're all in the ICU, require very invasive and up
8 to the minute, ongoing care, as well as the fact
9 that my patients in the ICU also represent other
10 significantly injured and ill patients whether it be
11 from an overwhelming infection or other types of
12 traumatic injuries such as car accidents or
13 significant falls.

14 Q Is it fair to say that you see the children
15 sooner after an accident than Dr. Luberoff?

16 A That's typically the case, yes.

17 Q Now, when you worked for the Children's
18 Hospital at Palmetto Richland, did you see Child

19

20 A I did.

21 Q When did you see him?

22 A I was one of the physicians that was
23 responsible for his care while he was admitted to
24 our institution. I was not the physician who
25 initially admitted him into the hospital, but our

1 group has four physicians and our call schedule and
2 covered schedule is such that we, on different
3 occasions, rotate through our care whether it be
4 actually in the hospital or overnight call on an
5 on-call basis.

6 Q And what was Child condition when he
7 presented at your hospital?

8 A He was critically ill.

9 Q And what does critically ill mean?

10 A Critically ill means that the medical
11 interventions we are providing, if they were taken
12 away, he would be in imminent danger of dying.

13 Q Within what amount of time?

14 A Seconds to minutes.

15 Q Dr. Cartie, what's respiratory failure?

16 A Respiratory failure is the inability of the
17 individuals to sustain their own breathing and
18 oxygenation to their tissues.

19 Q Was Child in respiratory failure when he was
20 admitted to Palmetto Richland?

21 A Yes.

22 Q And how is that treated?

23 A That is treated with intubation of mechanical
24 ventilation, which is the placement of a breathing
25 tube into the airway. And then a breathing machine,

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

233

1 a mechanical ventilator provides adequate oxygen and
2 adequate gas exchange and air movement into and out
3 of the lungs whether the patient is assisting with
4 that or not.

5 Q And the opinions that you will give us here
6 today, what do you base those opinions on?

7 A My experience, my review of the medical record
8 and my experience taking care of Child

9 Q And do you have an opinion of what caused
10 Child respiratory failure?

11 A I do.

12 Q And what is that?

13 A That would be the constellation of injuries he
14 suffered when he initially presented to Lexington
15 Medical Center.

16 Q And, Dr. Cartie, I want to go through his
17 injuries one at a time starting with his internal
18 injuries. What, if any, injury did he have to his
19 head?

20 A He had a C.T. scan, an x-ray, a detailed x-ray
21 of his head performed at Lexington Medical Center
22 that showed that there was blood collected on and
23 around his brain. That was the -- that would be the
24 result of some type of significant head injury or
25 spontaneous bleeding in and around the brain as a

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

234

1 result of an impact or a trauma.

2 Q Dr. Cartie, I'm going to show you what's been
3 marked as State's Exhibit 18. If you could tell me
4 -- if you could tell me what's in this photograph.

5 A The photograph represents the back of the
6 child's head, also known as the occiput, directly on
7 the posterior part of the scalp. And it shows a red
8 area with what appears to be some possible minor
9 swelling that could represent a site of impact to
10 the skull.

11 Q Dr. Cartie, I'll give you a pointer. If you
12 can point that out for the jury where you're talking
13 about.

14 A The area just above where the thumb is
15 (indicating).

16 Q Now, could a blow to the back of the head in
17 that area create a subdural hematoma?

18 A Yes.

19 Q And what kind of force would be necessary to
20 create this subdural hematoma that Child had?

21 A The subdural hematomas are caused by a
22 significant amount of force to the skull whether it
23 be from a direct impact with an object or whether it
24 be the child striking an object while the child is
25 in motion. The amount of impact required is

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

235

1 typically larger than an individual would consider a
2 mild impact. So what that means is a toddler
3 falling to the ground would not cause a subdural
4 hematoma, being hit by a car or falling from a first
5 floor window would be enough of an impact to cause a
6 subdural hematoma.

7 Q And are you familiar with the history that was
8 given of how these injuries came about on Child

9 A I am.

10 Q And what history was that?

11 A That the child's head had become entrapped in
12 the railings of a porch where the child had been
13 placed and then somehow gotten out of his -- out of
14 his chair and entrapped his head between the railing
15 on the steps. This -- there was no report given of
16 any impact type of injury whatsoever.

17 Q And in your opinion, Dr. Cartie, is the
18 subdural hematoma consistent with a child getting
19 his head caught in a railing?

20 A No.

21 Q And are you also aware of the CPR that the
22 defendant supposedly tried to perform on Child

23 A I am.

24 Q Would this injury be consistent with someone
25 trying to perform CPR?

1 A It would not.

2 Q What is it consistent with?

3 A This injury with the evidence of external
4 trauma to the head as well as the subdural hematoma,
5 indicates that there was some type of abuse of head
6 trauma done to this child.

7 Q And what -- is that a life threatening injury?

8 A It can be, yes.

9 Q How is a subdural hematoma repaired?

10 A If it is severe enough to cause neurologic
11 impairment, the neurosurgeons will do one of two
12 things. They will attempt to relieve the pressure
13 on the brain itself by inserting a catheter just
14 below the surface of the skull to monitor the
15 pressure, as well as relieve some of the pressure.

16 If the pressure on the brain becomes too great,
17 since the skull is a closed box, the pressure cannot
18 escape anywhere and so when there's swelling or
19 bleeding into the brain, that can cause compression
20 of the brain itself. If that pressure becomes
21 significant enough, the surgeons will often take the
22 patient to the operating room, lift off a section of
23 the skull, suction out the clot and the clot
24 material, repair any ongoing bleeding that there is
25 and then either replace or, in some cases, not

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

237

1 replace the section of skull that was removed to
2 allow the swelling to continue without compromising
3 blood flow to the brain.

4 Q And turning to his intestines, what injuries
5 did he have to his intestines?

6 A The patient had a jejunal transection. So if
7 you think about the intestines and the digestive
8 tract as a long tube, you go down the esophagus into
9 the stomach, out of the stomach comes the duodenum,
10 which is the first section of intestine, that curls
11 around the right side of your abdomen and starts
12 traveling to the left-hand side of your abdomen back
13 under the stomach.

14 The next section of intestines is called the
15 jejunum. And there is a point of attachment close
16 to where the stomach lies where the jejunum is kind
17 of tacked up and attached to the posterior of the
18 back abdominal wall. And the child had a complete
19 -- a complete interruption, a complete tear all the
20 way across his jejunum at that point.

21 Q And, Dr. Cartie, what causes free air in the
22 abdomen?

23 A Any time you have a hole or a tear in the
24 intestines, the air or gas that's in the intestines
25 itself escapes into the abdomen.

1 Q So is it normal for someone to have free air in
2 his or her abdomen?

3 A It is not normal.

4 Q And what's the risk of having free air in the
5 abdomen?

6 A Free air in the abdomen represents a hole in
7 the intestines. Any time you have a hole in the
8 intestines and you have abdominal contents and
9 intestinal contents spilling into what's supposed to
10 be a clean space, you run the risk of very
11 significant infection very quickly. The lower parts
12 of the intestines are just completely full of
13 bacteria and those bacteria can rapidly cause an
14 overwhelming infection that is life threatening.

15 Q And this was a life threatening injury that
16 Child had when he presented to you at Palmetto
17 Richland?

18 A That's correct.

19 Q What amount of force is required to completely
20 shear someone's intestines into?

21 A A huge amount of force. You need two things.
22 You need a sharp blow to the abdomen and you need a
23 large amount of force.

24 Generally, when children are injured, such as
25 from a fall or from a motor vehicle accident, the

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

239

1 most common injury we see are injuries to their
2 chest and to their head. We actually very rarely
3 see abdominal injuries.

4 Abdominal injuries are typically the result of
5 some sharp force from a relatively pointed or -- or
6 not large surface area object such as a fist or a
7 foot that would strike the abdomen with a large
8 amount of force.

9 The comparison for a documented type of injury
10 that's relatively common in pediatrics is when
11 children are riding their bike at a high rate of
12 speed and go over their handle bars. On rare
13 occasions, if the handle bar itself strikes the
14 child in the abdomen as he goes over the handle
15 bars, if the end of the handle bars strikes the
16 child in the abdomen, it can cause an injury to the
17 intestines such that the intestines can have a
18 rupture or a hole in them. That's about the only
19 comparison you could make to something that's
20 relatively well known in pediatrics that's not the
21 result of an abuse type of situation.

22 Q And, Dr. Cartie, I'm going to show you what's
23 been marked State's Exhibits 7 and 8 and ask you if
24 you can recognize what's in these photographs?

25 A Yes, I can recognize what's in those

1 photographs.

2 Q And what's depicted in these photographs?

3 A Those images are close-up pictures of his
4 abdomen primarily on the left-handed side in and
5 around the belly button area of his abdomen.

6 Q And, Dr. Cartie, what do you see in this
7 photograph as an expert in pediatric critical care
8 causes you concern?

9 A So if this is his abdomen, belly button here,
10 head is up this way, feet are down this way
11 (indicating), this little divot and scar right here
12 is an old scar from a feeding tube that he had had
13 placed as a result of his prematurity in the
14 neonatal intensive care stay that had been removed
15 prior to his presentation to us. It had obviously
16 healed and that's a typically healing pattern of a
17 tube that was placed for such a thing.

18 We also see a number of linear bruises and
19 smaller bruises along the left lower side -- left
20 mid-side of his abdomen. So his rib cage --
21 actually, that's his nipple right there, so his rib
22 cage is probably somewhere right around here. So
23 this catches him just below the rib cage and down to
24 the level of the belly button.

25 Q And what are the complications of ruptured

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

241

1 intestines?

2 A Ruptured intestines will cause significant
3 inflammation, the need for a lot more fluids. The
4 child will have low blood pressure potentially, then
5 he will rapidly develop overwhelming infection as a
6 result of the bacteria spilling into the abdominal
7 cavity.

8 Q Would a layperson be able to understand the
9 gravity of a child with this kind of injury?

10 A Typically children who have a rupture or a tear
11 in their intestines, that if that is their only
12 injury, there will be often a period of time where
13 that injury is not immediately life threatening.
14 They will complain of abdominal pain. It will
15 definitely hurt. Their whole abdomen will hurt as
16 those intestinal contents spill into the abdomen and
17 start to cause inflammation of the abdominal wall.

18 As time passes over the next hour, two hours,
19 three hours, the child will develop vomiting. He
20 will not be able to eat or drink. And then some
21 time after that, the infection will cause him to be
22 less awake, less arousable. He'll develop a fever
23 and will become more obviously ill.

24 Q Dr. Cartie, in your expert opinion, is the
25 sheering of Child intestines consistent with his

1 getting his head caught in a railing?

2 A It is not.

3 Q Is it inconsistent with improper CPR?

4 A It is not.

5 Q What is it consistent with?

6 A This injury is consistent with some type of

7 sharp blow with a large amount of force directed

8 into his abdomen either with a fist or a punch.

9 Q Now, Dr. Cartie, what, if any, injury did
10 Child have to his spinal column?

11 A Child had a spinal epidural hematoma, which is
12 a collection of blood inside the spinal column over
13 the surface of the spinal cord itself.

14 Q And what are the complications from that type
15 of injury?

16 A If the bleeding and the clot becomes large
17 enough, it can compress the spinal column and cause
18 paralysis.

19 Q In your experience, have you ever seen that
20 type of injury before?

21 A I have seen that injury only twice before.

22 Q And in what circumstances were those?

23 A In one instance, it was a spinal epidural
24 hematoma in the neck region as a result of a
25 strangulation that was caused by an adult. And in

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

243

1 the other instance, it was in the lower spinal
2 region approximately just above the level of the
3 pelvis and that was on a child who had been riding
4 her bike and was struck by an SUV at approximately
5 40 to 50 miles per hour.

6 Q And where on [Child] spinal column was this?

7 A This area of bleeding was in his lower spinal
8 column at the lower thoracic upper lumbar area,
9 which would put it just above the level of the
10 pelvis.

11 Q And the location of the injury, does that give
12 you any indication of how it was done to [Child]

13 A If there was a significant injury to the
14 abdomen such as a punch or a kick, that could
15 provide enough force to give that injury.

16 Q Could one punch or one kick cause such an
17 injury?

18 A Yes.

19 Q Now, is the spinal epidural hematoma that you
20 were discussing is that consistent with a child
21 being caught in the railing?

22 A Absolutely not.

23 Q Is it consistent with improper CPR?

24 A No.

25 Q What is it consistent with?

1 A It is consistent with some type of force or
2 blow applied to the lower spinal column or the
3 abdomen at that level.

4 Q Dr. Cartie, I want to show you what's been
5 marked as State's Exhibit Number 2 that's in
6 evidence and see if you recognize this photograph.

7 A I do.

8 Q What is that?

9 A That is the injury to his scrotum that he
10 presented with in the emergency room.

11 Q Dr. Cartie, have you ever seen this type of
12 injury before?

13 A No.

14 Q And in your opinion, how could Child have
15 suffered such an injury?

16 A Child had had a previous surgery a number of
17 days beforehand to repair an undescended testicle
18 that hadn't dropped into the correct position in the
19 scrotum, that surgery had been performed and he was
20 healing from that injury. And because of that,
21 there was an obvious weakness in the skin integrity
22 at the site of the incision.

23 If a significant amount of force is applied to
24 the abdominal contents, that force is transmitted
25 both upwards into the chest cavity, as well as

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

245

1 downwards into the scrotum. It's the same sort of
2 thing that anybody who's ever had a physical from a
3 doctor, when they say, Turn your head and cough,
4 it's actually done to increase the force in the
5 abdomen, increase the pressure in the abdomen. And
6 if somebody has a hernia, which is a communication
7 between the abdomen and the scrotum, if somebody has
8 a hernia, they will actually be able to feel the
9 downward force of the abdominal contents into the
10 scrotum.

11 In this case, the transmission of the force
12 that he suffered as a result of his injury actually
13 caused the testicle that had been repaired to
14 extravasate or pop out of that incisional site where
15 it had been repaired.

16 Q So it's your opinion that the force was so
17 great to his abdomen that it traveled down and
18 popped his testicle out?

19 A That's correct.

20 Q Is there any way that Child could have picked
21 it at this -- that he could have picked at it and
22 created this injury?

23 A No.

24 Q And why do you think that?

25 A Because the pain would have stopped him from

1 further picking.

2 Q And is there any way that this injury could
3 have come about by him getting his head caught in a
4 railing?

5 A No.

6 Q Or the improper CPR?

7 A The improper CPR, if enough force had been
8 applied over his abdomen in a downward pressure
9 because of the weakness in his scrotum, that is a
10 possibility that it could have provided this injury.

11 Q What about any other internal injuries such as
12 to the pancreas? Did he have any injuries to his
13 pancreas?

14 A He actually did show signs of some injury to
15 his pancreas. His initial labs that were checked
16 showed an elevation in the lab work that we check
17 for looking at pancreatic enzymes. And in his case,
18 they were significantly elevated indicating that he
19 had some type of inflammation to the pancreas.

20 Inflammation to the pancreas in an adult
21 population is typically the result of chronic
22 alcoholism. In his case, it was the result of a
23 sharp forceful blow to the abdomen that actually
24 injured his pancreas as well.

25 Q And, Dr. Cartie, going back to the testicle

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

247

1 injury, could a kick to the abdomen have caused this
2 injury to occur?

3 A Yes.

4 Q And what kind of force would that kick, what
5 would you relate that to?

6 A Given the injury to his intestines and the
7 bruises to the abdomen and the extravasation, the
8 rupturing of his testicle through his scrotum, the
9 amount of force would be similar to an adult winding
10 up with a full punch. Or, if it was a kick, the
11 best comparison would be if somebody was kicking a
12 football, whether it be a field goal or a punt, if a
13 full kick went and struck him in the abdomen, that's
14 the amount of force that would typically cause these
15 injuries.

16 Q And given the overall view of all the injuries
17 that he had to his abdomen including this injury, is
18 it your opinion that improper CPR could have
19 collectively created all of these injuries?

20 A No, it could not have.

21 Q Can you explain to the jury what is meant by a
22 battle sign?

23 A Battle sign, when there is a head injury that
24 causes fractures or bleeding in or around the brain,
25 there can be a collection of blood that collects

1 around the lower part of the ear, most typically
2 just in front of the ear, but it can also occur
3 below or just behind the earlobe, and that is --
4 shows up as a dark bruise.

5 The comparison would be if you have a head
6 injury and you -- or just a bump to the head that
7 causes a little bit of swelling, you may wind up
8 with a black eye a day or two later as the blood
9 travels along the skull and collects around the eye.

10 Q Did you observe any battle sign on Child

11 A He did have such a sign.

12 Q I'd like to show you what's been marked as
13 State's Exhibit 15, 16 and 17 and ask you if you can
14 identify these photographs?

15 A Those are images of his ears.

16 Q Can you explain to the jury what you see in
17 this photograph?

18 A Okay. This is his left ear. And if we can
19 have the lights down a little bit more, it'll be
20 easier to see.

21 You see the tape, this is the tape that's
22 securing his breathing tube that you can see in the
23 edge of the picture here. This is his left ear.
24 And the darker area here is a darker bruise that
25 would be consistent with a battle sign. The red

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

249

1 areas with some dots, those are called petechial
2 hemorrhages. Those reddened areas are from an
3 outside force being applied to the skin and the area
4 behind the ear.

5 Q And the bruising on the front, in front of the
6 earlobe, is that what you would call a battle sign?

7 A That's correct.

8 Q And would that be consistent with Child
9 suffering a head injury?

10 A That would be, yes.

11 Q Would that be consistent with the photograph
12 you previously saw of the bruising on the back of
13 Child head?

14 A That would be consistent with the hemorrhaging
15 in and around the brain and the injury to the skull.

16 Q And the petechial hemorrhages that you
17 referenced here under the ear, where would that come
18 from?

19 A These would be the result of a forceful blow
20 applied to that area or some type of compressive
21 force applied to that area.

22 Q And what kind of forceful blow would create
23 those kind of marks?

24 A A lot of times we see injuries to the ears that
25 have those areas of redness and the small petechial

1 hemorrhages, the small dots of bleeding to the ear,
2 to the earlobe, to the surrounding tissue of the
3 ear, those are often the result of cuffing the child
4 to the side of the head, an open-hand blow to the
5 head that covers the ear or a punch to the side of
6 the head.

7 Q I'm showing what's been marked as State's
8 Exhibit 15. Do you see in that photograph what
9 you're talking about with the cuffing?

10 A Yeah. This picture shows better the smaller
11 areas of bleeding to the earlobe itself, as well as
12 an area of bruising of the earlobe. Again, that is
13 something I have seen over the years a number of
14 times on children with significant head injury and
15 it represents a blow to the side of the head.

16 Q Would that be consistent with Child head
17 being caught in a railing?

18 A It would not. We don't see any abrasions or
19 any other injury to the earlobe itself.

20 Q And what would it be consistent with?

21 A A blow or a cuff to the side of the head.

22 Q And when you say a cuff to the side of the
23 head, what exactly do you mean?

24 A An open-handed blow with your hand slightly
25 cupped that actually covers the ear and the force is

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

251

1 transmitted to the earlobe causing either the
2 bruising or the small areas of hemorrhaging in the
3 earlobe itself.

4 Q And on State's Exhibit Number 16, can you
5 explain to the jury what you see in those
6 photographs?

7 A This is an image of his right ear in which is
8 the, kind of the posterior, the back view of the ear
9 that was just seen. And you can see there's darker
10 areas of bruising under the ear, which would be
11 consistent with the battle sign that was similar on
12 the other side, as well as areas of contusion or
13 lesser bruising to the back of the earlobe and to
14 the area underneath the ear, slightly behind the
15 ear.

16 Q Is it basically what's on this side of his
17 head, those injuries are the same as on the other
18 side of his head, correct?

19 A That's correct.

20 Q Dr. Cartie, I want to show you what's been
21 marked as State's Exhibit Number 10 and 11 and see
22 if you can identify what's in these photographs.

23 A Again, those are areas of Child of his neck
24 and underneath his chin and upper part of his chest.

25 Q And on State's 11, what do you see in that

1 photograph?

2 A This is a close-up picture of the area
3 underneath his chin. Again, we see the breathing
4 tube and it's taped into place over the top part of
5 his lip. And his chin is here. And we see the
6 crease of his neck from his position laying in his
7 hospital bed. You can see areas of bruising and
8 contusion to the tissue just underneath his chin and
9 the top part of his neck.

10 Q What is that bruising consistent with?

11 A If I saw that, that would most likely be
12 consistent with some type of manual strangulation.

13 Q And when you say manual strangulation, what do
14 you mean?

15 A Either some type of ligature or rope or hand
16 being held around his neck.

17 Q Is it consistent with him having his head
18 caught between railings?

19 A It is not.

20 Q And on State's Number 10, what do you see in
21 that photograph?

22 A This is an image lower down on his neck and the
23 upper part of his chest. And the area here
24 (indicating) on his lower neck and upper part of his
25 chest is one large area of bruising and some

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

253

1 contusions at the line of his neck here, but
2 predominantly bruises that extend really from collar
3 bone to collar bone along the upper part of his
4 chest and the lower part of his neck.

5 Q Dr. Cartie, how would a child get these
6 injuries during a manual strangulation?

7 A If a child is held down and strangled, the
8 force is directed in a downward direction as opposed
9 to if an adult was strangling another adult, it
10 would be directed at the same level. In addition,
11 children have a much smaller neck. Their neck is
12 certainly not as long as an adult and so the
13 strangulation force is applied predominantly to the
14 upper part of the chest and the lower part of the
15 neck simply because that's where adult hands lie as
16 they wrap around a child's neck.

17 Q Can you demonstrate that on my co-counsel,
18 Mr. Wedekind?

19 A I can.

20 (Witness leaves the witness stand.)

21 So if I was to strangle him as an adult, I
22 would wrap my hands around his neck here. In a
23 child, a child's going to be in a more inferior,
24 lower down position or an adult's going to be on top
25 of a child and the force is going to be directed in

1 this manner, (indicating) and it's going to compress
2 the chest.

3 In addition, he'll be much smaller, my hands
4 will be much larger relative to the child so my
5 hands would wrap completely around a child's neck
6 and along the upper part of his chest as opposed to
7 an adult where they would be less prominent.

8 Q So the bruising that we see in this photograph
9 that's the handprints, that's hands?

10 A (Witness resumes the witness stand.)

11 It's either handprints or hand compression or
12 palm compression on to the upper part of the chest.
13 It's hard to say without actually having been there.
14 However, it is done with some type of manual
15 strangulation.

16 Q And the bruising here on either side, could
17 those have been caused by fingers?

18 A It's certainly possible.

19 Q And in your opinion, Dr. Cartie, could Child
20 have self-inflicted any of these injuries?

21 A There is no way he could have self-inflicted
22 these injuries.

23 Q Do you see kids who have recently had CPR
24 performed on them?

25 A I do.

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

255

1 Q Within a certain amount of time?

2 A I do. I have actually performed plenty of CPR
3 on children as well.

4 Q And how do you perform CPR?

5 A Generally for me in the hospital, in which I
6 have the luxury of having the child actually in a
7 stretcher or in a bed, I'm typically standing on the
8 right or the left side of the child and the force is
9 directed on to the breastbone, the sternum, and
10 provided in an upwards and downwards motion to
11 compress the heart and attempt to continue blood
12 flow to the organs.

13 Q Have you seen children who have come into the
14 emergency room who have had CPR performed on them by
15 people who are not trained in CPR?

16 A I have.

17 Q And have they suffered any injuries?

18 A Generally, the only injuries we see with CPR
19 performed, whether it be us or outside institutions,
20 is you can see small areas of bruising to the area
21 over the breastbone, as well as you can occasionally
22 see small areas of bruising to the spinal column
23 directly underneath where the force is applied.

24 Q And was there any bruising on Child chest
25 area?

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

256

1 A There was not.

2 Q Overall, Dr. Cartie, what is the long-term
3 impact of these injuries on Child [REDACTED]

4 A Child [REDACTED] had his intestines repaired primarily,
5 which means that the injured sections of intestines
6 were cut away to provide a nice smooth surface to
7 reattach them to themselves. And those were sutured
8 back together to provide one continuous tube as it
9 should be. Those were relocated in the abdomen in
10 an appropriate position and that, as far as I know,
11 has provided no significant ongoing issues with

12 Child [REDACTED]

13 The injury to his brain with regards to the
14 bleeding, it can provide long-term sequela, such as
15 cerebral palsy. It can cause brain damage such that
16 you are not able to utilize parts of your body
17 correctly with muscle strength or sensation. It can
18 cause learning disabilities. It can cause other
19 types of emotional and educational impact as well.

20 Q Dr. Cartie, did you write a letter, like, a to
21 who it may concern letter, for the record, for

22 Child [REDACTED]

23 A I did.

24 Q And do you do that in every case?

25 A I typically will provide for any child abuse or

RICHARD J. CARTIE - DIRECT BY MS. MCMAHON

257

1 child injury cases in which an ongoing law
2 enforcement or child protective services
3 investigation is ongoing at the request of the
4 investigating individuals, I will provide a summary
5 of my involvement in the case with the presenting
6 history, the presenting findings, the subsequent
7 medical diagnosis and subsequent impact to the
8 individual.

9 Q And, Dr. Cartie, on a scale of zero to ten,
10 zero being the least concern for you, ten being the
11 greatest concern, what was the scale of Child
12 injuries?

13 A I'm not sure I understand. As far as concern
14 for his well-being?

15 Q That's right.

16 A Child injuries were well above a five,
17 probably not quite to a ten as far as how
18 significant his injuries were as with a threat to
19 his well-being.

20 Q And had he not received medical attention when
21 he did, what would have happened?

22 A He would have died.

23 MS. MCMAHON: Beg the Court's indulgence.

24 THE COURT: Yes, ma'am.

25 (Pause.)

RICHARD J. CARTIE - CROSS BY MR. FLOYD

258

1 MS. MCMAHON: Those are all the questions I
2 have, Dr. Cartie. Please answer any that Mr. Floyd
3 have.

4 THE COURT: Cross.

5 MR. FLOYD: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 BY MR. FLOYD:

8 Q Dr. Cartie, when you were given a history to
9 base your opinions on and your opinion you gave and
10 so forth, you based that upon information that the
11 railing that the child supposedly got caught in was
12 so large that an adult could easily move his head in
13 and out; is that correct?

14 A That's correct.

15 Q Now, let's talk first about, and this is
16 State's Exhibit 18, this area right above the finger
17 that's in the photograph.

18 A Yes.

19 Q Are you sure that's not a birthmark?

20 A I can't tell you without a doubt that it's not
21 a birthmark.

22 Q So it could be a birthmark, couldn't it? It
23 may not be an indicator of injury at all; is that
24 correct?

25 A I would have to review the C.T. scan to see if

RICHARD J. CARTIE - CROSS BY MR. FLOYD

259

1 there was some underlying swelling over that area
2 which would be consistent with a bruise or an
3 impact.

4 Q And so all you have on the back, you have, what
5 about that little area down there toward the bottom?

6 A I'm not sure if I can say anything about what
7 that is or isn't. It's a small area of bruising of
8 unknown origin.

9 Q So you don't -- you can't relay anything in
10 this photograph for certainty with injury inflicted
11 by anyone?

12 A Because the child had a subdural hemorrhage,
13 the redness to the back of the skull would be
14 consistent with an impact injury to the skull.

15 Q But it would be consistent with a birthmark
16 also, wouldn't it?

17 A But the subdural hemorrhage would not. That's
18 correct.

19 Q And let's talk about a subdural hemorrhage.

20 Child made a good recovery under your care, didn't
21 he?

22 A Yes, he did.

23 Q In fact, he was released without any type of
24 restriction, wasn't he?

25 A I was not part of his discharge planning,

1 but...

2 Q Now, let's talk a little bit about the hematoma
3 to the head. You did not observe any type of
4 permanent injury to him as a result of that, did
5 you?

6 A No. When he was sent out to the pediatric
7 floor to continue his ongoing recovery, what I saw
8 at that time would not have necessarily been
9 indicative of what his ultimate outcome would have
10 been.

11 Q And, in fact, he was released -- there was no
12 surgical intervention required of that, was there?

13 A That's correct, there was not.

14 Q And he was released as fully recovered from
15 that, was he not?

16 A I believe that's the story I've been given.

17 Q And let's talk about the blood around the
18 spine. There was no surgical requirement of that?

19 A That's correct.

20 Q In fact, he was released as being fully
21 recovered from that situation also, wasn't he?

22 A As far as I'm aware, yes.

23 Q And as to the surgery to the intestine, you did
24 a good job with that too, didn't you?

25 A I was not the one that performed the surgery,

RICHARD J. CARTIE - CROSS BY MR. FLOYD

261

1 but I believe that the medical folks did an
2 excellent job.

3 Q And he was released without any problems with
4 that, wasn't he?

5 A Again, as far as I know, not knowing if he has
6 any, you know, dietary or eating restrictions or
7 problems at this point.

8 Q Now, do you know how many surgeries Child had
9 undergone before you saw him?

10 A In the hospital or as part of his --

11 Q As part of his history?

12 A -- history. By the time I had seen him, he had
13 had his perforated intestine, his ruptured jejunum
14 repaired. He had had invasive lines placed by us at
15 our institution, which some could count as surgical
16 procedures. He had had his testicle repaired.

17 Q I'm sorry, Doctor. I maybe did not ask the
18 question correctly. Before this incident, do you
19 know how many surgical procedures he had undergone?

20 A I'm looking to see if there's documentation of
21 each and every surgery in his history.

22 He had had at least the feeding tube placed,
23 that would have been a surgical procedure. And he'd
24 had at least one repair of his undescended
25 testicles. Beyond that, I would have to have

RICHARD J. CARTIE - CROSS BY MR. FLOYD

262

1 additional medical records to know for sure how much
2 other surgery he had had.

3 Q And can surgical procedures, particularly on a
4 child this young, can they diminish the integrity of
5 his system?

6 A It depends on the level of the surgery. It
7 depends on the severity of the surgery.

8 Q So for all you know, for example, he could have
9 -- the condition of his jejunum area may have been
10 that it would require a lesser impact than normal to
11 sever it?

12 A I don't know if I would be able to say that.

13 Q Now, were you aware of the history -- or were
14 you given any kind of history that the child had
15 fallen down some stairs?

16 A I believe that was one of the historical facts
17 that were provided at some point. There were a
18 number of different histories and different stories
19 related along the way with medical professionals.

20 Q And -- if the child had fallen and struck his
21 head on the corner of a stair, could that have
22 caused a subdural hematoma?

23 A It depends on the height of the fall, depends
24 on the height of the stairs.

25 Q And if the child were to get his head lodged

RICHARD J. CARTIE - CROSS BY MR. FLOYD

263

1 between an area where there were edges and hard
2 surfaces, could that have caused abrasions to his
3 head, neck area?

4 A He did not have abrasions. He had contusions.
5 There was no skin interruption at all that would
6 suggest that he had had his head entrapped and was
7 struggling against a surface such as wood that would
8 have caused abrasions.

9 Q In his struggle, could he have not struck those
10 items and caused bruising?

11 A Not to the extent that we saw, no.

12 Q Could it have caused bruising, though?

13 A It could cause some bruising if he had hit his
14 head.

15 Q Or if when he fell, he struck his -- the area
16 around his ear or his neck, could that have caused
17 bruising?

18 A It could, yes.

19 Q Now, you mentioned that there was some possible
20 injury to the pancreas; is that correct?

21 A That's correct.

22 Q That resolved itself without surgery, didn't
23 it?

24 A That is correct.

25 Q And he was released fully recovered in that

1 area?

2 A As far as I know, that's correct.

3 Q Now, were you aware of the history given of
4 aggressive CPR with fists?

5 A I was told of that history that it had been
6 provided at least a couple of days later after the
7 discovery of the perforated jejunum.

8 Q Now, you say you have seen CPR injuries,
9 bruising?

10 A Yeah.

11 Q Even by professionals; is that correct?

12 A Yes, that's correct.

13 Q Now, if a child would be laying on a hard
14 surface and an adult applied pressure with his fist
15 with a striking blow as hard as he could to try to
16 get the child to breath again, that force would be
17 concentrated between the fist and the floor; is that
18 correct?

19 A That's correct.

20 Q It would have no way to dissipate, for example
21 if you kick somebody in the abdomen, you don't have
22 the corresponding pressure from something behind it,
23 do you?

24 A No.

25 Q So it would take less pressure if you came down

RICHARD J. CARTIE -- CROSS BY MR. FLOYD

265

1 hard and the infant was laying on a hard surface?

2 A That's not accurate to say. Since the force
3 that the -- the injury to the intestine is actually
4 the result of a sharp blow and the deceleration.
5 The jejunum is attached to the back of the abdominal
6 wall at that location and the force that's applied,
7 it provides a sheering force to the intestinal tube
8 at that location which causes it to be torn in half.

9 Q That would be the result of the pressure?

10 A No. That would be the result of the force
11 applied in a forward motion that suddenly strikes
12 the jejunum at that point of attachment. It's not a
13 pressure phenomenon, it's a force phenomenon.

14 Q Isn't force pressure?

15 A No, it's not.

16 Q What's the difference?

17 A Force is a motion. Pressure is a static
18 measurement.

19 Q Isn't pressure the impact of the force?

20 A Pressure is a static measurement of the force
21 applied to a fixed object.

22 Q And so the force, you admit that the fist can
23 produce enough force to sever the intestine; is that
24 correct?

25 A Yes, that's correct.

1 Q And you don't really know, you don't know the
2 history of his previous surgeries, so you don't
3 really know what the condition of his internal
4 organs were before this incident?

5 A His previous surgery on his abdomen was the
6 placement of the feeding tube which went into his
7 stomach, which did not impact his jejunum
8 whatsoever.

9 Q Then what surgery did he have at that time?

10 A Would have been a feeding tube placement.

11 Q Do you know whether or not it also was a result
12 of a surgical procedure?

13 A That's typically how feeding tubes are placed
14 as a result of a surgical procedure.

15 Q And what was the surgical procedure that
16 required the implementation of a feeding tube?

17 A It would have been done in one of two ways.
18 Either a scope would have been passed into his
19 belly, into his stomach from above, from down his
20 esophagus to look at the inside lining of his
21 stomach. And it would have actually -- you can
22 actually shine a light up through to the abdominal
23 wall. Then the surgeon takes and makes an incision
24 right at the site of that light to know exactly
25 where the stomach is and he incises into the abdomen

RICHARD J. CARTIE - CROSS BY MR. FLOYD

267

1 and into the stomach and places a feeding tube at
2 that point and looks at it from the other side.

3 The other way to do the procedure is to do it
4 without the scope and just do an incision into the
5 abdomen at the level you want to put the feeding
6 tube into place and a small incision is made. The
7 stomach wall is located. The stomach is cut into
8 and the feeding tube is placed and it is closed up
9 around it.

10 Q So he had some previous cutting around in that
11 area?

12 A In the abdomen wall and the front wall of the
13 stomach.

14 Q All right. Do you know whether or not there
15 were any other type of surgical procedures performed
16 on Child before you saw him before he got to the
17 Richland Memorial Hospital?

18 A Other than the surgeries on his testicle, there
19 was no other history provided of any surgical
20 procedures.

21 MR. FLOYD: Thank you. No further questions,
22 Your Honor.

23 THE COURT: Redirect.

24 *****

25 *****

1 REDIRECT EXAMINATION

2 BY MS. MCMAHON:

3 Q Dr. Cartie, in State's Exhibit Number 7, can
4 you point out where the feeding tube divot is?5 A The small incision, you can see actually the
6 edge of the incision right here at one end and it
7 goes to approximately the other end here. That
8 appears to be approximately three centimeters in
9 length and that scar represents where the feeding
10 tube was located.

11 Q And where would the shear intestines be?

12 A The stomach lies below the lower part of your
13 rib cage and into this area here. It lies just
14 under the abdominal wall, which is why the feeding
15 tube is able to be placed into the stomach very
16 easily by a surgeon.17 The intestines then travel -- the jejunum
18 travels across here and starts wrapping back around
19 and comes up behind the stomach itself and then
20 forms the small intestine and then the large
21 intestine. So the impact here would be directly
22 over the site of his jejunum in this area on the
23 back part of the abdomen behind the stomach.24 Q So how far away would, I'm going to call it,
25 the scar from the feeding tube would it be from

RICHARD J. CARTIE - REDIRECT BY MS. MCMAHON

269

1 Child intestines?

2 A It really would be nowheres (sic) near the rest
3 of his intestines.

4 Q And the force that was required to shear

5 Child intestines into, that -- it doesn't have to
6 be a first, does it?

7 A No.

8 Q It can be -- what else can it be?

9 A A foot, the toe of a shoe or a boot.

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

11 THE COURT: Yes, ma'am.

12 (Pause.)

13 BY MS. MCMAHON:

14 Q Dr. Cartie, one more question. Could it have
15 been inflicted by a stomping motion if the child was
16 laying on the floor?

17 A It's possible, but probably not as likely.

18 Q In your opinion, how would the child have to be
19 laying in order to get this type of injury?

20 A Most likely laying on his side to be struck
21 with a kick in the abdomen.

22 Q So he would have to be laying on his side with
23 his face facing a wall?

24 A He would have to be facing -- the stomach --
25 the abdomen would have to be facing the individual

RICHARD J. CARTIE - RECROSS BY MR. FLOYD

270

1 that is striking him.

2 Q So that would not be consistent with him laying
3 flat where someone's trying to perform CPR on him?

4 A That's correct.

5 MS. MCMAHON: No further questions, Your Honor.

6 THE COURT: Thank you.

7 Recross.

8 MR. FLOYD: Just a couple.

9 RECROSS-EXAMINATION

10 BY MR. FLOYD:

11 Q Dr. Cartie, how far away from the jejunum is
12 the scar?

13 A In order to get from the scar to the jejunum,
14 you would have to go through the abdomen through the
15 front wall of the stomach through the back wall of
16 the stomach and then the jejunum would be somewhere
17 in that area.

18 Q Less than two inches?

19 A That's difficult to say.

20 Q Less than three inches?

21 A It probably is in the neighborhood of, probably
22 in the neighborhood of a few inches, two to four
23 inches, given the child's size.

24 Q So not a great distance away, two to four
25 inches?

RICHARD J. CARTIE - RECROSS BY MR. FLOYD

271

1 A Correct.

2 Q And there's no way you can say whether or not
3 this blow was given while the child was on its side
4 as opposed to its back?

5 A There's no way I can say that for sure.

6 Q Okay. So you don't have an opinion, do you,
7 that you can say with reasonable medical certainty,
8 to say that this was a blow while the child was
9 laying on its side?

10 A No. The child could have been in an upright
11 position as well and been either punched or kick or
12 struck with some amount of force.

13 Q And he could have been laying on the floor?

14 A That's possible --

15 Q Isn't that true?

16 A That's possible, he could have been laying on
17 the floor somehow.

18 Q On his back?

19 A It's possible, but not as likely. Yes, it's
20 possible.

21 Q How can you say that the manner in which the
22 child was approached by the blow was more one way
23 than the other?

24 A The amount of force that's directed at the
25 child has to be directed in a straightforward

RICHARD J. CARTIE - RECROSS BY MR. FLOYD

272

1 manner. And in order to get the deceleration force
2 applied to the jejunum, typically that is a result
3 of not being pinned between something like a foot
4 and the ground. It's usually the result of just a
5 forceful blow. If somebody had been -- if this
6 child had been stomped on, I would expect to see
7 contusions or bruising to his back.

8 Q But you've ruled out he wasn't stomped on; is
9 that correct?

10 A I haven't ruled it out, but it certainly does
11 not fit with the clinical picture.

12 MR. FLOYD: Thank you.

13 I have no further questions, Your Honor.

14 THE COURT: Anything further of this witness?

15 MS. MCMAHON: No, Your Honor.

16 THE COURT: Thank you, Doctor. You may step
17 down.

18 Any further evidence from the State?

19 MR. WEDEKIND: At this point, the State would
20 rest, Your Honor.

21 THE COURT: Ladies and gentlemen, as I told you
22 at the outset of the trial, when the State rests, I
23 have to confer with the attorneys about some legal
24 matters. This typically takes about 20 minutes.

25 What I'm going to do is I'm going to find out

1 from them where we are in the process. It's 12
2 o'clock. I may let you go on to lunch, but I can't
3 do any of that with you in the courtroom. I need to
4 ask you to step back. I'll send word to you either
5 to come back in here and I'll send you to lunch or
6 that I'm going to ahead and do the 20 minute thing,
7 okay. Thank you.

8 (The jury retires to the jury room.)

9 **THE COURT:** Motions?

10 **MR. FLOYD:** Your Honor, at this time, the
11 defense would move for a directed verdict of
12 acquittal. It's our position that the State has
13 failed to establish either that the -- as the
14 statute requires, that there be permanent life
15 threatening injuries, as the evidence is consistent
16 that there are no permanent injuries as a result of
17 this.

18 And, Your Honor, in connection with this, I
19 would like to refer the Court to the indictment
20 itself in this matter. And according to the
21 indictment that Mr. Lucas is charged with is the
22 application of physical acts which cause permanent
23 damage to a two-year-old child's head, spine,
24 intestines and genitals causing life threatening
25 injuries. Therefore, according to the indictment,

1 the life threatening injuries are caused by the
2 permanent nature of the impacts.

3 Their own evidence clearly establishes that
4 there is no permanent injury and therefore the proof
5 offered in this case fails to satisfy the
6 requirements of the charge as charged in the
7 indictment and a directed verdict of acquittal would
8 be appropriate.

9 THE COURT: Well, great bodily injury under the
10 statute means bodily injury which creates a
11 substantial risk of death or which causes serious or
12 permanent disfigurement or protracted loss or
13 impairment of the function of any bodily member or
14 organ.

15 There is evidence in the record that the child
16 suffered great bodily injury as defined under the
17 statute. There was evidence related to a
18 substantial risk of death. There also is evidence
19 of permanent disfigurement specifically to the
20 intestines. They had to remove part of his
21 intestines, if I heard the doctor correctly, and
22 that is a permanent damage.

23 With regard to the wording of the indictment, I
24 mean it could have been worded differently. And we
25 can sit here and argue about which words modify

1 which sentences, but I think that -- I'm sorry --
2 which words modify other words, I apologize, in the
3 sentences, but I'm confident that the indictment is
4 sufficient to put the defendant on notice of what
5 he's being charged with and to grant the Court the
6 ability to go forward. The motion's respectfully
7 denied.

8 **MR. FLOYD:** Thank you, Your Honor.

9 **THE COURT:** Mr. Lucas, I have to ask you some
10 questions now. And once again, this is one of those
11 things where I have to have your responses under
12 oath. You remember that I placed you under oath
13 earlier in the week?

14 **DEFENDANT LUCAS:** Yes, sir.

15 **THE COURT:** You're still under oath; you
16 understand that?

17 **DEFENDANT LUCAS:** Yes, sir.

18 **THE COURT:** We've reached the stage of the
19 trial where the State has rested, that means they've
20 put up their case in chief. And the next thing that
21 we would do is give to your side, to the defense,
22 the opportunity to put up evidence for the jury to
23 consider. You understand where we are?

24 (Mr. Floyd confers with the defendant.)

25 **DEFENDANT LUCAS:** Yes, sir.

1 THE COURT: You understand where we are in the
2 trial?

3 DEFENDANT: Yes, sir.

4 THE COURT: The next thing that would happen,
5 if you want to put up evidence or have somebody
6 testify on your behalf or you testify, is that I
7 would give your side that chance. It's your turn.
8 You understand?

9 DEFENDANT LUCAS: Yes, sir.

10 THE COURT: Nobody can make you put up any
11 evidence, nobody can make you testify; you
12 understand that?

13 DEFENDANT LUCAS: Yes, sir.

14 THE COURT: You are presumed to be innocent.
15 And the State has the whole burden of proof and the
16 State has to prove that you're guilty beyond a
17 reasonable doubt. Do you understand that?

18 DEFENDANT LUCAS: Yes, sir.

19 THE COURT: You do not have to prove anything
20 at all; you understand that?

21 DEFENDANT LUCAS: Yes, sir.

22 THE COURT: All right. But if you want to, you
23 can have your lawyer call witnesses to testify on
24 your behalf; you understand?

25 DEFENDANT LUCAS: Yes, sir.

1 **THE COURT:** And regardless of whether you call
2 other people to testify or not, if you want to
3 testify, you can testify; you understand that?

4 **DEFENDANT LUCAS:** Yes, sir.

5 **THE COURT:** But nobody can make you testify.
6 You have an absolute right to remain silent. And if
7 you choose not to testify, I'm going to tell that
8 jury that they cannot hold your silence against you
9 in any way at all; you understand?

10 **DEFENDANT LUCAS:** Yes, sir.

11 **THE COURT:** I'm going to tell them that they're
12 not to discuss -- if you choose not to testify,
13 they're not to discuss that in the jury room, that
14 it's not to enter their mind in making the decision
15 of whether you're guilty or not guilty; you
16 understand?

17 **DEFENDANT LUCAS:** Yes, sir.

18 **THE COURT:** Does he have a prior criminal
19 record?

20 **MR. WEDEKIND:** No, sir.

21 **THE COURT:** Has he put up any evidence yet?

22 **MR. WEDEKIND:** No, sir.

23 **THE COURT:** Now, Mr. Lucas, some people think
24 this is important, some people don't think it's
25 important. It varies from lawyer to lawyer and

1 person to person. But if your side does not put up
2 any evidence at all, that is, if neither you nor
3 anybody on your behalf testifies or puts any
4 exhibits in, then your lawyer gets to make the last
5 argument to the jury, otherwise the State gets to
6 make the last argument to the jury; you understand?

7 (Mr. Floyd confers with the defendant.)

8 THE COURT: You understand, Mr. Lucas?

9 DEFENDANT LUCAS: Yes, sir.

10 THE COURT: All right. Now, whatever your
11 decision is, it has to be your decision and yours
12 alone; you understand that?

13 DEFENDANT LUCAS: Yes, sir.

14 THE COURT: Whether you testify or not testify,
15 that's up to you. It's not a decision for your
16 lawyer to make or any family member or friend or
17 anybody else.

18 Now, it's fine with you to -- it's fine for you
19 to consult with them, talk with them about it. And
20 anybody whose opinion you value on important
21 decisions, I encourage you to talk to them about it.
22 But, ultimately, it's your decision to make; you
23 understand?

24 DEFENDANT LUCAS: Yes, sir.

25 THE COURT: Have you understood everything I've

1 been over with you so far?

2 DEFENDANT LUCAS: Yes, sir.

3 THE COURT: Any question about any of it?

4 DEFENDANT LUCAS: Not at this time.

5 THE COURT: Okay. Well, whatever decision
6 you've made, you can change your mind until such
7 time as you actually come up here to testify if you
8 testify; you understand?

9 DEFENDANT LUCAS: Yes, sir.

10 THE COURT: Mr. Floyd, do you need a minute to
11 talk to him?

12 MR. FLOYD: Yes, Your Honor.

13 THE COURT: All right. I'm going to make a
14 finding right now, Mr. Lucas, that your decision,
15 whatever it is about testifying or not testifying,
16 is your own decision, made of your own free will;
17 that you understand you have a right to testify or
18 not to testify; you understand that nobody can force
19 you to testify; you understand that if you do not
20 testify, I'm going to tell that jury they cannot
21 hold your silence against you in any way at all; you
22 understand that if your side presents no evidence,
23 that your lawyer gets to make the last argument to
24 the jury, but if your side does put up evidence, the
25 State makes the last argument to the jury.

1 And I'm going to find that your decision to
2 testify or not testify is free, knowing, voluntary
3 and intelligent. So if anybody tries to improperly
4 influence you, you have to let me know that right
5 away, okay?

6 **DEFENDANT LUCAS:** Yes, sir.

7 **THE COURT:** Thank you. We're at ease.

8 (Brief recess.)

9 **MR. FLOYD:** Your Honor, after discussing the
10 matter with Mr. Lucas and his family, the defense
11 will not be putting up any testimony in this case.

12 **THE COURT:** Okay. I think one of the findings
13 I failed to announce specifically while ago, even
14 though I think it was implicit in my ruling, was I
15 find that Mr. Lucas understands that the decision
16 about whether he testifies or not is his decision to
17 make and his alone.

18 Mr. Lucas, your lawyer tells me you do not wish
19 to testify or offer any evidence; is that right?

20 **DEFENDANT LUCAS:** Yes, sir, that's correct.

21 **THE COURT:** Is that your own decision, made of
22 your own free will?

23 **DEFENDANT LUCAS:** Yes, sir, that's correct.

24 **THE COURT:** Okay. Bring the jury in.

25 (The jury returns to the courtroom.)

1 THE COURT: Ladies and gentlemen, I've been
2 advised by the attorneys that you now have all of
3 the evidence that you're going to have to decide the
4 case. So I need to give you an instruction and I
5 invite your close attention to this.

6 Ladies and gentlemen, I need to emphasize to
7 you that the fact that Mr. Lucas elected not to
8 testify is not a factor to be considered by you in
9 any way in your deliberations and in your
10 consideration on the question of whether he is
11 guilty or not guilty. The decision not to testify
12 must not be considered by you in any manner
13 whatsoever against Mr. Lucas.

14 An accused has a constitutional right to remain
15 silent and the assertion of that right cannot and
16 must not be considered by you in any manner
17 whatsoever against the defendant.

18 Under the oath you've taken, you are to reach
19 no inference and you are to draw no conclusion
20 whatsoever from the fact that Mr. Lucas elected not
21 to testify. His decision not to testify should not
22 be discussed by you in the jury room during your
23 deliberations. It should not enter your mind in
24 making your decision on whether Mr. Lucas is guilty
25 or not guilty.

1 The State has the entire burden of proof and
2 has to prove the guilt of the defendant beyond a
3 reasonable doubt and an accused has no obligation to
4 prove anything at all.

5 Now, folks, where we are in the trial is that
6 you're going to hear, after the lunch break, the
7 closing arguments of the attorneys and then the part
8 where I tell you the law, that's called the charge.
9 Typically, what I do is I print out what I propose
10 to tell you about the law, give that to the
11 attorneys and let them review it.

12 And when we're up against a lunch break, I
13 usually do that, give it to them. And it's one of
14 those things where you either wait back there or we
15 have a little bit longer lunch break. So what I'm
16 going to do is give you a little bit longer lunch
17 break today and ask you to be back here at two
18 o'clock.

19 Now, I've got another matter completely
20 unrelated to this case that I need to do a guilty
21 plea on, so I'm going to print this out for these
22 attorneys in this case, give it to them and then
23 I'll meet back with them before you come back and
24 discuss anything they want to discuss with me about
25 the law. And I've also got to allow a little bit of

1 time to do that other guilty plea.

2 So if you would be back in the jury room,
3 please, at two o'clock. Shortly thereafter, you
4 should -- I don't know of anything that would delay
5 us right now, if I did, I'd tell you a different
6 time, two o'clock, and you'll get the closing
7 arguments from the attorneys and then I'll tell you
8 the law. If I leave it like it is right now, the
9 law is going to take me 24 minutes to explain to
10 you.

11 All right. You're on your own for lunch.
12 Please be back in the jury room at two o'clock.
13 Don't discuss the case.

14 (The jury was excused for lunch.)

15 **THE COURT:** Is child defined in the statute?

16 **MR. WEDEKIND:** I don't believe so, sir, but we
17 did emphasize that he was two years of age or
18 thereabouts.

19 (Pause.)

20 **MR. WEDEKIND:** Subsection (C) just defines
21 great bodily injury, but it doesn't define child.

22 (Pause.)

23 **THE COURT:** All right. If the attorneys will
24 stay and get the copy of the charge from my law
25 clerk and just be back here about ten minutes till

1 2:00 and we'll talk about it.

2 Mr. Lucas, make sure you're back here by that
3 time, 1:50, okay?

4 DEFENDANT LUCAS: Yes, sir.

5 THE COURT: Y'all be careful as you leave not
6 to have any contact with the jurors. Thank you.

7 (Whereupon, there was a luncheon recess.)

8 THE COURT: What do you have, Mr. Floyd?

9 MR. FLOYD: Your Honor, as to your definition
10 of reasonable doubt, I recognize that it is an
11 accepted definition. We would also ask that you
12 also add in there the other definition commonly used
13 about hesitate to act.

14 THE COURT: I don't restrict lawyers from
15 arguing that definition, it's there. I've often
16 said that definition, while I realize that people a
17 lot smarter than me wrote it, I don't understand it
18 and I don't charge it because I don't understand it.
19 And I -- this is from a more recent case and I think
20 it's the one that I should use.

21 So I note your request to charge that a
22 reasonable doubt is the kind of doubt that would
23 cause a reasonable person to hesitate to act, but I
24 respectfully decline to charge that language.

25 MR. FLOYD: Thank you, Your Honor.

1 THE COURT: You can argue it to the jury,
2 though, because it's good law.

3 MR. FLOYD: Okay. Thank you.

4 THE COURT: I know all kinds of people that I
5 think are reasonable that hesitate to act over all
6 kinds of things, that's why it doesn't make sense to
7 me.

8 All right. We're at ease until we've got all
9 the jury.

10 (Brief recess.)

11 THE COURT: State ready for the jury?

12 MR. WEDEKIND: State's ready.

13 THE COURT: Defense?

14 MR. FLOYD: Defense is ready.

15 THE COURT: Bring them in.

16 (The jury returns to the courtroom.)

17 THE COURT: All right. Ladies and gentlemen,
18 as I told you before the break, there are two stages
19 that remain, the closing arguments and the charge.

20 Now, in these closing arguments, the attorneys
21 are permitted to use the art of advocacy to attempt
22 to get you to see things as they would like you to
23 see them on behalf of their respective positions.
24 It doesn't change the burden of proof. The burden
25 of proof remains with the State throughout the

1 trial.

2 The way this will work is that the State will
3 make the first closing argument and then the defense
4 makes the last closing argument. Now, I've never
5 limited attorneys in how long they talk. So what I
6 do is play it by ear and sometimes I take a break
7 between the closing arguments, sometimes I don't,
8 but I always take a brief break between the time
9 they finish and when I start because I have to get
10 set up and usually I have to print something out
11 before we get started with my part. So I invite
12 your close attention.

13 Mr. Wedekind, you're recognized for your
14 closing argument.

15 CLOSING ARGUMENTS

16 MR. WEDEKIND: Thank you, Your Honor.

17 Ladies and gentlemen, as you've heard the Judge
18 say, he is the judge of the law and you are the
19 judges of the facts in this case. And it's not been
20 a terribly long case, but it's going to be a very
21 important case because of the importance of what
22 happened to Child [REDACTED] and what's going to happen
23 to Mr. Jeffrey Lucas.

24 You've all been good jurors and paid strict
25 attention. We've been watching you. Everybody's

1 been paying attention in this courtroom and doing
2 their job, but there comes a time when a verdict has
3 to be rendered and we're near that point.

4 And as the Judge told you, he's the judge of
5 the law; you're the judge of the facts. And if I
6 say anything different than what he tells you from
7 up there on the bench, you listen to him not to me.
8 But what I'm going to do is just briefly go over the
9 law and what we have to deal with in this case and
10 it's pretty straightforward.

11 The infliction or allowing the infliction of
12 great bodily injury upon a child, that's the statute
13 in itself as to what we're dealing with today. It
14 is unlawful to inflict great bodily injury upon a
15 child.

16 Now, what's great bodily injury? For the
17 purpose of this section, a great bodily injury means
18 bodily injury which creates a substantial risk of
19 death or which causes serious or permanent
20 disfigurement or protracted loss or impairment of
21 the function of any bodily member or organ.

22 And, ladies and gentlemen, the three things we
23 have to prove in this case are that man, Jeffrey
24 Lucas, caused harm to the child. Child (sic)
25 was a child. You heard he was two years of age,

1 that's a child. And that there was some kind of
2 great injury that occurred to him, something that
3 led to a scarring, like a tear to your intestine, or
4 he was at death's door. And you heard from both
5 doctors that had he not been treated by them, that
6 within a matter of minutes, minutes, ladies and
7 gentlemen, but certainly hours, if they had not
8 attended to those child's injuries that day, he
9 would be dead.

10 So then in the conclusion as far as the law is
11 concerned, that's what we've shown you. That man
12 right there is the cause of those child's injuries,
13 he was a child and there was great bodily injury
14 that could have resulted in death.

15 All you have to do, ladies and gentlemen, is
16 look at those pictures. Brutality, savage and, even
17 in the words of Mr. Floyd, heinous. This was a
18 heinous crime. It doesn't get much worse than what
19 happened, than what Jeffrey Lucas did to little

20 Child [REDACTED]

21 A man, a full-sized, grown man taking out his
22 anger for whatever reason, and I don't care what the
23 reason was, he did it, ladies and gentlemen, and
24 when that person does that, knocks the stuffings out
25 of a little child who can't even call for help, run

1 away, get up and walk away, even have difficulty
2 crawling away from the brutality that was inflicted
3 upon him, that's a heinous crime.

4 But I want you, when we go through this
5 evidence and when you get back in your jury room, I
6 want you to go back and ask yourself this question
7 over and over, ask yourself what kind of man does it
8 take to beat a little child so severely that you
9 cause swelling in his little brain, beat a child so
10 severely?

11 What kind of man does it take that allows --
12 that needs a collar to be put around his neck so he
13 doesn't cause further injury to himself?

14 What kind of man does it take that's going to
15 put a bruise on the back of his head that leaves
16 that brain swelling, that cuffs his ears from a
17 savage beating that leads to swelling, petechia, the
18 battle bruising that you see right there, ladies and
19 gentlemen, strangulation that you heard from the
20 doctor, putting two hands around a neck, pressing so
21 hard that it causes bruising to the upper part of
22 his chest because it's a little neck, ladies and
23 gentlemen, it's a little child, what kind of man
24 does it take?

25 What kind of man does it take that inflicts

1 savage kicks or such brutal punches to the abdomen
2 that you see depicted in this photograph that leads
3 not only just to beating that kid, leaving the
4 bruises, but it's so violent, so direct, it wasn't
5 with any kind of CPR where you put the palms of your
6 hand and press and press, and usually that's to the
7 chest not to the abdomen or the lower part below the
8 belly button, it had to be something so forceful, so
9 rapid, so quick that it took those intestines and
10 pressed them up against his spinal column cutting
11 the intestines just like a quick knife, like that,
12 it wasn't some, oh, I'm going to help you, or a kick
13 tearing his intestines in half, leaving a bruise on
14 the back of his spine that swole (sic) up and could
15 have threatened his life by cutting off the vital
16 signals from his brain to the rest of his organs?
17 What kind of man does it take to do that, ladies and
18 gentlemen?

19 What kind of man does it with such violence,
20 such incredible force that that little body that the
21 doctor said he's never seen this type of injury
22 before, he's heard of it, but never seen it causing
23 the scrotum, even though it's in a weakened
24 condition, and this child's been a scraper since the
25 day he was born. He was premature, but he's fought

1 for everyday of his existence on this earth and no
2 child should have to be subjected to have to go
3 through that.

4 You've heard from the experts. Two doctors
5 said that there was permanent scarring on the
6 internal organs of that child. You've heard from
7 the doctors that these injuries were life
8 threatening.

9 And you've heard from the doctors that the
10 injuries that he had on his neck were more
11 consistent with hands being applied around that
12 child, strangling while he was choking, causing
13 damage and swelling that he had to have tubes
14 inserted in his throat to allow him to breathe.

15 Now, I don't have any doubt that after he
16 inflicted that injury on the child, he realized that
17 he was going to be in big trouble and he had to come
18 up with a story. He had to do something. But use
19 your God given common sense, ladies and gentlemen,
20 and ask yourself, does the stories that he gave to
21 Detective Pritchard fit with the facts?

22 Because he was in a jam and he had to ask
23 himself, how am I going to get out of this? Oh, the
24 kid was left alone. I went to the mailbox, just a
25 couple seconds, and I heard a thug and then when I

1 looked back, I saw him hanging there. So I ran up
2 and lifted him up and he wasn't breathing right, so
3 I had to save him and I did CPR. And then I had
4 went down the street to get to a telephone because I
5 didn't have one.

6 Well, think about that, ladies and gentlemen.
7 You had a little boy who wasn't breathing, I could
8 buy into the maybe doing the CPR stuff, could even
9 believe a little of that, but wouldn't you have got
10 in the car and driven the child yourself to the
11 hospital or the nearest ambulance service or
12 somewhere, a fire station to get help?

13 Would you leave the kid behind, go down and
14 make a phone call to the mama who's at work? Does
15 that really make sense to you or is that just
16 somebody coming up on the fly with a quick, oh,
17 they're on to me, I've got to come up with a story?
18 Because that's what happens when you tell a lie,
19 ladies and gentlemen.

20 There's an old saying that my mom used to tell
21 me and it goes, There's many paths to a lie, but
22 there's only one way to the truth.

23 What I think she meant by that is, if you tell
24 a lie, people are going to poke holes in it and
25 because it's not the truth, it's always going to be

1 shifting. There's going to be a different way to
2 look at it and a different way to get there.

3 But if you're honest and you're actually
4 telling the truth, it never changes because that's
5 the way it really happened. You don't have to get
6 up and make a second statement, and you'll have it
7 when you go back there, you'll have these statements
8 of the defendant, where he says, Oh, yeah, I lied
9 about that because I thought I was going to get into
10 trouble.

11 Well, if he admitted that in the second
12 statement about the first statement, maybe he's just
13 lying all around, maybe it kind of follows with the
14 actual evidence that we have in this case, maybe he
15 just got frustrated with that kid, strangled him,
16 threw him down, kicked him, caused those injuries
17 and then started to regret what he did when he
18 realized the kid wasn't moving. That's why we're
19 here today. But you also heard from the doctors
20 about some of these injuries and how they would have
21 occurred.

22 You heard the statement from Detective
23 Pritchard that this (indicating) was the mailbox
24 that he went to, that's the porch, that's a distance
25 of about 30 yards and it took him less than 30

1 seconds to walk from that porch to that mailbox, but
2 this is just the first story.

3 He hears that thump and he's blocked by this
4 tree, but by the time he gets somewhere back here,
5 he sees the child hanging from that railing right
6 there and comes up to assist him.

7 But the devil's in the details, ladies and
8 gentlemen, because you see on the ear, there's
9 swelling and there's bruising, which you might buy
10 into that the head was caught there until you check
11 out the handrail and realize that an adult man's
12 head can come in and out with no problem. How is a
13 little kid that's two years old head going to get
14 stuck in there?

15 But, okay, even if you want to give that
16 benefit of the doubt to him, why aren't there
17 abrasions there? You heard the doctor, Cartie, say
18 there was bruising, which is consistent with a sock
19 or cuff, whacking the kid up side the head, but
20 there's no scraping. And a child, you can bet, if
21 you had your head stuck in there, you'd be fighting
22 to get free. There would be some kind of splinters.
23 There would be some kind of abrasion.

24 The doctors said no way, no way that that could
25 have happened, there was no abrasion. There was

1 contusion with a smack and a cuff, but there was no
2 scraping. There was no surface blood that you would
3 expect from the friction of the -- of the pain that
4 you would have suffered to do that.

5 Also, when you look in these photographs, it
6 doesn't jive. If he described the child laying down
7 the stairs with his head trapped in there and a
8 little head like that, the point of contact that you
9 would see with the handrail would be right here on
10 this one. The head would have been the point of
11 contact on the upper side of the handrail.

12 The devil's in the details, ladies and
13 gentlemen. You might see the focal point be right
14 here, but that little kid's head to get -- even
15 attempt to get any kind of wedging effect in there,
16 it would be on the top of the head not the sides,
17 and maybe here, but not here behind this ear. And,
18 ladies and gentlemen, there would have been
19 abrasions not just those contusions.

20 And you can see in this photograph, Detective
21 Pritchard has no problem getting his head back and
22 forth. Probably not his best side to look at, but
23 you can see that's plenty wide.

24 But, also, the bruising on the child's chest,
25 look at that. When you look on those photographs,

1 ladies and gentlemen, pay strict attention. The
2 bruise is mostly on this side of his chest not this
3 side. And this is the point of contact that you
4 would have expected with this step right there if
5 that's where the child was hanging. That's the
6 result of his actions on the 24th of May 2006.

7 Why he did that, I don't care, just if he did
8 it, ladies and gentlemen, that's the sole question
9 that you're dealing with. And the one answer, how
10 you choose to define that question I ask you to ask
11 when you get back in that jury room is what kind of
12 man does it take to do this? An even kind of lower
13 man that once he's caught is going to lie about it,
14 that's about the only thing that's lower is when
15 you're caught, you lie about it.

16 But the only answer you have to do, the only
17 label that you have to give to somebody what kind of
18 man that is, that's a simple one, all you got to do
19 is answer one word and that's guilty. Thank you,
20 ladies and gentlemen.

21 **THE COURT:** Thank you, Mr. Wedekind.

22 Mr. Floyd, you're recognized for your closing
23 argument.

24 **MR. FLOYD:** Thank you, Your Honor.

25 Mr. Foreman and ladies and gentlemen of the

1 jury, before I get into my argument with you, I'd
2 like to thank you once again for being here. This
3 is the most important day in the life of Jeffrey
4 Lucas. And the decision that you make about him,
5 well it's going to affect him for a long time. And
6 we appreciate your close attention that you've
7 given.

8 Now, I'm going to tell you something and it's
9 something I've already told you. It's not that I
10 think you forgot it, it's just that it's so
11 important because it goes to what you, the jury,
12 actually decide.

13 Remember this, Jeff Lucas has the same rights
14 each of us have. One of those most important rights
15 is what we call the presumption of innocence. So
16 when you look at Jeff Lucas, you look at him now
17 just like you did at the beginning of this trial,
18 you must say in your heart and in your mind, Jeff
19 Lucas is innocent. And Jeff Lucas remains innocent
20 unless the State proves his guilt to each one of
21 your satisfactions beyond a reasonable doubt.

22 Now, what do we mean by that? Some people
23 define reasonable doubt as that doubt which would
24 cause a reasonable person to hesitate to act. That
25 doubt would cause a reasonable person to hesitate to

1 act.

2 So if you can somehow take all of this evidence
3 that you've heard here today and yesterday and put
4 it in the shape of this piece of paper and because
5 of one piece of that evidence or the lack of one
6 piece of evidence, you would hesitate before you
7 would vote to brand Jeff Lucas a criminal for this
8 act, for your obligation as a juror is to return a
9 verdict of not guilty even if other evidence in the
10 case makes you suspicious of the guilt.

11 Because when you vote guilty or not guilty,
12 you're not voting on whether or not you think he did
13 this. What you're voting on is, does the evidence
14 presented to me prove the guilt of Jeff Lucas beyond
15 a reasonable doubt?

16 Now, let's talk about the evidence in this
17 case. Remember when I made the opening statement to
18 you, I suggested to you that the State's case is
19 based on speculation and I think the evidence bore
20 that out.

21 You heard from what they call experts. The
22 Judge has charged you about experts. And our law
23 recognizes that an expert can come into court and
24 give you an opinion on something.

25 But what the law says is that you can either

1 accept that opinion in full, reject it in full,
2 accept it in part, reject it in part, it's entirely
3 up to you. You're the finders of the facts and
4 you're not required to just accept something because
5 a, quote, expert says it, because I think you
6 probably picked up on the fact that those experts
7 kind of say what you want them to say in some
8 aspects.

9 Now, why do I say that? You remember we had
10 two experts, one was a Dr. Luberoff. Now, she's the
11 one that's the child abuse expert. She's the expert
12 on child abuse. You also heard Dr. Cartie, who's
13 the treating physician, pediatric doctor.

14 You remember when asked whether or not the
15 injuries to the neck could be caused by the head
16 getting caught in the railing if the railing was not
17 the one that they were told it was so big that an
18 adult's head could fit through it, Dr. Luberoff had
19 to admit, yeah, it could have happened.

20 So they get Dr. Cartie up there to say, oh, no,
21 you should ignore what Dr. Luberoff says, although
22 she's the expert. It's got to be a strangulation
23 injury, in direct contravention what Dr. Luberoff
24 told us yesterday.

25 And then he gets up there and says, oh, this is

1 a traumatic injury on the back of his head.
2 Remember that? Of course, once it's brought to his
3 attention, and we already knew this because Dr.
4 Luberoff's already told us this, couldn't that be a
5 birthmark? Oh, well, yeah, yeah, it could. It
6 could be a birthmark.

7 And what else? This, that's nothing. That's
8 nothing to do with this case.

9 Now, let me ask you this. If this was a
10 strangulation injury, if Jeffrey Lucas had of got up
11 there and tried to demonstrate to you, I was
12 strangling him, why is there no bruising on the back
13 of the neck? Huh? Why is there no bruising on the
14 back of the neck, because there had to be if it was
15 strangling, wouldn't it? So you see, what you've
16 got is a lot of speculation.

17 What else did you hear? Did you hear them say
18 one thing, but then when confronted, backup. Oh,
19 this is a serious, life threatening injury,
20 concussion, blood on the brain. Oh, no, it didn't
21 require surgery, no. He recovered. There wasn't
22 anything wrong. Same with the pancreas, same with
23 the liver.

24 You know, these are terrible injuries. I'm not
25 going to stand up here and argue they're not. I'm

1 not going to argue at all. I'm not going to stand
2 up here and argue to you that Jeff Lucas should not
3 have left him alone for whatever period of time he
4 left him alone.

5 But, you know, he's not on trial for being
6 neglectful. He's not on trial for not using his
7 best judgment in connection with caring for this
8 child. What he is accused of, what he stands before
9 you to be tried of is that he did intentionally,
10 knowingly inflict this injury on Child

11 Now, what evidence have they given us? Let's
12 talk about what evidence they haven't given us. Did
13 you maybe get a little bit curious about why we
14 didn't hear from some people here?

15 Number one, what was Child condition before
16 May 24th of 2006, which is the day this has
17 occurred? We know that he had had surgery some
18 period of time within a matter of days before this
19 incident. Was there any bruising from that?

20 We know he had some surgeries before that. We
21 don't know when. We don't know what surgeries he
22 had. We only know that there was a feeding tube
23 placed in him and that scar was there.

24 What surgeries did he have? What impact could
25 those surgeries have had on his internal organs?

1 What else didn't we hear about? What was his
2 condition when the EMS arrived? What treatment did
3 the EMS people give him? Did they put some IVs in
4 him? Did they do some CPR on him? Did they do some
5 treatment on him? What would have been the impact
6 of that on Child Did anybody tell us that?
7 Nobody didn't tell us anything about that, did they?

8 Then he went to the Lexington Medical Center.
9 What did they do to him there? What was his
10 condition there? Did that have any impact?

11 Because you see, you know, the defense has no
12 obligation to give you any evidence whatsoever. The
13 burden of proof is entirely on the State. And the
14 State must remove all of these doubts out of your
15 mind through the presentation of evidence. And if
16 they fail to remove those doubts from your mind,
17 well, then your obligation as a juror is to return a
18 verdict of not guilty even if you're suspicious of
19 the guilt because the State must prove you the guilt
20 beyond a reasonable doubt.

21 Now, there's a lot of talk in here about
22 permanent injury. By the way, when I finish
23 speaking with you, and I know he's already told you
24 about it, Judge Keesley is going to instruct you on
25 the law and I ask you to listen carefully to it.

1 There's talk in the law of a permanent injury,
2 permanent loss of use of an organ -- of use of an
3 organ. And we heard doctors say those words, but
4 then when confronted on cross-examination, they all
5 had to back up. And they all had to admit, well,
6 no, there's no -- nothing wrong from that injury to
7 the head. There's nothing wrong with him from that
8 injury to the spine. There's nothing wrong with him
9 from that injury to the intestine. There's nothing
10 wrong with him from the injury to the pancreas.

11 I mean, I think we can all be thankful and
12 grateful that Child recovered so well.

13 And what's important, though, is that the law,
14 in order for Jeffery to be guilty, requires that a
15 child be placed in substantial risk of death or
16 permanent loss of use of some organ, and that
17 evidence just doesn't establish it.

18 The indictment, that's the charging paper, the
19 Judge will read it to you again. What the State
20 argues is that there were physical acts that's
21 caused permanent damage to a two-year-old child's
22 head, spine, intestines and genitals causing life
23 threatening injuries.

24 That's what they're saying, what they're
25 charging him with, they're alleging, that this

1 incident created permanent injuries that became life
2 threatening, but you heard the experts, what did
3 they have to admit? None of these injuries are
4 permanent. None of these injuries are permanent.

5 Now, question, and listen carefully to the
6 Judge on this, it is not enough that Child
7 was injured while in the care of Jeffrey Lucas,
8 that's not a crime. It's only a crime if the
9 evidence proves to you beyond a reasonable doubt
10 that Jeffrey Lucas intentionally, with criminal
11 intent in his heart, knowingly and purposefully
12 inflicted these injuries.

13 What evidence do you have on that point other
14 than the speculation we've been discussing? Even
15 Dr. Luberoff had to admit, yes, if you did
16 aggressive CPR with your fist, that could generate
17 enough force to sever the jejunum. He admitted
18 that.

19 Now, you have the statements Mr. Lucas gave.
20 He didn't have a lawyer. Shortly after this
21 happened -- and by the way, how did he act shortly
22 after this happened? He called the mama. He was
23 concerned and went to the hospital with her. He was
24 concerned about Child told the officer, I need to
25 go to the hospital they're moving him. I need to

1 go. I need to go.

2 A concerned person who loved the child and he
3 cared for his mama, also. Does that sound like
4 someone?

5 I don't know what their theory is, that he
6 strangled him and threw him against the wall, that
7 he strangled him and he kicked him, stomped him,
8 said he got all of these different scenarios because
9 they -- it's all speculation. It's all speculation.
10 How can you not help but hesitate when it's all
11 speculation?

12 I'm going to shut up and sit down now. I see
13 some pressing sighs of relief because I've been up
14 here talking for a long time and I apologize for
15 that. But you see the way our system works, I've
16 got to stand up here and try to cover every question
17 you've got in your mind and I never can, so I just
18 have to keep talking and try to figure it out.

19 I wish the system were that if you had a
20 question that I had to cover, that you can just ask
21 me, you know, Wayne, what about this or what about
22 that, and I could reply to it, but it doesn't allow
23 that. So I apologize if I've been up here talking
24 longer than you think I should have.

25 But you see it's the most important day in the

1 life of Jeffrey Lucas. This is a terrible crime
2 with which he has been charged.

3 All we can ask is that if some of you have
4 questions that I haven't answered and you get back
5 in that jury room and discuss it among yourselves
6 and try to figure out how we might have replied to
7 those questions, just remember these things, the
8 State has the burden of proof that the injuries
9 suffered by Child [REDACTED] were the intentional and
10 knowing, evil, criminal act of Jeffrey Lucas.

11 But if you -- everyone wants to be sympathetic
12 for this young child, I don't blame you for that at
13 all. It's a fabulous young man. We all have
14 sympathy for a child, particularly one that's
15 disadvantaged because he's got cerebral palsy, he's
16 disadvantaged in that way, so we're all sympathetic.
17 And injuries to a child are terrible. They tug at
18 our heart.

19 But what we can't let is that tug at our heart
20 blind us to what our job is here today and that's to
21 look at this evidence with a cold, hard stare and
22 determine whether or not it proves the guilt beyond
23 a reasonable doubt.

24 And I want you to think about the testimony
25 that you've heard that they tried to use because it

1 was all so inconsistent. It was speculation,
2 speculation, speculation, speculation. And when
3 pushed, their expert had to admit, yes, it could
4 have happened just the way Jeffrey Lucas said it
5 happened. And if that's the case, it's not a crime
6 and the only fair and just verdict is one of not
7 guilty.

8 I thank you very much for your attention.

9 **THE COURT:** Thank you, Mr. Floyd.

10 Ladies and gentlemen, I'm going to ask you to
11 step in the jury room. As soon as I'm set up, I'll
12 bring you back out and give you the law. Thank you.
13 Don't discuss the case.

14 (The jury retires to the jury room.)

15 **THE COURT:** Ladies and gentlemen, during the
16 charge, I don't allow people to move about or talk
17 or make noise. And the little child's been on great
18 behavior, but I really prefer that he not be in here
19 when I give the charge. Y'all can sit in that room
20 and see everything that's going on.

21 We're at ease.

22 (Brief Recess.)

23 **THE COURT:** During the charge, please stay
24 still, stay quiet, don't be moving around, don't say
25 things to distract the jury. Absent an emergency, I

1 expect you to stay still and stay quiet.

2 Bring in the jury.

3 (The jury returns to the courtroom.)

4 CHARGE OF THE COURT

5 THE COURT: Members of the jury, all of the
6 evidence has been presented. You've heard the
7 arguments of counsel. And now it's time for me to
8 instruct you on the law that applies to the case.
9 Please continue to pay close attention during this
10 next stage.

11 Now, first, you need to understand some basic
12 ground rules. You, the jury members, are the sole
13 judges of the facts. You decide all of the issues
14 of fact. You alone determine the truth of the
15 evidence, its effect, its value and its weight. You
16 alone judge the credibility of witnesses, in other
17 words, whether or not a witness' testimony is
18 believable.

19 In evaluating the testimony of the witnesses,
20 you may believe all that a witness said or none of
21 it; you may believe part of what a witness said and
22 not believe the balance; you may believe one witness
23 against many or many against one; you may consider
24 any interest, bias or prejudice that you feel that a
25 witness has in the case; you may consider the

1 demeanor and the appearance of the witness and the
2 opportunity for knowledge that the witness had; you
3 may consider whether a witness has been consistent
4 or inconsistent.

5 But you're not to exercise these considerations
6 arbitrarily. What you need to do is to use your
7 common sense, use your sense of logic and reason and
8 your good judgment.

9 It's not proper for me to give you a charge on
10 the facts of the case. I can't discuss the facts
11 with you. I'm not even permitted to convey to you
12 an impression as to what, if any, personal opinions
13 I may develop about the facts of a case. So if
14 during any stage of this trial, you develop an
15 impression that I've got a personal opinion about
16 the facts, you must remove that totally from your
17 mind. You're the sole judges of the facts.

18 Now, I am the judge of the law that applies to
19 the case. And under your oath, you must accept and
20 apply the law as I give it to you, that means if
21 you've got conflicting ideas about what the law is
22 or what it should be, you have to abandon those. I
23 give you the law, you apply it to the facts as you
24 determine them to be and in that way, you reach your
25 verdict.

1 It's also my job to decide what evidence is
2 admissible. If I've ruled something inadmissible or
3 told you to disregard something, you're not to
4 consider those things in arriving at your verdict.
5 Base your verdict on the competent evidence before
6 you, consider the testimony of the witnesses and the
7 exhibits admitted in the trial.

8 Now, the rules of evidence that we operate
9 under allow for opinion testimony to be given under
10 certain circumstances. The one area where that's
11 allowed is where somebody by virtue of education,
12 training and experience is designated as an expert
13 witness.

14 Now, the mere fact that a person is allowed to
15 give opinion testimony under our rules does not mean
16 that you must accept the opinions given if you
17 choose not to do so. You may accept or reject the
18 opinions of an expert witness just as you may the
19 testimony of any other witness in whole or in part.

20 I need to explain to you that there are two
21 types of evidence that are generally presented
22 during a trial. There's direct evidence and there's
23 circumstantial evidence.

24 Direct evidence is evidence of direct
25 perception, including the testimony of a person who

1 asserts or claims to have actual knowledge of a fact
2 such as an eyewitness.

3 Now, circumstantial evidence is proof of a
4 chain. It's proof of a chain of facts and
5 circumstances indicating the existence of a fact.

6 The law makes absolutely no distinction between
7 the weight or value to be given to either direct or
8 circumstantial evidence, nor is a greater degree of
9 certainty required of circumstantial evidence than
10 of direct evidence. You need to weigh all of the
11 evidence in the case. And after weighing all of the
12 evidence, if you're not convinced of the guilt of
13 the defendant beyond a reasonable doubt, you must
14 find him not guilty.

15 I remind you what I told you earlier that the
16 fact that Mr. Lucas elected not to testify is not a
17 factor to be considered by you in any way in your
18 deliberations and in your consideration on the
19 question of whether he is guilty or not guilty.
20 That decision must not be considered by you in any
21 manner whatsoever against Mr. Lucas.

22 An accused has the constitutional right to
23 remain silent and the assertion of that right cannot
24 be considered by you in your deliberations in any
25 way whatsoever against Mr. Lucas. Under your oath,

1 you are to reach no inference, you are to draw no
2 conclusion whatsoever from the fact that he elected
3 not to testify.

4 His decision not to testify should not be
5 discussed by you in the jury room. It should not
6 enter your mind in making your decisions. The State
7 has the entire burden of proof and the accused has
8 no obligation to prove anything at all.

9 As I've told you many times, the defendant is
10 presumed innocent. This is no mere legal theory.
11 It is a fundamental and substantial right to which
12 everyone is entitled.

13 It's been described as being like a robe of
14 righteousness that's placed around an accused and
15 remains with him through every stage of the trial.
16 It continues to exist after you go back to your jury
17 room to deliberate so that Mr. Lucas is presumed to
18 be innocent unless and until you, the jury,
19 determine that the State has proven him guilty
20 beyond a reasonable doubt.

21 In making your decision as to whether the
22 defendant has been proven guilty, you may consider
23 the lack of evidence presented by the State.

24 A defendant is not required to prove his
25 innocence. He is not required to prove anything at

1 all. The burden is on the State to prove the guilt
2 of the defendant. And the State has to prove to you
3 every essential element of the offense charged
4 beyond a reasonable doubt.

5 Now, that doesn't mean that the State has to
6 prove the guilt of the defendant beyond all doubt or
7 beyond every doubt. The appropriate standard is
8 proof beyond a reasonable doubt.

9 Some of you may have served as jurors in civil
10 court. And if you have, you know that the burden of
11 proof in civil court is to establish that something
12 is probable, that it's more likely than not. And
13 that's called the greater weight or preponderance of
14 the evidence.

15 But in a criminal court setting such as we're
16 in now, the standard is much higher and the proof
17 must be much stronger than what we require in civil
18 court. The burden of proof in this case is proof
19 beyond a reasonable doubt.

20 So what do I mean by that? Proof beyond a
21 reasonable doubt is proof that leaves you firmly
22 convinced of the defendant's guilt.

23 There are few things in the world that we know
24 with absolute certainty and in the law, in criminal
25 cases, it is not required that proof be given that

1 overcomes every possible doubt.

2 If, based on your consideration of the
3 evidence, you are firmly convinced that the
4 defendant is guilty of the crime charged, then you
5 are to find him guilty. If, on the other hand, you
6 think there is a real possibility that he is not
7 guilty, you have to give him the benefit of the
8 doubt and find him not guilty.

9 There's no obligation on the part of Mr. Lucas
10 to raise any doubt or any other possibility. He's
11 presumed to be innocent and the State has the entire
12 burden of proof and has to prove to you that he is
13 guilty to the exclusion of any other real
14 possibility.

15 Strongly suspicious circumstances are not
16 enough, nor is a probability of guilt sufficient.
17 Mere presence at the scene is not enough. You have
18 to be satisfied that the State has proven that the
19 defendant is guilty beyond a reasonable doubt.

20 All right. Now, ladies and gentlemen,
21 testimony has been given, and I think exhibits
22 admitted, about statements that are allegedly made
23 by the defendant to a law enforcement officer. Now,
24 I have to go through a good bit with you on this and
25 stay focused with me on it, please.

1 To explain this to you, I'm going to have to
2 explain several different scenarios so I'll try to
3 make this as short and clear as I can.

4 In evaluating the alleged statements, you first
5 need to determine if the State has proven that the
6 defendant in fact made the statement. If not, then
7 you cannot consider that alleged statement in any
8 way against the defendant, that's just common sense.
9 The State's got to prove the defendant made that
10 statement. If the State did not prove that, you
11 can't consider it in any way against the defendant.

12 Now, if you find that the defendant made the
13 statement, then the next thing you're going to have
14 to determine is whether the defendant was in police
15 custody. And if he was, whether the statement was
16 given in response to police questioning.

17 So in order for you to know what the law
18 requires concerning statements, I need to explain
19 some things to you. You've probably heard about
20 Miranda warnings.

21 The Miranda warnings are that you have the
22 right to remain silent; that any statement made can
23 and will be used against you in court; that you have
24 the right to an attorney; and if you cannot afford
25 an attorney, the court will appoint one at no

1 expense; that you have the right to consult with an
2 attorney before answering any questions or making
3 any statement; that you have the right to have a
4 lawyer present at all times during all interviews
5 and all interrogations; and that you may stop
6 answering questions at any time.

7 Now, it's not necessary that those exact words
8 be used, but the substantial equivalent has to be
9 communicated in order to constitute Miranda
10 warnings.

11 Now, what I need to explain to you is that not
12 all police questioning requires that Miranda
13 warnings be given. Miranda warnings are required
14 before the police may question a person whom they
15 have in custody. And I'm going to explain that term
16 -- those terms to you in more detail in a moment.

17 So in evaluating the alleged statements of a
18 person given to police and whether Miranda warnings
19 were required or not, you first have to ask yourself
20 two questions and determine the answers: One, was
21 that person in police custody? And, two, was the
22 statement in question given in response to police
23 questioning?

24 Now, this term that I'm using "in custody"
25 doesn't necessarily mean that the person has to be

1 under arrest. It may refer to situations where the
2 person is under arrest or where he is held in police
3 custody, but it also refers to situations where his
4 freedom of movement is prohibited by the police in a
5 significant way.

6 If a person is not in custody, then the police
7 may question him without giving him any Miranda
8 warnings, but if he is in custody, then the police
9 cannot question him without first giving him Miranda
10 warnings.

11 Now, you also need to understand that whether
12 the person was in custody or not, Miranda warnings
13 only relate to interrogations by the police. Police
14 interrogation means that the police are questioning
15 the person or performing the substantial equivalent
16 of questioning, in other words, where the police
17 makes some statement or engage in some conduct that
18 is designed to elicit a response from that person.

19 So Miranda warnings are not required unless the
20 police are questioning a person in custody.

21 If a person makes a spontaneous statement
22 that's not prompted by police interrogation, then
23 the statement can be considered by a jury even if
24 Miranda warnings were not given.

25 Now, if somebody's in custody, if a person's in

1 custody, the police cannot question or interrogate
2 that person unless Miranda warnings have been given
3 and the person has to waive those rights and
4 voluntarily elect to answer the police questions.

5 If the person was in custody therefore, before
6 you may consider any statement given in response to
7 police interrogation, the State has to prove to you
8 that the person was properly warned of his
9 constitutional rights, the Miranda warnings, prior
10 to the questioning and giving of the statement.

11 If the State proves that it gave Miranda
12 warnings prior to interrogating a person in custody,
13 the State then must prove that the person knowingly
14 and intelligently waived his constitutional rights
15 and made the statement to the police.

16 And the final requirement is that the statement
17 in question must have been given voluntarily. The
18 State must prove that the statement was the
19 expression of the person's own free will and was not
20 improperly induced by compulsion, duress, force or
21 fear or by the promise of reward or some hope of
22 reward. Unless a statement is given freely and
23 voluntarily, you may not consider it against a
24 defendant.

25 If the statement was made in custody to a law

319

1 enforcement officer in response to police questions,
2 I instruct you that you cannot use that statement
3 against the defendant unless you are satisfied that
4 all these things I've discussed with you have been
5 proven by the State beyond a reasonable doubt, that
6 Miranda warnings were given, that there was a
7 knowing and intelligent waiver of rights, and that
8 the statement in question was made freely and
9 voluntarily.

10 Now, let's discuss the specific crime that's
11 charged in this case. As you know, the defendant is
12 charged with infliction of great bodily injury upon
13 a child.

14 The indictment alleges that Mr. Lucas did in
15 Lexington County on or about May 24, 2006, inflict
16 great bodily injury upon a child, specifically by
17 application of physical acts causing permanent
18 damage to the head, spine, intestines and genitals
19 of a two-year-old child, Child [REDACTED] causing life
20 threatening injuries.

21 I caution you again, folks, that an indictment
22 is not evidence. It's merely a charging paper, the
23 formal means by which someone is charged and brought
24 to trial.

25 Now, this law is relatively short and I'm going

1 to read it to you. It provides that it is unlawful
2 to inflict great bodily injury upon a child. Great
3 bodily injury means bodily injury which causes a
4 substantial risk of death or which causes serious or
5 permanent disfigurement or protracted loss or
6 impairment of the function of any bodily member or
7 organ.

8 Great bodily injury means bodily injury which
9 creates a substantial risk of death or which causes
10 serious or permanent disfigurement or protracted
11 loss or impairment of the function of any bodily
12 member or organ.

13 So to prove the defendant guilty, the State has
14 to prove to you beyond a reasonable doubt that the
15 defendant inflicted injuries upon Child [REDACTED] as
16 alleged in the indictment, that Child [REDACTED] was a
17 child and that the child suffered great bodily
18 injury as a direct result of the actions of
19 Mr. Lucas.

20 Now, to prove the defendant guilty of this
21 offense, the State also has to prove to you beyond a
22 reasonable doubt that the defendant possessed the
23 necessary criminal intent. The intent required in
24 this case is that the act must have been done
25 knowingly. Knowingly means to do it with knowledge,

1 consciously, not something done by accident.

2 Now, Mr. Lucas is entitled to every reasonable
3 doubt arising in the entire case. If upon any issue
4 of fact essential to a conviction, you have a
5 reasonable doubt as to how that issue should be
6 resolved, you have to resolve the doubt in favor of
7 Mr. Lucas. If upon reviewing the entire case, you
8 have a reasonable doubt as to the guilt of the
9 defendant, he is entitled to that doubt and a
10 verdict of not guilty.

11 On the other hand, if upon reviewing the entire
12 case, you find that the State has proven every
13 essential element of the offense charged against
14 Mr. Lucas beyond a reasonable doubt, it is equally
15 your duty to find him guilty.

16 That's the law.

17 When you go back to the jury room, ladies and
18 gentlemen, you're going to have all of the exhibits
19 that have been admitted in the trial. You're also
20 going to have this verdict form. On this form,
21 you're going to tell us your decision.

22 Now, I'm supposed to tell you at this point
23 that you're not to infer from the order in which I
24 state these things that I'm trying to suggest one
25 over the other. I've got to put one thing first on

1 this piece of paper and one thing second.

2 You have two possible forms of verdict. The
3 verdict form reads: As to the charge of infliction
4 of great bodily injury upon a child, we, the jury,
5 unanimously find the defendant, and you have two
6 options, you may find him not guilty, the second
7 option is that you may find him guilty of infliction
8 of great bodily injury upon a child.

9 Mr. Foreman, part of your job is to complete
10 this form for me. I think you'll find it
11 self-explanatory, just check the option chosen by
12 the jury. There's a signature line on there I need
13 you to sign that for me.

14 Now, ladies and gentlemen, how you go about
15 your deliberation and taking your votes, all of that
16 is in your discretion subject to this requirement:
17 The verdict has to be unanimous. All 12 jurors must
18 agree before the foreman can record your verdict.
19 You cannot do anything to change the requirement
20 that the verdict be unanimous.

21 When you have reached your verdict, if you'll
22 knock on the door, the bailiff will respond to your
23 knock.

24 Ladies and gentlemen, I've probably told you
25 dozens of times now not to discuss the case until I

1 tell you to. Well, it's not time yet.

2 The law says that I have to go over with the
3 attorneys what I just told you and that's just
4 common sense. We don't want you back there deciding
5 the case and using the wrong law.

6 Now, as I told you, my practice is that I print
7 out what I intend to tell you and give it to the
8 attorneys and we did that. And we've already met
9 and discussed it, but I never read this thing
10 verbatim, the charge. Sometimes I say things and
11 don't even realize I said them. So the attorneys
12 have to be given an opportunity to point out to me
13 anything that I may have told you that they do not
14 agree is proper law.

15 So here's what'll happen: If I'm satisfied
16 with what I told you, I will send in the verdict
17 form, I will send in the exhibits and I will bring
18 the two alternates out. When it's just the 12 of
19 you in that room and you've got those documents and
20 the bailiff's out, just the 12 of you, you start
21 talking about the case, but don't talk about it
22 until then.

23 Thank you very much for your attention. You
24 may retire to your jury room.

25 (The jury retires to the jury room.)

1 **THE COURT:** All right. Please state for the
2 record exceptions, additions or objections to the
3 charge, from the State?

4 **MR. WEDEKIND:** None from the State, sir.

5 **THE COURT:** From the defense, other than what
6 you've already raised?

7 **MR. FLOYD:** Other than what I've already
8 raised, Your Honor.

9 **THE COURT:** All right. The objection is noted
10 for the failure of the Court to charge that a
11 reasonable doubt is the kind of doubt that would
12 cause a reasonable person to hesitate to act. I'll
13 stick by the earlier ruling.

14 All right. Folks, I've given y'all a copy of
15 the verdict form.

16 **MR. WEDEKIND:** No problem with that either,
17 sir.

18 **MR. FLOYD:** No problem with that either.

19 **THE COURT:** All right. If you'll check the
20 exhibits and the verdict form, please.

21 It's been a pleasure trying the case with you.
22 Both sides were well prepared, did a great job.

23 Mr. Lucas, I take people in custody at this
24 point, so you're in custody. They won't lock you up
25 or anything, but you can't leave the courtroom

1 without the deputy. If you need to use the restroom
2 or something, you tell them, they'll take you back
3 here.

4 (The alternates return to the courtroom.)

5 **THE COURT:** I need to discharge you all from
6 this case, but they tell me that they're still
7 working on cases upstairs so you have to call in
8 tonight after 6:00, follow the instructions. I
9 don't know if they'll bring you back or not, but
10 apparently they've got a case upstairs they may have
11 to try.

12 Folks, you're free to go, just call tonight
13 after 6:00, okay. Thank you.

14 Let me tell y'all, I use an alternate probably
15 in half the cases I do, so I didn't have you sitting
16 over there for no reason. We did have an issue this
17 morning that I might have had to sit one of them
18 aside. So I hope you understand, once I swear a
19 jury in, we can't stop, that's when jeopardy
20 attaches under that double jeopardy stuff, so that's
21 why I had you sitting over there. Thank you very
22 much.

23 (The alternates were excused.)

24 **THE COURT:** All right. We're at ease pending a
25 verdict.

1 (The jury commences its deliberations at
2 3:13 p.m.)

3 (A recess transpired.)

4 THE COURT: All right. I received a note from
5 the jury on the case we're doing. It reads, Can we
6 have a copy of the applicable statute?

7 I had my law clerk show this to the attorneys.
8 She indicated to me that the attorneys had stated
9 that they have no problem with sending to the jury
10 this document, which we'll mark, which contains
11 subsection (A) and subsection (C) of section 16-3-95
12 of the code. Is there anything that I stated wrong
13 or that you all need to add?

14 MR. WEDEKIND: The only thing we redacted in
15 subsection (A) was the penalty provisions, Your
16 Honor. We didn't think they needed to look at that,
17 but it's (A) with the exception of the penalty
18 provisions, (B) is deleted, (C) and (D) and (E) are
19 deleted.

20 MR. FLOYD: Your Honor, I'm in agreement with
21 the redacted statute in that it removes all patently
22 objectionable matters.

23 I have a problem, though, in that the statute
24 is a poorly written statute and it does not on its
25 face require intentional criminal conduct. The use

1 of the word inflict is a little nebulous and we
2 would ask that it also be sent back about the
3 criminal intent aspect of the charge to go along
4 with the statute.

5 THE COURT: You want me to print out a section
6 of the charge dealing with what I told --

7 MR. FLOYD: About the criminal intent to go
8 back with it, Your Honor, yes, sir.

9 MR. WEDEKIND: And the State would object to
10 that, sir. We believe that we're complying with
11 their request, which was a copy of the statute
12 itself. They didn't ask to be recharged on criminal
13 intent. I believe Your Honor charged that. They
14 should have that information. I would presume that
15 they've got it. There's no reason to go further
16 than what they requested.

17 MR. FLOYD: Well, Your Honor, they had the
18 charge, too. They had the statute, too, and they
19 forgot it.

20 THE COURT: What I need to know is if you all
21 agree or don't agree.

22 MR. WEDEKIND: I agree to what we submitted,
23 sir, not the criminal intent provision.

24 THE COURT: And you don't agree to this going
25 back --

1 MR. FLOYD: Without the criminal intent, that's
2 correct.

3 THE COURT: All right. Bring the jury in.

4 (The jury returns to the courtroom at 4:22
5 p.m.)

6 THE COURT: Folks, I need to ask y'all to step
7 back in there for a minute. Let me talk to the
8 lawyers, I'll bring you back out.

9 (The jury retires to the jury room at 4:24
10 p.m.)

11 THE COURT: Looking back through the statute,
12 apparently when I was doing this, I had indicated in
13 the charge to the jury that criminal intent required
14 that it be knowing. The language about conduct
15 being knowing is actually in subsection (B), I
16 think, which is a different offense than what the
17 defendant is charged with.

18 The different levels of intent, they range from
19 the top, which is purpose, below that is intent,
20 knowledge, recklessness, and the last, the least
21 level of criminal intent, is criminal negligence.

22 I'm not certain exactly which level of criminal
23 intent would be required, it's not specified. This
24 is subsection (A).

25 Subsection (E) reads that this section does not

1 apply to traffic accidents unless the accident was
2 caused by the driver's reckless disregard for the
3 safety of others, which seems to logically suggest
4 that the level of intent required would be below the
5 level of knowing, which is what I charged.

6 So I plan to stick with what I've got, but we
7 didn't talk about any of that at all. If you all
8 want to be heard on any of that, I'll be happy to
9 hear from you, but I'm just going to recharge the
10 jury what I charged them before.

11 MR. WEDEKIND: Sir, does that mean you're going
12 to put the intent as you spoke it before?

13 THE COURT: Yes.

14 MR. WEDEKIND: With all respect, sir, I think
15 they asked for the statute and we are providing them
16 the statute. I think we're jumping into their -- or
17 we're speculating as to what they're requesting when
18 we say criminal intent or any mention -- if they
19 want to hear about that, we can visit that issue if
20 they come back with a further question, but,
21 respectfully, I think we should just safely just
22 give them what they asked for and nothing more. If
23 they ask for something else, we can address that
24 issue, and that might be the most prudent course,
25 but that's the State's position, sir.

1 THE COURT: All right. The objection is noted.
2 I'm going to do what I said.

3 Bring in the jury.

4 MR. WEDEKIND: In the alternative, could we
5 then agree that having them just correctly charged
6 with the law and negate what was, you know,
7 inartfully stated beforehand and have the proper
8 level of intent stated to them?

9 THE COURT: Well, I'm going to be honest with
10 you, my reason for looking through all of this was
11 because I thought the intent required might be a
12 greater level, that subsection (E) leads me to
13 believe it may be sufficient to be a lesser level,
14 but, no, I'm not going to change without knowing
15 what the specific level of intent is.

16 I think to say that the defendant had to do
17 this knowingly, meaning consciously and not by
18 accident, I don't think that's an improper charge.

19 MR. WEDEKIND: Okay, sir.

20 THE COURT: But I'll note your objection.

21 MR. WEDEKIND: Thank you, sir.

22 THE COURT: Bring in the jury.

23 (The jury returns to the courtroom at 4:32
24 p.m.)

25 THE COURT: Mr. Foreman, I received a note from

1 the jury that reads, Can we have a copy of the
2 applicable statute? Is that the jury's request?

3 FOREMAN: Yes, sir.

4 THE COURT: Ladies and gentlemen, I cannot send
5 the statute back to you in written form. What I can
6 do is read to you again, and I'll read it a couple
7 of times, what the law provides. And I'll just read
8 the two sections where I read the statute to you and
9 read the criminal intent.

10 It is unlawful to inflict great bodily injury
11 upon a child. For purposes of this section, great
12 bodily injury means bodily injury which creates a
13 substantial risk of death or which causes serious or
14 permanent disfigurement or protracted loss or
15 impairment of the function of any bodily member or
16 organ.

17 So to prove the defendant guilty, the State
18 must prove beyond a reasonable doubt that the
19 defendant inflicted injuries upon Child [REDACTED] as
20 alleged in the indictment, that Child [REDACTED] was a
21 child and that the child suffered great bodily
22 injury as a direct result of the actions of
23 Mr. Lucas.

24 To prove the defendant guilty of this offense,
25 the State also must prove beyond a reasonable doubt

1 that the defendant possessed the necessary criminal
2 intent. The intent required in this case is that
3 the act must have been done knowingly. Knowingly
4 means with knowledge, consciously and not
5 accidentally.

6 All right. I'll read that again. It's
7 unlawful to inflict great bodily injury upon a
8 child. For the purposes of this section, great
9 bodily injury means bodily injury which creates a
10 substantial risk of death or which causes serious or
11 permanent disfigurement or protracted loss or
12 impairment of the function of any bodily member or
13 organ.

14 So to prove the defendant guilty, the State
15 must prove beyond a reasonable doubt that the
16 defendant inflicted injuries upon Child [REDACTED] as
17 alleged in the indictment, that Child [REDACTED] was a
18 child and that the child suffered great bodily
19 injury as a direct result of the actions of
20 Mr. Lucas.

21 To prove the defendant guilty of this offense,
22 the State also must prove beyond a reasonable doubt
23 that the defendant possessed the necessary criminal
24 intent. The intent required in this case is that
25 the act must have been done knowingly. Knowingly

1 means with knowledge, consciously and not
2 accidentally.

3 If you need anything else, send word to me
4 please. Do you need me to read it again?

5 (There was no response.)

6 THE COURT: All right. Thank you.

7 (The jury retires to the jury room to
8 continue its deliberations at 4:35 p.m.)

9 THE COURT: State for the record exceptions,
10 additions or objections to the instruction, from the
11 State?

12 MR. WEDEKIND: Just the ones previously noted,
13 sir.

14 THE COURT: Defense?

15 MR. FLOYD: Nothing, Your Honor.

16 THE COURT: Thank you. We're at ease pending a
17 verdict.

18 (Court's Exhibit Number 3, jury note, was
19 marked for identification.)

20 (A recess transpired.)

21 THE COURT: I've been informed that the jury
22 has a verdict. Obviously I have no way of knowing
23 what the jury decided.

24 This is something I say in every case. When
25 the verdict is announced, please do not show any

1 sign of approval or disapproval with the verdict. I
2 expect you to stay still and stay quiet. The jury
3 has the toughest job in the courthouse and I cannot
4 tolerate any display of approval or disapproval, so
5 don't shake your head in agreement or disagreement,
6 don't make any sounds, just stay still, stay quiet
7 and we'll get through this just fine.

8 Bring them in.

9 (The jury returns to open court to report
10 its verdict at 5:12 p.m.)

11 THE COURT: Madame Clerk.

12 THE CLERK: Mr. Foreman, have you reached a
13 verdict?

14 FOREMAN: Yes, ma'am, we have.

15 THE CLERK: If you can pass it to the bailiff,
16 please.

17 (The Clerk hands the verdict to the Judge.)

18 VERDICT OF THE JURY

19 THE COURT: State of South Carolina versus
20 Jeffery Thomas Lucas, case number 2009-GS-32-536, as
21 to the charge of infliction of great bodily injury
22 upon a child, we, the jury, unanimously find the
23 defendant guilty of infliction of great bodily
24 injury upon a child, signed by the Foreman.

25 Mr. Foreman, ladies and gentlemen of the jury,

1 if I've accurately stated your verdict, please
2 signify by raising your right hand.

3 All 12 hands are raised.

4 Are there any matters to take up prior to the
5 jury being discharged, from the State?

6 MR. WEDEKIND: No, sir.

7 THE COURT: Defense?

8 MR. FLOYD: No, Your Honor.

9 THE COURT: Thank you.

10 Judge McMahon needs you upstairs in the morning
11 at 9:15. Everybody's got to come back in the
12 morning at 9:15, so if you call, that's the message
13 that's going to be on there, but they're going to
14 draw another jury. I don't know if any of you will
15 get picked on it or not, but please be in here in
16 the morning at 9:15. Thank you. You're free to go.

17 Mr. Foreman, I need you to stay because you
18 have to sign the original indictment for me, but the
19 rest of you, just turn your buttons in on the way
20 out and please be here in the morning at 9:15.
21 Thank you.

22 (The jury was excused.)

23 THE COURT: Motions?

24 MR. FLOYD: Your Honor, at this time, the
25 defendant would move for the Court to set aside the

1 verdict. It's our position that the evidence fails
2 to establish the offense with which he has been
3 convicted. And we would ask that Your Honor set
4 aside the verdict and grant him a new trial.

5 THE COURT: All right. Motion is respectfully
6 denied.

7 Y'all got a sentence sheet?

8 MR. WEDEKIND: Ms. McMahon is getting it right
9 now, sir.

10 THE COURT: Do any of the victims wish to be
11 heard?

12 MR. WEDEKIND: Yes, sir, I believe so. I don't
13 know which ones were designated.

14 MS. ADAMS: This is Child |||

15 [REDACTED] Hey.

16 MS. ADAMS: Do you want to show the Judge your
17 tattoo?

18 Here is the scar where the feeding tube was.
19 And here's the scar that the brutal injury caused
20 him that he will have for the rest of his life.
21 Also, his genitalia --

22 THE COURT: What's your name, ma'am?

23 MS. ADAMS: My name's Nikki Adams. I'm his
24 aunt.

25 THE COURT: Thank you.

1 **MS. ADAMS:** I don't believe that 20 years is
2 enough. It's not enough time for what my nephew had
3 to suffer. He was in the hospital with tubes down
4 his throat and IVs that he had to get multiple,
5 multiple, multiple sticks, catheters in his penis.

6 His genitalia will never look like yours or
7 like his, like a normal man's. It will never be the
8 same. He may not even be able to have children
9 because of this brutality. And I ask that you give
10 him what you feel is appropriate and what will be
11 justice for Child

12 **THE COURT:** Thank you, ma'am, but I can't give
13 him more than 20 years.

14 **MS. ADAMS:** Yes, sir. Just in my heart, I
15 don't believe that it's enough, but I know what you
16 can do.

17 **THE COURT:** I understand. Thank you.

18 **MR. WEDEKIND:** Your Honor, I think that was
19 said pretty heartfelt, but what you've seen is that
20 child's made a remarkable recovery and almost, I
21 would say, miraculous, but it still doesn't undo
22 what you saw in the evidence that was presented.
23 And it was a terrible, terrible crime and we would
24 ask for the maximum sentence, sir.

25 He has no prior record, but even so, and the

1 recovery of the child I think is, you know, there's
2 still evidence of the trauma that he went through
3 and, thankfully, he doesn't seem to remember much of
4 it.

5 THE COURT: All right. Mr. Floyd, do you wish
6 to be heard related to sentencing?

7 MR. FLOYD: Yes, Your Honor. Your Honor, some
8 of the family members may wish to speak also and
9 I'll let them speak first.

10 THE COURT: Come around please, ma'am. What's
11 your name?

12 MS. PIERSON: I'm Stephanie Pierson. I'm his
13 fiancée. I've stayed by him through this. I don't
14 think he's guilty of it. He's been around my small
15 child for three years. He's been left with him
16 alone. He has never harmed him. I have never even
17 seen anger in Jeff towards himself or towards me or
18 towards my child. I do not believe he's capable of
19 this. I think they're trying to make him to be a
20 cold-blooded criminal and that is not in his
21 character whatsoever.

22 We go to church. We believe in prayer.
23 There's just -- there's no way that he could have
24 done what they said he could. He's not that person.
25 He doesn't have it in him.

1 **THE COURT:** Thank you, ma'am.

2 All right, Mr. Floyd.

3 **MR. FLOYD:** Thank you.

4 Your Honor, Jeff's 44 years of age. He has no
5 criminal record.

6 Jeff has had some mental health issues from
7 early on in life beginning at about age 11. He has
8 been diagnosed, and I know you've been provided the
9 -- we had him evaluated, Your Honor. I think you've
10 got that evaluation up there. He's been diagnosed
11 with major depression disorder and bipolar disorder.
12 Currently, he's on a regimen of medication.

13 And they've asked me to ask you this, I know
14 you don't have any control over this, Your Honor,
15 but they're concerned that he will not be able to
16 get his medications once he's over at LCDC or maybe
17 at SCDC either, but he's currently on Effexor,
18 Trazodone, Buspar, Abilify and Depakote, which are
19 mood stabilizers, antidepressants and antianxiety
20 medications.

21 He has no criminal record. Jeff's not a person
22 that has a mean bone in his body I don't think. And
23 this was a situation that I know the jury spoke so I
24 can't argue with what they said in accepting their
25 verdict. It's a one time situation where evidently

1 there was a loss of control.

2 We ask you whatever mercy you can give him.
3 He's a lifetime resident of the county. He has good
4 family support. They're all back here, his mother
5 and his uncles. Whatever mercy you can give him,
6 Your Honor.

7 DEFENDANT LUCAS: I do want to say one thing.

8 MR. FLOYD: I think he wants to say one thing,
9 Your Honor.

10 THE COURT: Yes, sir. I'll be happy to hear
11 from you.

12 DEFENDANT LUCAS: I want to thank you for
13 giving me the opportunity to go home when you did.
14 Thank you.

15 THE COURT: Mr. Lucas, I need to say a couple
16 of things and then I'll announce the sentence.
17 These are the same kind of things we talked about
18 before, just procedural things.

19 If you wish to appeal anything from this
20 proceeding, it has to be done in writing and it has
21 to be done quickly. There's a time limit, a very
22 short time limit, so if you want to appeal, you tell
23 Mr. Floyd and he will file a notice of intent to
24 appeal. If you cannot afford an attorney, then the
25 South Carolina Office of Appellate Defense can

1 defend you or prosecute your appeal. Do you
2 understand all of that?

3 **DEFENDANT LUCAS:** Yes, sir.

4 **THE COURT:** Okay. Mr. Lucas, you appear to be
5 one of those folks like a lot of people that when
6 you messed up, you really messed up. I don't have
7 any doubt that you did this. I don't doubt the
8 sincerity of the people that believe in you or your
9 attorney, who did, by the way, a fantastic job in
10 your behalf.

11 That jury was back there, I never walked down
12 the hall, but I could hear them all the way at this
13 end of the hall, they took their jobs very
14 seriously. And I'm confident that they gave it
15 every bit of thought that it was entitled to, but I
16 don't have any doubt that you did it.

17 **SENTENCE OF THE COURT**

18 **THE COURT:** The sentence of the Court is you be
19 committed to the South Carolina Department of
20 Corrections for 20 years plus costs and assessments.
21 You're given credit for jail time under section
22 24-13-40, that will be calculated and applied by the
23 department of corrections.

24 I've written on your sentence sheet that you're
25 currently on medication for depression and anxiety

1 and that the department of corrections should be
2 notified of such. When you go through reception and
3 evaluation, make sure you tell them about all of
4 that medicine.

5 You pay your court costs within a year of being
6 released on community supervision.

7 Good luck to you, sir.

8

9 END OF PROCEEDINGS

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

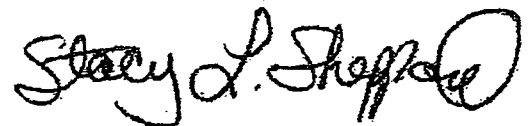
C E R T I F I C A T E

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

I, the undersigned, Stacy L. Sheppard, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal in the Criminal Court for Lexington County, South Carolina, on the 16th of March, 2009.

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

March 31, 2010



Stacy L. Sheppard, RPR
Circuit Court Reporter

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**

**THIS PAGE INTENTIONALLY
LEFT BLANK**



Lexington County Sheriff's Department

VOLUNTARY STATEMENT



1-16-65

(Not Under Arrest)

I, Jeffrey Thomas Lucas, am not under arrest, nor am I being detained for any criminal offenses concerning the events I am about to make known to Det. Pritchard. Without being accused of or questioned about any criminal offenses regarding the facts I am about to state, I volunteer the following information of my own free will, for whatever purposes it may serve. I am 44 years of age, and I live at S.C. 29053.

Alternate Contact Name: _____

Phone (H) _____

(W) _____

(C) _____

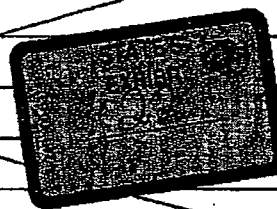
Alternate Contact Name: _____

Phone (H) _____

(W) _____

(C) _____

FR
I was taken care of byson on the porch in the front yard. I went to get the mail from mail box. I heard a loud noise that didn't sound right. I started to the porch and saw byson FR ~~with~~ with his head stuck between the porch rails. I then ran and picked him up. He was like a wet dishes bag he was not living. I took him inside and tried CPR and called Candice at work. She called 911 and came home from work. The ambulance got there just before she got there. Then Candice was there and they left in the ambulance. FR — End of statement —



I have read each page of this statement consisting of 1 page(s), each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained here in are true and correct.

Dated at Lexington Medical Center, this 24th day of May 20 06

WITNESS: David L. Pritchard

WITNESS: _____

Jeffrey T. Lucas
Signature of person giving voluntary statement.



Lexington County Sheriff's Department Statement Form



DATE May 26, 2006 PLACE LCSD TIME STARTED 6:30 P.M.

I, the undersigned, Jeffery Thomas Lucas, am 41 years of age, my date
11th day of May, at Lexington, S.C.

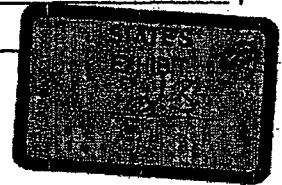
My present address is Gaston, S.C. 29053

I completed 12 grade(s) in school. I can read and write. JTL (Initials)

CONTACT NUMBERS: H) _____ W) _____ C) 477-1444

ALTERNATE CONTACT: Name _____ Phone Numbers: _____

Before answering any questions or making any statements, Pritchard
a person who identified him/herself as a Lexington County Detective
duly warned and advised me that:



- 1) I HAVE THE RIGHT TO REMAIN SILENT. JTL
- 2) ANYTHING I SAY, CAN AND WILL BE USED AGAINST ME IN A COURT OF LAW. JTL
- 3) I HAVE THE RIGHT TO TALK TO A LAWYER FOR ADVICE BEFORE ASKED ANY QUESTIONS AND TO HAVE HIM OR HER PRESENT WITH ME DURING QUESTIONING. JTL
- 4) IF I HAVE NO MONEY FOR LAWYER'S FEES, THE COURT WILL APPOINT ONE TO REPRESENT ME WITHOUT COST TO ME IF I WISH. JTL
- 5) IF I DECIDE TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT, I WILL STILL HAVE THE RIGHT TO STOP ANSWERING QUESTIONS AT ANY TIME. I ALSO HAVE THE RIGHT TO STOP ANSWERING QUESTIONS AT ANYTIME UNTIL I TALK WITH A LAWYER. JTL

I HAVE READ THIS STATEMENT OF MY RIGHTS AND I UNDERSTAND WHAT MY RIGHTS ARE. JTL I MAKE THE FOLLOWING STATEMENT:

At this is an addition to my first statement. I left Byron
on the porch to go back the Mail, took I thought some mail
and take to to my Papa Trail to see if he was home
it took about 15 minutes to do so. When walk from down
the road I saw Byron on the porch. I then took off running to
help him. I picked him up and took him to do CPR
didn't my heart hitting him in the chest + stomach for
a long period of time blow his mouth until he started to
breathe on his own for me. I then left laying
on his side with a pillow behind his back. I went across
JTL

David L. Pritchard
Witness

Notary Public

Jeffery T. Lucas
Person giving Statement
5-26-06
Date

My Commission expires

Page 2 of 2 pages.

JR
The street and called Candice, and she called 911. When
doing CPR I was using all the force that I
had in me until I got tired and he started breathe.
I lied in my first statement to the officer because
scared and didn't want to look bad to Candice. JR
End of Statement

I have read this page, initialed corrections or changes, if any, and received a copy of this page. I certify that the facts contained herein are true and correct to the best of my knowledge.

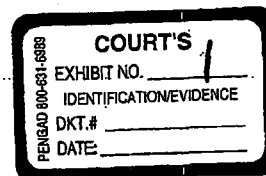
Joseph T. Lucas
Signature of person giving voluntary statement



South Carolina
Department of
Mental Health

Columbia Behavioral Health System
Forensic Center
7901 Farrow Road
Columbia, South Carolina 29203
Information: (803) 935-5600
Fax: (803) 935-5544

February 5, 2009



Lawrence G. Wedekind
Assistant Solicitor
205 E. Main Street
Lexington, SC 29072

Re: The State of South Carolina vs. Lucas, Jeffery T.
DMH Case #: 1009-8168
Lexington County, Court of General Sessions

Dear Assistant Solicitor Wedekind:

In accordance with the court order issued by the Honorable William P. Keesley, a competency to stand trial evaluation was conducted by the South Carolina Department of Mental Health, pursuant to S.C. Code Ann. § 44-23-410 (1976).

Please see the attached report for the results of this evaluation.

This 6 page document is certified to be the original court-ordered evaluation report issued pursuant to S.C. Code Ann. § 44-23-410 (1976).

2/5/2009
Date

Kenneth M. Kepler
Kenneth M. Kepler, L.P.C.
Program Coordinator
Forensic Evaluation Services
Department of Mental Health

cc: Wayne Floyd, Attorney at Law, PO Box 3972, West Columbia, SC
29171-3972

KMK/tl

COMPETENCY TO STAND TRIAL EVALUATION

DATE OF EVALUATION: January 5, 2009 and February 2, 2009

PRESIDING: Richard L. Frierson, M. D., Professor of Clinical Psychiatry,
University of South Carolina School of Medicine

SECOND EXAMINER: Tia Taylor, LMSW

OTHERS PRESENT: Christian Neal, M. D., Resident in Psychiatry,
University of South Carolina School of MedicineDIAGNOSES: AXIS I: Bipolar II Disorder.
 AXIS II: Dependent Personality Traits.
 AXIS III: Hypertension.

COMPETENCY TO STAND TRIAL: Yes.

DISPOSITION: Mr. Lucas has been returned to Lexington County where he is currently on bond.

PERTINENT STATEMENTS: Jeffrey Thomas Lucas is a 43-year-old Caucasian male who was seen at the Forensic Evaluation Service pursuant to a court order from the Lexington County Court of General Sessions. This order requests an evaluation of his competency to stand trial pursuant to State v. Blair, 275 S.C. 529, 273 S.E. 2d 536 (1981) and S.C. Code Ann. § 44-23-410 (1976). He is currently charged with Unlawful Neglect of a Child and Assault and Battery with Intent to Kill.

SOURCES OF INFORMATION:

1. Court order requesting the evaluation.
2. Arrest warrant #J-051018 for Assault and Battery with Intent to Kill.
3. Arrest warrant #J-051017 for Unlawful Neglect of a Child.
4. Statement given by Candace M. Deese.
5. Statement given by the defendant.
6. Incident report related to the alleged offense.
7. Records from South Carolina Department of Social Services.
8. Medical records from Three Rivers Behavioral Health.
9. A social history obtained from the defendant's mother.
10. Medical records from Lexington Mental Health Center.
11. Medical records from Columbia Area Mental Health Center.
12. Medical records from Richland Memorial Hospital.
13. Medical records from Palmetto Counseling Associates.

RL
LUCAS, JEFFERY THOMAS
1009-9170
OUTPATIENT EVALUATION

14. A telephone interview with the defendant's mother.
15. A two hour clinical forensic interview with the defendant on January 5, 2009.
16. A one hour fifteen minute clinical forensic interview on February 2, 2009.

STATEMENT REGARDING LIMITATIONS OF CONFIDENTIALITY: Mr. Lucas was informed that a report would be prepared for the court that would sent to his attorney, the solicitor, and the judge. He was informed that the examiners worked for the Department of Mental Health and could be called to testify in court about this evaluation.

PSYCHIATRIC HISTORY: Mr. Lucas has a complicated history of prior psychiatric treatment. There are discrepancies between his self report, the report of his mother, and available records.

He was first evaluated at Columbia Area Mental Health Center at age 11. Limited records are available from that contact, but indicate that he was seen due to excessive fearfulness and anxiety as well as loss of control with his temper. At that time he had difficulty sleeping alone, preferring to sleep with his mother or sister. He reports that he was hospitalized at Baptist Hospital shortly after his mental health center treatment, but Palmetto Baptist Hospital reports that the only records they have of him is from his birth.

He was subsequently hospitalized at Richland Memorial Hospital in 1981 with acute paranoia. At that time, he thought that others were accusing him of being a "narc" and that cars were following his family's car. He was there for approximately five days. He was noted to have been using marijuana around this time. His discharge diagnosis was "Adjustment Reaction of Adolescent with Atypical Features." Of note, while he was in Richland Memorial Hospital, he had a psychological consultation which revealed a Full Scale IQ of 96 with a Verbal IQ of 89 and a Performance IQ of 98. These scores would fall in the average range of human intelligence.

According to Mr. Lucas, he was hospitalized around age 23 approximately one year after he was married but we have not been able to find a record of that hospitalization. He was hospitalized at Richland Springs from January 8 through January 13, 2004 and received a discharge diagnosis of Major Depressive Disorder, recurrent and Dependent Personality traits. He states that this hospitalization was triggered by marital problems.

He has also received outpatient counseling with a Dale Salter, EDS at Palmetto Counseling Associates, L.L.C. from October 19, 2004 through May 24, 2005. During this time he was prescribed antidepressant medication by his primary care physician, Dr. John Fisher.

He reports that he also has a history of several hospitalizations at Three Rivers. He states that he was hospitalized there in the mid nineties due to relationship problems with his wife and after the loss of his grandmother. He was hospitalized twice at Three Rivers in 2005. In May of 2005, he discovered that his wife was having an affair and that he was going to be divorcing. He was hospitalized for depressive symptoms at that time. He was hospitalized after a suicide attempt via overdose in August of 2005. On both of those hospitalizations, he was diagnosed with Bipolar II


LUCAS, JEFFERY THOMAS
1009-9170
OUTPATIENT EVALUATION

Disorder, Current Episode Depressed. Mr. Lucas made another suicide attempt in 2008 and was hospitalized at Three Rivers from July 10, 2008 until July 24, 2008. This hospitalization was precipitated by the loss of a girlfriend who left him after finding out about his current charges. His diagnosis was Bipolar Disorder, depressed, with psychotic features.

Currently, Mr. Lucas is being treated by the Lexington County Mental Health Center. He states that he is doing very well at the present time and is on numerous medications to target depressive symptoms and mood instability. He takes venlafaxine (Effexor®), an antidepressant; trazadone, another antidepressant; buspirone (BuSpar®), an antianxiety medication; aripiprazole (Abilify®), an adjunct treatment for depression; and divalproex sodium, (Depakote®), a mood stabilizer. On this regimen, he has done very well.

When Mr. Lucas has depressive episodes, he is able to give symptoms that would meet diagnostic criteria for a Major Depressive Episode. For example, his depression is characterized by excessive sleep, anhedonia and lack of interest in usual pleasurable activities, a loss of appetite, tearful episodes, low energy, and suicidal ideation. He clearly has recurrent episodes of major depression and there is a family history of depression in both his mother and maternal grandmother. He has carried a diagnosis of Bipolar II Disorder, although the criteria necessary for this diagnosis are not contained in his medical records. Mr. Lucas has been periods of time where he has been told that he talks too much and displays pressured speech. His mother confirms this history. During these periods he reports a euphoric mood ("a natural high") where he "turns into a comedian". He also reports a decreased need for sleep during these periods. These symptoms, while not indicative of a full blown manic episode, would be consistent with hypomania. Therefore, we concur with a diagnosis of Bipolar II Disorder.

SUBSTANCE ABUSE HISTORY: Mr. Lucas denies alcohol use and states that he has never had a problem with alcohol. However, medical records from Three Rivers Behavioral Health would indicate a prior diagnosis of Alcohol Dependence. He reports that he did use marijuana briefly in adolescence and also with the victim's mother. He denies ever being arrested for cannabis use. He denies legal or occupational difficulties related to marijuana use. He denied the use of cocaine or crack cocaine.

MEDICAL HISTORY: Mr. Lucas is prescribed medications to manage his hypertension. He has no other known medical problems.

SOCIAL HISTORY: Mr. Lucas was raised by both parents. He comes from a family with a significant history of depression, especially on his maternal side of the family. Both his mother and grandmother have been treated for depression and there appears to be a biological predisposition for a mood disorder in his family. He is the oldest of two children. His mother reports that he had a seizure at 3 years of age and was placed on antiseizure medication until the age of 5. He reportedly was normal in meeting his developmental milestones. He had early difficulties attending school and ran away from school on at least two occasions in the 1st grade. He was in special resource classes


LUCAS, JEFFERY THOMAS
1009-9170
OUTPATIENT EVALUATION

for reading comprehension. He eventually graduated with a high school diploma. There was no history of suspensions or expulsions.

Mr. Lucas was married at age 22. This marriage lasted for approximately twenty years. This marriage ended due to his wife's infidelity. He has an 11-year-old daughter as a result of this marriage. He has had two significant relationships since his divorce. The first was with the alleged victim's mother and the second is with his current fiancé who has reunited with him following a brief separation when she found out about his current charges. She has a five year old son.

Mr. Lucas has worked as a truck driver and as a shipping/receiving clerk in warehouses. He became unemployed a week after his last psychiatric hospitalization. He is currently receiving unemployment benefits. He reports that his longest job was as an electrician for eight years. He denies a history of prior arrests, but has received numerous speeding tickets over the years.

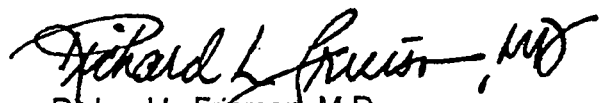
MENTAL STATUS EXAM: On today's date, he was alert and oriented to person, place, day, date and time. He was neatly groomed and cooperative with the interview. He made good eye contact. He was able to register three objects and he had no difficulty recalling all three objects after five minutes. We found no evidence of clinically significant long or short term memory impairment. His fund of knowledge was in the average range as evidenced by his recall of past presidents. He made one error on a test of concentration. He demonstrated a capacity for abstract reasoning as evidenced by his interpretation of both proverbs and similarities. He was able to perform a calculation although he was noted to count on his fingers. He described his mood as "pretty good" and 9 on a scale of 1 to 10 with 1 being severely depressed and 10 being euphoric (on February 2, 2009 he reported his mood was a 7). He denied a current sleep or appetite disturbance and he denied suicidal or homicidal ideation. There was no evidence of delusional thinking and he denied auditory or visual hallucinations. His thinking was logical and goal directed without loosening of associations or flight of ideas. There was no evidence of disturbed thought processes or thought content.

CONCLUSION REGARDING COMPETENCY TO STAND TRIAL: Mr. Lucas was aware of the charges against him and he appreciates their seriousness, including the potential maximum sentence he could receive if he were to be convicted. He was able to state his attorney's name and he understands the role of his attorney in assisting him with a defense. He states that he has met with his attorney on three occasions and is able to tell his attorney everything he knows about the allegations against him. He trusts that his attorney will try to help him. He understands the role of the judge in deciding a punishment. He is also aware of the nonadversarial role of the judge. He understands the adversarial role of the prosecutor although he was not familiar with the term *solicitor*. He understands the role and function of the jury and he understood the number of jurors on a jury. He was not aware of the unanimous requirement for a jury verdict. He was able to solve a hypothetical problem involving the legal system and he appreciates the importance of appropriate courtroom behavior. He understands the pleas that are available to him. He had some difficulty spontaneously defining a plea bargain, however, he demonstrated a capacity to understand how a plea bargain works and he was able to state what he would consider a good plea offer in his case. He was able to rationally discuss evidence and the role of evidence in the courtroom. He was able to

JK
LUCAS, JEFFERY THOMAS
1009-9170
OUTPATIENT EVALUATION

answer our questions in a rational manner and would be able to also answer questions of his attorney in a rational manner. Therefore, it is our opinion that he has a sufficient factual and rational understanding of the legal system and a present ability to rationally consult with his attorney regarding a defense. It is our opinion that he is competent to stand trial.

RECOMMENDATIONS: Mr. Lucas needs to continue in psychiatric treatment given the severity of his recurrent major depressive episodes. He does not need acute psychiatric hospitalization at the present time.



Richard L. Frierson, M.D.
Professor of Clinical Psychiatry
University of South Carolina School of Medicine

RLF/cj

D: 01/07/09
RT/EM: 01/07/09
F/EM: 02/04/09 (RLF)

AK
LUCAS, JEFFERY THOMAS
1009-9170
OUTPATIENT EVALUATION

3/18/09

Upur Horner,

My daughter went to
the doctor for an ear
infection yesterday (3/17).

Her doctor was Dr.

Libereff (husband of witness
yesterday afternoon). I wanted

to disclose that this has
been her doctor on a few

occasions, though I have

no personal relationship with

the doctor.

Tom Allen
page #3

FENGAD 800-631-6989

COURT'S

EXHIBIT NO. 2

IDENTIFICATION/EVIDENCE

DKT. # _____

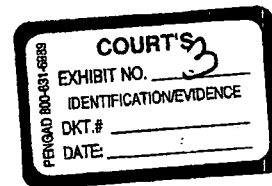
DATE: _____

§ 16-3-95. Infliction or allowing infliction of great bodily injury upon a child;

(A) It is unlawful to inflict great bodily injury upon a child.

(C) For purposes of this section, "great bodily injury" means bodily injury which creates a substantial risk of death or which causes serious or permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

*Can we have a
copy of the applicable
Statute.*



FORM 5

FILED

STATE OF SOUTH CAROLINA)

County of Lexington)Jeffery T. Lucas, #333799)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

IN THE COURT OF COMMON PLEAS P 1:20

RETH A. GARRIGS
CLERK OF COURT
LEXINGTON SC

APPLICATION FOR

POST-CONVICTION RELIEF

2010CP3200803

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution
P.O. Box 205/ Ridgeville, SC 29472
2. Name and location of Court which imposed sentence The Court of General Sessions- County of Lexington
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-GS-32-00536
 - (b) Infliction of Great Bodily Injury Upon a Child

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) March 18, 2009
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Yes
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
There was no Appealable issue for a Appellate review. (No)
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. N/A
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. N/A
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. N/A
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) There was no Appealable issue for a Appellate Review.
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) See the Attachment (Memorandum of Law)
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See the same Attachment (Memorandum of Law I & II)
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. N/A

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/a
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) This is first opportunity the Applicant had to bring this matter before this Court.
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? N/A
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
- _____
No
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Wayne Floyd, 1611 Augusta HWY
West Cola. S.C. 29169
- ii. _____
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Mr. Floyd, represented at my trial and sentence.
- ii. _____
- iii. _____

19. State clearly the relief you seek in filing this application:

Motion to Vacate the sentence and conviction
as a matter of law

20. Are you now under sentence from any other court that you have not challenged?

N/A

STATE OF SOUTH CAROLINA)

County of Lexington)

2010CP3200803

VERIFICATION

I, Jeffery T. Lucas, 3 33799, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Jeffery T. Lucas

SWORN to and subscribed before me this 17th
 day of February, 2010.

Sepira Jones (L.S.)
 Notary Public

My Commission Expires: 1/24/2018

BETH A. CARRIG
 CLERK OF COURT
 LEXINGTON SC

2010 FEB 19 P 1:21

FILED

Due Process Rights were indeed violated. Such also serves to deny the Applicant of Equal Protection of the laws against unjust prosecution.

2010CP3200803

CONCLUSION

For all the reasons stated herein above, it is respectfully requested that this Honorable Court grant the Applicant's an Evidentiary Hearing, as a matter of law the sentence and conviction must be vacated.

Respectfully Submitted,

Jeffery Thomas Lucas
 Jeffery Thomas Lucas, #333799
 Wando B-142
 Lieber Correctional Institution
 P.O. Box 205
 Ridgeville, South Carolina 29472

SWORN TO BEFORE ME this 17th day

of February, 2010

Sylvia Jones
 Notary Public for South Carolina

My Commission Expires: 1/24/2018

BETH A. CARRIGS
 CLERK OF COURT
 LEXINGTON SC

2010 FEB 19 P 1:21

FILED

State of South Carolina,) In The Court of Common Pleas
County of Lexington)

Jeffery T. Lucas, #333799)
Applicant,)

vs.

State of South Carolina,
Respondent.

Memorandum of Law In Support of
Post-Conviction Relief

2010CP3200803

2010 FEB 19 P 1:21

BETH A. CARRIGS
CLERK OF COURT
LEXINGTON SC

Pursuant to S.C. Code Ann. 17-27-20 (A) (1)(4)(6), the Applicant Jeffery T. Lucas, moves before this Honorable Court of Lexington County for an Application for Post-Conviction Relief to be heard accordingly to Rule 12 (A), SCRCP, within 90 days.

After service of this Notice upon Respondent by Clerk of Court exclusive of the day of service. If Respondent fail to do so, Judgment/Order of default will taken against Respondent for the relief demand in the Application/Complaint.

In his Application the Applicant alleges that he is being held in custody unlawfully for the following reasons:

I. Was the Applicant's Fifth, Sixth and Fourteenth Amendment Rights of the United States Constitution and his Rights of Due Process violated by the Solicitor up graded charges without any probable cause its failed to sufficiently apprise the Applicant of the charge against him?

This legal framework and foundation being firmly in place, the court is compelled to look at the facts in regard to this case sub-justice because the law arises from facts (*Ex Facto Oritur Jus.*) The Solicitor had no probable cause or mitigating circumstances to up grade the initial charges to Infliction of Great Bodily Injury Upon a Child.

To bolster the Applicant's position that he was initially charge with Assault and Battery with Intent to Kill and Unlawful Neglect of a Child, the initial charges was brought before the Grand Jury January 12, 2009, the allege crime occurred May 24, 2006 it was an Inordinate delay in adjudication of asserted Arrest Warrant of the initial charges,

where it appeared that more than two year had elapsed before the Solicitor prepare an indictment for presentment to the Grand Jury.

"Action on warrants": within Ninety (90) days after receipt of an arrest warrant from the Clerk of Court, the Solicitor "Shall" take

action on the warrant by one (1) Preparing an indictment for presentment to the Grand Jury which indictment "shall" be filed with the Clerk of Court, assigned a criminal case number and presented to the Grand Jury; (2) formally dismissing the warrant, noting on the face of the warrant the action taken; or (3) making other affirmative disposition in writing and filing such action with the Clerk of Court.

S.C.Code Ann. Section 1-7-730 and S.C.Cod Ann. Section 17-13-150 require that the prosecution fulfill and see that all the duties, requirements, and Rules of Criminal Procedure related to Due Process are adhered to and completed within the Court.

In order to understand the meaning of any statute or phrase of law, it is necessary to determine the meaning of the language as it is used in the particular context; Robinson v. Shell Oil Company, 117 S.Ct. 843, 846 (1997). Article 12 Section 2 utilize the words, "shall" provide. In this context, "shall" is mandatory. See United States v - Meyers, 106 F.3d 936, 941 (CA 10 1997). In order to understand the meaning of any word, phrase or sentence "the words should be given their plain and ordinary meaning unless something in the text requires a different meaning and or interpretation". South Carolina Rules of Criminal Procedure Rule 3 (c) states: Disposition on arrest warrant, the Solicitor shall take action on the Warrants within Ninety (90) days by Warrants, the Solicitor "Shall" take action on the Warrant within ninety (90) days by preparing an indictment" for presentment to the Grand Jury.

To further elaborate there was no Affidavit or Arrest Warrant issued to the Applicant to sufficiently apprise the Applicant of the New charge against the Applicant. Thus, the Complaint or affidavit is the initial step in the prosecution, and it is the pleading which shows the charge against accused. The instrument performing this function is also known as an information.

Subject to the rights secured to a person accused of crime by the provisions of the Constitution, the legislature may in general regulate complaints in criminal cases.

The fact that the information filed by the prosecuting attorney is not verified by him, or that it is verified by him on information and belief does not violate the constitutional provision that no warrant shall issue except on probable cause supported by oath, if with the information a complaint verified by some credible person is also filed. Such a constitutional provision does not invalidate a statute which requires the justice or other officer to issue a warrant upon a statutory complaint where the statutory complaint must show probable cause. The term "complaint" is a technical one, descriptive of proceedings before Magistrates. It is defined to be the preliminary charge or accusation against an offender made by a private person or an informer to a justice of the peace or other proper officer changing that accused has violated the law. It has also been defined as a preliminary charge before a committing Magistrate; a formal allegation or charge, preferred by someone against another, to an appropriate court or officer, the allegation in writing, made to a court or magistrate, that a person has been guilty of some designated offense, or sometimes as the real charge which may be made to a proper magistrate or court, and which is to be reduced to writing by the magistrate or court.

The complaint or affidavit is the foundation of the jurisdiction of the magistrate and it performs the same function that an indictment or information does. The complaint also provides a foundation for a neutral judgment by a judicial officer that resort for further criminal process is justified. Therefore, a warrant may be issued only by an officer authorized by law to do so, and the Magistrate issuing it must be neutral and detached. See Illinois v. Gates, 103 S.Ct. 2317, 462 U.S. 213, 76 L.Ed.2d 527. The Solicitor lack jurisdiction to alter a warrant after it has been issued by resting officer and Magistrate. Therefore, the General Assembly did not make a provision in its statute that create a "Direct indictment" by the "Solicitor" to the "Grand Jury".

With this legal framework in place the Applicant further contends, that "Solicitor" alter the charge from a lesser offense to a greater offense. Furthermore, S.C.CODE ANN. Section 16-3-95 (A) is a greater offense, then S.C. CODE Ann. 20-7-50. Unlawful neglect of child or helpless person by legal custodian. Provides:

Any person having the legal custody of any child or helpless person, who shall, without lawful excuse, refuse or neglect to provide, as defined in § 20-7-490, the proper care and attention for such child or helpless person is endangered or is likely to be endangered shall be guilty of a misdemeanor and shall be punish within the discretion of the circuit court.

Specifically, S.C.Code Ann. Section 17-23-20 bars prosecution for an unlawful act when the defendant was previously arrested. The statute is generally applied to prevent the prosecution of a greater offense after the defendant has been arrested under a lesser offense involving a Unlawful Neglect of A Child. The determination of legislative intent behind statute is a matter of law. As a result, the issuance of a warrant of arrest can be exercised only by one who is authorized by law to do so. An officer may not alter a warrant after it has been issued in an attempt to particularize it. Brown v. Byer, 870 F.2d 975, 978-79 (5th Cir. 1989).

It is more than clear there was no probable cause for the Solicitor to alter the charges. Thus, there was an Inordinate delay of approx. three years. Further, the Applicant did not made a inculpatory oral statement to the Police while he was in custody. As a result, the Solicitor based their case off the medical report. Therefore, the Police Fabricated their report to Magistrate to gain probable cause, the Police stated in their Affidavit that the Applicant given them a statement and a statement was not given to the Police by the Applicant. The Solicitor "Nolle proseui" the original charges on March 9, 2009, then the Solicitor alter the charges on March 2, 2009. Then what probable cause did the Solicitor had to alter the original charges? the child still alive. State v. Navy, 370 S.C. 398 (App. 2006), 635 S.E.2d 549, the Applicant did not made or signed any written statement to the Police. Initially the Applicant was not given the Miranda warnings required that warnings be given to a suspect after he or she has been taken into cusody or deprive of his or her freedom in any significant way.

II. Did the Trial Court lack Subject Matter Jurisdiction, due to the "procedural defect" in that there was no Order of Continuance issued to continue the case?

The Applicant contends in pursuant to Article V. Section 4 of the South Carolina Constitution: IT IS ORDERED that all criminal cases in the State of South Carolina shall be disposed of within (180) days from the date of the Defendant's arrest. Provided, however, that the Circuit Court may continue a criminal case beyond (180) days by Written Order if the Court determines that exceptional circumstances exist in the case This Order does not create or define a Right of Defendant to a Speedy Trial.

S.C.CODE ANN. Section 1-7-730 and 17-13-150 require that the prosecution fulfill and see that all duties, requirements and Rules of Criminal Procedure related to Due Process and the South Carolina Constitution are adhered to any completed within the Court.

In order to understand the meaning of any statute or phrase of law, it is necessary to determine the meaning of the language as it is used in the particular context; Robinson v. Shell Oil Company, 117 S. Ct. 843, 846 (1997). Article 12 Section 2 utilizes the words "shall" is mandatory see United States v. Meyers, 106 F.3d 936, 944 (CA 10 1997). In order to understand the meaning of any word, phrase, or sentence "the Cardinal Rule is that the words should be given their plain and ordinary meaning unless something in the text requires a different meaning and/or interpretation" Seckinger v. The Vessel Excaliber, 483 S. R2d (SC App. 1997); also see United States v. Ron Pair Enterprise Inc., 109 S.Ct. 1026, 1030 (1989).

Article 1 Section 23 of the South Carolina Constitution dictates: The provisions of the Constitution shall be taken, deemed and construed to be mandatory and/or prohibitory and not merely directory, except where made directory or promissory by its own terms."

Article 12 Section 2 of the South Carolina Constitution is clear and unambiguous "shall" is mandatory State v. Carson, 317 S.C. 430, 431, 454 S.E. 2d 888, 889 (1995).

Therefore, it can be factually stated that not only by the Applicant's Fourteenth Amendment Rights of Due Process, but also by the provisions of Article V. Section 4 of the South Carolina Constitution, it is mandatory that the Defendant's Due Process matters be disposed of before the Criminal Court within (180) days after his arrest. The Applicant was arrested on or about June 13, 2006. This means that the Applicant's Due Process matters should have been disposed of by December 13, 2006 yet they were not disposed of until March 18, 2009. To go beyond the prescribed deadline without an Order of Continuance creates a "procedural defect" which deprives the Trial Court of subject matter jurisdiction and/or the Right and/or power to enact its Subject Matter Judiciary powers to adjudicate the Applicant Trial. Subject Matter Jurisdiction is the power to hear and determine cases of a general class to which the proceeding in question belong. *Bell v. Monsanto Corp.* 579 S.E.2d 325 (SC 2003). Subject Matter Jurisdiction does not only cover and/or involve whether or not the matter resides in a proper Court of Jurisdiction to hear it. The Court's power to hear and determine a case is also defined as the Court's ability to hear and determine a case. Thus Subject Matter Jurisdiction also involved any issue that may affect and/or hinder that power and/or ability to act in accordance to Rules of Court and Due Process law, such matters can be raised at anytime and the Court should not fail to take notice. *Brown v. State*, 343 S.C. 342, 540 S.E.2d 846 (2001); *State v. Browning*, 320 S.C. At. 368, 465 S.E.2d at 359; citing *State v. Munn*, 357 S.E.2d 461 (SC 1987).

Without an Order of Continuance being issued the parties were prohibited from continuing the cause. Such deprived the Criminal Court of Subject Matter Jurisdiction and/or Right to enact and/or invoke its Subject Matter Judiciary powers to adjudicate the Applicant's Trial and violated his Due Process Right. Therefore, the sentence and conviction must be vacated.

In *State v. Adams supra*; the Supreme Court emaciated the "Practical Eye Test" It is perspicuous that with the Solicitor alter a warrant after it has been issued in an attempt to particularize it the Applicant's Fifth, Sixth and Fourteenth Amendment Rights, Article IV Section 2 and

2010CP3200803

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Jeffery T. Lucas, #333799, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Jeffery Thomas Lucas
Applicant

SWORN or affirmed to and subscribed before me this

17th day of February, 2010.

Sylvia Jones
Notary Public

My Commission Expires: 1/24/2018

BETH A. CARRIGS
CLERK OF COURT
LEXINGTON SC

2010 FEB 19 P. 1:21

FILED

February 12, 2010

Jeffrey Thomas Lucas, #333799
Wando B-142
Lieber Correctional Institution
P.O. Box 205
Ridgeville, South Carolina 29472

FILED

2010 FEB 19 P 1:20

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

The Honorable Beth A. Carrigg, Clerk of Court
Lexington County Judicial Center
205 East Main Street
Lexington, South Carolina 29072-3494

RE: POST-CONVICTION

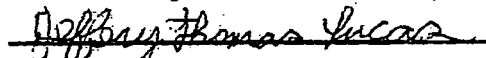
2010CP3200803

Dear Ms. Carrigg:

Please find enclosed for filine the oiginal Post-Conviction
and attach Memorandum of Law In Support of Post-Conviction Relief
Application. Please reurn a stamped copy with my Legal Representative.

Thank you for your attention to this matter. Please do not hesitate
to contact me should there be any questions or concerns.

With best personal regards,


Jeffrey Thomas Lucas

Enclosures

CC: ~~Nicole Kirkland~~, Legal Representative

Joyce T Lucas

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON

CA/No. 2010-Cp-32-803

Jeffery Lucas #333799 -- Applicant,

-VS-

State of South Carolina -- Respondent,

FILED
CLERK OF COURT
LEXINGTON, SC

2010-4-13 12:43

FILED

AMENDED POST CONVICTION RELIEF APPLICATION
PURSUANT TO RULE 15(a), SCRPC

Respectfully Submitted,

/s/ Jeffery Lucas
Jeffery Lucas #333799

INDEX

Standard of Review.....	i
Memorandum of Law.....	1
Issue (A).....	2
Issue (B).....	8
Issue (C).....	13
Conclusion.....	15
Motion for Expenditure of Funds.....	(Attached hereto).

STANDARD OF REVIEW

I. The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right... ..to have the Assistance of Counsel for his defense." U.S. Const. amend VI.

It is well established that the Sixth Amendment right to counsel cannot be satisfied by mere formal appointment. Avery v. Alabama, 308 U.S. 444, 446 (1940). Rather, the Sixth Amendment guarantees criminal defendants the assistance of a reasonable competent attorney. McMann v. Richardson, 397 U.S. 759, 770-771 n.14 (1970).

The Supreme Court defined the Sixth Amendment right to the effective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 686 (1984). In Strickland, the Court established a two-part test for reviewing claims of ineffective assistance of counsel. Id at 690.

First, the Applicant must demonstrate that trial counsel's (Floyd's) performance is "highly deferential." Id at 689. Indeed, courts must afford a strong presumption that counsel's performance was within the wide range of professionally competent assistance. See Id.

Second, if the Applicant is able to demonstrate his trial counsel's performance was objectively unreasonable, he must then "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id at 694. As a result, Applicant's trial counsel may be deemed ineffective only if his conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied on as having a just result."

Applicant here will show how Mr. Floyd's performance fell far below the objective standard of reasonableness in regards to the failure to object to the Solicitor's improper closing argument that impermissibly invoked the "Golden Rule Argument"; failure to retain and present an expert witness to challenge the State's scientific evidence; and file a notice of appeal following an unfavorable verdict of guilty.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)

Jeffery Lucas #333799) CA/No. 2010-Cp-32-803
Applicant,)
-V-) AMENDED POST CONVICTION RELIEF
State of South Carolina) APPLICATION PURSUANT TO:
Respondent,) RULE 15(a), SCRCP

COMES NOW, Jeffery Lucas, by and through attorney of record who respectfully asks this Honorable Court to amend the Original application in the above captioned case number pursuant to Rule 15(a) SCRCP.

Respectfully Submitted,

/s/ _____

Jeffery Lucas #333799

ISSUE (A) WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE SOLICITOR'S IMPROPER CLOSING ARGUMENT THAT IMPERMISSIBLY INVOKED THE "GOLDEN RULE" AND ULTIMATELY DENIED APPLICANT HIS RIGHT TO A FAIR TRIAL?

FACTS

Applicant asserts that he was denied the effective assistance of counsel when counsel failed to object to the solicitor's improper closing argument to the jury that impermissibly invoked the "Golden Rule Argument", that repeatedly used the word "you" or the form of the word "you" some 46 times during closing argument; most of which impermissibly placed the jury in the shoes of the victim. This argument was all the more prejudicial since the victim was a child. The solicitor's closing continually asked the jury to consider "what kind of man does this...." in order to seek a verdict of guilty, rather than ask the more appropriate question of.. "ladies and gentlemen you have listened to the witnesses and have the evidence before you and it is for you the jury to determine whether or not the state has carried their burden of proving guilt of the defendant beyond a reasonable doubt. Instead the solicitor invoked the Golden Rule in order to arouse the biases and prejudices of the jury in order to obtain a conviction.

The Solicitor during closing argued the following without objection from counsel, as was recorded:

But I want you, when you go through this evidence and when you get back into the jury room, I want you to ask yourself what kind of man does it take to beat a little child so severely that you cause swelling in his little brain, beat a child so severely? [Tr.p.289, L.4-10].

What kind of man does it take that it allows -- [Tr.p.289, L.11].

What kind of man does it take -- [Tr.p.289, L.14].

What kind of man does it take that inflicts savage kicks or such brutal punches to the abdomen that you see depicted in this photograph that leads not only just beating that kid, leaving the bruises, but it's so violent, so direct, it wasn't with any kind of CPR where you put the palms of your hands and press.. [Tr.p.289, L.25, 290, L.1-6].

Oh', I'm going to help you, or kick...[Tr.p.290, L.12].

But use your God given common sense, ladies and gentlemen and ask yourself, does the stories that he gave to Detective Pritchard fit with the facts? [Tr.p.291, L.18-21].

Well, think about that ladies and gentlemen. You had a little boy who wasn't breathing, I could buy into the maybe doing the CPR stuff, could even believe a little of that, but wouldn't you have got in the car and driven to the child yourself to the hospital or the nearest ambulance service or somewhere, a fire station to get help? [Tr.p.292, L.6-12].

Would you leave the kid behind, go down and make a phone call to the mama who's at work? Does that really make sense to you? [Tr.p.292, L.13-15].

There's an old saying that my mom used to tell me and it goes, there's many paths to a lie, but there's only one way to the truth. What I think she meant by that is, if you tell a lie, people are going to poke holes in it

and because it's not the truth, it's always going to be shifting.. [Tr.p.292, L.20-25, p.293, L.1].

But if you're honest and you're actually telling the truth, it never changes because that's the way it really happened. You don't have to get up and make a second statement, and you'll have it when you go back there, you'll have these statements of the defendant, where he says, oh' yeah I lied about that because I thought I was going to get into trouble. [Tr.p.293, L.3-10].

But the devil's in the details, ladies and gentlemen, because you see on the ear, there's swelling and there's bruising, which you might buy into that the head was caught there until you check out the handrail and realize that an adult man's head can come in and out with no problem. How is a little kid that's two years old head going to get stuck in there?

But, okay, even if you want to give that benefit of doubt to him, why aren't there abrasions there? You heard the doctor Cartie, say there's no scraping. And a child you can bet, if you had your head stuck in there, you'd be fighting to get free. [Tr.p.294, L.7-22].

There was no surface blood that you would expect from friction of the -- of the pain that you would have suffered to do that. [Tr.p.295, L.2-4].

Why he did that, I don't care, just if he did it, ladies and gentlemen, that's the one answer, how you choose to define that question I ask you to ask when you get back in the jury room is what kind of man does it take to do this? An even kind of lower man that once he's caught is going to lie about it, that's about the only thing that's lower is when you're caught, you lie about it. [Tr.p.296, L.7-15].

But the only answer you have to do, the only label that you have to give somebody what kind of man that is, that's a simple one, all you got to do is answer one word and that's guilty. [Tr.p.296, L.16-19]

DISCUSSION

Applicant asserts that he was denied the effective assistance of counsel when counsel failed to object to the solicitor's improper closing argument to the jury that impermissibly invoked the "Golden Rule Argument", that repeatedly used the word "you" or the form of the word "you" some 46 times during closing argument; most of which impermissibly placed the jury in the shoes of the victim. This argument was all the more prejudicial since the victim was a child. The solicitor's closing continually asked the jury to consider "what kind of man does this...." in order to seek a verdict of guilty, rather than ask the more appropriate question of.. "ladies and gentlemen you have listened to the witnesses and have the evidence before you and it is for you the jury to determine whether or not the state has carried their burden of proving guilt of the defendant beyond a reasonable doubt. Instead the solicitor invoked the Golden Rule in order to arouse the biases and prejudices of the jury in order to obtain a conviction.

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and it's content should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); accord Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); also see Cooper v. State, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) ("A solicitor's closing argument must be carefully tailored so it does not appeal to the personal biases of the jurors).

Specifically, the solicitor asking the jurors to put themselves in the place of the victim is improper and constitutes reversible error. State v. McDaniel, 320 S.C. 33, 38, 462 S.E.2d 882, 884 (Ct.App.1995). This is known as the Golden Rule Argument. The Golden Rule Argument "ask[s] the jurors to become advocates for the defendant or victim and to ignore their obligation to exercise calm and reasonable judgement." Black's Law Dictionary 700 (7th ed.1999); see also John W. Reis, Improper Jury Argument: Gilding the Lustre of the Golden Rule, 69-JAN Fla. B.J. 60, 60 (1995) ("The traditional notion of the Golden Rule, though not contained in any rule of evidence or procedure, holds that a lawyer shall not urge the jury members, either in a civil or criminal case, to imagine themselves or their family members or friends in the place of the offended litigant or victim and to render their verdict from that perspective").

Although the forbiddance of Golden Rule Arguments began in civil trials to hinder the plaintiff from urging the jury to put itself in the place of the victim in order to obtain higher damages, the prohibition has [now] been made applicable to criminal actions. 75A Am.Jur.2d Trial §650 (1991); see Lucas v. State, 335 So. 566, 568 (Fla-Dist.Ct.App.1976) (holding that "the technique of asking jurors to place themselves in the position of the victim has been held to be improper in both civil and criminal cases.)).

"The Golden Rule", argument, suggesting to jurors as it does that they put themselves in the shoes of one of the parties, is generally impermissible because it encourages the jurors to

depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." 75A Am.Jur.2d Trial §650 (1991). Regardless of the nomenclature used, any argument that importunes the jurors to place themselves in the victim's shoes is disallowed Golden Rule Argument. Johnson v. State, 263 Ga.App. 443, 587 S.E.2d 775, 781 (2003).

Golden Rule Arguments are generally improper and may constitute reversible error. State v. McHenry, 276 Kan. 513, 78 P.3d 403, 410 (2003); see also State v. Prevatte, 356 N.C. 178, 570 S.E.2d 440, 476 (N.C.2002)("Arguments that ask jurors to place themselves in the victim's shoes are improper"); also see Velocity Express Mid-Atlantic, Inc v. Hughes, 266 Va. 188, 585 S.E.2d 557, 565 (2003).

As is seen supra the improper closing argument of the solicitor was extremely prejudicial especially when the solicitor repeatedly kept using the word you or the form of the word some 46 times impermissible invoking the Golden Rule. Furthermore, rather than ask the jury to decide whether or not the state has carried it's burden of proving the Applicant's guilt beyond a reasonable doubt, the solicitor instead kept asking the jury "what kind of man does this", when the character of the Applicant isn't an issue. Applicant pled not guilty to the offense charged. This placed the burden of proving guilt beyond a reasonable doubt on the state. Counsel should be deemed ineffective and Applicant should be granted a new trial.

ISSUE (B) WAS COUNSEL INEFFECTIVE FOR FAILING INVESTIGATE AND
RETAIN AND CALL AN EXPERT WITNESS FOR APPLICANT'S DEFENSE TO
CHALLENGE THE STATES SCIENTIFIC EVIDENCE?

FACTS

During trial the State called two (2) witness'; Dr. Susan Luberoff and Dr. Richard J. Cartie.

Applicant's version of events was that the child had fallen and the child's head had become entangled in the railing. In opening summation the Solicitor told the jury that there was no way a child could have gotten his head caught in the railing and that Detective David Pritchard was going to testify it was not possible. Thus, directly refuting Applicant's version of events. Yet, during opening summation the Solicitor told the jury that Dr. Susan Luberoff was going to testify that the injuries were not consistent with a child getting his head caught in a railing. And further that Dr. Richard Cartie would testify the injuries were not consistent with a child getting his head caught in a railing. [Tr.p.103, L.19-25, p.104, L.-1-3].

During closing summation Applicant's counsel argued the following to the jury, as was recorded: "You remember when asked whether or not the injuries to the neck could be caused by the head getting caught in the railing if the railing was not the one that they were told it was so big that an adult's head could fit through it, Dr. Luberoff "had to admit, yeah, it could have happened." So, they get Dr. Cartie up there to say, oh, no, you should ignore what Dr. Luberoff says although she's an expert.

It's got to be a strangulation injury, in direct contravention what Dr. Luberoff told us yesterday. [Tr.p.299, L.20-24].

Applicant asserts the was denied the effective assistance of counsel when counsel failed to investigate and retain expert services due to the nature and seriousness of the offenses alleged. Especially since counsel was surely not qualified to challenge scientific evidence presented by the State's witness's, and as a result Applicant was denied his right to effective cross-examination.

Applicant asserts that counsel should have motioned the Court pretrial for an Authorization for Expenditure of Funds for Expert and Investigation Services pursuant to S.C. Code Ann. §17-3-50(B); and Ake v. Oklahoma, 470 U.S. 68 (1985) and called an expert witness for Applicant's defense to adequately challenge the State's scientific evidence and effectively cross-examine the State's witnesses. The failure to do so denied Applicant his right to the effective assistance of counsel and his right to a fair trial.

DISCUSSION

The Sixth Amendment U.S. Const. provides that "in all criminal prosecutions, the accused shall enjoy the right... ..to have the assistance of counsel for his defense." See U.S. Const. amend VI. The right to the effective assistance of counsel means the right to "effective assistance of counsel." See Cuyler v. Sullivan, 446 U.S. 335, 344, 352 (1980); also see United States

v. Morrison, 449 U.S. 361, 366 (1981) and Tollett v. Henderson, 411 U.S. 258, 266-68.

At the heart of effective representation is the independent duty to investigate and prepare. Goodwin v. Balcom, 684 F.2d 794, 805 (11th Cir.), cert. denied _____ U.S. _____, 103 S.Ct. 1798. Therefore, permissible trial strategy can never include the "failure" to conduct reasonably substantial investigation of the case.

Preparation and investigation "must be more than perfunctory." Counsel has an affirmative duty to conduct appropriate investigation, both factual and legal. Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.), cert. denied 393 U.S. 849 (1968). The failure to ascertain and investigate possible defenses has often resulted in finding that the defendant was denied adequate representation. See Goodwin v. Swenson, 287 F.Supp. 166, 176-86 (W.D.Mo.1968).

The primary input of the attorney to his client's case is that of professional expertise. Even in a simple criminal case, meticulous investigation and thoughtful legal analysis will often reveal a panolopy of issues -- to which the defendant, a layman will be oblivious to. Garland v. Cox, 472 F.2d 875, 879 (4th Cir.).

The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense. The American Bar Association Standards for Criminal Justice, Prosecution and Defense Function describes

the obligation in terms no one could misunderstand in circumstances of a case like this one: "it is the duty of the lawyer to conduct prompt investigation of the circumstances of the case and to explore [all] avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.

In the instant matter counsel was well aware of the scientific evidence in the case and the fact that counsel was not qualified in the field of forensic science to challenge the State's evidence. Furthermore, Counsel could not properly cross-examine either Doctor presented by the State in their respective fields.

The Sixth Amendment provides that the accused shall enjoy the right to cross-examine the witnesses against him. That guarantee is applicable via the Fourteenth Amendment that guarantees the "right to cross-examination of witnesses. See Pointer v. Texas, 380 U.S. 400 (1965). In the instant matter counsel's failure to retain and call an expert witness in Applicant's defense denied him the right to cross-examine the State's witnesses. The resulting implication denied Applicant the right to the effective assistance of counsel and the right to a fair trial.

For the errors complained of Applicant respectfully prays this Court will grant the requested relief of a new trial.

ISSUE (C). WAS COUNSEL INEFFECTIVE FOR FAILING TO FILE A NOTICE OF
APPEAL ON APPLICANT'S BEHALF?

FACTS

Applicant proceeded to trial by a jury before the Honorable William P. Keesley March 16-18, 2009. Applicant was charged with one count of infliction of great bodily harm upon a child.

Ultimately Applicant was convicted as charged and Judge Keesley sentenced Applicant to a term of (20) twenty years imprisonment in the South Carolina Department of Corrections.

After being sentenced Judge Keesley advised Applicant that there was a time limit within which to appeal the sentence and conviction, and therefore Applicant should advise his counsel (Mr. Floyd) of his intent to appeal. [Tr.p.340, L.19-25, p.341, L.1-3]. Following the sentence pronounced by the Court Applicant and his family immediately advised Mr. Floyd that Applicant clearly wished to appeal his conviction and sentence, especially in light of the fact that prior to trial during an in-camera hearing Mr. Floyd motioned the Court to suppress the statement(s) that were alleged to have been given voluntarily, therefore establishing sufficient grounds for an appeal.

Applicant asserts he was denied the effective assistance of counsel when Mr. Floyd failed to timely file a notice of appeal on Applicant's behalf.

Applicant is entitled a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

DISCUSSION

Applicant asserts he was denied the effective assistance of counsel when counsel failed to timely file a notice of appeal on Applicant's behalf upon Applicant's request and intent to appeal his sentence and conviction.

Applicant respectfully prays this Court will grant a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974); also see Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986); and Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002).

Applicant is entitled to a belated appeal according to White v. State, supra. Applicant respectfully requests a belated appeal in the instant matter.

CONCLUSION

WHEREFORE, Applicant respectfully prays this Honorable Court will grant the requested relief of a new trial on Issues (A) & (B), or in the alternative grant the requested relief of a belated appeal on Issue (C).

For the requested relief sought herein, Applicant will forever pray.

Respectfully Submitted,

/s/ Jeffrey Lucas
Jeffrey Lucas

STATE OF SOUTH CAROLINA) IN THE COURT COMMON PLEAS
COUNTY OF LEXINGTON)

Jeffery Lucas #333799) CA/No. 2010-Cp-32-803
Applicant,)
-v-) MOTION FOR EXPENDITURE OF FUNDS
State of South Carolina) PURSUANT TO S.C. CODE ANN.
Respondent,) § 17-3-50(B)
_____)

COMES NOW, above captioned Applicant by and through attorney of record respectfully motioning this Honorable Court for Authorization for Expenditures of Funds for Expert and Investigation Services pursuant to S.C. Code Ann. §17-3-50(B), to allow him to hire an expert witness to present favorable testimony during the PCR hearing that will be held in the above captioned.

Applicant will show unto this Honorable Court the following in support of this Motion; as follows:

(1). Applicant was charged with infliction of great bodily harm upon a child;

(2). During trial the State presented Two (2) doctor(s) as witness' for the State. One (1) was qualified as an expert.

(3). Both Doctors for the State presented some what

conflicting testimony, yet the testimony went unchallenged since counsel for Applicant did not present an expert witness to challenge the State's evidence.

(4). Counsel for Applicant was not qualified in the field of medicine and therefore could not properly challenge the evidence as put forth by the State and therefore Applicant was denied the right to effectively cross-examine the State's witness'.

(5). Accordingly, pursuant to Ake v. Oklahoma, 470 U.S. 68 (1985), Applicant enjoys the right to have an expert in his corner and defense to challenge the State's expert witness'.

(6). Accordingly, pursuant to Bannister v. State, 333 S.C. 298, 303, 523 S.E.2d 459 (1999)(PCR applicant must produce testimony of favorable witness to establish prejudice).

(7). The burden of proof lies on the PCR applicant during the PCR to establish his entitlement to relief through the preponderance of the evidence. SEE 71.1(e), SCRCP.

WHEREFORE, Applicant respectfully prays this Honorable Court will grant the requested relief of Authorization for Expenditures of Funds to Retain Expert and Investigation Services in the instant matter.

Respectfully Submitted,

/s/ Jeffery Lucas
Jeffery Lucas

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

CA/No. 2010-Cp-32-803

CERTIFICATE OF SERVICE

Jeffery Lucas -- Applicant

-v-

State of South Carolina -- Respondent

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON

2011 MAY -4 PM 12:43

FILED

The undersigned Applicant by and through attorney of record certifies he has mailed true and correct copies of the enclosed Amendment to the parties whose addresses appear below, by depositing same in first-class postage affixed envelopes and placed in the U.S. Mail this 29 day of April, 2011.

Office of Attorney General
P.O. Box 11549
Columbia, SC. 29211

Hon. Beth A. Carrigg, Clerk
Lexington County Judicial Center
205 East Main St.
Lexington, SC. 29072

Respectfully Submitted,

/s/ Jeffery Lucas
Jeffery Lucas

MAY 04 2011

Jeffery Lucas
SCDC# 333799
Lieber Corr. Inst.
P.O. Box 205 EA-11
136 Wilborn Ave.
Ridgeville, SC. 29472

Office of Attorney General
P.O. Box 11549
Columbia, SC. 29211

Hon. Beth A. Carrigg, Clerk
Lexington County Judicial Center
205 East Main St.
Lexington, SC. 29072

RE: Amended PCR Application
CA/No. 2010-Cp-32-803

RECEIVED
CLERK OF COURT
LEXINGTON, SC

2011 MAY -4 PM 12:43

FILED

Dear Clerk,

Enclosed for filing please find the Amended PCR Application to be filed in the above captioned by and through attorney of record.

I thank you for your time and consideration in this matter.

enclosures: as noted
all above captioned parties

Kindest Regards,

Jeffery Lucas

Jeffery Lucas

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2010-CP-32-0803

Jeffery T. Lucas, #333799,
Applicant,

v.

State of South Carolina,
Respondent.

RETURN
RECEIVED
CLERK OF COURT
LEXINGTON, SC

2010 JUN 10 A 8 56

FILED

The Respondent, making its Return to the application for post conviction relief (PCR) filed February 19, 2010, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the March 2009 term of the Lexington County Grand Jury for Infliction of Great Bodily Injury Upon a Child (2009-GS-32-0536). He was represented by Wayne Floyd, Esquire. On March 16-18, 2009, the Applicant underwent trial pursuant to which he was found guilty as charged. He was sentenced by the Honorable R. Knox McMahon to confinement for a period of twenty (20) years. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend and/or supplement this Return upon receipt with any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Was the Applicant's fifth, sixth, and fourteenth amendment rights of the United States Constitution and his Rights to Due Process violated by the solicitor (upgrading) charges without any probable cause its failed to sufficiently apprise the Applicant of the charge against him?"
2. "Did the trial Court lack subject matter jurisdiction, due to the procedural defect in that there was no order of continuance issued to continue the case?"

Applicant has failed to set forth with specificity the grounds upon which the application is based and facts in support thereof. S.C. Code §17-27-50. Any claims not specifically enumerated in the PCR application or amendments will be opposed by the State at an evidentiary hearing, and the State will seek summary dismissal of vague or general claims at an evidentiary hearing. All amendments should be made well in advance of an evidentiary hearing by counsel of record. Rule 11, SCRCP.

III.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment: Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Nevertheless, the allegation of ineffective assistance of counsel probably raises a question of fact which cannot be conclusively refuted by the record and, therefore, requires that an evidentiary hearing be held. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983); Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

IV.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

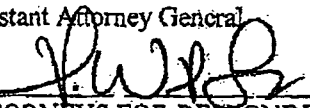
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

A. WEST LEE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

June 8, 2010.

FILED
2010 JUN 10 A 8:56
BETTY A. CANNON
CLERK OF COURT
LEXINGTON, SC

ORIGINAL

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
 CASE NO: 2010-CP-32-00803

Jeffery T. Lucas #333799)

VS.)

State of South Carolina)

AMENDED
 APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472
2. Name and location of Court which imposed sentence Court of General Sessions Lexington County, SC
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed.
 - (a) 2009-GS-32-00536 Infliction of Great Bodily Injury on a Child
 - (b) _____
 - (c) _____

5. The date upon which sentence was imposed and the terms of sentence:

(a) March 18, 2009 - 20 years plus costs and assessments

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty X _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

no

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed: n/a

i

ii

iii

(b) the result in each such Court to which you appealed: n/a

i

ii

iii

(c) the date of each such result: n/a

i

ii

iii

(d) if known, citations of any written opinion or orders entered pursuant to such results: n/a

i

ii

iii

9. If you answered "no" to (7), state your reasons for not appealing:

(a) I advised my lawyer to Appeal but he failed to do so

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) See Attached Exhibit "A"
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attached Exhibit "B"
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina law? No, this is an Amended Post Conviction Relief Application
- (b) any petition in State or Federal Courts for habeas corpus or post-conviction relief? No
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof: N/A
- i _____
- ii _____
- iii _____
- iv _____
- (b) the name and location of the Court in which each was filed: N/A
- i _____
- ii _____
- iii _____
- iv _____

(c) the disposition thereof: N/A

i
ii
iii
iv

(d) the date of each such disposition: N/A

i
ii
iii
iv

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition: N/A

i
ii
iii
iv

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you filed?
No

15. If you answered "yes" to (14) identify:
(a) which grounds have been presented: N/A

i
ii
iii

(b) the proceedings in which each ground was raised;

i
ii
iii

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reason why such ground has not previously been presented:

(a) This is the first opportunity the Applicant has had to bring this matter before the Court

(b) _____
 (c) _____

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

- (a) your arraignment and plea? _____
 (b) your trial, if any? yes _____
 (c) your sentencing? yes _____
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? n/a _____
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
yes _____

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

- (a) the name and address of each attorney who represented you:
 i Wayne Floyd, Esq., 1611 Augusta Hwy, West Columbia, SC 29168
 ii Harry L. Devoe, Jr., Esq., 7411 Black River Road, New Zion, SC 29111
 iii _____
 (b) the proceedings at which each attorney represented you:
 i Mr. Floyd represented me at my trial and sentencing
 ii Mr. Devoe is representing me in this PCR
 iii _____

19. State clearly the relief you seek in filing this application:

The right to file a belated Appeal and the vacation of my sentence

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)

VERIFICATION

I, Jeffery T. Lucas, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Jeffery T. Lucas

SWORN to and subscribed before me this 3rd
 day of March, 2011

Harry A. Decker (L.S.)
 Notary Public

My Commission Expires: May 27, 2012

EXHIBIT A

- (1) My attorney, Wayne Floyd, failed to file a Notice of Intent to Appeal my conviction upon being advised to do so.
- (2) My attorney, Wayne Floyd, failed to provide adequate representation of me during his representation of me in connection with the above-referenced criminal charge. This included, but was not limited to, his representation during the trial of my case.
 - (a) Mr. Floyd failed to adequately prepare my case for trial;
 - (b) Mr. Floyd failed to object to the Solicitor's Office amending my charge so close to the time of trial and then, in allowing me to be tried on the new charge, for which I had been "straight indicted". Mr. Floyd did not have the appropriate time to prepare neither himself nor me for a trial based upon the charge set forth in the "straight indictment".
 - (c) Mr. Floyd failed to adequately represent me during the actual trial of my case.
- (3) I am not guilty of the charge of which I was convicted. Therefore, I am being held in custody illegally and my sentence should be vacated.

EXHIBIT B

The set of alleged facts for which Applicant was subsequently arrested, tried and convicted arose from an unfortunate accident that occurred on May 24, 2006. As a result of harm that allegedly occurred to the child who was then in Applicant's care, Applicant was arrested and originally charged with the crimes of Assault and Battery with Intent to Kill and with Unlawful Neglect of a Child. He was also originally indicted on those charges.

Applicant's case was called for trial on March 16, 2009. Prior to any testimony or evidence being presented, Applicant and his attorney were advised in open Court that the above-referenced charges were being dismissed and that the State was, instead, proceeding to trial on an indictment for Infliction of Great Bodily Injury Upon a Child. Neither the Applicant nor his attorney had sufficient time to prepare for trial on this new, more serious offense, an offense that required the State to prove different elements to establish guilt than the elements required to prove guilt on the original charges. In spite of this, without requesting a continuance, Applicant's attorney instead advised the trial judge he was ready to proceed to trial. He had previously advised Applicant to likewise state that he was ready to proceed to trial when asked that question by the judge.

In addition, the attorney failed to adequately prepare the defense of this case. He refused to allow the Applicant to testify, even though the Applicant desired to do so and had no prior record. The attorney was also aware that the State intended to introduce the testimony of several medical experts at the trial regarding the minor's injuries. The minor had been involved in prior injuries and operations. In fact, one operation had occurred shortly before the injuries that the child allegedly received at the hands of the Applicant.

The attorney failed to contact and call a witness or witnesses with medical backgrounds who would have contradicted the evidence put before the jury by the medical experts called by the State.

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Jeffery T. Lucas, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Jeffery T. Lucas
Applicant

SWORN or affirmed to and subscribed before me this

3rd day of March, 2011.

Harry A. Powell
Notary Public

My Commission Expires: May 27, 2012

FILED
2011 MAR 24 PM 1:55
CLERK OF COURT
LEXINGTON

STATE OF SOUTH CAROLINA **ORIGINAL** THE COURT OF COMMON PLEAS
 COUNTY OF LEXINGTON ELEVENTH JUDICIAL CIRCUIT

2010-CP-32-0803

Jeffery T. Lucas, #333799;
 Applicant,

v.

State of South Carolina,
 Respondent.

**AMENDED RETURN AND PARTIAL
 MOTION TO DISMISS**

The Respondent, making its Amended Return and Partial Motion to Dismiss to the amended application for post conviction relief (PCR) filed April 29, 2011, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the March 2009 term of the Lexington County Grand Jury for Infliction of Great Bodily Injury Upon a Child (2009-GS-32-0536). He was represented by Wayne Floyd, Esquire. On March 16-18, 2009, the Applicant underwent trial pursuant to which he was found guilty as charged. He was sentenced by the Honorable R. Knox McMahon to confinement for a period of twenty (20) years. The Applicant did not appeal his conviction or sentence.

Incorporated herein are the records of the Lexington County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend and/or supplement this Return upon receipt with any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Was the Applicant's fifth, sixth, and fourteenth amendment rights of the United States Constitution and his Rights to Due Process violated by the solicitor (upgrading) charges without any probable cause its failed to sufficiently apprise the Applicant of the charge against him?"
2. "Did the trial Court lack subject matter jurisdiction, due to the procedural defect in that there was no order of continuance issued to continue the case?"
3. Ineffective Assistance of Counsel
 - a. Failure to object to the Solicitor's improper closing argument that impermissibly invoked the 'Golden Rule' and ultimately denied Applicant his right to a fair trial;
 - b. Failure to investigate, retain and call an expert witness for Applicant's defense to challenge the State's scientific evidence;
 - c. Failure to file a notice of appeal.

III.

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Nevertheless, the allegation of ineffective assistance of counsel probably raises a question of fact which cannot be conclusively refuted by the record and, therefore, requires that an evidentiary hearing be held. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983); Delaney v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

IV.

The Respondent submits that the Applicant's claim that the circuit court lacked subject matter jurisdiction is meritless. A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003), citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001). In this case, the Applicant was indicted by the Lexington County

Grand Jury. That indictment was true-billed and signed by the foreman of the grand jury. The said indictment contains all the necessary elements of the offense, and further cites the applicable statute.

A presumption of regularity attaches to all proceedings in the courts of this State, and it is incumbent upon one who challenges a proceeding to prove his claims. *See, e.g., Tate v. State*, 345 S.C. 577, 549 S.E.2d 601 (2001); *Pringle v. State*, 287 S.C. 409, 339 S.E.2d 127 (1986). The Applicant here cannot show any irregularity, because the indictments in question are sufficient on their face. Therefore, the Respondent would move for summary judgment on this allegation pursuant to S.C. Code Ann. § 17-27-70 (2003), because there is no issue of material fact relating to this allegation and it should be dismissed as a matter of law.

V.

The State therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VI.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

CLERK OF COURT
JAN 11 2011

VII.

WHEREFORE, having made its Amended Return, the State requests that an evidentiary hearing be held solely on the issue of ineffective assistance of counsel.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAELOH F. MAY
Assistant Attorney General

By: [Signature]
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC. 29211
Telephone: (803) 734-3737

September 9, 2011.

5



ALAN WILSON
ATTORNEY GENERAL

September 9, 2011

The Honorable Beth Carrigg
Lexington County Clerk of Court
205 East Main Street, Suite 146
Lexington, SC 29072

Re: Jeffrey T. Lucas, #333799 v. State of South Carolina
2010-CP-32-0803

Dear Ms. Carrigg:

Enclosed please find the original Amended Return and Partial Motion to Dismiss of the Respondent, in the above-captioned case, for filing in your office.

Sincerely,

Kaelon E. May
Assistant Attorney General

KEM/lp

cc: Harry Devoe, Jr., Esquire

1 STATE OF SOUTH CAROLINA
2 COUNTY OF LEXINGTON

IN THE CIVIL COURT

3
4
5 JEFFERY T. LUCAS,
6 Plaintiff,
7 -vs-
8 STATE OF SOUTH CAROLINA,
9 Defendant.

)
)
) TRANSCRIPT OF RECORD
)
) 10-CP-32-0803
)

10
11 April 25, 2012
12 Lexington, South Carolina

13
14 B E F O R E:

15 HONORABLE CLIFTON NEWMAN, Judge.
16
17

18 A P P E A R A N C E S:

19 TOMMY A. THOMAS, Esquire
Attorney for the Plaintiff

20 KAELOE E. MAY, Asst. Attorney General
21 Attorney for the State
22
23

24 L. COCONUT PANTSARI, R.P.R.
25 Circuit Court Reporter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX OF WITNESSES

<u>WITNESSES:</u>	<u>PAGE</u>
WAYNE FLOYD	
Direct By Mr. Thomas	4
Cross By Ms. May	22
Redirect By Mr. Thomas	41
JEFFERY LUCAS	
Direct By Mr. Thomas	43
Cross By Ms. May	51

INDEX

Plaintiff Rests	52
Certificate	60

INDEX OF EXHIBITS

(Court Reporter's Note: No exhibits were marked or received into evidence).

1 (The following proceedings are reported on
2 April 25, 2012.)

3 THE COURT: We are up to Mr. Thomas' case.

4 MR. THOMAS: Yes, sir. Good afternoon, Your
5 Honor.

6 THE COURT: How are you today?

7 MR. THOMAS: Good, good.

8 THE COURT: Who are you representing today,
9 Mr. Thomas?

10 MR. THOMAS: Your Honor, if it please the
11 Court. I am representing Mr. Jeffrey Lucas. He is
12 right over here.

13 THE COURT: Mr. Lucas. Very good. Jeffrey
14 Lucas. You can swear Mr. Lucas in.

15 JEFFERY T. LUCAS, being
16 first duly sworn, testifies as follows:

17 CLERK: Take the stand and state your name.

18 MR. THOMAS: Your Honor, we are going to call
19 Mr. Wayne Floyd first.

20 CLERK: Oh, I'm sorry.

21 THE COURT: You can sit over there next to
22 Mr. Thomas.

23 MR. THOMAS: I'm sorry, Your Honor. I just
24 thought you were swearing him for the proceeding.

25 THE COURT: It's all right. He came and stood

WAYNE FLOYD -- DIRECT -- MR. THOMAS

4

1 right there; so I had just swore him in.

2 WAYNE FLOYD, being
3 first duly sworn, testifies as follows:

4 CLERK: Take a seat and state your name for
5 the Court.

6 THE WITNESS: My name is Wayne Floyd.

7 MR. THOMAS: Your Honor, if it please the
8 Court.

9 THE COURT: Yes, sir.

10 DIRECT EXAMINATION

11 BY MR. THOMAS:

12 Q Mr. Floyd, you were retained to represent Jeffrey
13 Lucas?

14 A That's correct.

15 Q And what charges did he have pending against him?
16 Do you remember?

17 A You mean initially?

18 Q Yes, sir. Was it assault and battery with intent
19 to kill?

20 A Assault and battery with intent to kill and
21 unlawful conduct or neglect, something to that
22 effect.

23 Q Just for -- I know the Court has no prior knowledge
24 of this case -- would you give us just a brief
25 summary of what happened in this case, what the

1 charges were; and it doesn't have to be long. Just
2 give the Court an idea of what was going on with
3 this case.

4 A Well, the case sat there for a long time.
5 Initially it was an assault and battery with intent
6 to kill and the unlawful neglect.

7 Q Right.

8 A He was later indicted for the charge of unlawful
9 conduct toward a child causing permanent injury,
10 words to that effect in the statute.

11 Q Right. Did the child die in this case?

12 A No, he didn't.

13 Q Just great bodily injury?

14 A Great bodily injury, yeah.

15 Q And this was a trial?

16 A That's correct.

17 Q And he was found guilty?

18 A That's correct.

19 Q And was sentenced to how much time? Do you know?

20 A Twenty years.

21 Q Twenty years. Is that the maximum he could have
22 gotten?

23 A Yes.

24 Q It is. Now, you were retained to represent him; is
25 that correct?

WAYNE FLOYD -- DIRECT -- MR. THOMAS

6

1 A Correct.

2 Q And what did you do in preparing this case? I
3 guess you were preparing it all the time for a
4 trial?

5 A Yes. We had met with the family, looked over the
6 evidence. There was a time where we did have
7 Mr. Lucas evaluated; so we did do that.

8 Q Why did you have him evaluated?

9 A Because of some things he told me.

10 Q And you were just concerned about his mental
11 stability?

12 A Yes.

13 Q And was this a court-ordered evaluation or was this
14 something you did on your own?

15 A We did on our own.

16 Q And you felt though after the evaluation that he
17 was competent for trial?

18 A Yes, according to the evaluation.

19 Q Did you receive any plea offers in this case?

20 A Plead straight up.

21 Q Plead straight up?

22 A (Witness nods.) (Indicating affirmative response.)

23 Q In developing this case, I guess, I have read
24 through the transcript. It was -- a substantial
25 part of it was medical testimony?

1 A Yes.

2 Q And as a matter of fact, there were two doctors who
3 testified at trial?

4 A Yes, that's correct.

5 Q I think Dr. Luberoff and then another gentleman who
6 also, I guess, specialized in trauma for children,
7 pediatric trauma?

8 A Dr. Carter or somebody like that. I think it was
9 Carter, but I don't remember.

10 Q It was. I think he had come from Georgia. He had
11 worked at Palmetto?

12 A That's correct.

13 Q In preparing this case -- or what did you do with
14 the medical testimony? And how would you prepare a
15 case like this for trial?

16 A I just studied the medical records.

17 Q And were you able to develop a theory of defense?

18 A Well, we were -- according to Mr. Lucas' statement,
19 he had been aggressively giving the child C.P.R.
20 So we were going to try to tie in some of the
21 injury to the C.P.R. Of course, the child also had
22 had previous surgery not too long before this
23 incident.

24 Q Right.

25 A And so we were going to try to tie in some of the

WAYNE FLOYD -- DIRECT -- MR. THOMAS

8

1 injury to perhaps that surgery or that it made him
2 more susceptible to existing injury, particularly
3 with the C.P.R.

4 Also, we were going to try to establish that
5 some of the injury was when the child's head got
6 stuck on the railings on the porch, which was
7 consistent with Mr. Lucas' statement.

8 Q This was a situation where he was basically that
9 day the custodial kind of -- it wasn't his child
10 but he was the custodial provider?

11 A Right, his girlfriend's child.

12 Q His girlfriend's child.

13 A He was there that day alone with the child.

14 Q And it was his contention that the child had gotten
15 his head stuck in between two pickets --

16 A That's correct.

17 Q -- of the porch. And that's how the injuries
18 occurred?

19 A Right, and then that he then gave C.P.R.

20 Q Now, did you feel it was necessary in this case to
21 hire a private investigator?

22 A No.

23 Q And why was that?

24 A Well, I had all the evidence and I actually knew
25 what happened from what Mr. Lucas told me.

1 Q And the State had presented pictures of the
2 pickets, and actually even reenacted, I guess, one
3 of the statements that Mr. Lucas had made to them
4 about how this incident occurred?

5 A Correct.

6 Q And did you feel that it would have been necessary
7 to have provided your pictures or any testimony in
8 regards to the nature of these pickets and to give
9 that information to the jury?

10 A No, we just argued from their pictures.

11 Q From their pictures. There was a lot of medical
12 testimony in this case. Did you feel like it was
13 necessary to retain a doctor or someone in the
14 medical profession to have reviewed the evidence
15 that the State had?

16 A No.

17 Q And why was that?

18 A Because Mr. Lucas had candidly told me what
19 happened.

20 Q All right. Now, this case, you said, there was a
21 plea offer for Mr. Lucas that was just a
22 straight-up plea?

23 A That's correct.

24 Q And you discussed that with Mr. Lucas?

25 A Yes.

WAYNE FLOYD -- DIRECT -- MR. THOMAS

10

1 Q And did he -- he made a decision to take the case
2 to trial?

3 A Yes. We had some conversation about it, and we
4 were concerned that he would very likely get the
5 full 20 with a plea.

6 Q Right.

7 A And so it was kind of six of one, half a dozen of
8 another; and maybe something could develop at trial
9 that would help us.

10 Q So your concern was that he would potentially get
11 the full 20?

12 A Correct.

13 Q Thereafter, that was kind of taking away any
14 advantage you would have at a plea in this case?

15 A Right. I mean, it wasn't like they were going to
16 give us any kind of cap or anything like that, you
17 know; and they were going to ask for the full 20
18 years.

19 Because of the nature of the injuries and the
20 age of the child, the condition of the child and so
21 forth, we were concerned that he may well still get
22 the full 20 with a plea.

23 Q Now, the environment, as far as the timing of when
24 this case came up for trial, there had been
25 previous, I guess, child abuse cases that had been

1 in the news from Lexington County? Do you remember
2 that? Specifically I think it was Judge Goode's
3 case?

4 A I didn't recall it being at the same time, but it
5 may well have been.

6 Q So you don't know whether or not you took that into
7 consideration in regards to the timing of the
8 bringing of this case?

9 A As to that specific case?

10 Q Right.

11 A No, I don't recall.

12 Q Do you think if it had been, would there have been
13 any possibility of asking for a different venue of
14 this case or would that have been appropriate?

15 A Well, my understanding of the venue situation
16 would be if there was publicity about Mr. Lucas'
17 case.

18 Q Right.

19 A And there hadn't been any of that.

20 Q So there was no publicity about his case?

21 A About his case.

22 Q Now, you made pretrial motions in this case in
23 regards to there were pictures that they wanted
24 to -- certain pictures they wanted to introduce?

25 A That's correct.

1 Q I believe you were successful in keeping some of
2 those pictures out?

3 A Some but not all.

4 Q And you also had a Jackson versus Denno hearing?

5 A That's correct.

6 Q And in this Jackson v. Denno hearing, that was in
7 regards to statements that had been made by
8 Mr. Lucas?

9 A Right, by Mr. Lucas.

10 Q And were you successful in being able to keep those
11 statements out?

12 A No.

13 Q And did you have any particular concern about the
14 damaging aspect of those statements?

15 A Well, sure. I mean, there was some things in the
16 statements, you know, that were consistent with the
17 argument we wanted to try to take in connection
18 with this case; but there were also things in the
19 statements that were damaging. So, sure, that's
20 why we tried to keep them out.

21 Q Okay. And that was unsuccessful?

22 A That was unsuccessful.

23 Q Now, in regards to the expert testimony or
24 retaining medical personnel or somebody with
25 medical ability to be able to evaluate the case,

1 was that based upon, I guess, your decision that
2 you didn't feel like it was necessary?

3 A That, and I did not feel it would be helpful.

4 Q You didn't feel like it would be helpful. Now,
5 he was originally charged with the A.B.W.I.K. and
6 the unlawful neglect. Then just prior to trial,
7 he was indicted for great bodily injury upon a
8 child?

9 A That's correct.

10 Q And how soon or how close to trial was this
11 indictment?

12 A I couldn't tell you the exact time. I know the
13 case sat for several years. Then when they were
14 getting it ready for trial, there was an indictment
15 with a new charge. My guess is weeks, but I don't
16 remember exactly but it was close in time.

17 Q Close in time. This change or this new direct
18 indictment, they actually dismissed or elected not
19 to proceed on the other charges?

20 A That's correct.

21 Q And do you feel like you had adequate time and
22 notice to prepare for the direct indictment
23 charge?

24 A Well, I didn't see a lot of difference. The
25 assault and battery with intent to kill, for

1 example, of course, goes to the nature of the
2 conduct and the injuries and so forth, which would
3 kind of be the same thing you are looking at with
4 the great bodily injury to a child.

5 Q Right. So you felt like -- do you feel like it
6 would have been of any advantage to have asked the
7 Court to continue the case based on the notice?

8 A Well, in hindsight since we didn't get a good
9 result, sure. You know, maybe I could have done
10 better with more time.

11 Q But it was a different charge?

12 A Yes.

13 Q And in this case you did waive the arraignment, and
14 you told the Court that you were ready to proceed
15 to trial?

16 A That's correct.

17 Q Now, how did you handle with your client whether or
18 not he was going to testify or not?

19 A Well, we discussed it. I didn't feel like
20 ethically I could put him on the stand.

21 Q But he had no prior record?

22 A That's correct.

23 Q And did he indicate to you that he wanted to
24 testify?

25 A I don't recall him specifically saying that.

1 Q But he did inform the Court that he was aware and
2 that he was electing not to testify?

3 A That's correct.

4 MR. THOMAS: Your Honor, beg the Court's
5 indulgence just for a second.

6 THE COURT: Yes, sir.

7 (Pause.)

8 MR. THOMAS: Your Honor, may I approach?

9 THE COURT: Sure.

10 BY MR. THOMAS:

11 Q Mr. Floyd, I will ask you to look at these pages,
12 page 143 of the transcript. I have marked the
13 lines 12 through 14. You may want to look at a
14 couple of pages just to refresh your memory rather
15 than coming out of the blue. This is talking about
16 one of the statements that he had given to the
17 authorities?

18 A Okay.

19 Q He told the police officer in that statement that
20 he said, I lied --

21 A Yes.

22 Q -- correct? And that was in regards to a change in
23 the story about him going -- was he going to the
24 phone or what?

25 A I would have to look back and see exactly.

WAYNE FLOYD -- DIRECT -- MR. THOMAS

16

1 Q Because he performed C.P.R. and he didn't have a
2 phone, and he had gone to a phone booth to make a
3 phone call?

4 A Yes.

5 Q To the best of your knowledge, does that statement
6 revolve around the phone portion of his activity?

7 A Yes. Without looking back specifically, I couldn't
8 say with certainty.

9 Q All right. Do you feel like it would have been
10 advantageous to put him on the stand to address
11 that statement that came in about, "I lied," or to
12 explain that statement?

13 A But I still had the same problem as to whether or
14 not I could ethically put him on the stand.

15 Q But he still could have taken the stand and
16 testified?

17 A Yes, he could have.

18 Q He could have. And --

19 THE COURT: What do you mean? You said you
20 had a problem of whether you could ethically put him on
21 the stand. What do you mean?

22 THE WITNESS: Your Honor, I think we would be
23 getting into attorney/client privilege.

24 THE COURT: In a P.C.R. hearing -- and I have
25 heard lawyers take different positions on this -- when a

1 former client files a P.C.R. alleging ineffective
2 assistance of counsel and all that, is the
3 attorney/client privilege still applicable, Mr. Thomas?

4 MR. THOMAS: Your Honor, I have seen mixed --
5 I mean, we would take the position that it is still
6 applicable unless it's officially waived.

7 THE COURT: So then I have to accept the truth
8 as being true that Mr. Floyd was in an ethical dilemma
9 that presented him from putting him on the witness
10 stand?

11 MR. THOMAS: If that's his testimony, Your
12 Honor.

13 THE COURT: Okay.

14 MR. THOMAS: And that is his testimony. I
15 think the Court has to take him for what he says.

16 THE COURT: Okay.

17 MR. THOMAS: And, Your Honor, I think it would
18 only go to the point of our questioning in regards to
19 whether or not his decision and counseling with his
20 client whether to take the stand or not.

21 THE COURT: Okay.

22 BY MR. THOMAS:

23 Q Mr. Floyd, this was on 293 of the transcript.

24 A Two ninety-three?

25 Q It is 293, the closing of the solicitor.

WAYNE FLOYD -- DIRECT -- MR. THOMAS

18

1 A Okay.

2 Q And he uses the words again about, "I lied," in his
3 closing?

4 A Uh-huh. (Indicating affirmative response.)

5 Q Which was in the statement of Mr. Lucas; is that
6 correct?

7 A Yes, I see what you are saying.

8 Q Mr. Floyd, my client has also expressed concerns
9 about filing of an appeal.

10 A Okay.

11 Q Do you feel like -- because you made a motion in
12 limine in regards to the pictures. You also made a
13 Jackson v. Denno or had a Jackson v. Denno hearing
14 and make objections to the statements.

15 You also, I thought, brought a good argument
16 in regards to the motion for directed verdict in
17 that you indicated that there was no evidence of
18 the infliction of great bodily harm being the
19 permanent injury, which all were denied.

20 I guess the motion in limine, some of the
21 pictures were not admitted. The statements were
22 admitted. Your motion for directed verdict was
23 denied. Do you feel like there were any viable
24 appellate issues that could have gone up on
25 appeal?

1 A No. That's what I informed the family. I didn't
2 feel there were. I felt Judge Keesley had tried a
3 very legally valid case. I felt it would have been
4 a waste of money for the appeal.

5 Q To do it?

6 A Correct. I didn't think Mr. Lucas would qualify
7 for public funds for the appeal because of some
8 property he had inherited. I didn't really feel
9 like it would justify the family to spend the money
10 for the appeal.

11 Q Did they ask you to file an appeal?

12 A We discussed it and I explained to them what it
13 would cost, and they never got back to me.

14 MR. THOMAS: Your Honor, if I can beg the
15 Court's indulgence.

16 THE COURT: Yes, sir.

17 (Pause.)

18 MR. THOMAS: Your Honor, may I approach? I
19 want to get the transcript back.

20 THE COURT: Sure.

21 BY MR. THOMAS:

22 Q Mr. Floyd, the last questions that I have are in
23 regards to the closing by the solicitor. The
24 solicitor made a number of comments in his closing
25 which I think were: What kind of man does it take?

WAYNE FLOYD -- DIRECT -- MR. THOMAS

20

1 He said that a number of times?

2 A Yes, I saw that.

3 Q He also used the word "you" a substantial amount of
4 time?

5 A Correct.

6 Q And did you feel like that an objection would have
7 been proper for a golden rule violation?

8 A Well, I didn't object. So if I should have, I was
9 ineffective. But, no, I did not pick that up.

10 MR. THOMAS: Your Honor, may I approach again?

11 THE COURT: Yes, sir.

12 BY MR. THOMAS:

13 Q Let me show you page 295, beginning on line 1
14 through 4. Feel free to look through and refresh
15 your memory in regards to that point. I think that
16 is the closing argument by the solicitor?

17 A Which part did you want me to read, Mr. Thomas?

18 Q It's highlighted.

19 A There is the use of the term "you." I did not
20 think at that time that he was referring to the
21 jurors individually.

22 Q Does that paragraph seem to imply that the jurors
23 put themselves in the position of the child in
24 talking about "what pain you must have suffered"?

25 A You could argue that.

1 Q And did you object to that as being in violation of
2 the golden rule?

3 A No, I didn't.

4 MR. THOMAS: Your Honor, beg the Court's
5 indulgence just for a second.

6 THE COURT: What page was that now?

7 MR. THOMAS: Your Honor, I was on page...

8 THE WITNESS: I think it was 295.

9 MR. THOMAS: Yes, 295.

10 THE WITNESS: What was underlined was right at
11 the top.

12 THE COURT: Okay.

13 BY MR. THOMAS:

14 Q Mr. Floyd, would it be fair to say that the
15 solicitor used the word "you" 46 times in his
16 closing?

17 A I would not dispute that.

18 Q But you did not make an objection to that on the
19 basis of the golden rule?

20 A No, I didn't.

21 MR. THOMAS: Your Honor, beg the Court's
22 indulgence.

23 THE COURT: All right.

24 (Pause.)

25 MR. THOMAS: Your Honor, we have no further

1 questions.

2 THE COURT: Ms. May.

3 MS. MAY: May it please the Court, Your Honor.

4 THE COURT: Yes, ma'am.

5 CROSS EXAMINATION

6 BY MS. MAY:

7 Q Mr. Floyd, how long had you been practicing law at
8 the time you represented Mr. Lucas?

9 A What year was this?

10 Q I believe it was 2009.

11 A Thirty-five years.

12 Q And had you had experience in these type of cases,
13 infliction of great bodily injury?

14 A Yes, I have tried many cases.

15 Q Do you recall about how many times y'all were able
16 to meet with Mr. Lucas prior to the trial?

17 A I couldn't tell you exactly. I have known Jeff for
18 years and his family, his momma. So we would meet
19 fairly regularly, but the case did lay dormant for
20 a long period of time. We had hoped that it would
21 just disappear. So there were periods we did not
22 meet.

23 Q And Mr. Thomas covered most of my questions. Did
24 you discuss Mr. Lucas' version of the events?

25 A Yes.

1 Q And do you recall what he told you?

2 THE WITNESS: Your Honor, I think we would be
3 getting into the attorney/client privilege.

4 MR. THOMAS: Your Honor, we would object at
5 this time. I don't think that has any bearing as far as
6 what he did say or didn't say, other than the issue
7 about whether he was going to testify or not, Your
8 Honor.

9 He still could have testified. If Mr. Floyd
10 felt like he had an ethical problem, then he could have
11 just put the client on the stand and let him testify on
12 his own behalf.

13 THE COURT: Ms. May?

14 MS. MAY: Mr. Floyd answered a few questions
15 by Mr. Thomas that under his ethical obligations he
16 could not put Mr. Lucas on the stand. The State's
17 position is that attorney/client privilege is waived
18 when P.C.R. is filed. I have a case cite for Your Honor
19 if you would like it.

20 THE COURT: What case is that?

21 MS. MAY: Binney v. State, 326 S.C. 353.

22 THE COURT: Is that Binney?

23 MS. MAY: Yes, B-I-N-N-E-Y.

24 THE COURT: Let's look at Binney versus the
25 State. The defendant sought P.C.R. relief for a murder

1 and first degree burglary charge, a conviction that had
2 been affirmed on appeal.

3 He moved for a return of his trial file from
4 the Attorney General's Office and disqualifications of
5 the attorneys general who viewed the file. Judge Baxley
6 denied that.

7 Then Chief Justice Toal gave this opinion
8 holding that the statute had waived the attorney/client
9 privilege to the extent for prior counsel to respond to
10 allegations of ineffective assistance of counsel.

11 It automatically waived the privilege to
12 defendant's entire trial file, and defendant's trial
13 counsel was justified in disclosing entire trial file to
14 A.G.O. What is an A.G.O.? The Attorney General's
15 Office?

16 MS. MAY: I believe so.

17 THE COURT: So we have here: Petitioner
18 argues that his attorney-client privilege was violated
19 when, after he filed an application for P.C.R., trial
20 counsel turned over his entire trial file to the A.G.O.

21 He was convicted of murder, first degree
22 burglary, and sentenced to death. After a stay in the
23 execution, he filed a P.C.R. on mental grounds. The
24 trial attorney met with the attorneys for the Attorney
25 General's Office to discuss the allegations made by the

1 petitioner in the P.C.R.

2 Because of extensive allegations, the lawyer
3 determined it was necessary to make an entire copy of
4 the file available for review and copying by the
5 Attorney General.

6 The petitioner later found out about it and
7 moved the P.C.R. Court to order that the file be
8 returned and that everyone in the Attorney General's
9 Office who looked at the file be disqualified.

10 On hearing the P.C.R. Court denied the
11 petitioner's motion, finding that the broad allegations
12 of ineffective assistance of counsel contained in the
13 petitioner's P.C.R. application waived the
14 attorney/client privilege with respect to all material
15 contained in the trial file.

16 He appealed that to the Supreme Court. The
17 Supreme Court says Section 17-27-130, which describes a
18 P.C.R. applicant's waiver of the attorney/client
19 privilege, states in pertinent part where a defendant
20 alleges ineffective assistance of prior trial counsel as
21 a grounds for P.C.R., the applicant shall be deemed to
22 have waived the attorney/client privilege with respect
23 to both oral and written communications between counsel
24 and the defendant and between retained or appointed
25 experts and the defendant.

1 To the extent necessary for prior counsel to
2 respond to the allegations, this waiver of
3 attorney/client privilege shall be deemed automatic upon
4 the filing of the application alleging ineffective
5 assistance of counsel; and the Court need not enter an
6 order waiving the privilege.

7 Thereafter, counsel alleged to have been
8 ineffective is free to discuss and disclose any aspect
9 of the representation with representatives of the State
10 for purposes of defending against the allegations of
11 ineffectiveness to the extent necessary for prior
12 counsel to respond to the allegation.

13 We find the language of this section is plain
14 and unambiguous and clearly states the waiver of
15 attorney/client privilege shall be deemed automatic upon
16 filing of a P.C.R. application alleging ineffective
17 assistance.

18 Turning to the facts of this case, upon
19 application the petitioner waived his attorney/client
20 privilege to the extent necessary for prior counsel to
21 respond to the allegations of ineffectiveness.

22 We find that the particular allegations made
23 in the petitioner's application for P.C.R. were so broad
24 as to effectuate a complete waiver of his
25 attorney/client privilege.

1 In this particular application, he alleged
2 counsel was ineffective because he failed to investigate
3 the facts and circumstances surrounding the death and
4 failed to investigate and develop all relevant and
5 admissible mitigating evidence, investigate and present
6 evidence to support all potential defenses in the guilt
7 and innocence phase.

8 All right. Under the specific facts of this
9 case, prior counsel was justified in making petitioner's
10 entire file available to the Attorney General's Office.
11 Everyone agreed other than Justice Pleicones' dissent.

12 Let's see. He said: I would reverse the
13 circuit court's order and require that the file be
14 returned to trial counsel and disqualify any member of
15 the Attorney General's Office.

16 So in Justice Pleicones' reading of the first
17 paragraph of the statute, it's his opinion that the
18 automatic waiver of the privilege does not extend to the
19 entire file but is instead limited to oral and written
20 communications between counsel and the defendant and
21 between retained experts and the defendant to the extent
22 necessary to respond.

23 It is noteworthy that while this paragraph
24 makes no mention of the client's file, it explicitly
25 limits the permissible scope of counsel's disclosures to

WAYNE FLOYD -- CROSS -- MS. MAY

28

1 the Attorney General's Office attorneys and disagreed in
2 giving the whole file.

3 All right. That is a good case that addresses
4 that issue. Based on that case, then what do you say,
5 Ms. May?

6 MS. MAY: A lot of Mr. Thomas' questions and a
7 lot of Mr. Floyd's answers goes to his trial strategy,
8 whether they were going to hire an expert, were based on
9 his conversations with Mr. Lucas and whether his advice
10 to testify or not was based on whether he could put him
11 on the stand ethically.

12 THE COURT: And your last question, again, was
13 what?

14 MS. MAY: Did he discuss Mr. Lucas' version of
15 the facts initially meeting prior to trial in forming
16 his opinion of the case?

17 THE COURT: I overrule that objection. That's
18 a yes or no answer.

19 THE WITNESS: That's just a yes or no answer?
20 BY MS. MAY:

21 Q I believe you answered yes. My next question was:
22 Do you recall what he told you?

23 MR. THOMAS: Your Honor, we would object at
24 that point.

25 THE COURT: That's another yes or no: Do you

1 recall what he told you?

2 BY MS. MAY:

3 Q What did he tell you, I believe, was my question.

4 THE WITNESS: Your Honor, I'd rather be found
5 ineffective than disclose the confidence.

6 THE COURT: Well, that's a double-edge sword
7 that a P.C.R. judge is sitting on. On the one hand,
8 you have an allegation of ineffective assistance of
9 counsel.

10 If I have to evaluate the ineffectiveness or
11 not, then -- I have had too many of them where lawyers
12 are willing to fall on the sword at a P.C.R. hearing if
13 it would benefit the applicant. So that's another
14 reason that works against being able to assert the
15 privilege.

16 The first one: Why didn't you call him as a
17 witness?

18 I had ethical problems with calling him as a
19 witness.

20 So then you have pretty much agreed we must
21 accept the fact there was an ethical issue. Of course,
22 I am left as to conjecture: Do you have an ethical
23 issue because he confessed to committing a crime and you
24 couldn't put him up because he would be giving
25 fraudulent testimony? So ethically you couldn't allow

1 that.

2 With me evaluating this case, how do I judge
3 that particular issue in regard to even if there is
4 ineffectiveness. There may not be any prejudice because
5 of the ethical issue. I don't know.

6 Secondly, we hear he came and talked with you.
7 You have known him a number of years. You know him.
8 You know his family members. You had a lot of
9 interaction with them in preparation.

10 He gave you his full story. You thought that
11 was sufficient. So, therefore, there was no need to
12 hire any investigator to find out the facts because you
13 knew the facts. There was no need for any medical
14 experts because you knew what his version of the facts
15 were. So now, what did he tell you?

16 It puts the judge sitting in trying to
17 evaluate a P.C.R. in a quandary when the applicant can
18 complain about ineffective assistance, but the witness
19 does not disclose anything that might be harmful to the
20 applicant. It sort of...

21 MR. THOMAS: I have a thought, Your Honor.

22 THE COURT: All right. I thought you would.

23 MR. THOMAS: I do have a thought. I hope I
24 can get it -- I have been trying to get it set in my
25 mind. It has been swirling around. I don't know what

1 was said. I wasn't privy to that conversation. What
2 I'm thinking though, Your Honor, is that this case --

3 THE COURT: I'm not assuming that that's what
4 was said.

5 MR. THOMAS: I don't know what was said.

6 THE COURT: I don't know either.

7 MR. THOMAS: I think the case at hand can be
8 distinguished from this case in that, first off, we are
9 dealing with files. It does say oral and written
10 communication with your lawyer.

11 THE COURT: If they didn't turn over the
12 entire file, then I don't believe Justice Pleicones
13 would have dissented. His dissent was based on the
14 statute didn't address: Just go over there and give
15 them your file. Is disclosure necessary to defend the
16 P.C.R.?

17 MR. THOMAS: I think that's kind of where I am
18 going with the second part of this argument is that I
19 don't think we are necessarily saying -- I don't think
20 the information or whatever was said necessarily goes to
21 the defense of ineffective assistance in regards to
22 whether or not Mr. Floyd put him -- told him to take the
23 stand or told him not to take the stand.

24 I think the difference is that if he had an
25 ethical problem, whatever it may be, he could have

1 advised the client: You can take the stand. Because
2 it's my understanding that if you have an ethical
3 problem, you can put the client on the stand. You just
4 can't participate in asking questions.

5 THE COURT: Right.

6 MR. THOMAS: I don't think that he told the
7 client that he could take the stand and testify, and if
8 there was a problem, I can't ask you any questions. I
9 don't think he gave him that option.

10 THE COURT: The bar sponsored a real good
11 C.L.E. on that: What do you do in that instance?

12 MR. THOMAS: I never have had the problem,
13 Your Honor. The only thing I remember from law school
14 is that you put the individual on the stand and ask them
15 to tell their story.

16 THE COURT: Tell your story.

17 MR. THOMAS: And you have no participation
18 into it whatsoever.

19 THE COURT: As a judge when someone puts
20 someone on the stand and the response is a narrative,
21 when the lawyer asks the questions, and there is one
22 question and sits down, then I wait for a narrative
23 response. Then that is maybe a clue to the judge as
24 well. I don't know.

25 MR. THOMAS: My only thing would be to argue

1 that it doesn't go to a necessary defense of ineffective
2 assistance of counsel in advising him that he should
3 either take the stand or not take the stand.

4 I think that it will go hand in hand with my
5 client's testimony that he wishes to -- that he had
6 wished to take the stand and didn't know that he could
7 have taken the stand under those circumstances because
8 it never was discussed with him. He just didn't take
9 the stand and testify. He had no prior record.

10 THE COURT: First of all, the issue of whether
11 he should or should not testify or not was covered by
12 the judge as well.

13 MR. THOMAS: Yes, sir, it was.

14 THE COURT: His right to testify or not
15 testify.

16 MR. THOMAS: Yes, sir. He did have a colloquy
17 in regards to asking him those questions.

18 THE COURT: Just on this issue, what is the
19 significance of his -- why do you need him to respond to
20 the question?

21 MS. MAY: Well, if that was the understanding
22 that Mr. Floyd was ineffective in his advice about
23 whether he can testify or whether he can't testify, I
24 think that the ethical obligation he had with him
25 testifying probably went into that conversation or went

1 into that thought process. But his right to testify
2 and right not to testify was addressed by the trial
3 judge.

4 MR. THOMAS: I think it then becomes whether
5 it's relevant or not, Your Honor. If the question is:
6 Did you explain to him that he still had the right to
7 testify without my participation?

8 Him saying what he said -- if he said
9 anything -- is not relevant to that portion of what he
10 may be contending, Your Honor.

11 THE COURT: Of course, my question wasn't
12 specifically: What did he tell you?

13 MR. THOMAS: Right.

14 THE COURT: Her question is more specifically:
15 What did he tell you? And Mr. Floyd doesn't want to
16 divulge what he was told as being in confidence.

17 But I think you can respond as to why you
18 didn't want him to -- why it was your -- or based on
19 what he told you, why did you think he shouldn't
20 testify?

21 THE WITNESS: I felt he would be vulnerable to
22 cross examination.

23 THE COURT: We will leave it at that on that
24 particular question and issue.

25 MS. MAY: I'm sorry, Your Honor?

1 THE COURT: We will leave it at that on that
2 particular question and issue.

3 MS. MAY: Okay.

4 THE COURT: Lawyers have different
5 philosophies about it. I don't know that it's a -- I
6 know the statute is there, and it serves a very
7 legitimate purpose.

8 But as the judge, as I said, I have to guard
9 against it coming from all sides. I have known lawyers
10 who were so disappointed that they lost their case and
11 the client and so sad their client is off doing time,
12 that on P.C.R. they are willing to come and say, It was
13 all my fault.

14 It's not all their fault. The fact of the
15 matter is that the evidence was overwhelming of guilt.
16 I have to factor all that in in trying to evaluate all
17 of this. Go ahead.

18 MS. MAY: Judge, in order to judge and make a
19 determination on P.C.R., it's an objective standard of
20 reasonableness. I guess it's hard to make that judgment
21 if you don't know --

22 THE COURT: Absolutely.

23 MS. MAY: -- what was the thought process in
24 that decision making.

25 THE COURT: But the State doesn't have the

1 burden.

2 MS. MAY: No, sir.

3 BY MS. MAY:

4 Q Mr. Floyd, you filed a discovery motion?

5 A Yes.

6 Q And I believe you testified to it earlier, but do
7 you recall just generally the items in the
8 discovery materials?

9 A There were statements. There were medical reports.
10 I don't remember specifically each and every item.

11 Q And you reviewed those discovery materials with
12 Mr. Lucas?

13 A Yes.

14 Q And did you do any type of independent
15 investigation? Visit the scene?

16 A I did not go to the scene.

17 Q And y'all discussed possible defenses or trial
18 strategies that you were going to put forth at
19 trial?

20 A Yes.

21 Q Can you address that issue? Was there more than
22 one?

23 A Well, we knew where they were going to be coming
24 from and we knew the injuries. So we were going to
25 try our best to tie the injuries that were present

1 with the child to his previous medical surgeries
2 and to getting his head caught in the rail and to
3 the C.P.R., both of Mr. Lucas and of the E.M.S.
4 people.

5 Of course, like the E.M.S. people also -- and
6 Lexington Medical Center -- had provided treatment
7 to the child, which also could cause some bruising
8 and marks and so forth from the tubes and treatment
9 that they gave him.

10 Q And I believe Mr. Thomas asked you. Do you believe
11 you had sufficient time to prepare for Mr. Lucas'
12 trial?

13 A Yes.

14 Q And with regards to Dr. Luberoff, I believe, do you
15 feel that you were adequately able to cross examine
16 her on the medical testimony?

17 A Yes.

18 Q And I believe you did bring out the type of
19 injuries that C.P.R. could cause; correct?

20 A Right. She was actually -- gave us some
21 ammunition.

22 Q Could you explain that a little?

23 A She admitted that some of the injuries could have
24 come from aggressive C.P.R., some of the bruising
25 and so forth.

1 Q And the same question in regards to Dr. Cartee
2 (phonetic). I believe you feel you were adequately
3 able to cross examine?

4 A Correct.

5 Q Your particular strategy in cross examining the
6 doctors, was that to tie in the C.P.R. and the
7 other types of injuries that could have been
8 caused?

9 A Correct. The child had some internal injury.
10 Everybody testified to that. But the child had
11 recently had some surgery in that area, even in the
12 area of the scrotum area.

13 I believe Dr. Luberoff admitted that the
14 pressure from the C.P.R. for a small child like
15 that could have caused some of that internal
16 injuries that was testified to.

17 Q And I believe you testified that based on your
18 review of the discovery and your discussions with
19 Mr. Lucas was how you formed your trial strategy?

20 A Yes.

21 Q And how you were going to cross examine the
22 doctors?

23 A Yes.

24 Q And that went into your decision as well as to
25 whether you were going to obtain an expert?

1 A Yes.

2 Q With regard to Mr. Lucas and his right to testify
3 or not testify, do you recall your discussions
4 just generally in advising him of that?

5 A Well, sure, we talked about it. Jim [sic] is
6 very nervous. I just didn't feel it would be
7 beneficial to testify. I think Jeff felt remorse
8 for what happened to the child, and he cared about
9 that.

10 I didn't know how that would -- that would
11 make him more vulnerable also to cross examination,
12 as to what would come out. There were some
13 inconsistencies in his statements that we had to
14 worry about. It would have been a difficult thing
15 for him to explain.

16 Q Did he ever tell you that he wanted to testify? He
17 was adamant about it?

18 A No, I don't recall that.

19 Q If he had just been very adamant about wanting to
20 testify, would you have denied him that right?

21 A No. It's his right. I did not ever discuss with
22 him the procedure that Mr. Thomas brought up. I
23 did not discuss that specific procedure with him.

24 Q But he was aware that he could testify and that he
25 did not have to testify?

1 A Yes.

2 Q And with regard to the closing arguments that
3 Mr. Lucas has brought up, I guess looking back, do
4 you feel that an objection -- that you should have
5 made an objection?

6 A On second thought, yeah. I guess I didn't
7 appreciate the overall impact of the argument at
8 the time it was made.

9 Q Do you think --

10 A If I had to do it over again, yes, I would object
11 to it.

12 Q Do you have a specific strategy during closing
13 arguments about whether you are going to object or
14 not?

15 A Sure. You always have to weigh the chance of your
16 successful objection as to whether or not you mess
17 up the jury -- you know, get on the jury's bad
18 side.

19 Of course, sometimes you will object just to
20 break the rhythm of the prosecutor. But you are
21 mainly trying to preserve any grounds for appeal.
22 So improper argument to the jury is certainly
23 something you should be looking for.

24 Q I have no further questions. Thank you.

25 MR. THOMAS: Your Honor, may it please the

1 Court.

2 THE COURT: Yes.

3 MR. THOMAS: Just about two questions.

4 THE COURT: Yes, sir.

5 REDIRECT EXAMINATION

6 BY MR. THOMAS:

7 Q Mr. Floyd, you said that you did not go to the
8 scene?

9 A That's correct.

10 Q And the State did have pictures of -- I guess this
11 was a railing around a porch; is that correct?

12 A That's correct.

13 Q And it was a wood railing that had pickets in it?

14 A Yes.

15 Q Did you feel like it was necessary to have provided
16 your own photographs of that? Because I know your
17 contention was that one picket was spaced further
18 apart than the others?

19 A No. I felt the pictures that they had allowed us
20 to make the argument, from the angle that they were
21 shot, it made it appear there was a close -- two of
22 them were closer than the others.

23 Q And your argument was that one of them was further
24 apart and that the child could have put his head
25 in -- could have gotten his head in between the

1 pickets?

2 A Well, actually the question was not so much whether
3 the child could get his head between the pickets;
4 but whether they were close enough to have caused
5 him to get stuck, therefore producing the marks
6 around his neck that they testified to.

7 Everybody testified about what they saw on the
8 child. So what you wanted was to have a couple of
9 them that would look close together; so if the
10 child could have gotten his head in, but then maybe
11 turned his head and then got stuck.

12 Q Got stuck. And you think the pictures the State
13 had adequately demonstrated that?

14 A Right. Because it did appear from the angle they
15 were taken that there were a couple of them that
16 were closer than the ones -- they went out and
17 looked at it. We didn't measure it as I recall but
18 maybe not.

19 MR. THOMAS: Thank you, Your Honor. I have no
20 further questions.

21 MS. MAY: No questions.

22 THE COURT: Thank you, sir.

23 THE WITNESS: Thank you, Judge.

24 (Witness leaves the witness stand.)

25 MR. THOMAS: Can I have just a second, please,

1 Your Honor?

2 THE COURT: Yes, sir.

3 (Pause.)

4 MR. THOMAS: Your Honor, we call Mr. Lucas to
5 the stand.

6 CLERK: Do I need to swear him again, Your
7 Honor?

8 THE COURT: He is already sworn.

9 JEFFERY LUCAS, having been
10 previously duly sworn, takes the witness stand and
11 testifies as follows:

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

14 THE COURT: Yes, sir.

15 DIRECT EXAMINATION

16 BY MR. THOMAS:

17 Q Mr. Lucas, you are currently incarcerated at the
18 South Carolina Department of Corrections?

19 A Yes, sir, that's correct.

20 Q And where are you being housed?

21 A At Lieber.

22 Q All right, sir. And you received a 20-year
23 sentence?

24 A Yes, sir.

25 Q And you understand that you have filed post

1 conviction relief?

2 A Yes, sir.

3 Q You are asking for a new trial; is that correct?

4 A That's correct.

5 Q You understand that generally with filing a post
6 conviction that you have certain exposure?

7 A Yes, sir.

8 Q You and I talked about that. You would be asking
9 for a new trial and you could, in fact, be tried
10 again?

11 A Yes, sir.

12 Q And in this case did you get the maximum sentence?

13 A Yes, sir.

14 Q When is your max-out date?

15 A We are looking at March the 14th of 2026 right now.

16 Q Mr. Lucas, you were arrested and charged with what?

17 A The original charges was neglect and assault and
18 battery with intent to kill.

19 Q Now, this was your girlfriend's child?

20 A That's correct.

21 Q And how old was the child or is the child? How old
22 was the child at the time?

23 A I believe he was two or three at the time.

24 Q And he was left in your care?

25 A Yes, sir.

1 Q Now, after you were charged, you hired Mr. Floyd to
2 represent you?

3 A That's correct.

4 Q And were you out on bond or were you in the county
5 jail during this period of time?

6 A I stayed out on bond for three years.

7 Q Were you able to participate with Mr. Floyd in
8 preparing your defense?

9 A Yes, sir. And right there before we went to trial,
10 probably two weeks before, he called me in and my
11 parents and my uncle and aunts and said that, you
12 know, he had good news and bad news. They dropped
13 the two charges, you know, and consolidated it with
14 the one; and we discussed it.

15 Q You did discuss it?

16 A Yes, sir.

17 Q Do you feel like that Mr. Floyd was prepared for
18 this trial?

19 A Myself I don't really think I could have been
20 prepared, you know, being honest with you if
21 somebody changes something in two or three weeks
22 and try to get ready for something totally
23 different.

24 Q So that gave you concern?

25 A Yes, sir.

1 Q And did you talk to Mr. Floyd about that concern?

2 A I did at one time. Basically like he told up here
3 today, you know, he is an attorney; and it really
4 wasn't a whole lot going to change, you know. He
5 felt that he could be prepared for it.

6 Q Did you fully understand what they were charging
7 you with?

8 A Not really. To be honest with you, I didn't.

9 Q You have some difficulty understanding the legal
10 system?

11 A That's correct.

12 Q And did you ever go through the evidence that the
13 State had against you?

14 A Yes, sir. Me and Wayne went over a good bit of it.

15 Q Now, this case was always going to be a trial?

16 A Yes, sir. When he called me into his office and we
17 discussed that about a plea and giving up the
18 opportunity for a direct appeal, I knew right then
19 that I wasn't going to go for that, you know. I
20 would take my chances of going to trial.

21 Q Now, did you talk to Mr. Floyd about the
22 possibility of hiring an expert witness?

23 A Yes, sir, we did a little bit. And like he said up
24 here, we kind of discussed the situation with the
25 money; and we kind of agreed together to utilize

1 what the State was putting up, working off of that.

2 Q So you made the decision to use basically what
3 their experts' testimony was going to be?

4 A Yes, sir.

5 Q Did you know whether or not if you had hired an
6 expert that the opinion would be the same or
7 different? Did you have any indication?

8 A No, sir, because I don't know a whole lot about
9 law. I really don't, you know. It might have
10 helped a great deal.

11 Q But you just trusted what Mr. Floyd told you?

12 A Yes, sir.

13 Q Now, because you brought this to my attention in
14 regards to the closing argument of the solicitor,
15 you have looked at that?

16 A Yes, sir, I have looked at the transcript. I have
17 read it more than one time, prayed about it, got
18 woke, looked back at it again more than one time,
19 three times to be exact.

20 Q What is your concern about that closing argument?

21 A I'm going to be honest and real with everybody
22 here. If I was sitting over there and I heard it,
23 I would find me guilty too.

24 Q Because of the --

25 A The way it was stirred up, you know. It kind of

1 drawed your attention and kind of magnified things.
2 I think it hyped it up a lot more, you know. It
3 took them away from looking at nothing but the
4 evidence. It enhanced it.

5 Q Now, did you ask Mr. Floyd to file an appeal for
6 you?

7 A Yes, sir.

8 Q And what happened with that?

9 A Well, what happened with that is you got a short
10 window to act on it. I asked him -- it might not
11 have been in this courtroom, but it was one that
12 looked like this.

13 I said, I would like for you to put in for a
14 direct appeal for me. I went to Lexington County.
15 I believe it was sometime during the night or the
16 next morning they moved me to R. & E.

17 Until I got letters out and access to use the
18 phone, the ten days was up. When I talked to my
19 mom, dad, my aunts and uncles, they said that he
20 didn't and couldn't find no appealable issues.

21 Q But you had wanted him to file an appeal for you?

22 A I would like to have had that opportunity, yes,
23 sir.

24 Q And would it have been your plan to allow Appellate
25 Defense to handle that appeal on your half?

- 1 A That's correct.
- 2 Q Because you did not have any funds --
- 3 A That's correct.
- 4 Q -- for continued representation; is that right?
- 5 A That's right.
- 6 Q Now, there was a statement that was introduced at
- 7 trial; and on that statement it said something
- 8 about, "I lied"?
- 9 A Yes, sir.
- 10 Q And that was used against you?
- 11 A Yes, sir.
- 12 Q Was that taken out of context in what you were
- 13 trying to tell the detective?
- 14 A Well, I mean, I took and had a statement. Then I
- 15 changed it for the fact that, yeah, it did look
- 16 bad that I did leave a child unattended to go get
- 17 help.
- 18 When I saw that way was failing, there was no
- 19 phone at the house; so I did have to leave him
- 20 unattended, and I knew that there would be more
- 21 repercussions.
- 22 Q Because you had to leave the child to go find a
- 23 phone?
- 24 A That is correct.
- 25 Q Did you intentionally lie to the detective?

1 A No, sir.

2 Q Do you feel like that statement, that portion of
3 the statement, hurt you?

4 A I know it did. They got to use it against me.

5 Q Had you testified could you have explained that
6 statement?

7 A I believe I could have, you know, clarified it. I
8 would have hoped I could have, you know, cleared it
9 up.

10 Q Now, Mr. Lucas, we talked about this. This is your
11 day in court. You said you have been very nervous,
12 and you have been waiting for this day for quite
13 some time?

14 A Yes, sir.

15 Q Is there anything else that you would like to bring
16 to the attention of the Court?

17 A About all I can ask for is I sure would love for
18 everyone to reconsider and give me the opportunity
19 to have a new trial. I really would love to have
20 that.

21 I have learned a lot. I've been incarcerated
22 for over three years now. I got a daughter out
23 there that I'm sure she would love to have me out
24 there. It hurts to be looking at pictures watching
25 her grow up, knowing what I am missing out on.

1 That's really all I got.

2 MR. THOMAS: Your Honor, I have no further
3 questions.

4 THE COURT: Thank you. Ms. May.

5 **CROSS EXAMINATION**

6 BY MS. MAY:

7 Q Mr. Lucas, I just have two questions.

8 A Yes, ma'am.

9 Q When did you ask Mr. Floyd to file an appeal? Do
10 you recall?

11 A Well, to start with it was in his office when we
12 discussed agreeing, you know, to a plea. I said,
13 No, I don't want to do that. He said, Well, you
14 know, that's good. That leaves the door open for
15 an appeal. I said that's right. If that's the
16 case I want to leave it like that.

17 Then when the judge give their ruling and the
18 Court, you know, decided I was guilty; and Judge
19 Keesley -- I believe that's his name -- said 20 at
20 85, Mr. Floyd pushed the mike up -- right over
21 there about where Mr. Thomas is at now -- and asked
22 me, he said, Mr. Lucas is there anything else you
23 would like me to do for you?

24 I said, Yes, sir. Let's put in for that
25 direct appeal. At that time I took it with good

1 faith he had it and was going to take care of it
2 for me.

3 Q No further questions. Thank you.

4 THE COURT: Anything further?

5 MR. THOMAS: Nothing further, Your Honor.

6 THE COURT: Thank you, sir. You may step
7 down.

8 (Witness leaves the witness stand.)

9 MR. THOMAS: Your Honor, may it please the
10 Court. That's the applicant's case.

11 THE COURT: Any additional witnesses?

12 MS. MAY: No, Your Honor.

13 THE COURT: On this filing of an appeal issue,
14 what is the law involving that? What is the grounds for
15 P.C.R. if the person who gets convicted doesn't get an
16 appeal filed?

17 MS. MAY: Your Honor, I believe the standard
18 for a belated appeal is that trial counsel is required
19 to -- I think it's Roe very Flores is the case -- he is
20 required to inform the defendant of their right to
21 appeal.

22 If he believes that -- if the defendant asks
23 him about it or if the defendant doesn't specifically
24 ask for an appeal but makes it known that that is
25 something that he would want or if trial counsel

1 believes there are legitimate, appealable issues -- and
2 I have that case over here -- he has a constitutional
3 duty to inform the defendant about an appeal only when
4 there is reason to think:

5 Either, one, a rational defendant would want
6 to appeal; for example, because there are non-frivolous
7 grounds for appeal; or, two, this particular defendant
8 reasonably demonstrated to counsel that he was
9 interested in so appealing.

10 That's Roe versus Flores. That is cited at
11 120 Sp.Ct. 1029.

12 THE COURT: Any other comments or argument by
13 either side?

14 MR. THOMAS: Your Honor, no. We don't have a
15 jury here. We have been through all the issues, and I'm
16 sure the Court has noted those.

17 Your Honor, just the other thing, is that a
18 White appeal, White v. State? I keep getting them
19 confused, Your Honor.

20 MS. MAY: White is right.

21 MR. THOMAS: White, I believe, is a direct
22 appeal. The other one is in regards to an appeal of
23 post conviction relief. If my memory serves me correct,
24 I think counsel does have an obligation to file on
25 behalf of the client a direct appeal if he asks him to

1 do so.

2 We would argue -- I don't know what the
3 Supreme Court would do on it -- but there are three
4 issues that were preserved for appeal that could have
5 gone up.

6 Of course, that was the motion in limine that
7 he made. Also, the Jackson versus Denno hearing. Then
8 he did make, I think, a very creative motion for a
9 directed verdict in that the State did not prove their
10 case as set forth in the indictment and in the statute.
11 That's the third issue that we feel like could have gone
12 up, Your Honor.

13 THE COURT: Anything from the State?

14 MS. MAY: Your Honor --

15 MR. THOMAS: I had those, Your Honor.

16 MS. MAY: I believe under White v. State, that
17 standard, is you are to determine whether he freely and
18 voluntarily waived his appellate right.

19 MR. THOMAS: Here it is, Your Honor. I do
20 have it. It's 263 S.C. 120.

21 THE COURT: Well, if counsel does not advise
22 the applicant of their right to appeal, do they get a
23 new trial or do they get a delayed appeal?

24 MR. THOMAS: They get a belated appeal, Your
25 Honor. Then also I think they have to -- what you have

1 to do, it actually becomes pretty cumbersome. You have
2 to submit the appeal.

3 With the appeal you actually almost have to do
4 the appeal itself. You have to address the issues to
5 the Supreme Court. Then they decide at that point in
6 time as to whether or not they will hear it or not.

7 THE COURT: So it's a separate type of P.C.R.?

8 MR. THOMAS: It is.

9 MS. MAY: Your Honor, the P.C.R. Court -- how
10 that decision is couched -- is that the P.C.R. Court
11 does not have actual ability to grant an appeal. So if
12 a belated appeal is granted, they will file that; and
13 they file the petition for the appeal to the Supreme
14 Court.

15 THE COURT: That's a separate issue as to
16 whether the trial counsel is deficient in the trial of
17 the case?

18 MS. MAY: Correct.

19 MR. THOMAS: That's correct. Your Honor, I
20 think also -- we were talking about this today in my
21 office -- I think that if, say, a P.C.R. is either
22 denied or generally if it's denied and the Court grants
23 a belated appeal, then you do the appeal, I think, and
24 the post conviction at the same time. I think they kind
25 of go up together.

1 MS. MAY: You can appeal the denial of the
2 application as well, in addition to filing for your --

3 MR. THOMAS: As far as stating the facts in
4 regards to what the issues are for the belated appeal.
5 Yes, sir.

6 THE COURT: Very good. Well, I will take
7 these issues under advisement. It will give me an
8 opportunity to review some of the submissions and let
9 you know in a couple of days.

10 MR. THOMAS: Thank you, Your Honor. Your
11 Honor, I have got some cases in regards to the golden
12 rule. I am sure you probably have all that; but if you
13 would like it, I would be glad to give it to you.

14 THE COURT: Well, I would be happy to look at
15 whatever you have on the golden rule issue.

16 MR. THOMAS: Yes, sir. The one that I have
17 that sets it out the best is State versus Reese.

18 THE COURT: R-E-E-S-E?

19 MR. THOMAS: R-E-E-S-E. Your Honor; it was --
20 part of it was overturned; but I think it was overturned
21 not on the issue of the golden rule. That issue was
22 upheld. I have got it too. I will hand this up, Your
23 Honor, if it please the Court.

24 THE COURT: Yes, sir.

25 (Hands to Court.)

1 THE COURT: This particular transcript on that
2 issue where the solicitor used the word "you," how do
3 you know he just didn't use the wrong word? What page
4 is that on again?

5 MR. THOMAS: Your Honor, it's throughout the
6 closing.

7 THE COURT: It's not just the overuse of the
8 word "you" because using the word "you" itself is not --

9 MR. THOMAS: Your Honor, it's just there is a
10 situation where on 295 -- I think is the clearest
11 example -- where it says that: Of the pain that you
12 would have suffered to do that. I think that gets into
13 the territory of the golden rule, Your Honor.

14 THE COURT: So if you read the paragraph: The
15 doctors say no way, no way that that could have
16 happened. There is no abrasion. There is no contusion
17 with a smack and a cut, but there was no scraping.
18 There was no surface blood that you would expect from
19 the infliction of the pain that you would have suffered
20 to do that.

21 So the solicitor is saying what the doctor
22 said. So how, if the doctor said there is no way you
23 could have done it that way because there is no this,
24 there is no that -- how does that ask the jury to put
25 themselves in the place of the victim? She is quoting

1 the doctor, saying the doctor said that.

2 MR. THOMAS: I think what she is doing is
3 saying that -- it's kind of putting themselves in the
4 place of the victim in saying that last part. In
5 saying, Could you imagine the pain you would have to
6 suffer?

7 I know it's kind of disjointed. They are also
8 talking about the cupping and the difference between
9 whether or not he would have the abrasions from being in
10 the pickets or not.

11 But if you look at the closing as a whole --
12 as a whole -- there is a lot of uses of the word "you."
13 It's used a lot of times. Some of them are clearly just
14 saying, You need to look at the evidence or you need to
15 do that.

16 I think that this one is the best example of a
17 borderline crossing over into saying about putting
18 yourself in the position of imagining that pain.

19 THE COURT: What do you say about that,
20 Ms. May?

21 MS. MAY: I think the context is pretty much
22 what you just explained, Your Honor. She -- or I think
23 he. Mr. Wedekind was actually doing this -- but he is
24 reviewing what the doctor has testified to. I don't
25 think it goes towards asking the jury to put themselves

1 in the victim's shoes.

2 THE COURT: Who did you say is doing the
3 closing?

4 MS. MAY: I believe it's Mr. Wedekind, Larry
5 Wedekind. Yes, it is Mr. Wedekind.

6 THE COURT: Very good. I will ponder it all.
7 Thank you very much.

8 MR. THOMAS: Thank you, Your Honor.

9 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

I, the undersigned L. Coconut Pantsari, Official Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal, in the Civil Court for Lexington County, South Carolina, on the 25th day of April, 2012.

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

May 9, 2013

L. Coconut Pantsari

Court Reporter

ORIGINAL

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON)

2010-CP-32-0803

Jeffery T. Lucas, #333799,)

Applicant,)

**ORDER OF DISMISSAL
AND GRANT OF BELATED APPEAL**

v.)

State of South Carolina,)

Respondent.)

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed February 19, 2010. Respondent made its Return on June 8, 2010. An evidentiary hearing into the matter was convened on April 25, 2012, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Tommy Thomas, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. The State offered the testimony of Wayne Floyd, Esquire (Mr. Floyd) Applicant's trial counsel. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the March 2009 term of the Lexington County Grand Jury for Infliction of Great Bodily Injury Upon a Child (2009-GS-32-0536). He was represented by Wayne Floyd, Esquire. On March 16-18, 2009, the Applicant underwent trial pursuant to which he was found guilty as charged. He

was sentenced by the Honorable R. Knox McMahon to confinement for a period of twenty (20) years. The Applicant did not appeal his conviction or sentence.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Was the Applicant's fifth, sixth, and fourteenth amendment rights of the United States Constitution and his Rights to Due Process violated by the solicitor (upgrading) charges without any probably cause its failed to sufficiently apprise the Applicant of the charge against him?"
2. "Did the trial Court lack subject matter jurisdiction, due to the procedural defect in that there was no order of continuance issued to continue the case?"
3. Ineffective Assistance of Counsel
 - a. Failure to object to the Solicitor's improper closing argument that impermissibly invoked the 'Golden Rule' and ultimately denied Applicant his right to a fair trial;
 - b. Failure to investigate, retain, and call an expert witness for Applicant's defense to challenge the State's scientific evidence;
 - c. Failure to file a notice of appeal.

II. SUMMARY OF EVIDENCE AND TESTIMONY PRESENTED AT THE PCR

EVIDENTIARY HEARING

Applicant's Testimony

At the PCR hearing Applicant testified that he retained Mr. Floyd to represent him and that Applicant was out on bond for three years prior to trial. Applicant testified that he participated with counsel in preparing their defense. that two weeks prior to trial counsel informed Applicant that the state dropped 2 charges and consolidated to 1 charge. Applicant testified that he informed counsel that he was concerned counsel would not have enough time to prepare for a new charge, but that

FILED
JUL 15 4 3:29
BETH A. CAMPBELL
CLERK OF COURT
LEXINGTON, SC

counsel told Applicant counsel would be prepared for trial. Applicant testified that he reviewed the state's evidence against him. that Applicant discussed with counsel whether to hire an expert, and that Applicant and counsel decided not to hire an expert and instead utilize the state's evidence. Applicant testified that in regards to his written statement wherein Applicant stated, "I lied" that Applicant changed his previous statement because it looked bad that Applicant had to leave the child unattended to call for help, but that Applicant did not intentionally lie. Applicant testified that this statement hurt him at trial and that Applicant could have clarified the statement if Applicant testified at trial.

Applicant testified that he first asked counsel to file an appeal at counsel's office when they discussed a potential plea and that Applicant again asked counsel to file an appeal after sentencing. Applicant testified that he believed counsel was going to take care of filing an appeal.

Mr. Floyd's Testimony

At the PCR hearing counsel testified that he was retained by the Applicant. that the initial charges filed against Applicant were assault and battery with intent to kill and unlawful neglect of a child, and that Applicant was later indicted for great bodily injury of a child. Counsel testified that he met with Applicant's family, filed a discovery motion, reviewed the state's evidence, and obtained a mental evaluation for Applicant that was not court ordered. Counsel testified that Applicant informed counsel that the child's head got stuck in the porch railings and Applicant then gave the child CPR. Counsel testified that it was not necessary to hire a private investigator because counsel received all of the state's evidence and counsel was aware of Applicant's version of the events.

Counsel testified that the State offered to allow Applicant to enter a guilty plea straight-up to the charge. Counsel testified that he was concerned Applicant would be sentenced to the full 20 years

with a straight-up plea due to the nature of the injuries and the condition of the child. Counsel testified that there not any publicity of Applicant's case and that there was no need to request a change of venue. Counsel testified that while the new indictment came close to the start of Applicant's trial, the new charge was not much different than what counsel was preparing for anyways. Counsel testified that during the pre-trial motions he was successful in getting some pictures suppressed, but that the trial court did not suppress the Applicant's statements. Counsel testified that some things in the statements were good for Applicant and some were bad.

Counsel testified that a substantial part of the trial was medical testimony and that he studied the medical records used at trial. Counsel testified that he did not need to retain an expert to review the medical reports. Counsel testified that he was able to adequately cross-examine Dr. Luberoff and Dr. Cartie, and that Dr. Luberoff's testimony actually helped the defense.

Counsel testified that the defense's trial strategy consisted of tying in the child's injuries with the fact that Applicant performed CPR on the child, that the victim prior to the incident recently underwent a surgical procedure and that counsel would tie in the child's injuries with his recent surgery. Counsel testified that the defense sought to establish that some of the child's injuries occurred when the child's head got stuck in the porch rails. Counsel testified that at trial he argued using the state's pictures. Counsel testified that he and Applicant discussed Applicant's right to testify, but that counsel could not ethically put Applicant on the stand to testify. Counsel testified that he could not recall Applicant indicating that he wanted to testify, that Applicant was never adamant about wanting to testify, and that if Applicant had been insistent on testifying counsel would not have precluded Applicant from testifying. Counsel testified that the words, "I lied" contained in Applicant's statement concerned whether Applicant went to use a phone and that counsel could not

put Applicant on the stand to testify about the statement because it would have presented an ethical problem for counsel.

Counsel testified that he did not object to the solicitor's use of the word 'you' during closing arguments because counsel did not believe the solicitor was referring to the jurors individually and that counsel did not believe the solicitor's statements were in violation of any rule. Counsel testified that when determining whether to object during closing argument he takes into account whether an objection will put you on the jury's bad side, whether an objection will preserve arguments for appeal, and the likelihood of a successful objection. Counsel testified that at second glance, maybe he should have objected during the solicitor's closing argument.

Counsel testified that he did not believe there any viable issues for appeal, that Judge Keesley tried a very legally valid case, and that an appeal would have been a waste of money for Applicant's family. Counsel testified that he did discuss Applicant's right to appeal with Applicant and that Applicant never asked counsel to file an appeal.

III. APPLICABLE LAW

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered

FILED
JUL 15 4 02
CLERK OF COURT
LEXINGTON, KY

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

FILE
FEB 15 2
ESTHER A. CARR
CLERK OF COURT
LEXINGTON, S.C.

1. Ineffective Assistance of Counsel

a. Failure to object to solicitor's improper closing argument

Applicant alleges that trial counsel was ineffective for failing to object to the Solicitor's improper closing argument that impermissibly invoked the 'Golden Rule' and ultimately denied Applicant his right to a fair trial. Specifically, Applicant directs this Court's attention to page 295 lines 1-4 of the trial transcript, asserting that the solicitor's statement asked the jurors to put themselves in the child's position violating the 'Golden Rule.' Applicant also alleges that counsel was ineffective for failing to object to the solicitor's use of the word 'you' 46 times during closing argument. At the PCR hearing counsel testified that he did not object because he did not believe the solicitor was referring to the jurors individually or that the solicitor's statements were in violation of any rule. It is easy as a lawyer to reflect back on a particular argument and see that he could have raised certain objections; and this Court appreciates counsel's honesty in stating that at second glance counsel may not have appreciated the overall impact of the solicitor's argument, and that maybe counsel should have objected during the solicitor's closing argument.

South Carolina law dictates that the solicitor's closing arguments must be viewed in the context of the entire record. McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). While the State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence, State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996); to be entitled to a new trial for improper closing arguments Applicant must show "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001). After reviewing the entire record, this Court does not find any comments by the solicitor so infected the trial that a new

FILED
CLERK OF COURT
JAN 10 2003
SC

MAR 13 5 8 30

trial is warranted. This Court is not convinced that the solicitor's arguments even reach the level of being improper, but certainly there is no evidence that Applicant was prejudiced. This Court finds that counsel was not ineffective for failing to object. Counsel provided a rational explanation as to why he did not object and this Court accepts counsel's reasoning as to why he did not object. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

b. Failure to investigate, retain, and call an expert witness at trial

Applicant asserts that counsel was ineffective for failing to investigate and obtain an expert witness to challenge the state's scientific evidence, specifically the testimony of Doctors Susan Luberoff and Richard Cartie. The Applicant argues that counsel was not qualified to challenge the scientific evidence, that Applicant was denied his right to effective cross-examination, and that counsel should have obtained funds for an expert. At the PCR hearing counsel testified that he studied the medical records and that based on the defense strategy there was no need to hire an expert to review the medical reports or to testify at trial. Counsel explained that he was able to adequately cross-examine both doctors, and that Dr. Luberoff's testimony ended up helping Applicant.

This Court finds that Applicant failed to meet his burden of proof. The Applicant did not present any testimony from a medical expert at the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). An Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.

RECEIVED
JUL 15 4 30
CLERK OF COURT
EXINGTON, SC

Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). The Applicant presented no such witnesses or records at the PCR hearing. This Court finds that Applicant failed to show that counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

Furthermore, the nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony showing the witnesses' answers at trial would have been different. Accordingly, this Court finds that Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. This Court finds that Applicant failed to show counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

c. Failure to file a notice of appeal

Applicant asserts that counsel was ineffective for failing to file a notice of appeal. At the PCR hearing Applicant testified that he first asked counsel to file an appeal at counsel's office when they discussed a potential plea and that Applicant again asked counsel to file an appeal after sentencing. Applicant testified that he believed counsel was going to take care of filing an appeal. Counsel testified that he and Applicant discussed Applicant's right to appeal, but that Applicant never asked counsel to file an appeal. Counsel explained that he did not believe there were any viable issues for appeal and that Judge Keesley tried a very legally valid case.

FILED
2017 FEB 15 A 3
CLERK OF COURT
LEXINGTON, SC