

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Oconee County
R. Lawton McIntosh, Circuit Court Judge

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S.C. Supreme Court

CLARENCE CRITTENDON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-002380

APPENDIX

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1 STATE OF SOUTH) IN THE COURT OF GENERAL
2 CAROLINA) SESSIONS
3)
4 COUNTY OF OCONEE) INDICTMENTS NOS.:
5 2004-GS-37-509 AND
6 2006-GS-37-927

5 STATE OF SOUTH)
6 CAROLINA)
7)
8 PLAINTIFF,) TRIAL
9)
10 -VS-)
11)
12 CLARENCE E. CRITTENDON,)
13)
14 DEFENDANT.

11 DECEMBER 11 AND 12, 2006
12 WALHALLA, SOUTH CAROLINA

13 B E F O R E:

14 THE HONORABLE ALEXANDER S. MACAULAY, JUDGE; AND A
15 JURY.

16
17
18 A P P E A R A N C E S:

19 CHRISSY T. ADAMS, 10TH CIRCUIT SOLICITOR, AND
20 LINDSEY S. SIMMONS, ESQ.
21 ASSISTANT 10TH CIRCUIT SOLICITOR
22 ATTORNEYS FOR THE STATE

23
24 BRUCE BYRHOLDT, ESQ.
25 ATTORNEY FOR THE DEFENDANT

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EXHIBITS

NO.	DESCRIPTION	ID./EV.
S # 1,	WAIVER OF RIGHTS FORM DATED 1-21, 2004	46/46
S # 2,	VOLUNTARY STATEMENT DATED JANUARY 21ST, 2004, AT THE LAW ENFORCEMENT CENTER, STARTED AT 5:38 P.M.	41/105
S # 3,	BIRTH CERTIFICATE	80/80
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1 ***** START OF REQUESTED TRANSCRIPT *****

2 (WHEREUPON, THE TRIAL OF THE STATE OF SOUTH
3 CAROLINA V. CLARENCE E. CRITTENDON COMMENCED
4 IN THE COURT OF GENERAL SESSIONS FOR OCONEE
5 COUNTY ON THE 11TH DAY OF DECEMBER, 2006,
6 BEFORE THE HONORABLE ALEXANDER S. MACAULAY,
7 AT APPROXIMATELY 3:25 P.M.)

8 JURY VOIR DIRE:

9 THE COURT: LADIES AND GENTLEMEN OF THE JURY
10 PANEL, AS I MENTIONED EARLIER, THIS IS A TERM OF GENERAL
11 SESSIONS COURT, SOMETIMES CALLED CRIMINAL COURT. ITS
12 PURPOSE IS TO RESOLVE QUESTIONS OF ALLEGED CRIMINAL
13 CONDUCT ARISING BETWEEN THE STATE OF SOUTH CAROLINA AND
14 THE DEFENDANT IN A FASHION WHICH WILL ENSURE THAT
15 JUSTICE UNDER THE LAW IS ACCOMPLISHED.

16 THE TRIAL OF A CASE BEGINS WITH THE
17 SELECTION OF A JURY. BOTH THE STATE AND THE DEFENDANT
18 ARE ENTITLED TO JURORS WHO APPROACH THE CASE WITH AN
19 OPEN MIND. THE TRIAL JURY MUST BE AS FREE AS HUMANLY
20 POSSIBLE FROM BIAS, PREJUDICE, OR SYMPATHY FROM ANY SIDE
21 AND FREE FROM PRECONCEIVED IDEAS ON THE FACTS OF THE
22 CASE OR ON THE LAW OF THE CASE. THEREFORE, CERTAIN
23 QUESTIONS WILL BE REQUESTED OF YOU, THE PETIT JURY
24 PANEL. THE QUESTIONS WHICH WILL BE ASKED ARE DESIGNED
25 TO ENSURE EACH SIDE A FAIR AND IMPARTIAL JURY.

1 I MIGHT NOTE FURTHER THAT IF ANYBODY SHOULD
2 TALK TO YOU OR ATTEMPT TO TALK TO YOU ABOUT ANY CASE
3 THAT MIGHT BE PENDING IN THIS TERM OF COURT, IT IS YOUR
4 SOLEMN DUTY TO IMMEDIATELY REPORT THEM TO THE COURT SO I
5 MIGHT TAKE THE APPROPRIATE ACTION. FROM THIS POINT ON
6 YOU ARE ALL JURORS OF THE COURT OF GENERAL SESSIONS FOR
7 OCONEE COUNTY, AND NO ONE IS TO INTERFERE WITH YOUR
8 PROPER SERVICE AS JURORS.

9 NOW, IT WAS MENTIONED EARLIER, PERHAPS, THAT
10 THIS IS NOT THE BEST ACOUSTICS THAT WE WOULD LIKE; WE
11 ARE WORKING ON IT, HOWEVER. BUT IS THERE ANY MEMBER OF
12 THE JURY PANEL WHO CANNOT HEAR ME OR UNDERSTAND ME? IF
13 SO, PLEASE RAISE THEIR HAND.

14 ALL RIGHT. IT HASN'T GOTTEN ANY BETTER,
15 MR. BARKER?

16 PROSPECTIVE JUROR BARKER: NO, SIR.

17 THE COURT: I'LL TRY TO SPEAK MORE
18 DISTINCTLY AS WELL AS LOUDER IF THAT WILL HELP. IF YOU
19 STILL CAN'T HEAR ME, RAISE YOUR HAND AND I'LL TRY TO
20 RESPOND TO YOU.

21 ANYONE ELSE? (NO RESPONSE.) VERY GOOD.

22 SOLICITOR, CALL YOUR FIRST CASE.

23 MS. SIMMONS: THANK YOU, YOUR HONOR. MAY IT
24 PLEASE THE COURT. THE STATE OF SOUTH CAROLINA CALLS THE
25 STATE OF SOUTH CAROLINA VERSUS CLARENCE ELIJAH

1 CRITTENDON ON 2004-GS-37-509 FOR LEWD ACT UPON A CHILD
2 UNDER 16 AND 2006-GS-37-927, THE STATE OF SOUTH CAROLINA
3 VERSUS CLARENCE ELIJAH CRITTENDON FOR CRIMINAL SEXUAL
4 CONDUCT WITH A MINOR IN THE FIRST DEGREE.

5 THE COURT: AS YOU HEARD, LADIES AND
6 GENTLEMEN OF THE JURY, WE'LL START THE TRIAL OF THE CASE
7 OF THE STATE OF SOUTH CAROLINA VERSUS CLARENCE ELIJAH
8 CRITTENDON, WHO IS CHARGED IN INDICTMENT 2004-GS-37-509
9 WITH LEWD ACT ON A CHILD UNDER 16; AND IN INDICTMENT
10 NUMBER 2006-GS-37-927, CRIMINAL SEXUAL CONDUCT WITH A
11 MINOR IN THE FIRST DEGREE.

12 THE STATE WILL BE REPRESENTED BY
13 MS. SIMMONS, AND MS. ADAMS, THE SOLICITOR FOR THE 10TH
14 JUDICIAL CIRCUIT.

15 MS. SIMMONS, IF YOU WOULD PLEASE STAND,
16 INTRODUCE YOURSELF AND ANYONE ELSE WHO WILL BE ASSISTING
17 YOU IN THE TRIAL OF THIS CASE.

18 MS. SIMMONS: GOOD AFTERNOON. MY NAME IS
19 LINDSEY SIMMONS, I AM ASSISTANT SOLICITOR HERE IN THE
20 TENTH JUDICIAL CIRCUIT, AND I HAVE THE PLEASURE OF
21 WORKING FOR YOUR ELECTED SOLICITOR, CHRISSY ADAMS.

22 MS. ADAMS: GOOD AFTERNOON.

23 THE COURT: ALL RIGHT. IS THERE ANYONE WHO
24 WILL BE ASSISTING YOU IN THE TRIAL OF THE CASE, IN OTHER
25 WORDS, SITTING AT YOUR TABLE?

1 MS. SIMMONS: JUDGE, YES, LIEUTENANT GREG
2 REED OF THE OCONEE COUNTY SHERIFF'S OFFICE.

3 THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

4 THE DEFENDANT, MR. CLARENCE ELIJAH
5 CRITTENDON, IS REPRESENTED BY MR. BYRHOLDT.

6 MR. BYRHOLDT, IF YOU WOULD PLEASE STAND,
7 INTRODUCE YOURSELF, YOUR LAW FIRM, AND YOUR CLIENT.

8 MR. BYRHOLDT: MAY IT PLEASE THE COURT.

9 MY NAME IS BRUCE BYRHOLDT. I PRACTICE LAW
10 HERE IN THE UPSTATE WITH THE FIRM OF CHAPMAN, BYRHOLDT,
11 AND YON. WE ARE LOCATED IN ANDERSON, SOUTH CAROLINA.
12 MY PARTNERS ARE LANIEL CHAPMAN, FORMER SOLICITOR; AND
13 PATRICK YON.

14 CLARENCE CRITTENDON --

15 CLARENCE, DO YOU WANT TO STAND UP?

16 -- IS A RESIDENT HERE IN OCONEE COUNTY.

17 AND I LOOK FORWARD TO WORKING WITH YOU THE
18 NEXT COUPLE OF DAYS.

19 THE COURT: VERY GOOD. THANK YOU VERY MUCH.

20 NOW, THE REASON I ASK INDIVIDUALS TO STAND
21 AND LOOK UPON THE JURY IS IN THESE DAYS WE MIGHT NOT
22 RECOGNIZE EVERYBODY BY THEIR NAMES, BUT OCCASIONALLY WE
23 WILL SEE SOMEBODY THAT WE ARE FAMILIAR WITH IN SOME
24 FASHION, SO I ASK THEM TO LOOK UPON THE JURY SO YOU WILL
25 HAVE AN OPPORTUNITY TO BE SURE THAT YOU DO NOT KNOW, OR,

1 IF YOU DO, WHAT THE CONNECTION WOULD BE.

2 NOW, IS ANY MEMBER OF THE JURY PANEL RELATED
3 BY BLOOD OR MARRIAGE, NOW OR FORMERLY, CLOSE PERSONAL
4 FRIEND OR BUSINESS ASSOCIATE OF THE DEFENDANT,
5 MR. CLARENCE ELIJAH CRITTENDON? IF SO, PLEASE STAND.
6 (NO RESPONSE.)

7 IS ANY MEMBER OF THE JURY PANEL RELATED BY
8 BLOOD OR MARRIAGE, CLOSE PERSONAL FRIEND OR BUSINESS
9 ASSOCIATE OF ANY OF THE ATTORNEYS INVOLVED IN THIS
10 ACTION, MS. SIMMONS, MS. ADAMS, OR MR. BYRHOLDT, IF THEY
11 WOULD PLEASE STAND AT THIS TIME. THIS WOULD ALSO
12 INCLUDE ANY WHO MIGHT HAVE BEEN REPRESENTED OR INVOLVED
13 WITH THE 10TH JUDICIAL CIRCUIT SOLICITOR'S OFFICE OR
14 EMPLOYED BY OR REPRESENTED BY ANY OF THE ATTORNEYS IN
15 THIS ACTION. IF SO, PLEASE STAND.

16 YES, SIR, IF YOU WOULD GIVE US YOUR NAME,
17 PLEASE.

18 POTENTIAL JUROR COX: JOHN COX.

19 THE COURT: YES, SIR, MR. COX. AND WHAT IS
20 YOUR RELATIONSHIP TO ANY OF THE ATTORNEYS?

21 PROSPECTIVE JUROR COX: I WORK WITH OCONEE
22 COUNTY. SOMETIMES I HAVE TO WORK ON COMPUTERS WITH THE
23 SOLICITOR'S OFFICE AND LAW ENFORCEMENT.

24 THE COURT: ALL RIGHT. WOULD THAT IN ANY
25 WAY INTERFERE WITH YOUR ABILITY TO GIVE BOTH THE STATE

1 OF SOUTH CAROLINA AND THE DEFENDANT A FAIR AND IMPARTIAL
2 TRIAL IN THIS CASE?

3 PROSPECTIVE JUROR COX: NO.

4 THE COURT: ALL RIGHT. VERY GOOD. THANK
5 YOU, SIR.

6 ANYONE ELSE? (NO RESPONSE.)

7 NOW, THIS QUESTION HAS BEEN ASKED BEFORE,
8 BUT IS THERE ANY MEMBER OF THE JURY PANEL WHO WAS A
9 MEMBER OF THE OCONEE COUNTY GRAND JURY FROM 2004 OR
10 2006? IF SO, PLEASE STAND. (NO RESPONSE.)

11 ALL PERSONS OR MEMBERS OF THE JURY PANEL
12 WHO MAY HAVE HEARD ANYTHING ABOUT THIS CASE, FROM ANY
13 SOURCE WHATSOEVER, IF YOU WOULD PLEASE STAND AT THIS
14 TIME. (NO RESPONSE.)

15 ANY MEMBER OF THE JURY PANEL WHO MAY HAVE
16 HEARD ANYTHING ABOUT THE CASE OR THIS CASE FROM ANY
17 SOURCE WHATSOEVER, IF YOU WOULD PLEASE STAND AT THIS
18 TIME.

19 YES, MA'AM. IF YOU WOULD COME FORWARD,
20 PLEASE.

21 (A JUROR APPROACHED THE BENCH AND CONFERRED
22 WITH THE COURT, WITH COUNSEL PRESENT, AS
23 FOLLOWS:)

24 THE COURT: YOUR NAME, PLEASE?

25 PROSPECTIVE JUROR CLEVELAND: THERESA

1 CLEVELAND.

2 THE COURT: YES, MA'AM.

3 PROSPECTIVE JUROR CLEVELAND: I SAW THE
4 PICTURE AND READ THE INFORMATION IN THE, I GUESS IT WAS
5 THE SENECA JOURNAL ABOUT THESE THREE CASES, BUT I MAINLY
6 SAW THE PICTURES AND READ, YOU KNOW, WHAT THE CHARGES
7 WERE.

8 THE COURT: ALL RIGHT. THAT'S THE ONLY
9 THING THAT YOU DO KNOW IS WHAT YOU READ IN THE PAPER?

10 PROSPECTIVE JUROR CLEVELAND: RIGHT. I
11 NEVER HEARD OF ANY CONNECTIONS, I JUST SAW THAT IN THE
12 PAPER. I DIDN'T REALIZE I WAS GONNA BE HERE.

13 THE COURT: ALL RIGHT. HAVE YOU FORMED AN
14 OPINION ABOUT THE GUILT OR INNOCENCE OF THE DEFENDANT?

15 PROSPECTIVE JUROR CLEVELAND: I HAVEN'T
16 HEARD EITHER SIDE YET.

17 THE COURT: CAN YOU PROVIDE BOTH THE STATE
18 AND THE DEFENDANT A FAIR AND IMPARTIAL TRIAL?

19 PROSPECTIVE JUROR CLEVELAND: I CAN SAY I
20 WOULD BE FAIR.

21 THE COURT: LET ME ASK YOU: CAN YOU PUT
22 ASIDE ANY INFORMATION YOU MAY HAVE RECEIVED, FROM ANY
23 SOURCE WHATSOEVER, AND SETTING ASIDE SUCH INFORMATION
24 RENDER A FAIR AND IMPARTIAL VERDICT BASED SOLELY ON THE
25 LAW AND EVIDENCE RECEIVED DURING THE TRIAL OF THE CASE?

1 POTENTIAL JUROR CLEVELAND: YES, SIR.

2 THE CLERK: SHE'S NUMBER 32.

3 MR. BYRHOLDT: JUDGE, CAN WE MAKE THAT
4 ARTICLE A COURT'S EXHIBIT?

5 THE COURT: YES, SIR.

6 (COURT'S EX. # 1, NEWSPAPER ARTICLE, WAS
7 MARKED FOR IDENTIFICATION.)

8 THE COURT: IS THERE ANYBODY ELSE, A MEMBER
9 OF THE JURY PANEL WHO HAS HEARD ANYTHING ABOUT THE CASE
10 FROM ANY SOURCE WHATSOEVER, PLEASE STAND AT THIS TIME.
11 (NO RESPONSE.)

12 HAS ANY MEMBER OF THE PANEL FORMED OR
13 EXPRESSED AN OPINION ABOUT THIS CASE? IF SO, PLEASE
14 STAND. (NO RESPONSE.)

15 IS ANY MEMBER OF THE PANEL AWARE OF ANY
16 INTEREST, BIAS, OR PREJUDICE TOWARDS EITHER THE
17 DEFENDANT OR THE STATE OF SOUTH CAROLINA? IF SO, PLEASE
18 STAND.

19 THE CLERK: JUDGE, WE HAVE ONE STANDING.

20 ALL RIGHT. YES, SIR, IF YOU WOULD, PLEASE,
21 GIVE US YOUR NAME FOR THE RECORD.

22 PROSPECTIVE JUROR BOOTHE: ROGER BOOTHE.

23 THE COURT: YES, SIR.

24 PROSPECTIVE JUROR BOOTHE: WELL, I DON'T --

25 ON A CASE LIKE THIS, YOUR HONOR ---

1 THE COURT: JUST A MOMENT. IT MIGHT BE
2 BETTER IF I SPOKE TO YOU PRIVATELY, PLEASE.

3 (PROSPECTIVE JUROR BOOTHE APPROACHED THE
4 BENCH AND CONFERRED WITH THE COURT, WITH
5 COUNSEL PRESENT, AS FOLLOWS:)

6 THE COURT: YES, SIR, IF YOU WOULD PLEASE
7 COME FORWARD.

8 THE CLERK: NUMBER 15.

9 PROSPECTIVE JUROR BOOTHE: THANK YOU, YOUR
10 HONOR.

11 IN NOVEMBER OF 2005 -- WELL, FIRST OF ALL, I
12 WAS A PASTOR IN PENNSYLVANIA FOR A NUMBER OF YEARS.
13 ABOUT 15 YEARS AGO, A VERY DYSFUNCTIONAL FAMILY LIVED
14 ADJACENT TO A CHURCH. IN 2005 MY WIFE AND I FOUND OUT
15 OUR SEVEN-YEAR-OLD CHILD WAS BEING MOLESTED BY ONE OF
16 THE CHILDREN THAT HAD BEEN MOLESTED BY HER FATHER.

17 THE COURT: ALL RIGHT. I'LL TELL YOU WHAT.
18 I'M GOING TO EXCUSE YOU FROM THE TRIAL IN THIS CASE.
19 THERE ARE TWO REASONS I ASK IF A JUROR CAN BE FAIR AND
20 IMPARTIAL; NOT ONLY FOR THE BENEFIT OF THE PARTIES
21 INVOLVED, BUT I DON'T WANT THEM TO BE UNCOMFORTABLE IN
22 WHATEVER THEY HAVE TO DO.

23 PROSPECTIVE JUROR BOOTHE: YES. THIS IS TOO
24 FRESH IN MY MIND.

25 THE COURT: I'LL EXCUSE YOU FOR THE TRIAL OF

1 THIS CASE. BUT STAY WITH US, IF YOU WOULD, PLEASE.

2 PROSPECTIVE JUROR BOOTHE: YES, SIR.

3 THE COURT: ANYONE ELSE? (NO RESPONSE.)

4 NOW I'M GOING TO ALSO CALL OUT THE NAMES OF
5 CERTAIN POTENTIAL WITNESSES. WHEN I SAY POTENTIAL
6 WITNESSES, THOSE ARE WITNESSES WHO MAY BE CALLED DURING
7 THE TRIAL OF THE CASE BUT DO NOT HAVE TO BE CALLED.

8 IF THEY ARE IN THE COURTROOM AT THE TIME
9 THEIR NAMES ARE CALLED, IF THEY WOULD PLEASE STAND.

10 AS I SAY, THESE ARE POTENTIAL WITNESSES, NOT
11 NECESSARILY THAT WILL BE CALLED BUT THEY MAY BE CALLED.

12 LIEUTENANT GREG REED. LIEUTENANT, IF YOU
13 WOULD STAND ONE MORE TIME, PLEASE.

14 THANK YOU, SIR.

15 SERGEANT GENTRY HAWK, OCONEE COUNTY
16 SHERIFF'S OFFICE.

17 SERGEANT RICHARD KIRK, OCONEE COUNTY
18 SHERIFF'S OFFICE.

19 DR. JOSEPH GEER, FOOTHILLS ALLIANCE.

20 MIKE LARK, LARK & ASSOCIATES.

21 Minor MS. Minor

22 (MS. Minor STANDS.)

23 THE COURT: THANK YOU, MA'AM.

24 MR. MARION HALMON.

25 (MS. HALMON STANDS.)

1 THE COURT: OH, EXCUSE ME, MA'AM, I'M SORRY.
2 I DIDN'T RECOGNIZE THE GENDER THERE.

3 MS. MARION HALMON. YES, MA'AM, I JUST
4 WANTED TO BE SURE THAT THEY UNDERSTOOD THAT YOU WERE THE
5 PERSON I WAS TALKING ABOUT. THANK YOU, MA'AM.

6 MR. TIMOTHY CRITTENDON.

7 MS. TIFFANY BIRCH.

8 AGAIN, IS THERE ANY MEMBER OF THE JURY PANEL
9 RELATED BY BLOOD OR MARRIAGE, CLOSE PERSONAL FRIEND,
10 BUSINESS ASSOCIATE OR -- AS TO ANY OF THE POTENTIAL
11 WITNESSES IN THIS CASE? LIEUTENANT GREG REED, SERGEANT
12 GENTRY HAWK, SERGEANT RICHARD KIRK, DR. JOSEPH GEER,
13 MR. MIKE LARK, MS. Minor MS. MARION
14 HALMON, MR. TIMOTHY CRITTENDON AND TIFFANY BIRCH? IF
15 SO, PLEASE STAND.

16 MR. BYRHOLDT: YOUR HONOR, CAN WE APPROACH?

17 THE COURT: CERTAINLY.

18 (WHEREUPON, COUNSEL APPROACHED THE BENCH AND
19 CONFERRED WITH THE COURT OUT OF THE PRESENCE
20 OF THE COURT REPORTER AND THE JURY PANEL.)

21 MR. BYRHOLDT: THANK YOU, JUDGE.

22 THE COURT: ALL RIGHT, THANK YOU.

23 ONE OTHER NAME I HAVE IS MS. SARAH
24 CRITTENDON, MS. SARAH CRITTENDON. IF THERE IS ANY
25 MEMBER OF THE JURY PANEL WHO IS RELATED BY BLOOD OR

1 MARRIAGE, CLOSE PERSONAL FRIEND, BUSINESS ASSOCIATE OF
2 ANY OF THE POTENTIAL WITNESSES IN THIS CASE, IF THEY
3 WOULD PLEASE STAND AT THIS TIME.

4 ALL RIGHT. YES, SIR, WE'LL START ON THIS
5 END. YOUR NAME, PLEASE?

6 PROSPECTIVE JUROR JONES: ROBERT JONES.

7 THE COURT: YES, SIR.

8 PROSPECTIVE JUROR JONES: I'VE WORKED WITH
9 MR. REED AND WITH MR. HAWK IN THE PAST.

10 THE COURT: ALL RIGHT. IN WHAT CAPACITY?

11 PROSPECTIVE JUROR JONES: JUST A COUPLE
12 CASES WE HAD DOWN AT FOXWOOD.

13 THE COURT: OH, I UNDERSTAND. YOU ARE HEAD
14 OF SECURITY THERE?

15 PROSPECTIVE JUROR JONES: CORRECT.

16 THE COURT: WOULD THAT IN ANY WAY INTERFERE
17 WITH YOUR ABILITY TO GIVE BOTH THE STATE AND THE
18 DEFENDANT A FAIR AND IMPARTIAL TRIAL?

19 PROSPECTIVE JUROR JONES: NO, SIR.

20 THE COURT: THANK YOU, SIR.

21 YES, SIR.

22 POTENTIAL JUROR COX: JOHN COX.

23 THE COURT: YES, SIR.

24 POTENTIAL JUROR COX: I WORK WITH THE

25 SHERIFF'S OFFICE, TOO, AND I'VE MET MIKE LARK BEFORE.

1 THE COURT: WOULD THAT IN ANY WAY INTERFERE
2 WITH YOUR ABILITY TO GIVE BOTH THE STATE AND DEFENDANT A
3 FAIR AND IMPARTIAL TRIAL?

4 POTENTIAL JUROR COX: NO, SIR.

5 THE COURT: VERY GOOD, THANK YOU, SIR.

6 ANYONE ELSE? (NO RESPONSE.)

7 DOES ANY MEMBER OF THE PANEL KNOW OF ANY
8 REASON WHY HE OR SHE CANNOT GIVE BOTH THE STATE OF SOUTH
9 CAROLINA AND THE DEFENDANT A FAIR AND IMPARTIAL TRIAL?
10 IF SO, PLEASE STAND. (NO RESPONSE.)

11 ANY OTHER QUESTIONS, FROM THE STATE?

12 MS. SIMMONS: NO, YOUR HONOR.

13 THE COURT: ANY ADDITIONAL QUESTIONS, FROM
14 THE DEFENDANT?

15 MR. BYRHOLDT: NO, YOUR HONOR.

16 JURY SELECTION:

17 THE COURT: LADIES AND GENTLEMEN OF THE JURY
18 PANEL, THE WAY WE SELECT A JURY IN GENERAL SESSIONS
19 COURT IS THAT THE CLERK, AS YOU WILL NOTICE, HAS A DRUM
20 IN FRONT OF HER, AND IN THAT DRUM ARE CAPSULES. EACH
21 CAPSULE HAS ONE OF YOUR NAMES, AND AS WE DRAW A JURY SHE
22 LITERALLY DRAWS A NAME OUT OF THE CAPSULE FROM THE DRUM
23 AND THAT NAME WILL BE CALLED.

24 IF YOUR NAME IS CALLED, OR WHEN YOUR NAME IS
25 CALLED, IF YOU WOULD COME FORWARD TO THE FRONT OF THE

1 COURTROOM WHERE THE BAILIFF IS STANDING AND FACE BACK
2 TOWARDS THE BACK OF THE COURTROOM. THE STATE WILL FIRST
3 CONSIDER THE POTENTIAL JUROR, AND WILL EITHER SAY SWEAR
4 THE JUROR -- EXCUSE ME -- WILL EITHER SAY PRESENT THE
5 JUROR OR EXCUSE THE JUROR. THEN THE DEFENDANT WOULD
6 HAVE AN OPPORTUNITY TO CONSIDER THAT JUROR AND WILL
7 EITHER SAY SWEAR THE JUROR OR EXCUSE THE JUROR.

8 SO IF WE COULD, MADAM CLERK, GIVE US A JURY
9 IN THIS CASE.

10 THE CLERK: YES, JUDGE.

11 THE COURT: OH. FIVE AND TEN?

12 MR. BYRHOLDT: THAT'S CORRECT.

13 MS. SIMMONS: YES, SIR.

14 THE COURT: VERY GOOD.

15 THE CLERK: NUMBER 90, HAILEY BROOKE LEE.

16 WHAT SAYETH THE STATE?

17 MS. SIMMONS: PLEASE PRESENT THE JUROR.

18 THE CLERK: WHAT SAYETH THE DEFENSE?

19 MR. BYRHOLDT: PLEASE SWEAR THE LADY.

20 THE CLERK: PLEASE HAVE A SEAT IN THE

21 JURY-BOX.

22 NUMBER 115, PHYLLIS NEAL.

23 WHAT SAYETH THE STATE?

24 MS. SIMMONS: PLEASE PRESENT THE JUROR.

25 THE CLERK: WHAT SAYETH THE DEFENSE?

1 MR. BYRHOLDT: PLEASE SWEAR THE LADY.

2 THE CLERK: PLEASE HAVE A SEAT IN THE
3 JURY-BOX.

4 NUMBER 154, SEAN SHIFFLER.

5 WHAT SAYETH THE STATE?

6 MS. SIMMONS: PLEASE PRESENT THE JUROR.

7 THE CLERK: WHAT SAYETH THE DEFENSE?

8 MR. BYRHOLDT: PLEASE EXCUSE HIM FROM
9 SERVICE ON THIS CASE.

10 THE CLERK: SIR, YOU HAVE BEEN EXCUSED FROM
11 THIS CASE, YOU MAY BE SEATED.

12 NUMBER 60, TRACIE GUTHRIE.

13 WHAT SAYETH THE STATE?

14 MS. SIMMONS: PLEASE PRESENT THE JUROR.

15 THE CLERK: WHAT SAYETH THE DEFENSE?

16 MR. BYRHOLDT: PLEASE SWEAR THE LADY.

17 THE CLERK: MA'AM, IF YOU WOULD PLEASE HAVE
18 A SEAT IN THE JURY-BOX.

19 NUMBER 8, LOUIS BEAUDOIN.

20 WHAT SAYETH THE STATE?

21 MS. SIMMONS: PLEASE PRESENT THE JUROR.

22 THE CLERK: WHAT SAYETH THE DEFENSE?

23 MR. BYRHOLDT: PLEASE EXCUSE HIM FROM
24 SERVICE ON THIS CASE.

25 THE CLERK: SIR, YOU HAVE BEEN EXCUSED ON

1 THIS CASE, YOU MAY BE SEATED.

2 NUMBER 122, CONNIE ONATE.

3 WHAT SAYETH THE STATE?

4 MS. SIMMONS: PLEASE EXCUSE THE JUROR FROM
5 THE TRIAL OF THIS CASE.

6 THE CLERK: MA'AM, YOU HAVE BEEN EXCUSED
7 FROM THIS CASE, YOU MAY BE SEATED.

8 NUMBER 134, SARAH PRATER.

9 WHAT SAYETH THE STATE?

10 MS. SIMMONS: PLEASE EXCUSE THE JUROR FROM
11 THE TRIAL OF THIS CASE.

12 THE CLERK: MA'AM, YOU HAVE BEEN EXCUSED
13 FROM THIS CASE, YOU MAY BE SEATED.

14 NUMBER 139, SHANNON RAMSAY.

15 WHAT SAYETH THE STATE?

16 MS. SIMMONS: PLEASE PRESENT THE JUROR.

17 THE CLERK: WHAT SAYETH THE DEFENSE?

18 MR. BYRHOLDT: PLEASE SWEAR THE GENTLEMAN.

19 THE CLERK: SIR, PLEASE HAVE A SEAT IN THE
20 JURY-BOX.

21 NUMBER 51, FREDERICK GIESEKING.

22 WHAT SAYTH THE STATE?

23 MS. SIMMONS: PLEASE PRESENT THE JUROR.

24 THE CLERK: WHAT SAYETH THE DEFENSE?

25 MR. BYRHOLDT: PLEASE EXCUSE HIM FROM

1 SERVICE ON THIS CASE.

2 THE CLERK: YOU HAVE BEEN EXCUSED FROM THIS
3 CASE. PLEASE BE SEATED.

4 NUMBER 58, CAROL GRIFFIN.

5 WHAT SAYETH THE STATE?

6 MS. SIMMONS: PLEASE PRESENT THE JUROR.

7 THE CLERK: WHAT SAYETH THE DEFENSE?

8 MR. BYRHOLDT: PLEASE EXCUSE HER FROM
9 SERVICE ON THIS CASE.

10 THE CLERK: MA'AM, YOU HAVE BEEN EXCUSED
11 FROM THIS CASE, PLEASE BE SEATED.

12 NUMBER 81, ROBERT JONES.

13 WHAT SAYETH THE STATE?

14 MS. SIMMONS: PLEASE PRESENT THE JUROR.

15 THE CLERK: WHAT SAYETH THE DEFENSE?

16 MR. BYRHOLDT: PLEASE EXCUSE HIM FROM
17 SERVICE ON THIS CASE.

18 THE CLERK: SIR, YOU HAVE BEEN EXCUSED ON
19 THIS CASE, YOU MAY BE SEATED.

20 NUMBER 32, THERESA CLEVELAND.

21 WHAT SAYETH THE STATE?

22 MS. SIMMONS: PLEASE PRESENT THE JUROR.

23 THE CLERK: WHAT SAYETH THE DEFENSE?

24 MR. BYRHOLDT: PLEASE EXCUSE HER FROM
25 SERVICE ON THIS CASE.

1 THE CLERK: MA'AM, YOU HAVE BEEN EXCUSED ON
2 THIS CASE, YOU MAY BE SEATED.

3 NUMBER 13, BETTY BLACK.

4 WHAT SAYETH THE STATE?

5 MS. SIMMONS: PLEASE PRESENT THE JUROR.

6 THE CLERK: WHAT SAYETH THE DEFENSE?

7 MR. BYRHOLDT: I APOLOGIZE, WHAT NUMBER?

8 THE CLERK: NUMBER 13.

9 MR. BYRHOLDT: BEG THE COURT'S INDULGENCE,
10 YOUR HONOR.

11 (MR. BYRHOLDT AND THE DEFENDANT CONFERRED OFF
12 THE RECORD.)

13 MR. BYRHOLDT: PLEASE SWEAR THE LADY.

14 THE CLERK: MA'AM, YOU MAY HAVE A SEAT IN
15 THE JURY-BOX.

16 NUMBER 118, WINSTON NORRIS.

17 WHAT SAYETH THE STATE?

18 MS. SIMMONS: PLEASE PRESENT THE JUROR.

19 THE CLERK: WHAT SAYETH THE DEFENSE?

20 MR. BYRHOLDT: PLEASE SWEAR THE GENTLEMAN.

21 THE CLERK: SIR, IF YOU WOULD PLEASE TAKE A
22 SEAT IN THE JURY-BOX.

23 NUMBER 4, JOHNATHAN BARKER.

24 WHAT SAYETH THE STATE?

25 MS. SIMMONS: PLEASE PRESENT THE JUROR.

1 THE CLERK: WHAT SAYETH THE DEFENSE?

2 MR. BYRHOLDT: PLEASE EXCUSE HIM FROM
3 SERVICE ON THIS CASE.

4 THE CLERK: SIR, YOU HAVE BEEN EXCUSED ON
5 THIS CASE, YOU MAY BE SEATED.

6 NUMBER 136, PHILLIP PRICE.

7 WHAT SAYETH THE STATE?

8 MS. SIMMONS: PLEASE EXCUSE THE JUROR FROM
9 THE TRIAL OF THIS CASE.

10 THE CLERK: SIR, YOU HAVE BEEN EXCUSED, YOU
11 MAY BE SEATED.

12 NUMBER 168, JULIAN ZOELLNER.

13 WHAT SAYETH THE STATE?

14 MS. SIMMONS: PLEASE PRESENT THE JUROR.

15 THE CLERK: WHAT SAYETH THE DEFENSE?

16 MR. BYRHOLDT: PLEASE EXCUSE HIM FROM
17 SERVICE ON THIS CASE.

18 THE CLERK: SIR, YOU HAVE BEEN EXCUSED ON
19 THIS CASE, YOU MAY BE SEATED.

20 NUMBER 14, JAMES BLAIR.

21 WHAT SAYETH THE STATE?

22 MS. SIMMONS: PLEASE PRESENT THE JUROR.

23 THE CLERK: WHAT SAYETH THE DEFENSE?

24 MR. BYRHOLDT: PLEASE SWEAR THE GENTLEMAN.

25 THE CLERK: SIR, IF YOU WOULD PLEASE HAVE A

1 SEAT IN THE JURY-BOX.

2 NUMBER 67, JOYCE HASTINGS.

3 WHAT SAYETH THE STATE?

4 MS. SIMMONS: PLEASE PRESENT THE JUROR.

5 THE CLERK: WHAT SAYETH THE DEFENSE?

6 MR. BYRHOLDT: PLEASE SWEAR HER.

7 THE CLERK: MA'AM, IF YOU WOULD PLEASE TAKE

8 A SEAT IN THE JURY-BOX.

9 NUMBER 75, LAURA HRYNDA.

10 WHAT SAYETH THE STATE?

11 MS. SIMMONS: PLEASE PRESENT THE JUROR.

12 THE CLERK: WHAT SAYETH THE DEFENSE?

13 MR. BYRHOLDT: PLEASE EXCUSE HER FROM

14 SERVICE ON THIS CASE.

15 THE CLERK: MA'AM, YOU HAVE BEEN EXCUSED

16 FROM SERVICE ON THIS CASE, YOU MAY BE SEATED.

17 NUMBER 55, PEGGY GRANT.

18 WHAT SAYETH THE STATE?

19 MS. SIMMONS: PLEASE PRESENT THE JUROR.

20 THE CLERK: WHAT SAYETH THE DEFENSE?

21 MR. BYRHOLDT: PLEASE SWEAR THE LADY.

22 THE CLERK: MA'AM, IF YOU WOULD PLEASE TAKE

23 A SEAT IN THE JURY-BOX.

24 NUMBER 56, LESLIE GRAY.

25 WHAT SAYETH THE STATE?

1 MS. SIMMONS: PLEASE EXCUSE THE JUROR FROM
2 THE TRIAL OF THIS CASE.

3 THE CLERK: MA'AM, YOU HAVE BEEN EXCUSED
4 FROM THIS CASE, YOU MAY BE SEATED.

5 NUMBER 17, ASHLEY BRAGG.

6 WHAT SAYETH THE STATE?

7 MS. SIMMONS: PLEASE PRESENT THE JUROR.

8 THE CLERK: WHAT SAYETH THE DEFENSE?

9 MR. BYRHOLDT: PLEASE SWEAR THE LADY.

10 THE CLERK: MA'AM, IF YOU WOULD PLEASE TAKE
11 A SEAT IN THE JURY-BOX.

12 NUMBER 138, SUSAN RAMEY.

13 WHAT SAYETH THE STATE?

14 MS. SIMMONS: PLEASE PRESENT THE JUROR.

15 THE CLERK: WHAT SAYETH THE DEFENSE?

16 MR. BYRHOLDT: PLEASE SWEAR THE LADY.

17 THE CLERK: IF YOU WOULD PLEASE TAKE A SEAT
18 IN THE JURY-BOX.

19 NUMBER 59, MELANIE GRIFFIN.

20 WHAT SAYETH THE STATE?

21 MS. SIMMONS: PLEASE EXCUSE THE JUROR FROM
22 THE TRIAL OF THIS CASE.

23 THE CLERK: MA'AM, YOU HAVE BEEN EXCUSED,
24 YOU MAY BE SEATED.

25 NUMBER 5, BARRON BARKLEY.

1 WHAT SAYETH THE STATE FOR CAUSE?

2 MS. SIMMONS: PLEASE PRESENT THE JUROR.

3 THE COURT: WHAT SAYETH THE DEFENSE?

4 MR. BYRHOLDT: PLEASE SWEAR THE GENTLEMAN.

5 THE CLERK: SIR, IF YOU WOULD PLEASE TAKE A
6 SEAT IN THE JURY-BOX.

7 NUMBER 19, DOROTHY --

8 THIS IS FOR THE ALTERNATE.

9 THE COURT: LET'S HAVE TWO ALTERNATES,
10 ALTERNATES ONE AND TWO.

11 MR. BYRHOLDT: YES, SIR.

12 THE CLERK: NUMBER 19, DOROTHY BRIDGES.

13 WHAT SAYETH THE STATE?

14 MS. SIMMONS: PLEASE PRESENT THE JUROR.

15 THE CLERK: WHAT SAYETH THE DEFENSE?

16 MR. BYRHOLDT: PLEASE EXCUSE HER FROM
17 SERVICE ON THIS CASE.

18 THE CLERK: NUMBER 171, HOWARD HILLER.

19 WHAT SAYETH THE STATE?

20 MS. SIMMONS: PLEASE PRESENT THE JUROR.

21 THE CLERK: WHAT SAYETH THE DEFENSE?

22 MR. BYRHOLDT: PLEASE EXCUSE HIM FROM
23 SERVICE ON THIS CASE.

24 THE CLERK: SIR, YOU HAVE BEEN EXCUSED FROM
25 THIS CASE, YOU MAY BE SEATED.

1 102, MELINDA MCNEELY.

2 WHAT SAYETH THE STATE?

3 MS. SIMMONS: PLEASE PRESENT THE JUROR.

4 THE CLERK: WHAT SAYETH THE DEFENSE FOR
5 CAUSE?

6 MR. BYRHOLDT: SWEAR THE LADY.

7 THE CLERK: MA'AM, IF YOU WOULD PLEASE HAVE
8 A SEAT IN THE JURY-BOX.

9 NUMBER 27, RILEY CAPPS.

10 WHAT SAYETH THE STATE?

11 MS. SIMMONS: PLEASE PRESENT THE JUROR.

12 THE CLERK: WHAT SAYETH THE DEFENSE?

13 MR. BYRHOLDT: PLEASE EXCUSE HIM FROM
14 SERVICE ON THIS CASE.

15 THE CLERK: SIR, YOU HAVE BEEN EXCUSED FROM
16 THIS CASE, YOU MAY BE SEATED.

17 NUMBER 20, TERRY BRYANT.

18 WHAT SAYETH THE STATE?

19 MS. SIMMONS: PLEASE PRESENT THE JUROR.

20 THE CLERK: WHAT SAYETH THE DEFENSE?

21 MR. BYRHOLDT: PLEASE SWEAR THE GENTLEMAN.

22 THE CLERK: SIR, IF YOU WOULD PLEASE TAKE A
23 SEAT IN THE JURY-BOX.

24 THE COURT: IS THERE ANY REASON THIS JURY
25 CANNOT BE SWORN FOR THE TRIAL OF THIS CASE, FROM THE

1 STATE?

2 MS. SIMMONS: NO, YOUR HONOR.

3 THE COURT: FROM THE DEFENDANT?

4 MR. BYRHOLDT: NO, YOUR HONOR. CAN WE SWEAR
5 THEM IN THE MORNING, THOUGH?

6 THE COURT: NO, BUT I'M JUST WONDERING IF WE
7 CAN IMPANEL THE JURY.

8 MR. BYRHOLDT: WITHOUT OBJECTION, YOUR
9 HONOR.

10 THE COURT: ALL RIGHT, NO OBJECTION.

11 MS. HASTINGS, I'M GONNA ASK YOU TO SERVE AS
12 FOREPERSON ON THIS JURY, SO WHEN WE COME BACK, I WANT
13 YOU TO SIT ON THE FRONT ROW IN THE FIRST SEAT WHERE THE
14 GENTLEMAN IS SITTING RIGHT NOW.

15 MS. MCNEELY AND MR. BRYANT, I'M GONNA ASK
16 YOU TO ALWAYS SIT IN THOSE TWO SEATS WHERE YOU ARE
17 SITTING RIGHT NOW. THOSE ARE THE ONLY THREE SEATS THAT
18 WOULD BE RESERVED. EACH ONE OF YOU WILL SIT IN THE SAME
19 SEAT THERE. AND, MS. HASTINGS, YOU WILL SIT IN THE
20 FIRST SEAT ON THE FRONT ROW. EVERYBODY ELSE CAN BE
21 SEATED WHERE THEY WOULD LIKE IN THE JURY-BOX.

22 NOW I'M GOING TO ASK YOU TO GO WITH THE
23 BAILIFF, HE'S GONNA SHOW YOU THE JURY ROOM THAT WE'LL BE
24 USING DURING THE TRIAL OF THIS CASE.

25 ONE THING -- AND THROUGHOUT THE TRIAL ONE

1 THING I'LL BE TELLING YOU AND THAT IS NOT TO DISCUSS
2 THIS CASE AMONG YOURSELVES OR PERMIT ANYBODY TO DISCUSS
3 IT WITH YOU.

4 I'LL EXPLAIN IF YOU ALREADY DON'T -- WELL,
5 I'LL GO AHEAD AND EXPLAIN IT NOW. THE REASON FOR THAT,
6 OF COURSE, IS A TRIAL HAS TO FOLLOW A CERTAIN ORDER.
7 YOU NEVER KNOW WHAT'S GONNA BE THE MOST IMPORTANT PART
8 OF THE TRIAL: THE FIRST PART, THE OPENING STATEMENTS OR
9 THE LAST PART BEING THE CHARGE ON THE LAW; THE FIRST
10 WITNESS'S TESTIMONY OR CLOSING ARGUMENTS. SO YOU NEED
11 TO HAVE AN OPEN MIND THROUGHOUT THE TRIAL OF THE CASE.

12 THEREFORE, PLEASE DO NOT DISCUSS THE CASE
13 AMONG YOURSELVES, EVEN PERSONALITIES OR ANYTHING ELSE,
14 UNTIL IT'S FINALLY GIVEN TO YOU AFTER YOU HAVE HEARD ALL
15 THE TESTIMONY AND SEEN ALL THE EXHIBITS AND ALL THE
16 OTHER EVIDENCE.

17 SO WITH THAT I'M GOING TO ASK YOU TO RETIRE
18 TO THE JURY ROOM. IT WILL JUST BE A FEW MINUTES. I
19 NEED TO TAKE UP SOME MATTERS WITH THE REMAINING JURY
20 PANEL AS WELL AS WITH THE ATTORNEYS. VERY GOOD. IF YOU
21 WOULD PLEASE GO WITH THE BAILIFF.

22 (WHEREUPON, THE JURY LEFT THE COURTROOM AT
23 4:03 P.M.)

24 (THE COURT CONFERRED WITH THE JURY PANEL OFF
25 THE RECORD, AFTER WHICH JURY PANEL WAS

1 EXCUSED FOR THE DAY AT 4:06 P.M.)

2 THE COURT: ALL RIGHT. LET'S SEE. WE HAVE
3 A JACKSON V. DENNO IN THE MORNING?

4 MS. SIMMONS: YES, YOUR HONOR.

5 THE COURT: HOW LONG DO YOU THINK THAT WILL
6 TAKE?

7 MS. SIMMONS: I WOULD SAY AT MOST 30
8 MINUTES.

9 MR. BYRHOLDT: I AGREE.

10 THE COURT: DO YOU WANT TO SAY 9:00 WE COME
11 IN, THE JURY COME IN AT 10:00?

12 MR. BYRHOLDT: I CAN BE HERE, THAT'S FINE.

13 THE COURT: ALL RIGHT. WE CAN CUT IT SHORT
14 AND SAY 9:30.

15 MR. BYRHOLDT: 9:00 IS FINE.

16 THE COURT: THOSE OF US LOCALLY WILL PLAN TO
17 BE HERE AT 9:00.

18 MR. BYRHOLDT: I'LL BE HERE AT 9:00.

19 THE COURT: ALL RIGHT, MR. BYRHOLDT.

20 I'M GONNA LET THE JURY GO, THEN, UNTIL 10:00
21 IN THE MORNING AND THEN WE'LL SWEAR THEM AND START THE
22 TRIAL. WE'LL HAVE THE JACKSON V. DENNO AT THAT TIME.
23 ALSO, BEFORE WE BREAK FOR THE DAY, WE'LL PUT THE MOTION
24 ON THE RECORD. ALL RIGHT.

25 ASK THE JURY TO JOIN US, PLEASE.

1 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
2 4:09 P.M.)

3 THE COURT: LET THE RECORD REFLECT THE JURY
4 AND ALTERNATES ARE IN THE JURY-BOX.

5 MADAM FORELADY, LADIES AND GENTLEMEN OF THE
6 JURY, WE'RE NOT GONNA START THE TRIAL IN THIS CASE UNTIL
7 TOMORROW MORNING SO YOU CAN HAVE A FRESH START, BUT ALSO
8 I NEED TO TAKE UP SOME MATTERS WITH THE ATTORNEYS BEFORE
9 WE DO START.

10 I'M GOING TO SUGGEST THAT YOU COME IN AT
11 10:00 IN THE MORNING. THAT GIVES ME TIME TO TAKE THIS
12 AFTERNOON AND ALSO TOMORROW MORNING TO GET DONE WHAT I
13 NEED TO DO. SO YOU JUST, TOMORROW MORNING IF YOU WILL
14 COME BACK TO THE JURY ROOM THAT YOU HAVE JUST BEEN IN,
15 THAT WILL BE THE JURY ROOM THAT WE WILL USE, AND THEN
16 WE'LL START THE TRIAL AT 10:00.

17 NOW, THERE ARE TWO THINGS I NEED TO TELL
18 YOU. ONE, I HAVEN'T SEEN ANYBODY HERE TODAY OR ANYTHING
19 OF THAT NATURE, BUT YOU NEVER KNOW WHEN SOMETHING MIGHT
20 BE OF SOME, YOU KNOW, INTEREST AS FAR AS THE NEWS OR
21 RADIO OR T.V. SO I WOULD ADMONISH YOU NOT TO READ
22 ANYTHING IN THE NEWSPAPER OR LISTEN TO THE RADIO OR THE
23 T.V. THAT MIGHT HAVE SOMETHING THAT WOULD INVOLVE THE
24 CASE HERE TODAY THAT WE'LL BE TRYING STARTING TOMORROW,
25 BECAUSE YOU MUST MAKE YOUR DECISION BASED SOLELY AND

1 ONLY ON THE TESTIMONY FROM THIS WITNESS STAND AND
2 EXHIBITS AND EVIDENCE THAT IS INTRODUCED IN THIS
3 COURTROOM, AND ANYTHING OUTSIDE CAN'T HELP YOU.

4 AND IN THAT REGARD I'LL ALSO TELL YOU THAT
5 THIS IS PROBABLY THE MOST DIFFICULT TIME THAT YOU WILL
6 HAVE DURING THE TRIAL OF THE CASE, BECAUSE YOU WILL BE
7 GOING HOME AND SOMEBODY IS GONNA ASK YOU, WELL, WHAT ARE
8 YOU DOING?

9 AND YOU'LL SAY, WELL, I'VE BEEN DRAWN ON A
10 JURY.

11 AND THEY'LL SAY, WELL, WHAT IS IT ABOUT?

12 YOU'RE GONNA HAVE TO TELL THEM, WELL, I
13 CAN'T TALK TO YOU ABOUT IT.

14 AND THEN THEY'LL SAY, WELL, WHY NOT?

15 AND YOU'RE GONNA TELL THEM, BECAUSE THE
16 JUDGE SAID SO.

17 MORE THAN LIKELY, THEY'LL SAY SOMETHING TO
18 THE EFFECT OF, WELL, THAT'S RIDICULOUS.

19 I THINK THAT YOU UNDERSTAND THIS IS AN
20 IMPORTANT CASE TO EVERYBODY AND EVERYONE INVOLVED IN
21 THIS CASE, AND IT NEEDS TO BE RESOLVED IN THE PROPER
22 FASHION. AND JUST AS I SAID, THAT NO ONE WHO HAS NOT
23 BEEN WHERE YOU ARE NOW AND WILL BE IN THAT JURY ROOM
24 WITH YOU WHEN YOU CONVENE TO MAKE YOUR DECISION IN THIS
25 CASE AFTER YOU'VE HEARD ALL OF THE TESTIMONY AND ALL OF

1 THE OTHER EVIDENCE CAN HELP YOU, THEY CAN ONLY INTERFERE
2 WITH THE PROPER RESOLUTION IN THE CASE. THEY HAVEN'T
3 HEARD THE FIRST BIT OF TESTIMONY, THEY WILL NOT HEAR THE
4 FIRST BIT OF TESTIMONY OR SEE THE FIRST EXHIBITS.

5 SO WHAT YOU NEED TO DO IS JUST TELL THEM,
6 NO, YOU CANNOT DISCUSS IT WITH THEM. AND IF THEY
7 INSIST, JUST TELL THEM THAT I'LL BE HERE AT 8:30 IN THE
8 MORNING AND I WILL BE GLAD TO EXPLAIN THAT TO THEM. I
9 THINK YOU ALL UNDERSTAND HOW IMPORTANT THIS IS.

10 SO WITH THAT I'M GOING TO EXCUSE YOU UNTIL
11 TOMORROW MORNING AT 10:00, AND I HOPE YOU HAVE A
12 WONDERFUL EVENING. ALL RIGHT. VERY GOOD. THANK YOU
13 VERY MUCH. I LOOK FORWARD TO WORKING WITH YOU THIS
14 WEEK.

15 EVERYONE ELSE REMAIN SEATED WHILE THE JURY
16 RETIRES FROM THE COURTROOM.

17 (WHEREUPON, THE JURY WAS EXCUSED FOR THE DAY
18 AT 4:13 P.M.)

19 THE COURT: ALL RIGHT. I UNDERSTAND THAT --
20 WELL, FIRST OF ALL, I WANT TO PUT ON THE RECORD THAT
21 PRIOR TO THE TRIAL OF THE CASE THE COURT WAS ADVISED
22 THAT THERE HAD BEEN AN ARTICLE IN THE SENECA JOURNAL AND
23 DAILY MESSENGER, I THINK IT WAS FROM FRIDAY, DECEMBER
24 THE 8TH, 2006, ON PAGE 3-A THAT REFERRED TO LONG PRISON
25 TERMS ON THE LINE IN THREE CRIMINAL CASES TO BE TRIED AT

1 THIS TERM OF COURT.

2 THE DEFENDANT NOTED A MOTION AND MADE THE
3 MOTION IN CHAMBERS PRIOR TO THE TRIAL OF THE CASE
4 ACCORDING TO THE STRIKE RULE, AND I ADVISED THE PARTIES,
5 THE STATE AND THE DEFENDANT, THAT I WOULD BE RELYING ON
6 STATE V. EASLER TO VOIR DIRE THE JURY PANEL AND MAKE A
7 DECISION WHETHER OR NOT THE MOTION FOR A CONTINUANCE
8 WOULD BE GRANTED AT THIS TIME.

9 THE COURT DID SO, AND HAS FOUND THAT THE
10 COURT COULD -- OR THE JURY COULD PROCEED WITHOUT FURTHER
11 CONCERN. IN THIS REGARD NOT ONLY WAS IT A MOTION TO
12 CONTINUE, BUT I UNDERSTAND A MOTION FOR A CHANGE OF
13 VENUE?

14 MR. BYRHOLDT: THAT'S CORRECT, DEPENDING ON
15 THE JURY'S ANSWERS, YOUR HONOR.

16 THE COURT: VERY GOOD. AND, OF COURSE, SO
17 THE COURT OVERRULES BOTH MOTIONS AND THE TRIAL WILL
18 PROCEED.

19 ANYTHING FURTHER FROM THE DEFENDANT ON THAT?

20 MR. BYRHOLDT: NOTHING FURTHER, YOUR HONOR.

21 THE COURT: I MARKED THE ARTICLE AS COURT'S
22 EXHIBIT ONE FOR THE RECORD.

23 ALL RIGHT. ANYTHING ELSE FROM THE DEFENDANT
24 ON THAT?

25 MR. BYRHOLDT: NO, YOUR HONOR.

1 THE COURT: ANYTHING FROM THE STATE?

2 MS. SIMMONS: NO, YOUR HONOR.

3 THE COURT: I UNDERSTAND WE HAVE A JACKSON
4 V. DENNO MOTION IN THE MORNING, SO I'M GONNA ASK THE
5 ATTORNEYS TO BE HERE AS CLOSE TO 9:00 AS THEY CAN SO
6 WE'LL BE SURE, WE'LL DO OUR BEST TO BE ABLE TO DISPOSE
7 OF THE MOTION AND BE ABLE TO PROCEED AT 10:00 WHEN THE
8 JURY COMES IN.

9 ANYTHING ELSE FROM THE STATE?

10 MS. SIMMONS: NO, SIR.

11 THE COURT: FROM THE DEFENDANT?

12 MR. BYRHOLDT: NO, YOUR HONOR.

13 THE COURT: VERY GOOD. I LOOK FORWARD TO
14 SEEING YOU IN THE MORNING AND WORKING WITH YOU THIS
15 WEEK. WE'LL STAND IN RECESS UNTIL 9:00 IN THE MORNING.

16 (COURT ADJOURNED AT APPROXIMATELY 4:30 P.M.
17 ON MONDAY, DECEMBER 11, 2006, TO RESUME AT
18 APPROXIMATELY 10:00 A.M. ON TUESDAY, DECEMBER
19 12, 2006.)

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1 (WHEREUPON, THE TRIAL OF THE STATE OF SOUTH
2 CAROLINA V. CLARENCE E. CRITTENDON RESUMED ON
3 TUESDAY, DECEMBER 12TH, 2006, AT
4 APPROXIMATELY 9:14 A.M., IN THE OCONEE COUNTY
5 COURT OF GENERAL SESSIONS, BEFORE THE
6 HONORABLE ALEXANDER S. MACAULAY.)

7 THE COURT: WE'RE BACK ON THE CASE OF STATE
8 OF SOUTH CAROLINA VERSUS CLARENCE ELIJAH CRITTENDON ON
9 INDICTMENTS 2004-GS-37-509 AND 2006-GS-37-927.

10 JACKSON V. DENNO HEARING:

11 THE COURT: IT'S MY UNDERSTANDING THAT THE
12 STATE HAS A MOTION, OR AT LEAST INTENDS TO PRESENT A
13 STATEMENT THAT NEEDS TO BE HEARD?

14 MS. SIMMONS: YES, YOUR HONOR. WE HAVE A
15 PARTIAL WRITTEN STATEMENT AND TWO ORAL STATEMENTS THAT
16 WE WOULD MOVE IN.

17 THE COURT: ALL RIGHT. HAVE THEY BEEN
18 FURNISHED, AT LEAST THE CONTENT OF THE ORAL STATEMENTS
19 BEEN FURNISHED TO THE DEFENSE?

20 MS. SIMMONS: YES, YOUR HONOR.

21 MR. BYRHOLDT: I'M AWARE OF THE WRITTEN
22 STATEMENT, I'M AWARE OF ONE VOLUNTARY STATEMENT; I'M NOT
23 AWARE OF ANY OTHER ---

24 MS. SIMMONS: IT'S THE SAME THING TWICE.

25 THE COURT: ALL RIGHT. WHY DON'T YOU JUST

1 STATE WHAT THE COURT'S GONNA BE CONSIDERING THIS
2 MORNING.

3 MS. SIMMONS: RIGHT, YOUR HONOR. WE HAVE
4 THE WRITTEN STATEMENT THAT MR. BYRHOLDT JUST REFERENCED,
5 AND THERE WAS AN ORAL STATEMENT MADE TO MIKE LARK, WHO
6 WAS WORKING ON CONTRACT WITH THE OCONEE COUNTY SHERIFF'S
7 OFFICE, AND AGAIN, THE SAME CONTENT OF THAT ORAL
8 STATEMENT AGAIN MADE PRIOR TO JUST WRITING THAT WRITTEN
9 STATEMENT.

10 MR. BYRHOLDT: I MEAN, THE ONE PROVIDED BY
11 MR. LARK HAS BEEN PROVIDED TO ME. I'M NOT AWARE OF --
12 THERE'S NO -- THE INCIDENT REPORT DOES NOT REFLECT ANY
13 OTHER STATEMENT OTHER THAN THE ONE OF MR. LARK.

14 MS. SIMMONS: THE CONTENTS OF THE STATEMENT
15 WAS DISCLOSED, AND IT'S EXACTLY THE SAME TO BOTH
16 PARTIES.

17 THE COURT: DO I UNDERSTAND THAT -- ALL
18 RIGHT. WELL, LET'S PUT IT IN SEQUENCE. AN ORAL
19 STATEMENT WAS MADE?

20 MS. SIMMONS: YES, SIR.

21 THE COURT: THAT'S ONE, THAT'S A SEPARATE
22 ORAL STATEMENT WE'RE GONNA BE HEARING TODAY.

23 MR. BYRHOLDT: MR. LARK.

24 MS. SIMMONS: YES.

25 THE COURT: ALL RIGHT. AND AN ORAL

1 STATEMENT WAS MADE THAT WAS THEN MEMORIALIZED IN A
2 WRITTEN STATEMENT?

3 MS. SIMMONS: NO, SIR. LET ME MAKE IT A
4 LITTLE CLEARER.

5 THE COURT: PLEASE DO. THAT'S WHY I KEEP
6 ASKING QUESTIONS.

7 MS. SIMMONS: THE DEFENDANT WAS MIRANDIZED
8 BY SERGEANT GREG REED OF THE OCONEE COUNTY SHERIFF'S
9 OFFICE. AFTER BEING MIRANDIZED, HE WAS INTERVIEWED BY
10 MIKE LARK. TO MIKE LARK HE MADE AN ORAL STATEMENT.

11 AT THAT TIME HE WAS TURNED BACK OVER TO
12 SERGEANT REED WITH THE SHERIFF'S OFFICE TO BEGIN WRITING
13 A WRITTEN STATEMENT, WHICH WE HAVE, AND THE SAME ORAL
14 STATEMENT WAS REPEATED TO SERGEANT REED.

15 THE COURT: ALL RIGHT. IN OTHER WORDS, YOU
16 ARE NOT GOING TO USE ANYTHING THAT'S NOT IN THE WRITTEN
17 STATEMENT?

18 MS. SIMMONS: NO, SIR. THE WRITTEN
19 STATEMENT IS INCOMPLETE, SO THE ORAL STATEMENTS ARE
20 DIFFERENT.

21 THE COURT: WELL, THEN WHAT COMPLETENESS DID
22 YOU FURNISH THE DEFENDANT THAT WOULD HAVE COMPLETED THE
23 WRITTEN STATEMENT THAT YOU FURNISHED THE DEFENDANT?

24 MS. SIMMONS: WE FURNISHED THE ENTIRE REPORT
25 OF MR. LARK.

1 MR. BYRHOLDT: I AGREE WITH THAT. THE
2 PROBLEM IS NOTHING FROM SERGEANT REED WAS EVER PROVIDED
3 TO ME. NO INCIDENT REPORT. NOTHING THAT REFLECTS
4 THE -- IN OTHER WORDS, THE STATE IS NOW CONTENDING THAT
5 THE ORAL STATEMENT WAS MADE TWICE, OR THERE WAS A
6 STATEMENT MADE AND IT WAS CONFIRMED AGAIN IN THE SECOND
7 STATEMENT?

8 THE COURT: I'M NOT EXACTLY SURE IF I
9 UNDERSTAND, EITHER, MR. BYRHOLDT. I HEAR TWO ORAL
10 STATEMENTS.

11 ALL RIGHT. LET'S DO THIS SEQUENTIALLY
12 AGAIN. AN ORAL STATEMENT WAS MADE TO A GENTLEMAN NAMED
13 LARK?

14 MS. SIMMONS: YES, SIR.

15 THE COURT: AND THEN THE DEFENDANT MADE A
16 WRITTEN STATEMENT TO DETECTIVE REED?

17 MS. SIMMONS: NO, SIR. LET ME GO INTO GREAT
18 DETAIL.

19 THE COURT: IT'S NOT GREAT DETAIL. I'M JUST
20 TRYING TO UNDERSTAND. I HEAR THREE STATEMENTS, AND I'M
21 TRYING TO FIND OUT IF ALL THREE HAVE BEEN FURNISHED THE
22 DEFENDANT.

23 MS. SIMMONS: YOUR HONOR, HE ---

24 THE COURT: OTHERWISE, I HAVE A PROBLEM.

25 MS. SIMMONS: RIGHT. WE HAVE FURNISHED --

1 THE CONTENTS OF THE ORAL STATEMENT REPEATED THE SAME
2 THING TWICE. WE DID NOT FURNISH THAT THIS SPECIFICALLY
3 WAS SAID TWICE, BUT WE FURNISHED WHAT WAS SAID.

4 THE COURT: SO YOU ARE NOT GONNA USE
5 ANYTHING THAT'S NOT IN THE WRITTEN STATEMENT?

6 MS. SIMMONS: SIR, HE NEVER COMPLETED THE
7 WRITTEN STATEMENT. HE STARTED IT AND THEN SAID HE
8 WANTED TO SPEAK WITH HIS FAMILY. SO THE WRITTEN
9 STATEMENT, HE BEGINS SAYING HOW MUCH HE LOVES THE LITTLE
10 GIRL AND THAT HE DIDN'T WANT TO HURT HER, BUT HE
11 NEVER ---

12 THE COURT: I'M NOT CONCERNED WITH THE
13 CONTENT, EXCEPT TO THE POINT THAT IF YOU ARE GOING TO
14 USE A STATEMENT AND IT HASN'T BEEN FURNISHED TO THE
15 DEFENDANT, WE HAVE A PROBLEM.

16 MS. SIMMONS: WELL, YOUR HONOR, I WOULD BE
17 HAPPY TO PROCEED ON SERGEANT REED SAYING ONLY WHAT WAS
18 IN THE WRITTEN STATEMENT AND MR. LARK REGARDING THE ORAL
19 STATEMENT.

20 IS THAT FINE, MR. BYRHOLDT?

21 MR. BYRHOLDT: YES, YOUR HONOR.

22 THE COURT: VERY GOOD. THAT'S ALL WE NEEDED
23 NOW. IF YOU HADN'T FURNISHED THE CONTENTS OF THE
24 STATEMENT, TO ANY ORAL STATEMENT, THEN, OF COURSE, IT
25 CAN'T BE USED. AND I JUST WANTED TO BE SURE. SO, NO,

1 THAT'S FINE.

2 ALL RIGHT. SO YOU'VE GOT -- THE TWO
3 STATEMENTS WE'LL HAVE WILL BE A, WHAT WE MIGHT SAY A
4 PRELIMINARY STATEMENT MADE TO -- ALLEGEDLY MADE -- IT'S
5 OFFICER CLARK?

6 MR. BYRHOLDT: LARK, L-A-R-K.

7 THE COURT: OH, LARK. OFFICER? DETECTIVE?

8 MS. SIMMONS: HE WORKS ON A CONTRACT
9 CONSULTANT BASIS WITH THE OCONEE COUNTY SHERIFF'S
10 OFFICE.

11 THE COURT: ALL RIGHT. CONSULTANT LARK.

12 ALL RIGHT. THERE WAS AN ORAL STATEMENT MADE TO
13 MR. LARK?

14 MS. SIMMONS: YES.

15 THE COURT: AND THEN FOLLOWING THAT, HE MADE
16 A STATEMENT TO DETECTIVE REED -- STARTED THE STATEMENT
17 TO DETECTIVE REED WHICH WAS BEING MEMORIALIZED, WRITTEN
18 DOWN?

19 MS. SIMMONS: YES, SIR.

20 THE COURT: ALL RIGHT. AND THAT'S ALL WE'RE
21 GONNA BE CONCERNED ABOUT?

22 MR. BYRHOLDT: YOUR HONOR, AND AS FAR AS THE
23 PARTIAL WRITTEN STATEMENT, WE WOULD HAVE NO OBJECTION TO
24 THAT.

25 THE COURT: ALL RIGHT. SO THEN WE ARE

1 REALLY DEALING WITH THE ORAL STATEMENT TO MR. LARK?

2 MR. BYRHOLDT: YES.

3 THE COURT: VERY GOOD. THANK YOU.

4 MS. SIMMONS: THANK YOU, JUDGE.

5 THE COURT: ALL RIGHT. SO LET ME SEE IF
6 YOU'RE GONNA -- IF YOU HAVE THE WRITTEN STATEMENT, LET
7 ME PUT IT INTO EVIDENCE, AT LEAST AS A COURT'S EXHIBIT.

8 MS. SIMMONS: (HANDING).

9 THE COURT: ALL RIGHT. THIS IS STATE'S
10 EXHIBIT TWO FOR I.D., A STATEMENT DATED JANUARY 21ST,
11 2004, AT THE LAW ENFORCEMENT CENTER, STARTED AT 5:38
12 P.M.

13 IT IS MY UNDERSTANDING THAT THERE IS NO
14 OBJECTION TO THIS STATEMENT?

15 MR. BYRHOLDT: NO, SIR.

16 THE COURT: ALL RIGHT. VERY GOOD. IT WILL
17 BE ADMITTED AS -- WELL, STATE'S EXHIBIT TWO.

18 (STATE'S EXHIBIT # 2, STATEMENT DATED JANUARY
19 21ST, 2004, AT THE LAW ENFORCEMENT CENTER,
20 STARTED AT 5:38 P.M., WAS MARKED FOR
21 IDENTIFICATION.)

22 THE COURT: NOW, THE NEXT WILL BE THE OTHER,
23 THE ONLY OTHER STATEMENT, WHICH WOULD BE BY MR. LARK?

24 MS. SIMMONS: YES, YOUR HONOR, BUT I WOULD
25 NEED TO CALL SERGEANT GREG REED.

1 THE COURT: OH, NO. I'M SAYING THAT THE
2 STATEMENT WE'RE DEALING WITH, NOT THE ---

3 MS. SIMMONS: YES.

4 THE COURT: VERY GOOD. THANK YOU -- OR THE
5 STATEMENT TO MR. LARK.

6 YOU MAY CALL YOUR FIRST WITNESS.

7 OH, WAIT A MINUTE. ANYTHING ELSE FROM THE
8 DEFENDANT BEFORE WE START?

9 MR. BYRHOLDT: NO, YOUR HONOR.

10 THE COURT: YOU MAY CALL YOUR FIRST WITNESS.

11 MS. SIMMONS: THANK YOU, JUDGE. WE WOULD
12 CALL SERGEANT GREG REED WITH THE OCONEE COUNTY SHERIFF'S
13 OFFICE.

14 (WHEREUPON, THE WITNESS WAS SWORN BY THE
15 CLERK.)

16 THE COURT: LIEUTENANT, IF YOU WOULD, PLEASE
17 GIVE US YOUR FULL NAME FOR THE RECORD, SPELLING YOUR
18 LAST NAME.

19 THE WITNESS: GREG REED, R-E-E-D.

20 THE COURT: THANK YOU, SIR.

21 WHEREUPON,

22 GREG REED,

23 AFTER FIRST HAVING BEEN DULY SWORN, TESTIFIED AS
24 FOLLOWS:

25 //

1 DIRECT EXAMINATION BY MS. SIMMONS:

2 Q. GOOD MORNING, SERGEANT REED. HOW LONG HAVE YOU
3 BEEN EMPLOYED AT THE OCONEE COUNTY SHERIFF'S OFFICE?

4 A. 21-PLUS YEARS.

5 Q. AND WHAT ARE YOUR PRESENT DUTIES?

6 A. I'M SUPERVISOR LIEUTENANT WITH CRIMINAL
7 INVESTIGATIONS.

8 Q. DID YOU HAVE OCCASION TO BECOME INVOLVED IN A
9 CASE INVOLVING THIS DEFENDANT, CLARENCE CRITTENDON, IN
10 JANUARY OF 2004?

11 A. YES, I DID.

12 Q. AND DID YOU HAVE OCCASION TO ADVISE THE SUSPECT
13 OF HIS, WHAT'S COMMONLY KNOWN AS HIS MIRANDA RIGHTS ON
14 THAT DATE, ON JANUARY 21ST OF 2004?

15 A. YES, I DID.

16 Q. AND WHAT TIME DID YOU BECOME INVOLVED IN THIS
17 CASE?

18 A. RICHARD KIRK, WHO IS A SERGEANT, UNIFORM PATROL,
19 TOOK AN INCIDENT REPORT IN DECEMBER OF '03, IT WAS
20 ASSIGNED TO OUR DIVISION.

21 I AT THAT TIME ASSIGNED SERGEANT GENTRY HAWK TO
22 DO A FORENSIC INTERVIEW WITH THE VICTIM. HE SET THE
23 INTERVIEW UP. I BELIEVE THAT WAS DONE ON JANUARY THE
24 6TH OF 2004.

25 AND AFTER THAT FORENSIC INTERVIEW I SIGNED

1 WARRANTS ON THE DEFENDANT ON CRIMINAL SEXUAL CONDUCT,
2 FIRST DEGREE, WITH A MINOR, I BELIEVE ON THE 9TH OF
3 DECEMBER.

4 Q. AND WAS IT THE AFTERNOON WHEN YOU BECAME INVOLVED
5 WITH THE INTERVIEW OF THE DEFENDANT ON THE 21ST?

6 A. YES, I WAS.

7 Q. WAS HE IN CUSTODY AT THAT TIME?

8 A. YES, HE WAS.

9 Q. I'M GOING TO SHOW YOU WHAT'S BEEN MARKED FOR
10 PURPOSES OF IDENTIFICATION AS STATE'S EXHIBIT ONE.

11 MS. SIMMONS: YOUR HONOR, MAY I APPROACH THE
12 WITNESS?

13 THE COURT: PLEASE.

14 BY MS. SIMMONS:

15 Q. DO YOU RECOGNIZE THIS EXHIBIT?

16 A. YES, I DO.

17 Q. AND WHAT IS IT?

18 A. IT'S A WAIVER OF YOUR RIGHTS, IT'S YOUR MIRANDA
19 WARNING.

20 Q. AND HOW DID YOU ADVISE THE DEFENDANT OF HIS
21 RIGHTS ON THAT DAY?

22 A. WELL, FIRST OF ALL, I FILLED OUT PLACE, DATE, AND
23 TIME. ASKED THE DEFENDANT HIS EDUCATION, WHICH HE
24 RESPONDED HE WAS 12TH GRADE. I ASKED HIM IF HE COULD
25 READ AND WRITE AND UNDERSTAND THE ENGLISH LANGUAGE, HE

1 RESPONDED YES.

2 I ACTUALLY READ THE RIGHTS FORM TO HIM AND HAD
3 HIM TO INITIAL EACH LINE OF THE MIRANDA WARNING AND SIGN
4 IT, AND THEN IT IS TIME BEGAN.

5 Q. WHERE WERE YOU WHEN YOU READ HIM HIS RIGHTS?

6 A. IN AN INTERVIEW ROOM IN THE LAW ENFORCEMENT
7 CENTER.

8 Q. WAS ANYONE ELSE PRESENT?

9 A. NO, THERE WASN'T.

10 MS. SIMMONS: YOUR HONOR, WE WOULD MOVE --
11 OFFER STATE'S EXHIBIT ONE INTO ADMISSION, THE RIGHTS
12 WAIVER.

13 THE COURT: VOIR DIRE?

14 MR. BYRHOLDT: PLEASE.

15 VOIR DIRE BY MR. BYRHOLDT:

16 Q. I NOTICE ON STATE'S EXHIBIT NUMBER ONE THERE'S A
17 PLACE FOR TWO WITNESSES TO SIGN ---

18 A. YES, SIR.

19 Q. --- BUT THERE'S ONLY YOURSELF.

20 DON'T YOU NORMALLY HAVE SOMEONE WITNESS THE FACT
21 THAT YOU ARE GIVING SOMEONE THEIR MIRANDA RIGHTS?

22 A. NOT NORMALLY. SOMETIMES IF THERE'S TWO PEOPLE IN
23 THE ROOM, I WILL, BUT IF I'M THE ONLY ONE THERE, NO.

24 Q. IF YOU ARE THE ONLY ONE THERE, THEN THERE'S NO
25 ONE TO CONTEST WHAT YOU SAY TODAY, CORRECT?

1 A. WELL, NO, SIR, THERE'S NOT, OTHER THAN THE
2 DEFENDANT WHO ACTUALLY INITIALED EACH LINE AND SIGNED
3 VOLUNTARILY.

4 Q. AND DID YOU READ EACH LINE TO HIM OR DID YOU ASK
5 HIM, SINCE HE TOLD YOU HE COULD READ, JUST TO READ IT
6 OVER AND SIGN IT IF HE UNDERSTOOD IT?

7 A. I NORMALLY WOULD READ IT.

8 Q. I'M NOT ASKING WHAT YOU NORMALLY DID. WHAT DID
9 YOU DO ON THIS OCCASION?

10 A. I WOULD SAY THAT I READ THE RIGHTS FORM TO HIM.

11 MR. BYRHOLDT: NO FURTHER QUESTIONS.

12 THE COURT: ALL RIGHT. I ADMIT STATE'S
13 EXHIBIT NUMBER ONE, THE WAIVER OF RIGHTS. WHAT'S THE
14 DATE ON THAT AGAIN, 1-21?

15 THE WITNESS: YES, SIR.

16 MS. SIMMONS: YES, SIR.

17 THE COURT: ALL RIGHT, VERY GOOD.

18 (STATE'S EXHIBIT # 1, WAIVER OF RIGHTS FORM
19 DATED 1-21, WAS MARKED FOR IDENTIFICATION AND
20 RECEIVED IN EVIDENCE.)

21 BY MS. SIMMONS:

22 Q. WHAT WAS THE DEFENDANT'S PHYSICAL APPEARANCE ON
23 THAT DAY?

24 A. HE APPEARED TO BE EMOTIONALLY AND PHYSICALLY
25 STABLE. HE CONDUCTED HIMSELF PROPER AND COOPERATED IN

1 THE INTERVIEWS.

2 Q. DID HE APPEAR UNDER THE INFLUENCE OF ANY DRUGS OR
3 ALCOHOL?

4 A. NO, HE DID NOT.

5 Q. AND DID HE APPEAR TO UNDERSTAND EACH PORTION OF
6 THE RIGHTS WAIVER THAT WE HAVE PREVIOUSLY DISCUSSED?

7 A. YES, HE DID.

8 Q. WAS HE COHERENT IN HIS SPEECH?

9 A. YES, HE WAS.

10 Q. DID HE EVER TELL YOU THAT HE WANTED AN ATTORNEY
11 AT ANY POINT?

12 A. NO, MA'AM.

13 Q. AND DID HE AGREE TO ANSWER YOUR QUESTIONS WITHOUT
14 AN ATTORNEY BEING PRESENT AT THAT POINT IN TIME?

15 A. YES, MA'AM.

16 Q. DID YOU PROMISE HIM ANYTHING IN RETURN FOR MAKING
17 A STATEMENT TO YOU OR TO MR. LARK?

18 A. NO, MA'AM.

19 Q. DID YOU COERCE HIM IN ANY WAY, MAKE ANY
20 THREATS ---

21 A. NO, MA'AM.

22 Q. --- INTIMIDATE HIM?

23 AND FROM THE BEST OF YOUR RECOLLECTION, HOW DID
24 THE STATEMENTS IN QUESTION COME ABOUT AFTER HE WAS
25 ADVISED OF HIS RIGHTS?

1 A. AFTER HE WAS ADVISED OF HIS RIGHTS, I INTRODUCED
2 HIM TO MICHAEL LARK. MICHAEL LARK CONDUCTED AN
3 INTERVIEW WITH HIM. AFTER THEIR INTERVIEW MR. LARK CAME
4 TO MY OFFICE, BRIEFED ME ON THE INTERVIEW.

5 I WENT INTO THE INTERVIEW ROOM, SPOKE BRIEFLY
6 WITH THE DEFENDANT, AND ASKED HIM IF HE WOULD DO A
7 WRITTEN STATEMENT FOR ME. HE SAID THAT HE WOULD. I
8 FILLED OUT THE TOP OF THE FORM, AND LEFT HIM WITH THE
9 STATEMENT IN THE ROOM TO WRITE THE STATEMENT.

10 Q. DID YOU HAVE OCCASION -- DID YOU GO BACK AND
11 CHECK ON HIM AFTER THAT WHILE HE WAS WRITING THE
12 STATEMENT?

13 A. I CHECK FREQUENTLY JUST BY LOOKING IN THE WINDOW
14 OF THE DOOR; BUT YES, I CHECKED FREQUENTLY.

15 Q. AND HOW DID THAT STATEMENT -- HOW DID THAT
16 STATEMENT END THAT DAY, THE WRITTEN STATEMENT?

17 A. WELL, I THINK AFTER ABOUT 40, 45 MINUTES, LOOKING
18 IN, HE WASN'T DOING MUCH ON THE STATEMENT, A LINE OR TWO
19 HERE AND THERE. SO I REENTERED THE ROOM, ASKED HIM WAS
20 HE HAVING PROBLEMS WITH HIS STATEMENT.

21 AND AT THAT TIME HE SAID THAT -- HE HAD WRITTEN
22 PROBABLY MAYBE FIVE LINES, AND SAID THAT HE WANTED TO --
23 WELL, HE AND I HAD A CONVERSATION, AND THEN AFTER THE
24 CONVERSATION HE SAID THAT HE WOULD BE WILLING TO GIVE A
25 STATEMENT BUT HE WANTED TO TALK WITH HIS FAMILY FIRST,

1 AND HE HAD WRITTEN OUT HIS LAST LINE OF HIS STATEMENT.

2 Q. AND AT THAT POINT YOUR DISCUSSION AND INTERVIEW
3 HAD ENDED?

4 A. THAT'S CORRECT.

5 MS. SIMMONS: NO FURTHER QUESTIONS.

6 THE COURT: CROSS-EXAMINATION?

7 MR. BYRHOLDT: NO QUESTIONS AT THIS TIME.

8 THE COURT: YOU MAY STEP DOWN. THANK YOU,
9 SIR.

10 (WITNESS LEAVES STAND.)

11 THE COURT: ALL RIGHT. YOU MAY CALL YOUR
12 NEXT WITNESS.

13 MS. SIMMONS: YOUR HONOR, WE CALL MICHAEL
14 LARK.

15 (WHEREUPON, THE WITNESS WAS SWORN BY THE
16 CLERK.)

17 MS. SIMMONS: GOOD MORNING, MR. LARK.

18 THE WITNESS: GOOD MORNING.

19 THE COURT: IF YOU WOULD, PLEASE, GIVE US
20 YOUR FULL NAME FOR THE RECORD, SPELLING YOUR LAST NAME.

21 THE WITNESS: CHARLIE MICHAEL LARK, L-A-R-K.

22 THE COURT: VERY GOOD, THANK YOU, SIR.

23 //

24 //

25 //

1 WHEREUPON,

2 MICHAEL LARK,

3 AFTER FIRST HAVING BEEN DULY SWORN, TESTIFIED AS
4 FOLLOWS:

5 DIRECT EXAMINATION BY MS. SIMMONS:

6 Q. MR. LARK, TELL ME ABOUT YOUR EMPLOYMENT
7 BACKGROUND AND EDUCATION.

8 A. MA'AM, I'VE GOT A BACHELOR OF SCIENCE DEGREE FROM
9 CLEMSON UNIVERSITY, I'VE GOT A MASTER OF BUSINESS
10 ADMINISTRATION FROM THE CLEMSON-FURMAN M.B.A. PROGRAM.
11 I HAVE GONE TO CONTINUING EDUCATION SEMINARS TO CONDUCT
12 INTERVIEWS, AND I HAVE WENT TO A SCHOOL FOR ABOUT
13 APPROXIMATELY EIGHT WEEKS TO BE ABLE TO CONDUCT THESE
14 INTERVIEWS.

15 Q. VERY GOOD. AND DID YOU HAVE OCCASION TO BECOME
16 INVOLVED IN A CASE REGARDING THIS DEFENDANT?

17 A. YES, MA'AM, I DID.

18 Q. AND DO YOU WORK AS A CONSULTANT ON A CONTRACT
19 BASIS FOR THE OCONEE COUNTY SHERIFF'S OFFICE?

20 A. YES, MA'AM.

21 Q. WHAT KIND OF THINGS DO YOU DO IN THE COURSE OF
22 BEING A CONSULTANT FOR THEM?

23 A. I DO INTERVIEWS FOR THEM ON PEOPLE AT THE REQUEST
24 OF THE DETECTIVES.

25 Q. AND DO YOU WORK FOR OTHER AGENCIES, AS WELL?

1 A. YES, MA'AM, I DO. I WORK FOR OTHER LAW
2 ENFORCEMENT AGENCIES, LAWYER FIRMS, CORPORATIONS; A WIDE
3 VARIETY OF CLIENTELE.

4 Q. ALL IN THE BUSINESS OF CONDUCTING INTERVIEWS,
5 THOUGH?

6 A. YES, MA'AM.

7 Q. WHEN DID YOU INTERVIEW THIS DEFENDANT?

8 A. ON JANUARY 21ST, 2004.

9 Q. AND AT THAT POINT IN TIME HAD HE BEEN OFFERED HIS
10 MIRANDA WARNINGS BY SERGEANT REED?

11 A. YES, MA'AM, HE HAD.

12 Q. AND DID YOU GO A STEP FURTHER IN HAVING HIM SIGN
13 A CONSENT FORM TO SPEAK WITH YOU?

14 A. YES, MA'AM.

15 Q. TELL ME WHAT KIND OF QUESTIONS YOU ASKED THE
16 DEFENDANT.

17 A. THE QUESTIONS I ASKED HIM, I ASKED FOR HIM TO
18 GIVE ME HIS SIDE OF THE STORY CONCERNING THE ALLEGATIONS
19 THAT WAS MADE BY Minor AND I LET HIM TELL ME HIS
20 SIDE OF THE STORY.

21 Q. DID YOU ASK HIM SPECIFIC QUESTIONS, HAD HE EVER
22 TOUCHED Minor AND THINGS OF THAT NATURE?

23 A. YES, MA'AM. SPECIFICALLY HAS HE EVER TOUCHED HER
24 VAGINAL AREA, HAD HE EVER PUT HIS PENIS IN HER MOUTH.

25 Q. AND WHAT WAS THE RESPONSES TO THAT QUESTION?

1 A. INITIALLY HE DENIED IT. HE DENIED ANY, ANY
2 SEXUAL MOLESTATION OF Minor

3 Q. AND AT ANY POINT IN TIME DID HE OFFER HIS VERSION
4 OF THE EVENTS OR SOME SORT OF EXPLANATION TO YOU?

5 A. TOWARD THE CONCLUSION OF MY INTERVIEW WITH HIM,
6 HE STATED THAT, THAT HE LOVED Minor AND THAT HE
7 WOULD NOT DO ANYTHING AND TRY TO MAKE HER TESTIFY
8 AGAINST HIM BECAUSE HE LOVED HER AND AND DIDN'T WANT TO
9 EMBARRASS HER IN THAT WAY.

10 HE STATED THAT HE HAD HAD A DREAM, AND HE STATED
11 THAT AT SOME, ON SOME OCCASIONS IN THE PAST THAT HIS
12 WIFE WOULD PERFORM ORAL SEX ON HIM WHILE HE WAS ASLEEP.
13 HE HAD A DREAM THAT HIS WIFE WAS PERFORMING ORAL SEX ON
14 HIM AND HE WOKE UP AND HIS WIFE WAS NOT IN BED WITH HIM
15 AND Minor WAS IN BED WITH HIM.

16 I ASKED HIM FURTHER, I SAID, DID Minor PUT
17 HER MOUTH ON YOUR PENIS? AND HE TOLD ME THAT HE
18 COULDN'T SAY YES OR NO TO THAT QUESTION.

19 Q. AT ANY POINT IN YOUR DISCUSSION WITH HIM, DID YOU
20 COERCE HIM OR INTIMIDATE HIM OR THREATEN OR PROMISE HIM
21 ANYTHING IN RETURN FOR SPEAKING WITH YOU?

22 A. NO, MA'AM.

23 Q. AND AT ANY POINT IN TIME DURING THAT CONVERSATION
24 DID HE TELL YOU HE WANTED AN ATTORNEY?

25 A. NO, MA'AM.

1 Q. AND WHEN YOU WERE FINISHED WITH THIS
2 CONVERSATION, DID YOU TURN THE DEFENDANT BACK OVER TO
3 SERGEANT REED, OR WHAT HAPPENED NEXT?

4 A. AT THAT POINT IN TIME I WENT OUT AND TALKED WITH
5 SERGEANT REED, I TOLD HIM WHAT HE HAD TOLD ME. THEN
6 SERGEANT REED TALKED TO HIM.

7 AT THE CONCLUSION OF MY INTERVIEW HE ALSO, ON THE
8 CONSENT FORM THAT YOU WERE REFERRING TO, HE SIGNED THAT,
9 HE SIGNED THAT HE HAD NOT BEEN THREATENED OR -- DURING
10 THE INTERVIEW THAT I CONDUCTED ON HIM.

11 MS. SIMMONS: YOUR HONOR, I HAVE NO FURTHER
12 QUESTIONS FOR THIS WITNESS.

13 THE COURT: MR. BYRHOLDT?

14 CROSS-EXAMINATION BY MR. BYRHOLDT:

15 Q. MR. LARK, YOU SAID HE INITIALLY DENIED
16 MISCONDUCT?

17 A. YES, SIR.

18 Q. AND HE DENIED IT THROUGHOUT THE WHOLE THING,
19 DIDN'T HE?

20 A. HE DID.

21 Q. I MEAN, HE DENIED ---

22 A. WELL, HE -- YES, SIR, HE DENIED IT. HE SAID --
23 AT THE END OF THE INTERVIEW HE SAID HE COULDN'T SAY
24 WHETHER OR NOT IT HAPPENED.

25 Q. WHEN YOU SAY HE INITIALLY DENIED IT, IT SOUNDS

1 LIKE LATER HE ADMITTED IT. HE DENIED THROUGHOUT THE
2 WHOLE THING.

3 A. YES, SIR. YES, SIR.

4 Q. WHEN THIS INTERVIEW WAS BEING CONDUCTED, WAS
5 ANYBODY PRESENT OTHER THAN YOU AND THE DEFENDANT?

6 A. NO, SIR.

7 Q. DID YOU MAKE ANY HANDWRITTEN NOTES DURING THIS
8 INTERVIEW?

9 A. YES, SIR.

10 Q. DO YOU HAVE THOSE WITH YOU?

11 A. NO, SIR.

12 Q. DID YOU DESTROY THEM?

13 A. NO, SIR. SIR, MOST EVERYTHING THAT'S IN MY
14 HANDWRITTEN NOTES IS INCORPORATED IN THE REPORT THAT YOU
15 HAVE.

16 Q. MOST EVERYTHING, BUT NOT EVERYTHING.

17 A. I'M NOT -- I CAN'T THINK OF ANYTHING THAT MIGHT
18 NOT BE IN THERE.

19 Q. WHERE ARE YOUR HANDWRITTEN NOTES AT?

20 A. IN MY HOUSE, IN MY OFFICE.

21 Q. WHERE IS YOUR OFFICE LOCATED?

22 A. AT 203 OLD SALUDA DAM ROAD IN EASLEY, SOUTH
23 CAROLINA.

24 MR. BYRHOLDT: THAT'S ALL THE QUESTIONS I
25 HAVE OF MR. LARK AT THIS TIME, YOUR HONOR.

1 REDIRECT EXAMINATION BY MS. SIMMONS:

2 Q. MR. LARK, SO YOU DID PREPARE A WRITTEN REPORT AT
3 THE CONCLUSION OF THIS INTERVIEW?

4 A. I PREPARED IT NOT AT THAT PARTICULAR TIME, BUT AT
5 A LATER TIME I TYPED UP A REPORT AND GAVE IT TO SERGEANT
6 REED.

7 Q. AND THAT WOULD HAVE BEEN FORWARDED ON TO
8 DEFENSE ---

9 A. YES.

10 Q. --- IN THE DISCOVERY PROCESS?

11 A. YES, MA'AM.

12 MS. SIMMONS: JUDGE, WE WOULD MOVE THAT THE
13 ORAL STATEMENT OF THE DEFENDANT BE ADMITTED INTO
14 EVIDENCE.

15 MR. BYRHOLDT: NO. I WOULD OBJECT TO TWO
16 PORTIONS OF THAT SENTENCE UNDER RULE 403, THAT ANY
17 RELEVANCY IS OUTWEIGHED BY THE PREJUDICE.

18 THE TWO SENTENCES OR TWO STATEMENTS ARE AS
19 FOLLOWS: THE FIRST BEING MR. CRITTENDON STATED THAT HE
20 WOULD NEVER ALLOW Minor TO HAVE TO TESTIFY IN COURT
21 AGAINST HIM. WHAT THE RELEVANCY -- ONE, I DON'T THINK
22 IT'S RELEVANT, AND THE PREJUDICIAL VALUE OF THAT CLEARLY
23 OUTWEIGHS IT.

24 AND THE SECOND SENTENCE, THE ONE THAT
25 FOLLOWS THAT, THAT MR. CRITTENDON LOVED HER TOO MUCH TO

1 EMBARRASS HER IN THAT WAY. THE DEFENDANT HAS A RIGHT TO
2 EXERCISE HIS CONSTITUTIONAL RIGHT TO TRIAL, AND I THINK
3 THOSE STATEMENTS KIND OF INFRINGE UPON THAT AND CAST A
4 LIGHT.

5 THE ONLY ISSUE BEFORE THE COURT -- BEFORE
6 THIS JURY TODAY IS, (A), WAS A CRIME COMMITTED, EITHER
7 LEWD ACT AND/OR CRIMINAL SEXUAL CONDUCT WITH A MINOR;
8 AND WHETHER MR. CRITTENDON COMMITTED THOSE CRIMES. SO I
9 DON'T THINK THOSE TWO STATEMENTS ADD ANYTHING TO THAT
10 WHATSOEVER, AND I WOULD ASK THE COURT AT THIS POINT --

11 NOW, IF MR. CRITTENDON DECIDES TO TESTIFY,
12 THEY MAY BECOME RELEVANT AT THAT TIME, BUT AT THIS POINT
13 UNDER RULE 403 I THINK THE PREJUDICE OF THOSE CLEARLY
14 OUTWEIGH ANY PROBATIVE VALUE ON JUST THOSE TWO
15 STATEMENTS.

16 THE COURT: MS. SIMMONS?

17 MS. SIMMONS: YOUR HONOR, I BELIEVE THAT
18 THOSE TWO STATEMENTS, THAT HE LOVED Minor AND HE
19 WOULD NEVER ALLOW HER OR WANT HER TO TESTIFY IN COURT
20 AGAINST HIM, ARE INDEED RELEVANT FOR HIS STATE OF MIND
21 AT THAT POINT IN TIME. IT SHOWS A DEGREE OF REMORSE ON
22 HIS PART OR AT LEAST THAT HE HAS CONSIDERED THIS. AND
23 THE FACT THAT HE LOVED HER VERY MUCH IS INDEED RELEVANT
24 IN THE SOME SORT OF CONFESSION THAT HE DID INDEED GIVE.
25 I BELIEVE IT IS NOT OVERLY PREJUDICIAL FOR THE JURORS TO

1 KNOW THAT HE SAID THAT HE DID LOVE HER VERY MUCH. I
2 BELIEVE IT'S RELEVANT IN THE CASE FOR HIS, YOU KNOW, HIS
3 MOTIVE.

4 THE COURT: DO YOU JUST WANT TO LEAVE IT AT
5 THAT, THAT HE LOVED HER VERY MUCH?

6 MS. SIMMONS: YOUR HONOR, OF COURSE I WOULD
7 LIKE TO BE ABLE TO GO FURTHER INTO IT, THAT HE LOVED HER
8 VERY MUCH AND DID NOT WANT TO SEE HER TESTIFY IN COURT.
9 BUT IF YOUR HONOR IS INCLINED, I WOULD AT LEAST LIKE FOR
10 THE FIRST PORTION OF THAT STATEMENT TO BE ADMISSIBLE.

11 MR. BYRHOLDT: TO BE RELEVANT IT MUST GO TO
12 SOME ISSUE THAT'S A FACT, AND THE ONLY ISSUE OF FACT, OR
13 THE ONLY FACT AT ISSUE IS WHETHER A SEXUAL ASSAULT WAS
14 COMMITTED. MOTIVE, NONE OF THAT HAS ANYTHING TO DO WITH
15 IT. I THINK THAT STATEMENT CLEARLY PREJUDICES
16 MR. CRITTENDON'S RIGHT TO A TRIAL ON THE EVIDENCE IN
17 THIS CASE.

18 THE COURT: WELL, LET ME SEE THE STATEMENT.
19 APPARENTLY IT'S BEEN...

20 MR. BYRHOLDT: I HAVE TWO SENTENCES I'M
21 TALKING ABOUT, YOUR HONOR (HANDING).

22 THE COURT: HOW DO YOU INTEND TO PRESENT
23 THIS TESTIMONY?

24 MS. SIMMONS: YOUR HONOR, I WOULD CALL ---

25 THE COURT: THIS EVIDENCE?

1 MS. SIMMONS: MY INTENT IS TO CALL SERGEANT
2 REED FOR MIRANDA PURPOSES, AND THEN, OF COURSE, MR. LARK
3 TESTIFIED SOLELY THAT HE INTERVIEWED HIM, CERTAINLY NOT
4 DISCUSSING THE SPECIFIC SCIENTIFIC PORTION OF HIS
5 INTERVIEW, BUT THAT HE INTERVIEWED HIM ON A CONSULTANT
6 BASIS. WE DON'T INTEND TO ADMIT ANY SORT OF SCIENTIFIC
7 DATA.

8 THE COURT: WHAT DO YOU INTEND TO ENTER, I
9 MEAN AS FAR AS THIS STATEMENT IS CONCERNED?

10 MS. SIMMONS: THE ORAL STATEMENT, YOUR
11 HONOR?

12 THE COURT: WELL, THIS IS A REPORT. YOU ARE
13 NOT INTENDING TO PUT THE REPORT IN.

14 MS. SIMMONS: NO, SIR. I WAS PLANNING ON
15 MR. LARK JUST TESTIFYING THE CONTENTS OF THE STATEMENT
16 MADE TO HIM, THAT HE LOVED HER VERY MUCH, HE DID NOT
17 WANT TO MAKE HER TESTIFY.

18 THE COURT: WELL, THE THING IS, HE DOESN'T
19 SAY THAT. HE SAYS, MR. CRITTENDON STATED THAT HE LOVED
20 HER TOO MUCH TO EMBARRASS HER.

21 MS. SIMMONS: I'M SORRY, YOUR HONOR.

22 THE COURT: WELL, I MEAN, I'M NOT -- I DON'T
23 SEE HOW THAT HAS ANYTHING TO DO, BECAUSE THE WHOLE
24 THING, THE FIRST SENTENCE AND THEN THAT SENTENCE RELATES
25 TO THE JUDICIAL PROCESS AND NOT TO TESTIFY IN COURT

1 AGAINST HIM.

2 I'M GOING TO -- IF THAT'S WHAT THE MOTION IS
3 OF THE DEFENDANT -- TO INSTRUCT THE WITNESS THAT THOSE
4 TWO SENTENCES, OR AT LEAST -- YES, IT WOULD BE THE TWO
5 SENTENCES STARTING WITH, DURING THE POST-TEST INTERVIEW
6 MR. CRITTENDON STATED THAT HE WOULD NEVER ALLOW
7 Minor TO HAVE TO TESTIFY IN COURT AGAINST HIM.
8 MR. CRITTENDON STATED THAT HE LOVED HER TOO MUCH TO
9 EMBARRASS HER IN THAT WAY.

10 I'M GOING TO, I GUESS YOU'D SAY, STRIKE THAT
11 FROM ANY REPORT THAT MR. CRITTENDON MIGHT MAKE AS TO
12 INTERVIEWS HE HAD WITH HER. SO YOU WOULD LEAVE OUT THAT
13 PORTION OF IT. IN FACT, I'M GONNA HIGHLIGHT IT IN
14 YELLOW SO THERE WON'T BE ANY QUESTION ABOUT IT.

15 I HAVE THE DEFENDANT'S. DO YOU HAVE ANOTHER
16 ONE THAT ---

17 MS. SIMMONS: YES, YOUR HONOR, I'LL BE GLAD
18 TO PASS THAT UP TO YOU.

19 THE COURT: I'LL LET THE DEFENDANT HAVE HIS
20 BACK.

21 MR. BYRHOLDT: THANK YOU, JUDGE.

22 MS. SIMMONS: UNFORTUNATELY, I BELIEVE I
23 HIGHLIGHTED MOST OF MINE.

24 THE COURT: WELL, LET'S SEE. I MIGHT HAVE
25 TO MAKE A COPY OF IT. LET'S SEE. WHAT I WAS GOING TO

1 DO IS --

2 MADAM CLERK, COULD YOU MAKE A COPY OF THAT?
3 YELLOW DOESN'T COME THROUGH.

4 THE CLERK: I DON'T THINK SO.

5 MR. BYRHOLDT: JUDGE, I'VE GOT A PINK
6 HIGHLIGHTER.

7 THE COURT: WELL, I JUST WANT, I WANT A
8 CLEAN COPY ONLY WITH MY EDITING. DO YOU UNDERSTAND WHAT
9 I'M SAYING, MR. LARK?

10 THE WITNESS: YES, SIR.

11 THE COURT: IN OTHER WORDS, YOU ARE NOT TO
12 DISCUSS ANYTHING THAT I HIGHLIGHTED.

13 THE WITNESS: YES, SIR.

14 THE COURT: VERY GOOD, THANK YOU.

15 MS. SIMMONS: AND YOUR HONOR?

16 THE COURT: YES, MA'AM.

17 MS. SIMMONS: HE WILL BE ABLE TO DISCUSS THE
18 STATEMENT MADE AFTER THAT ABOUT THE DREAM, THOUGH?

19 THE COURT: AS I UNDERSTAND, THERE IS NO
20 OBJECTION TO THAT. APPARENTLY, IF HE MADE THAT
21 STATEMENT THAT...

22 MS. SIMMONS: I JUST WANTED TO MAKE SURE I
23 UNDERSTOOD, YOUR HONOR.

24 (THE CLERK CONFERRED WITH THE COURT OFF THE
25 RECORD.)

1 THE COURT: THANK YOU, MA'AM.

2 ALL RIGHT. I'M GOING TO MARK THIS AS
3 COURT'S EXHIBIT TWO, BUT I WANT COUNSEL TO LOOK AT IT TO
4 BE SURE THERE'S NO PROBLEM.

5 MR. BYRHOLDT: FROM THE DEFENSE THAT'S FINE,
6 YOUR HONOR.

7 MS. SIMMONS: YOUR HONOR, IN YOUR INTENT IN
8 HIGHLIGHTING THIS PORTION, ARE YOU INTENDING TO ACTUALLY
9 ALLOW HIM TO READ THAT SPECIFIC PORTION?

10 THE COURT: NO, MA'AM. I AM JUST DELETING
11 WHAT WOULD NOT BE ADMISSIBLE ---

12 MS. SIMMONS: OKAY. I WILL GIVE THAT TO HIM
13 SO HE WILL KNOW.

14 THE COURT: --- UNDER RULE 403.

15 MS. SIMMONS: I APOLOGIZE, YOUR HONOR. I'LL
16 GIVE HIM THAT, THEN.

17 THE COURT: NO, NO PROBLEM.

18 ALL RIGHT. ANYTHING ELSE? LET'S SEE. IS
19 THAT MINE YOU JUST HANDED HIM?

20 MS. SIMMONS: SORRY, JUDGE. I WANTED HIM TO
21 LOOK AT THAT SPECIFICALLY.

22 THE COURT: WELL, LET'S HAVE IT MARKED AS A
23 COURT'S EXHIBIT. OFF THE RECORD UNTIL THE COURT
24 REPORTER HAS THE OPPORTUNITY.

25 (COURT'S EX. # 2, REPORT OF INTERVIEW JANUARY

1 21ST, 2004, REDACTED VOLUNTARY STATEMENT, WAS
2 MARKED FOR IDENTIFICATION.)

3 THE COURT: THIS IS COURT'S EXHIBIT NUMBER
4 TWO, I THINK IT'S THE REPORT OF AN INTERVIEW THAT TOOK
5 PLACE -- JANUARY THE 21ST, 2004?

6 THE WITNESS: YES, SIR.

7 THE COURT: ALL RIGHT. I'M HANDING IT TO
8 THE WITNESS SO HE WILL SEE THE PORTION OF THE EXHIBIT
9 THAT THE COURT HAS DELETED.

10 MR. BYRHOLDT: YOUR HONOR, MAY I CONSULT
11 WITH...

12 THE COURT: CERTAINLY.

13 (OFF-THE-RECORD DISCUSSION.)

14 MR. BYRHOLDT: JUDGE, THERE'S A FOLLOWING
15 SENTENCE THAT I'VE OVERLOOKED THAT SAID HE WOULD TAKE
16 HIS CHANCE BY PLEADING GUILTY TO SOME CHARGE; I THINK
17 THE SOLICITOR AGREED WE WERE GONNA STAY AWAY FROM THAT.

18 MS. SIMMONS: YES, YOUR HONOR. THE WITNESS
19 HAS ALREADY BEEN INSTRUCTED THAT THERE WOULD BE NO
20 MENTION TO THAT PORTION OF THE STATEMENT.

21 THE COURT: ALL RIGHT. SO I'M ALSO STRIKING
22 THE THIRD SENTENCE HIGHLIGHTED IN YELLOW. VERY GOOD.

23 MR. BYRHOLDT: THANK YOU, JUDGE.

24 THE COURT: ALL RIGHT. I DO FIND THAT,
25 AFTER CONSIDERING ALL THE EVIDENCE, THE COURT IS

1 CONVINCED THAT THE STATEMENT -- OR THE DEFENDANT WAS
2 FULLY ADVISED OF HIS RIGHTS UNDER THE FIFTH AND SIXTH
3 AMENDMENT, TO INCLUDE THE RIGHT TO REMAIN SILENT, IT CAN
4 BE USED AGAINST YOU IN A COURT OF LAW; THE RIGHT TO AN
5 ATTORNEY, IF HE COULD NOT AFFORD ONE, ONE WOULD BE
6 APPOINTED FOR HIM, AND THE RIGHT TO CONSULT AN ATTORNEY;
7 THE RIGHT TO INTERRUPT OR TERMINATE THE INTERROGATION,
8 THE INTERROGATION WOULD CEASE UNTIL THE OPPORTUNITY TO
9 CONSULT WITH AN ATTORNEY; AND THE DEFENDANT KNOWINGLY
10 AND INTELLIGENTLY WAIVED HIS RIGHTS UNDER THE FIFTH AND
11 SIXTH AMENDMENT.

12 FURTHERMORE, THE COURT FINDS THE STATEMENT
13 WAS FREELY AND VOLUNTARILY GIVEN, WITHOUT HARASSMENT,
14 WITHOUT COERCION, WITHOUT UNDUE INFLUENCE, WITHOUT
15 REWARD -- WITHOUT PROMISE OR HOPE OF REWARD, WITHOUT
16 PROMISE OF LENIENCY, WITHOUT THREAT OF INJURY, AND
17 WITHOUT FORCE OR INDUCEMENT OF ANY KIND. THE COURT
18 FURTHER FINDS IT WAS THE FREE AND UNCONSTRAINED WILL OF
19 THE DEFENDANT.

20 I FIND ALL THESE FOREGOING CONCLUSIONS
21 BEYOND A REASONABLE DOUBT, AND THE STATEMENT WILL BE
22 SUBMITTED AS MODIFIED BY THE COURT, OR THE CONTENTS OF
23 IT AS MODIFIED BY THE COURT TO THE JURY. OF COURSE, IT
24 WILL BE THE JURY'S DECISION AS TO WHETHER OR NOT TO RELY
25 ON IT, BUT AT LEAST AS TO IF THE EXHIBIT WILL BE RELIED

1 UPON. VERY GOOD.

2 ALL RIGHT. ANYTHING ELSE FROM THIS WITNESS?

3 MS. SIMMONS: NO, SIR.

4 THE COURT: ALL RIGHT. YOU MAY STEP DOWN.

5 THANK YOU, SIR.

6 (WITNESS LEAVES STAND.)

7 THE COURT: ANYTHING ELSE?

8 MS. SIMMONS: NOTHING FROM THE STATE.

9 THE COURT: ALL RIGHT. VERY GOOD. IT'S
10 ABOUT 10:00. HOW ARE WE DOING ON JURORS?

11 THE SHERIFF'S DEPUTY: THEY'RE HERE.

12 THE COURT: DO YOU WANT TO TAKE A FEW
13 MINUTES, A VERY FEW MINUTES, AND THEN WE'LL START THE
14 TRIAL OF THE CASE? VERY GOOD.

15 MS. SIMMONS: THANK YOU, JUDGE.

16 THE COURT: LET ME KNOW WHEN Y'ALL ARE
17 READY.

18 (WHEREUPON, A RECESS WAS TAKEN.)

19 THE COURT: ANYTHING FROM THE STATE BEFORE
20 WE BRING THE JURY IN AND START THE TRIAL?

21 MS. SIMMONS: NO, YOUR HONOR.

22 THE COURT: FROM THE DEFENDANT?

23 MR. BYRHOLDT: NO, SIR.

24 THE COURT: ALL RIGHT. ASK THE JURY TO JOIN
25 US, PLEASE.

1 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
2 10:09 A.M.)

3 THE COURT: LET THE RECORD REFLECT THAT THE
4 JURY AND ALTERNATES ARE IN THE JURY-BOX.

5 MADAM FORELADY, LADIES AND GENTLEMEN OF THE
6 JURY, I'LL ASK THE CLERK TO SWEAR YOU NOW, PLEASE.

7 THE CLERK: PLEASE STAND AND RAISE YOUR
8 RIGHT HAND.

9 (WHEREUPON, THE JURY WAS SWORN BY THE DEPUTY
10 CLERK OF COURT.)

11 THE COURT: MADAM FORELADY, LADIES AND
12 GENTLEMEN OF THE JURY, I'M SURE THAT EACH OF YOU NOW
13 FULLY APPRECIATES THAT THIS COURT, THE COURT OF GENERAL
14 SESSIONS FOR OCONEE COUNTY, EXISTS FOR THE PURPOSE OF
15 RESOLVING QUESTIONS OF ALLEGED CRIMINAL CONDUCT ARISING
16 BETWEEN THE STATE OF SOUTH CAROLINA AND THE DEFENDANT.

17 IT IS A GUARANTEED RIGHT OF EVERY CITIZEN
18 THAT A CHARGE OF CRIMINAL CONDUCT BE PRESENTED IN OPEN
19 COURT ACCORDING TO CERTAIN RULES OF PROCEDURE. THE
20 STATE NOT ONLY HAS AN EQUAL RIGHT BUT THE DUTY TO
21 PRESENT A CHARGE OF CRIMINAL CONDUCT IN OPEN COURT
22 ACCORDING TO THE SAME RULES OF PROCEDURE.

23 EACH OF THE PARTIES, THEREFORE, BOTH THE
24 STATE AND THE DEFENDANT, THEN HAVE AN EQUAL RIGHT TO THE
25 OPPORTUNITY OF THIS JUDICIAL PROCEEDING AND TO HAVE YOU

1 AS A JURY SELECTED AND NOW SWORN FOR THE TRIAL OF THIS
2 CASE.

3 ONE OF THE MOST IMPORTANT ASPECTS OF YOUR
4 DUTY AS THE JURY LIES ESSENTIALLY IN THE OATH THAT YOU
5 HAVE NOW TAKEN, TO WELL AND TRULY TRY AND DETERMINE THE
6 FACTS OF THE CASE. THAT OATH IN A VERY ESSENTIAL WAY
7 SAYS THAT YOU ARE THE SOLE JUDGES OF THE FACTS IN THIS
8 CASE. OBVIOUSLY, ANY CASE TRIED IN COURT WILL INVOLVE A
9 QUESTION ABOUT WHAT HAPPENED OR HOW SOMETHING CAME TO
10 HAPPEN OR WHOM, IF ANYONE, DID ANYTHING IN A PARTICULAR
11 OCCURRENCE OR CIRCUMSTANCE.

12 FROM THIS POINT FORWARD, THEN, NO ONE
13 CONCERNED WITH THE TRIAL OF THE CASE HAS A RIGHT TO
14 DECIDE ANY QUESTION OF FACT IN THIS TRIAL OR THE TRUTH
15 OF IT EXCEPT YOU, THE JURY. THE FACTS THEN ARE FOR YOUR
16 RESOLUTION AND YOUR DECISION AND YOURS ALONE.

17 AND AFTER YOU HEAR ALL OF THE EVIDENCE IN
18 THE CASE, THEN IT WILL BE YOUR DUTY BY YOUR MUTUAL AND
19 JOINT DISCUSSIONS TO DETERMINE THE TRUTH OF THE CASE BY
20 DECIDING THE WEIGHT AND THE BELIEVABILITY OF EACH PART
21 OF THE EVIDENCE AND BY APPLYING THE LAW OF THE CASE
22 THERETO.

23 AS TRIAL JUDGE I AM THE JUDGE OF THE LAW IN
24 THIS CASE. IT IS ALSO MY RESPONSIBILITY, AMONG OTHER
25 THINGS, TO PRESIDE OVER THIS TRIAL, TO RULE ON

1 ADMISSIBILITY OF EVIDENCE OFFERED DURING THE PROGRESS OF
2 THE TRIAL, AND TO STATE TO YOU, THE JURY, THE LAW
3 APPLICABLE TO THE CASE. THE CONSTITUTION OF SOUTH
4 CAROLINA MANDATES THAT I AS THE TRIAL JUDGE CANNOT
5 DIRECTLY OR INDIRECTLY COMMENT ABOUT THE FACTS IN THIS
6 CASE.

7 THE PROCESS IN A VERDICT, THEN, IS SIMPLY
8 THAT YOU, THE JURY, FIRST DETERMINE WHAT IS THE TRUTH OF
9 THE FACTS, AND THEN APPLY TO THAT TRUE STATE OF FACTS
10 THAT PRINCIPLE OF LAW APPLICABLE, AND BY THAT PROCESS
11 DETERMINE OR REPORT TO THIS COURT YOUR FINAL VERDICT IN
12 THE CASE, SPEAKING THE TRUTH OF THE CASE AS YOU FIND IT.

13 I WILL MORE FULLY AND COMPLETELY STATE TO
14 YOU THE PRINCIPLES OF LAW APPLICABLE TO THE ISSUES OF
15 THIS CASE BEFORE THE CASE IS SUBMITTED TO YOU FOR YOUR
16 DECISION.

17 HOWEVER, THERE ARE CERTAIN PRINCIPLES OF LAW
18 APPLICABLE TO THE FRAMEWORK OF EVERY CASE IN GENERAL
19 SESSIONS COURT. FIRST, THE DEFENDANT HAS ENTERED A PLEA
20 OF NOT GUILTY TO THE CHARGES CONTAINED IN THE
21 INDICTMENT. NOW, THE INDICTMENT IN THIS CASE IS NOT
22 EVIDENCE, IT IS SIMPLY THE WRITTEN INSTRUMENT THAT
23 CONTAINS THE CHARGE OR CHARGES AGAINST THE DEFENDANT,
24 AND IT SERVES AS THE FORMAL DOCUMENT BY WHICH THIS CASE
25 IS PROCESSED INTO COURT. THE PLEA OF NOT GUILTY PLACES

1 UPON THE STATE THE BURDEN OF PROOF IN THIS CASE.

2 AS FOR WHAT IS MEANT BY THE TERM "BURDEN OF
3 PROOF," THE DEFENDANT IS PRESUMED TO BE INNOCENT IN LAW,
4 INNOCENT OF ALL CHARGES CONTAINED IN THE INDICTMENT.
5 THE BURDEN OF PROOF REQUIRES THE STATE TO PROVE GUILT
6 BEYOND A REASONABLE DOUBT AND, THEREFORE, CONSISTENT
7 WITH THAT BURDEN THE DEFENDANT OR THE ACCUSED PARTY
8 SHALL BE PRESUMED INNOCENT, AND THAT PRESUMPTION OF
9 INNOCENCE IS SUFFICIENT TO COMPEL A VERDICT OF NOT
10 GUILTY OR A VERDICT OF ACQUITTAL UNLESS YOU, THE JURY,
11 CONCLUDE THAT THE STATE HAS SATISFIED ITS OBLIGATION TO
12 PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.
13 THE TERM REASONABLE DOUBT MEANS THE KIND OF DOUBT THAT
14 WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

15 NOW, THIS CASE WILL BE OPENED BY THE
16 SOLICITOR, AFTER WHICH THE SAME OPPORTUNITY WILL BE
17 AFFORDED TO THE DEFENDANT TO MAKE AN OPENING STATEMENT.
18 WHEN ALL THE EVIDENCE HAS BEEN RECEIVED BY THE COURT,
19 COUNSEL FOR THE STATE AND COUNSEL FOR THE DEFENDANT WILL
20 STATE TO THE JURY THEIR RESPECTIVE POSITIONS, AFTER
21 WHICH THE COURT WILL FULLY STATE THE LAW APPLICABLE IN
22 THE CASE.

23 OBVIOUSLY, ALL PARTS OF THE CASE ARE
24 IMPORTANT. YOU DO NOT KNOW WHICH WITNESS IN A CASE WILL
25 MOST IMPRESS YOU, WHETHER THE FIRST WITNESS OR THE LAST.

1 IN REACHING YOUR FINAL CONCLUSION, YOU WILL NEED THE
2 GUIDANCE AND JUDGMENT OF THE OTHER JURORS, YOU WILL NEED
3 THE GUIDANCE OF THE PRINCIPLES OF LAW THAT WILL BE
4 STATED TO YOU BY THE COURT.

5 FOR ALL THESE REASONS, THEN, IF YOU HAVE ANY
6 RECESS PERIODS WHEN YOU RETIRE TO YOUR JURY ROOM, OR
7 DURING OVERNIGHT OR MEAL RECESS, I INSTRUCT YOU THAT YOU
8 MUST NOT UNDERTAKE TO DISCUSS THIS CASE AMONG YOURSELVES
9 UNTIL THE CASE IS FINALLY GIVEN TO YOU FOR YOUR
10 DELIBERATION, NOR ARE YOU TO DISCUSS THIS CASE WITH
11 ANYONE OR PERMIT ANYONE ELSE TO DISCUSS THIS WITH YOU.
12 AS I MENTIONED YESTERDAY, IF SOMEONE SHOULD TRY TO DO
13 SO, YOU ARE TO REPORT THEM AND I WILL TAKE THE
14 APPROPRIATE ACTION.

15 NOW, THERE ARE A FEW OTHER THINGS I NEED TO
16 MENTION BEFORE WE START. AS I SAID EARLIER, ALTHOUGH I
17 AM THE ONLY PERSON WHO CAN TELL YOU WHAT THE LAW IS, YOU
18 ARE THE ONLY ONES WHO CAN DETERMINE THE FACTS. I DO NOT
19 HAVE THE RIGHT TO INDICATE HOW I MAY FEEL ABOUT THE
20 EVIDENCE PRESENTED, AND THROUGHOUT THE TRIAL MY
21 INTENTION WILL BE TO ACT IMPARTIALLY TOWARDS EACH PARTY.

22 SECOND, FROM TIME TO TIME AN ATTORNEY MAY
23 OBJECT TO SOME BIT OF TESTIMONY OR EVIDENCE WHICH THE
24 OTHER SIDE IS SEEKING TO PRESENT. AS IN SPORTS OR
25 BUSINESS OR ANY OTHER STRUCTURED ACTIVITY, THERE ARE

1 CERTAIN RULES THAT BOTH SIDES MUST OBEY IN PRESENTING
2 EVIDENCE. THESE RULES HAVE A DEFINITE PURPOSE. THEY
3 ARE TO ENSURE THAT THE INFORMATION YOU RECEIVE IS THE
4 MOST TRUSTWORTHY AND RELIABLE EVIDENCE AVAILABLE.

5 AN OBJECTION IS THE PROCEDURE WE USE FOR AN
6 ATTORNEY TO CALL A POSSIBLE VIOLATION OF THE RULES TO MY
7 ATTENTION, AND FOR THIS REASON YOU SHOULD NOT HOLD AN
8 ATTORNEY'S OBJECTION AGAINST HIS OR HER CLIENT, NOR
9 SHOULD YOU CONCLUDE FROM MY RULING ON THE OBJECTION THAT
10 I FAVOR ONE SIDE OR THE OTHER.

11 FINALLY, I WOULD ASK THAT YOU PAY THE
12 CLOSEST ATTENTION POSSIBLE TO THE EVIDENCE PRESENTED TO
13 YOU. I WILL ASK THAT YOU NOT TAKE NOTES, FOR IF THE
14 NOTE-TAKER MAKES AN ERROR, THOSE NOTES MIGHT BE MORE
15 DETRIMENTAL THAN HELPFUL DURING YOUR DELIBERATIONS. THE
16 TIME-TESTED SYSTEM IS FOR EACH OF YOU TO LISTEN
17 CAREFULLY, AND I'M SURE YOU WILL DO THAT.

18 NOW, MADAM FORELADY, LADIES AND GENTLEMEN OF
19 THE JURY, I HAVE ASKED YOU OR SUGGESTED TO YOU NOT TO
20 TAKE NOTES. THE REASON FOR THAT, OF COURSE, IS IF YOU
21 TAKE A NOTE, YOU HAVE A TENDENCY TO CONCENTRATE ON THE
22 NOTE WHILE YOU'RE WRITING IT DOWN, IN OTHER WORDS, TO BE
23 SURE YOU PUT DOWN WHAT YOU THINK YOU HEARD, AS WELL AS
24 MAYBE EVEN SPELLING OR CONTEXT OR SOMETHING OF THAT
25 NATURE. IN DOING SO YOU ARE DISTRACTED FROM WHAT IS

1 HAPPENING IN THE COURTROOM.

2 AS I'VE SAID, YOU MUST MAKE YOUR DECISION
3 BASED ON THE SWORN TESTIMONY ON THIS WITNESS STAND AS
4 WELL AS OTHER EXHIBITS AND EVIDENCE INTRODUCED IN THIS
5 COURTROOM, AND YOU NEED TO CONCENTRATE ON THAT. AND
6 WHEN IT COMES TIME TO DELIBERATE, YOU AND THE OTHER
7 MEMBERS OF THE JURY WILL DETERMINE WHAT THE FACTS WERE
8 OR WHAT THE TESTIMONY MIGHT BE. IF YOU HAVE A QUESTION,
9 WE CAN REPEAT THE TESTIMONY AND SHOW YOU THE OTHER -- OR
10 YOU WILL HAVE THE EXHIBITS. BUT THE FACT IS YOU WILL BE
11 ABLE TO HAVE THE TESTIMONY REPEATED FOR YOU IF YOU NEED
12 TO.

13 SO NOTES MIGHT BE MORE DETRIMENTAL THAN
14 HELPFUL, PARTICULARLY IF YOU MISS SOMETHING IN WRITING
15 DOWN A NOTE. THINK ABOUT LEAVING JUST ONE WORD OUT.
16 THE WORD "NOT" OBVIOUSLY CHANGES THE WHOLE PURPOSE. AND
17 SO, THEREFORE, YOU DON'T WANT TO TAKE THE CHANCE OF
18 SOMETHING BEING DONE IN WRITING WHICH MIGHT BE MORE
19 PERSUASIVE THAN THE RECOLLECTION WHERE WE CAN HAVE THE
20 ACTUAL TESTIMONY DONE. FOR THAT REASON I SUGGEST THAT
21 YOU NOT TAKE NOTES.

22 NOW, HAVING SAID THAT, I DO TAKE NOTES.
23 NOW, THE THING IS IT'S NOT ONE OF THOSE THINGS, DO AS I
24 SAY, NOT AS I DO. WE HAVE ENTIRELY DIFFERENT PURPOSES
25 IN THIS COURTROOM. YOU AND YOU ALONE ARE THE ONLY ONES

1 WHO CAN DETERMINE THE FACTS IN THIS CASE. I AM NOT
2 CONCERNED ABOUT THE WEIGHT OR THE BELIEVABILITY OF ANY
3 TESTIMONY OR THE WEIGHT TO BE GIVEN ANY PARTICULAR PIECE
4 OF EVIDENCE. I AM ONLY CONCERNED THAT CERTAIN THINGS
5 ARE DONE AS ARE REQUIRED IN OUR PROCEDURES AND,
6 THEREFORE, I'M JUST JOTTING DOWN WHAT OCCURS, NOT THE
7 SIGNIFICANCE OF IT. THAT IS FOR YOU AND YOU ALONE.
8 PLEASE UNDERSTAND, ALTHOUGH I SUGGEST YOU NOT TAKE
9 NOTES, WHEN I TAKE NOTES IT'S FOR AN ENTIRELY DIFFERENT
10 PURPOSE.

11 NOW WITH THAT I WILL RECOGNIZE MS. SIMMONS
12 FOR HER OPENING STATEMENT.

13 MS. SIMMONS: THANK YOU, YOUR HONOR. MAY IT
14 PLEASE THE COURT?

15 THE COURT: MS. SIMMONS.
16 OPENING STATEMENT ON BEHALF OF THE STATE:

17 MS. SIMMONS: GOOD MORNING, LADIES AND
18 GENTLEMEN. AS I TOLD YOU YESTERDAY, MY NAME IS LINDSEY
19 SIMMONS. I GREW UP HERE IN WALHALLA, AND FOR THE PAST
20 TWO YEARS I HAVE BEEN WORKING FOR SOLICITOR ADAMS, YOUR
21 ELECTED SOLICITOR.

22 FIRST OF ALL, I WANT TO THANK YOU FOR BEING
23 HERE TODAY. I KNOW THERE'S PROBABLY A MILLION OTHER
24 THINGS THAT YOU WOULD LIKE TO BE DOING, BUT THE JOB YOU
25 HAVE HERE IS IMPORTANT; IT'S IMPORTANT TO THE STATE,

1 IT'S IMPORTANT TO THE DEFENSE, IT'S IMPORTANT TO THE
2 VICTIM IN THIS CASE.

3 THIS DEFENDANT IS CHARGED WITH CRIMINAL
4 SEXUAL CONDUCT WITH A MINOR IN THE FIRST DEGREE AND LEWD
5 ACT UPON A CHILD. YOU MAY BE WONDERING WHAT THAT MEANS.
6 CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE FIRST DEGREE
7 REQUIRES A SEXUAL BATTERY ON A CHILD LESS THAN 11 YEARS
8 OLD, AND SEXUAL BATTERIES HAVE BEEN DEFINED AS ACTUAL
9 PENETRATION OR ORAL SEX. THE JUDGE IS GONNA INSTRUCT
10 YOU ON ALL THOSE THINGS AT THE END OF THE CASE, BUT KEEP
11 THAT IN MIND AS YOU HEAR THE EVIDENCE. AND YOU HAVE TO
12 HAVE A CHILD LESS THAN 11 TO HAVE CRIMINAL SEXUAL
13 CONDUCT WITH A MINOR IN THE FIRST DEGREE. INDEED YOU
14 WILL FIND THE CHILD IN THIS CASE WAS SEVEN YEARS OLD
15 WHEN THIS HAPPENED.

16 AS TO LEWD ACT UPON A CHILD, YOU HAVE TO
17 HAVE A CHILD THAT IS LESS THAN 16 YEARS OF AGE, AND THE
18 DEFENDANT HAS TO COMMIT A LEWD ACT FOR THE PURPOSE OF
19 SATISFYING THEIR PASSIONS AND LUSTFUL DESIRES. AGAIN,
20 THE CHILD WAS SEVEN YEARS OLD.

21 I HAVE TO PROVE TO YOU THAT THESE TWO THINGS
22 OCCURRED BEYOND A REASONABLE DOUBT. THIS IS NOT CSI,
23 IT'S NOT FORENSIC FILES, IT'S NOT ANY OF THOSE THINGS
24 THAT YOU HAVE SEEN ON T.V. ABOUT HOW THE CRIMINAL
25 JUSTICE SYSTEM WORKS. YOU'RE NOT GONNA SEE A BUNCH OF

1 EYEWITNESSES COME BEFORE YOU AND TESTIFY THAT THEY SAW
2 THIS HAPPEN. YOU'RE NOT GONNA HEAR ABOUT A BUNCH OF
3 D.N.A. EVIDENCE THAT SHOWS THAT THIS HAPPENED.

4 BUT YOU ARE GONNA HEAR FROM A LITTLE GIRL
5 NAMED Minor SHE'S TEN YEARS OLD NOW, AND SHE'S
6 GONNA TELL YOU THAT BACK BEFORE -- THE SUMMER BEFORE THE
7 SECOND GRADE, THAT WOULD BE BACK IN 2003, SHE SPENT A
8 LOT OF TIME AT HER GRANDMA'S HOUSE. HER MOM WAS WORKING
9 SECOND SHIFT, WAS GONE AT NIGHT SOME. AND HER MOM WAS A
10 SINGLE MOM AT THAT POINT IN TIME SO SHE HAD TO GET HELP
11 FROM HER FAMILY, SHE HAD TO GET HELP FROM HER MOM TO
12 BABY-SIT.

13 AND YOU WILL LEARN THAT THIS DEFENDANT WAS
14 MARRIED TO Minor 'S GRANDMOTHER. HE HAD A LOT OF
15 TIME THAT HE WAS ALONE WITH Minor SHE DID THE
16 THINGS THAT A NORMAL LITTLE GIRL WOULD DO DURING HER
17 SUMMER BREAK. SHE STAYED UP LATE, SHE WATCHED MOVIES,
18 SHE ATE JUNK FOOD, SHE DID ALL THOSE THINGS THAT
19 SEVEN-YEAR-OLDS WANT TO DO.

20 AND SHE'S GONNA TELL YOU THAT DURING THAT
21 TIME, DURING THE TIME WHEN SHE WAS AROUND THIS
22 DEFENDANT, THAT HE TOUCHED HER IN INAPPROPRIATE WAYS ON
23 HER PRIVATE PARTS AND THAT ORAL SEX OCCURRED.

24 SHE TRUSTED THE DEFENDANT. SHE LOVED HIM
25 LIKE A GRANDPA. SHE'S NOT PERFECT. SHE'S TEN YEARS

1 OLD. BUT SHE'S GONNA GET UP HERE AND SHE'S GONNA DO THE
2 BEST SHE CAN AND TELL YOU WHAT HAPPENED TO HER. AND I
3 JUST ASK THAT YOU LISTEN TO HER STORY AND LISTEN TO WHAT
4 SHE HAS TO SAY TO YOU, AND YOU BE THE JUDGE. SEE IF IT
5 INDEED HAPPENED. I THINK IT DID.

6 YOU'RE ALSO GONNA HEAR FROM MIKE LARK AND
7 GREG REED; THEY WORK FOR THE OCONEE COUNTY SHERIFF'S
8 OFFICE. INVESTIGATOR REED IS GONNA TELL YOU HE SPOKE
9 WITH THE DEFENDANT IN THE CASE AND THAT THE DEFENDANT
10 STARTED WRITING HIM A STATEMENT ABOUT WHAT HAD HAPPENED,
11 BUT THEN DECIDED THAT HE WOULD STOP WRITING THE
12 STATEMENT, THAT HE WAS GONNA TALK TO HIS FAMILY FIRST.

13 MR. LARK IS GONNA TELL YOU THAT HE
14 INTERVIEWED THE DEFENDANT. HE'S GONNA TELL YOU THAT THE
15 DEFENDANT DENIED THE ALLEGATIONS. HE DENIED TOUCHING
16 Minor HE DENIED WHAT HAPPENED. BUT HE ALSO GAVE
17 HIS OWN VERSION OF THE EVENTS. HE TOLD HIM THAT WHILE
18 HE SLEPT HIS WIFE OFTEN GAVE HIM ORAL SEX, AND THAT HE
19 WOKE UP ONCE AND HE WAS HAVING A DREAM THAT HIS WIFE WAS
20 PERFORMING ORAL SEX, AND HE WOKE UP AND Minor WAS IN
21 THE BED WITH HIM, AND IT WASN'T HIS WIFE, AND HE TOLD
22 MR. LARK THAT HE COULDN'T SAY YES OR NO IF HIS PRIVATE
23 PART WAS IN Minor MOUTH. THAT'S WHAT HE HAD TO
24 SAY.

25 I'M GONNA ASK THAT YOU LISTEN CAREFULLY TO

1 THE EVIDENCE IN THE CASE, LISTEN TO WHAT BOTH SIDES HAVE
2 TO SAY. HOPEFULLY THIS WILL ONLY TAKE A DAY. AND AT
3 THE END OF THIS DAY I'M GONNA COME BACK TO YOU AND I'M
4 GONNA ASK YOU TWO THINGS. I'M GONNA ASK YOU TO FIND THE
5 DEFENDANT GUILTY OF LEWD ACT UPON A CHILD. I'M GONNA
6 ASK YOU TO FIND HIM GUILTY OF CRIMINAL SEXUAL CONDUCT
7 WITH A MINOR IN THE FIRST DEGREE. THANK YOU.

8 THE COURT: MR. BYRHOLDT?

9 MR. BYRHOLDT: MAY IT PLEASE THE COURT?

10 THE COURT: MR. BYRHOLDT.

11 OPENING STATEMENT ON BEHALF OF THE DEFENDANT:

12 MR. BYRHOLDT: THIS IS A PERSON'S WORST
13 NIGHTMARE. IT'S CLARENCE ELIJAH CRITTENDON'S WORST
14 NIGHTMARE. IT COULD BE YOUR WORST NIGHTMARE. BECAUSE
15 WE HAVE A CASE WITH NO PHYSICAL EVIDENCE, WE HAVE A CASE
16 WITH NO D.N.A., NO HAIR, NO SEMEN, NOTHING. AND WE'VE
17 GOT A FINGER POINTER: "HE DID IT." "YOU TOUCHED ME."
18 THAT'S WHAT WE HAVE.

19 AS THE JUDGE TOLD YOU, MR. CRITTENDON IS
20 PRESUMED INNOCENT. THOSE ARE NOT EMPTY WORDS. OUR
21 SYSTEM OF JUSTICE IS BASED ON THAT. THE STATE HAS TO
22 PROVE HIS GUILT BEYOND A REASONABLE DOUBT.

23 WHAT I HAVE TO DO IS TRY TO PROVE THE
24 NEGATIVE, WHICH IS IMPOSSIBLE, BECAUSE I CAN'T PROVE
25 SOMETHING DIDN'T HAPPEN. BUT WHAT WE CAN DO IS TRY TO

1 POINT OUT THE FLAWS AND THE ABSENCE OF EVIDENCE IN THE
2 STATE'S CASE THROUGH THEIR WITNESSES, THROUGH THEIR LACK
3 OF EVIDENCE. BECAUSE IT'S NOT FROM WHAT YOU HEAR, BUT
4 FROM WHAT YOU DON'T HAVE.

5 I ASK YOU TO KEEP AN OPEN MIND UNTIL YOU
6 HEAR ALL OF THE EVIDENCE, UNTIL YOU HEAR THE JUDGE'S
7 CHARGE ON THE LAW, BECAUSE THE OATH YOU TOOK WAS TO HOLD
8 THE STATE OF SOUTH CAROLINA TO THAT HIGH DUTY OF PROVING
9 GUILT BEYOND A REASONABLE DOUBT, AND IF THEY FAIL TO DO
10 THAT BECAUSE OF THE LACK OF EVIDENCE, UNDER THE OATH YOU
11 TOOK, YOU SHOULD RETURN A VERDICT OF NOT GUILTY; BECAUSE
12 IT'S NOT WHAT YOU THINK HAPPENED, IT'S NOT WHAT MAY HAVE
13 HAPPENED, IT IS WHAT THE STATE HAS PROVEN TO YOU BY
14 COMPETENT EVIDENCE.

15 IT'S AN IMPORTANT DAY FOR THE STATE OF SOUTH
16 CAROLINA, BUT IT'S CLARENCE CRITTENDON THAT'S ON TRIAL
17 TODAY, NOT THE STATE OF SOUTH CAROLINA, IT'S CLARENCE
18 CRITTENDON. WE SELECTED YOU TO BE A FAIR JURY, TO
19 LISTEN TO ALL THE EVIDENCE AND FOLLOW THE LAW. AND WHEN
20 YOU LISTEN TO THAT EVIDENCE, EACH OF YOU INDIVIDUALLY
21 SHOULD FORM YOUR OWN CONCLUSION, AND THEN WHEN YOU GO
22 BACK AND DISCUSS IT, HOLD ON TO THOSE CONVICTIONS.

23 EVERYBODY IS GONNA BE IN A HURRY: LET'S GET
24 BACK TO OUR HOMES, LET'S GET BACK TO OUR JOBS AND LET'S
25 GET BACK TO OUR FAMILIES. BUT THIS IS THE MOST

1 IMPORTANT DAY IN CLARENCE CRITTENDON'S LIFE BECAUSE HE'S
2 THE ONE THAT'S FACING THESE CHARGES, NO ONE ELSE.

3 ON BEHALF OF CLARENCE WE APPRECIATE YOUR
4 TAKING YOUR TIME TO SERVE ON JURY DUTY. IT'S BEEN SAID
5 THAT OTHER THAN SERVING YOUR COUNTRY IN THE ARMED FORCES
6 DURING A TIME OF CONFLICT, THE MOST IMPORTANT DUTY A
7 CITIZEN CAN SERVE IS AS A JUROR IN THE COURTS OF OUR
8 LAND. OUR COUNTRY HAS TRIAL BY JURY. IT PROTECTS OUR
9 FREEDOMS. AND WE THANK YOU FOR TAKING TIME OUT OF YOUR
10 SCHEDULE TO HEAR THIS CASE. BUT REMEMBER, YOUR DUTY IS
11 TO HOLD THE STATE TO THAT HIGH BURDEN. IT'S BEEN SAID
12 BEFORE THAT IT WOULD BE BETTER TO SET A GUILTY MAN FREE
13 THAN TO CONVICT AN INNOCENT MAN.

14 I JUST ASK YOU TO PAY CLOSE ATTENTION, SEE
15 IF THE STATE CAN PROVE THE THINGS THEY TOLD YOU THEY
16 WERE GONNA PROVE IN THEIR OPENING STATEMENT. AT THE
17 CONCLUSION OF THIS CASE WE BELIEVE THE STATE WILL FAIL
18 TO CARRY THAT BURDEN AND YOU WILL HAVE NO CHOICE BUT TO
19 RETURN A VERDICT OF NOT GUILTY. THANK YOU.

20 THE COURT: SOLICITOR, YOU MAY CALL YOUR
21 FIRST WITNESS.

22 MS. SIMMONS: THANK YOU, YOUR HONOR. THE
23 STATE CALLS Minor

24 (WHEREUPON, THE WITNESS WAS SWORN BY THE
25 CLERK.)

Minor

-- DIRECT BY MS. SIMMONS

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1 THE COURT: Minor WOULD YOU PLEASE GIVE
2 US YOUR FULL NAME?

3 THE WITNESS: Minor

4 THE COURT: HOW OLD ARE YOU, MA'AM?

5 THE WITNESS: TEN.

6 THE COURT: NOW, DO YOU UNDERSTAND WHAT YOU
7 ARE DOING HERE TODAY?

8 THE WITNESS: YES.

9 THE COURT: YOU'RE GONNA BE TELLING US WHAT
10 YOU KNOW. DO YOU UNDERSTAND THAT?

11 THE WITNESS: YES, SIR.

12 THE COURT: AND ARE YOU GONNA BE TELLING THE
13 TRUTH?

14 THE WITNESS: YES, SIR.

15 THE COURT: WHAT HAPPENS IF YOU DON'T TELL
16 THE TRUTH?

17 THE WITNESS: I'LL GET IN TROUBLE.

18 THE COURT: ALL RIGHT. VERY GOOD.

19 YOU MAY PROCEED. THANK YOU.

20 MS. SIMMONS: THANK YOU, JUDGE.

21 WHEREUPON,

22 Minor

23 AFTER FIRST HAVING BEEN DULY SWORN, TESTIFIED AS
24 FOLLOWS:

25 //

1 DIRECT EXAMINATION BY MS. SIMMONS:

2 Q. GOOD MORNING, Minor

3 A. GOOD MORNING.

4 Q. I KNOW YOU'RE NERVOUS TODAY, SO IF YOU NEED A
5 BREAK OR ANYTHING, JUST LET ME KNOW, OKAY?

6 A. (NODDED HEAD.)

7 Q. HOW OLD ARE YOU TODAY?

8 A. TEN.

9 Q. AND WHEN'S YOUR BIRTHDAY?

10 A.

11 Q. OF WHAT YEAR?

12 A. 1995.

13 MS. SIMMONS: YOUR HONOR, WE WOULD MOVE
14 Minor BIRTH CERTIFICATE INTO EVIDENCE AS A
15 SELF-AUTHENTICATING DOCUMENT UNDER 901.

16 THE COURT: ANY OBJECTION?

17 MR. BYRHOLDT: NO, SIR.

18 THE COURT: ALL RIGHT. STATE'S EXHIBIT
19 NUMBER THREE IS ADMITTED WITHOUT OBJECTION.

20 (STATE'S EXHIBIT # 3, BIRTH CERTIFICATE, WAS
21 MARKED FOR IDENTIFICATION AND RECEIVED IN
22 EVIDENCE.)

23 BY MS. SIMMONS:

24 Q. WHAT GRADE ARE YOU IN NOW, Minor

25 A. FIFTH GRADE.

1 Q. DO YOU GET GOOD GRADES IN SCHOOL?

2 A. YES.

3 Q. AND WHEN YOU HELD YOUR HAND UP AND SWORE TO TELL
4 THE TRUTH, DO YOU KNOW WHAT THAT MEANS?

5 A. YES.

6 Q. DO YOU KNOW THE DIFFERENCE BETWEEN TELLING A LIE
7 AND TELLING THE TRUTH?

8 A. YES, MA'AM.

9 Q. WHAT'S THE DIFFERENCE?

10 A. THE TRUTH IS SOMETHING THAT DID HAPPEN AND A LIE
11 IS SOMETHING THAT YOU MADE UP.

12 Q. AND IS IT WRONG TO TELL A LIE?

13 A. YES.

14 Q. AND DID YOU AND I MEET BEFORE YOU CAME TO COURT
15 TODAY?

16 A. YES.

17 Q. AND DID YOU TELL ME YOUR STORY WHEN YOU CAME AND
18 MET WITH ME?

19 A. YES.

20 Q. AND DID I TELL YOU ANYTHING OTHER THAN TO TELL
21 THE TRUTH WHEN YOU MET WITH ME?

22 A. YES, MA'AM.

23 Q. WHAT DID I TELL YOU?

24 A. I MEANT NO.

25 Q. OKAY. I TOLD YOU TO TELL THE TRUTH.

1 TELL ME, DO YOU REMEMBER THE SUMMER BEFORE THE
2 SECOND GRADE?

3 A. YES.

4 Q. AND WHO WAS YOUR TEACHER IN THE SECOND GRADE?

5 A. MS. HAWK.

6 Q. OKAY. THE SUMMER BEFORE THE SECOND GRADE, WAS
7 THAT THE SUMMER OF 2003, DO YOU THINK?

8 A. YEAH.

9 Q. TELL ME WHO YOU WERE LIVING WITH BACK BEFORE THE
10 SECOND GRADE.

11 A. MY MOM, MY DAD, MY SISTER, AND MY BROTHER.

12 Q. OKAY. AND SOMETIME DURING THAT TIME FRAME DID
13 YOUR DADDY GO AWAY FOR A LITTLE WHILE?

14 A. YES, MA'AM.

15 Q. OKAY. SO YOU JUST HAD YOUR MOMMA AND YOUR
16 BROTHERS AND SISTERS LIVING THERE THEN FOR A LITTLE
17 WHILE, TOO?

18 A. YES.

19 Q. WAS YOUR MOMMA WORKING BACK THEN?

20 A. YES.

21 Q. DID SHE SOMETIMES WORK AT NIGHT OR DID SHE WORK
22 DURING THE DAY?

23 A. SHE -- SOMETIMES SHE WORKED AT, YEAH, DURING THE
24 NIGHT.

25 Q. TELL ME, YOUR MOMMA'S MOMMA, WHAT DO YOU CALL

1 HER?

2 A. MAMA.

3 Q. MAMA, OKAY. WHAT'S MAMA'S NAME?

4 A. SARAH.

5 Q. SARAH. OKAY. DID YOU SPEND SOME TIME WITH HER
6 THAT SUMMER?

7 A. YES, MA'AM.

8 Q. AND WHO ELSE LIVED IN THE HOUSE WITH MAMA THAT
9 SUMMER?

10 A. CLARENCE.

11 Q. WHAT WAS CLARENCE'S LAST NAME?

12 A. I DON'T KNOW.

13 Q. OKAY. DO YOU SEE CLARENCE IN COURT TODAY?

14 A. HUH-UH.

15 Q. YOU DON'T SEE HIM?

16 A. HUH-UH.

17 Q. DO YOU RECOGNIZE THE PERSON SITTING OVER THERE AT
18 THE DEFENSE TABLE?

19 A. YES, MA'AM.

20 Q. WHAT DO YOU CALL HIM?

21 A. CLARENCE.

22 Q. OKAY. SO DO YOU SEE THE PERSON THAT IS MARRIED
23 TO YOUR MAMA IN COURT TODAY, IS HE SITTING AT THE
24 DEFENSE TABLE?

25 A. UH-HUH.

1 Q. OKAY. AND IS HE THE MAN IN THE GREEN SHIRT?

2 A. (NODDED HEAD.)

3 Q. OKAY. WHAT SORT OF STUFF WOULD YOU DO WHEN YOU
4 STAYED AT MAMA'S AND CLARENCE'S THAT SUMMER?

5 A. ME AND MY SISTER, WE WOULD GO OUTSIDE TO OUR
6 COUSINS' HOUSE AND PLAY IN THE YARD OR WATCH MOVIES AT
7 NIGHT.

8 Q. OKAY. SO YOU GOT TO STAY UP LATE BECAUSE IT WAS
9 THE SUMMERTIME?

10 A. YES.

11 Q. AND WHO ELSE STAYED WITH YOU THAT -- WAS IT YOU
12 AND YOUR SISTER THAT STAYED WITH THEM?

13 A. YES.

14 Q. OKAY. AND WERE THERE TIMES -- WAS MAMA WORKING
15 DURING THAT TIME?

16 A. YEAH.

17 Q. AND WERE THERE TIMES WHEN SHE WAS GONE?

18 A. YES, MA'AM.

19 Q. AND WHO WOULD TAKE CARE OF YOU WHILE SHE WAS
20 GONE?

21 A. CLARENCE, BUT SHE WOULD WORK AT NIGHT.

22 Q. OKAY. SO SHE WORKED AT NIGHT AND CLARENCE TOOK
23 CARE OF YOU AT NIGHT; IS THAT RIGHT?

24 A. (NODDED HEAD.)

25 Q. OKAY. SO WERE THERE TIMES THAT YOU WERE ALONE

Minor

-- DIRECT BY MS. SIMMONS

8:

1 WITH CLARENCE?

2 A. YES.

3 Q. TELL ME WHAT HAPPENED THAT SUMMER WITH CLARENCE.

4 A. ONE NIGHT I GOT SCARED 'CAUSE I WAS WATCHING A
5 SCARY MOVIE WITH MY LITTLE SISTER. WELL, SHE WENT TO
6 SLEEP IN THE MIDDLE OF IT, AND IT WAS ABOUT DEAD PEOPLE,
7 AND I WAS SCREAMING, AND SO THEY CAME IN THERE AND MY
8 GRANDMA SAID WHY WAS I SCREAMING.

9 MR. BYRHOLDT: OBJECT, YOUR HONOR, TO WHAT
10 THE GRANDMOTHER SAID.

11 THE WITNESS: AND SHE SAID ---

12 THE COURT: JUST A MOMENT, PLEASE.

13 DO NOT TELL WHAT SOMEBODY ELSE SAID. YOU
14 CAN TELL WHAT YOU DID AFTER THEY SAID SOMETHING, ALL
15 RIGHT?

16 THE WITNESS: UH-HUH.

17 THE COURT: OKAY. RESTATE YOUR QUESTION,
18 MS. SIMMONS.

19 MS. SIMMONS: ALL RIGHT.

20 BY MS. SIMMONS:

21 Q. OKAY. YOU CAN'T TELL ME WHAT GRANDMA SAID, OKAY?

22 A. OKAY.

23 Q. OKAY. SO TELL ME ABOUT -- YOU WERE WATCHING A
24 SCARY MOVIE?

25 A. THEY CAME IN TO THERE AND THEN SHE WENT BACK IN

1 HER ROOM BECAUSE SHE HAD TO GO TO WORK AND SHE GOT READY
2 FOR WORK, AND ME AND CLARENCE STAYED IN THE LIVING ROOM
3 BECAUSE I WAS SCARED. AND I LAID IN A PALLET DOWN ON
4 THE FLOOR AND I TURNED ON THE T.V. AND I WANTED TO WATCH
5 A MOVIE, SO I WATCHED A MOVIE AND HE GOT DOWN THERE WITH
6 ME.

7 Q. WHAT HAPPENED WHEN HE GOT DOWN THERE WITH YOU?

8 A. HE PUT HIS PRIVATE PART IN MY MOUTH.

9 Q. AND WHEN YOU SAY "PRIVATE PART," WHAT ARE YOU
10 TALKING ABOUT?

11 A. THE LINE BETWEEN HIS LEGS.

12 Q. OKAY. YOU SAID HE PUT HIS PRIVATE PART IN YOUR
13 MOUTH?

14 A. YES.

15 Q. CAN YOU REMEMBER ANYTHING SPECIFIC ABOUT THAT,
16 HOW IT SMELLED OR TASTED OR ANYTHING?

17 A. IT SMELLED FUNNY.

18 Q. FUNNY IN WHAT SORT OF WAY?

19 A. LIKE IN A WEIRD WAY.

20 Q. DID ANYTHING COME OUT OF HIS PRIVATE WHEN THAT
21 HAPPENED?

22 A. NO.

23 Q. OKAY. DID HE EVER TOUCH YOUR PRIVATES IN ANY
24 WAY?

25 A. YES.

1 Q. AND HOW DID THAT HAPPEN?

2 A. ONE NIGHT WHEN I WAS SCARED AND I GOT IN THEIR
3 BED 'CAUSE I WAS SCARED, AND MAMA, GRANDMA, SHE WENT TO
4 WORK, AND I TURNED ON THE T.V. AT THE BOTTOM OF THEIR
5 BED AND I STARTED WATCHING T.V., AND THEN I CLIMBED UP
6 AT THE FRONT OF THE BED AND THEN I WENT TO SLEEP 'CAUSE
7 I WAS SLEEPY.

8 AND WHEN I WOKE UP, 'CAUSE I WOKE UP IN THE
9 MIDDLE OF THE NIGHT BECAUSE I FELT SOMETHING, AND HE WAS
10 DOWN THERE, HE HAD HIS MOUTH ON MY PRIVATES.

11 Q. WHEN YOU SAY YOUR PRIVATES, IS THAT YOUR PRIVATE
12 PART BETWEEN YOUR LEGS, TOO?

13 A. YES.

14 Q. AND WHEN YOU WERE IN THE BED LIKE YOU WERE
15 SAYING, DID HE EVER PUT HIS PRIVATES IN YOUR MOUTH
16 THERE?

17 A. YES.

18 Q. OKAY. WAS THAT THAT SAME DAY OR A DIFFERENT DAY?

19 A. IT WAS THE SAME DAY BECAUSE WHEN I WAS GOING DOWN
20 TO WATCH T.V., I STOPPED BECAUSE -- I STOPPED, AND THEN
21 I WENT BACK DOWN, BUT WHEN I STOPPED, HE PUT HIS PRIVATE
22 PART IN MY MOUTH.

23 Q. DO YOU REMEMBER ANYTHING ABOUT THE SPECIFICS OF
24 THAT, WHEN THAT HAPPENED THAT TIME?

25 A. NO.

1 Q. DID ANYTHING COME OUT OF HIS PRIVATE PART THEN?

2 A. NO.

3 Q. OKAY. HOW MANY TIMES DO YOU THINK THAT HE
4 TOUCHED YOUR PRIVATES -- HOW MANY TIMES DID HE TOUCH
5 YOUR PRIVATES THAT SUMMER THAT YOU CAN REMEMBER? OR CAN
6 YOU GIVE ME A NUMBER?

7 A. A LOT.

8 Q. OKAY. AND HOW MANY TIMES DID HE PUT HIS MOUTH ON
9 YOUR PRIVATES THAT SUMMER?

10 A. ONE TIME.

11 Q. OKAY. DID HE EVER TOUCH YOUR PRIVATES WITH HIS
12 HAND OR DID HE PUT HIS HANDS ON YOUR PRIVATES?

13 A. YES.

14 Q. AND DID HE EVER RUB HIS PRIVATES AGAINST ANY PART
15 OF YOUR BODY?

16 A. YES.

17 Q. AND HOW DID THAT HAPPEN?

18 A. I CAN'T REMEMBER, BUT I DO REMEMBER THAT I KEPT
19 ON GETTING SCARED FROM WATCHING SCARY MOVIES AND GETTING
20 IN THEIR BED.

21 Q. AND DID HE EVER RUB YOUR CHEST OR YOUR BEHIND OR
22 ANYTHING LIKE THAT?

23 A. NO.

24 Q. DID HE EVER PUT ANYTHING INSIDE YOUR PRIVATES?

25 A. NO.

Minor

-- DIRECT BY MS. SIMMONS

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1 Q. ANY OF THE TIMES THAT HE TOUCHED YOU IN THESE
2 WAYS OR HE PUT HIS PRIVATE IN YOUR MOUTH, DID IT HURT?

3 A. NO.

4 Q. WHY DID YOU NOT TELL ANYBODY THIS WAS HAPPENING
5 AT FIRST?

6 A. BECAUSE I WAS AFRAID MY GRANDMA, SHE WOULD BE MAD
7 AT ME.

8 Q. AND WHO DID YOU FINALLY TELL?

9 A. MY MOM.

10 Q. AND ALL THESE THINGS THAT YOU TOLD ME THAT
11 HAPPENED, DID THEY HAPPEN AT GRANDMA'S HOUSE ---

12 A. YES.

13 Q. --- OR GRANDMA AND CLARENCE'S HOUSE?

14 A. YES.

15 Q. AND WHERE WAS THAT, PLEASE?

16 A. IN SENECA, ON , THE TRAILER.

17 Q. SO YOU TOLD YOUR MOM?

18 A. (NODDED HEAD.)

19 Q. DO YOU REMEMBER WHEN YOU TOLD YOUR MOM? WAS IT
20 AFTER YOU WENT BACK TO SCHOOL OR BEFORE?

21 A. IT WAS WHEN SHE CAME TO PICK ME UP, CAME TO PICK
22 US UP FROM THEIR HOUSE ON SUNDAY.

23 Q. AND YOU TOLD HER THEN?

24 A. NO. I -- YEAH, I TOLD HER. BUT I TOLD HER
25 MONDAY. SHE WAS GETTING SUSPICIOUS SUNDAY, BUT I TOLD

1 HER MONDAY.

2 Q. OKAY. SO YOU WERE TRYING TO TELL HER FOR A
3 COUPLE DAYS?

4 A. UH-HUH.

5 Q. OKAY. AND DID YOUR MOMMA TAKE YOU TO SEE THE
6 POLICEMAN?

7 A. YES.

8 Q. AND WHO DID YOU TALK TO AT THE POLICE DEPARTMENT?

9 A. I TALKED TO MR. HAWK.

10 Q. OKAY. AND DID YOU KNOW HIM ALREADY?

11 A. NO.

12 Q. YOU MET HIS WIFE LATER?

13 A. YES.

14 Q. OKAY. WAS SHE YOUR TEACHER IN SECOND GRADE?

15 A. YES.

16 Q. OKAY. DID YOU TELL HIM WHAT YOU TOLD US HERE
17 TODAY, THE BEST THAT YOU REMEMBER IT?

18 A. UH-HUH.

19 Q. DID SERGEANT HAWK SEND YOU TO THE DOCTOR?

20 A. YES.

21 Q. OKAY. AND WHAT DOCTOR DID YOU GO TO, DO YOU
22 REMEMBER?

23 A. NO.

24 Q. WAS IT A MAN OR A WOMAN?

25 A. IT WAS A MAN.

1 Q. OKAY. AND DID YOU -- DID THE DOCTOR CONDUCT AN
2 EXAM ON YOU?

3 A. YES.

4 Q. AND DID THE DOCTOR TALK TO YOU ABOUT WHAT YOU
5 TOLD ME JUST NOW?

6 A. YES.

7 Q. DO YOU REMEMBER WHEN YOU WERE TALKING TO THE
8 DOCTOR, AND I THINK YOU WROTE SOME THINGS DOWN FOR HIM,
9 DID YOU EVER SAY THAT "HE PUT HIS PRIVATE IN MY BUTT,"
10 DO YOU REMEMBER SPECIFICALLY SAYING THAT?

11 A. YEAH, BUT ---

12 Q. TELL ME WHAT YOU MEANT BY THAT.

13 A. I DIDN'T MEAN LIKE IN IT, I JUST MEANT ON IT.

14 Q. SO RUBBING VERSUS -- LIKE ON VERSUS IN; IS THAT
15 RIGHT?

16 A. YES.

17 Q. OKAY. AND ALL OF THESE THINGS THAT YOU TOLD ME
18 THAT WERE HAPPENING IN THE SUMMER OF TWO-THOUSAND- --
19 THE SUMMER BEFORE THE SECOND GRADE; IS THAT RIGHT?

20 A. YES, AND A LITTLE INTO THE FALL.

21 Q. OKAY. AND YOU WERE HOW OLD THEN?

22 A. SEVEN.

23 MS. SIMMONS: BEG THE COURT'S INDULGENCE FOR
24 ONE MOMENT.

25 (THERE WAS A PAUSE IN THE PROCEEDINGS.)

1 MS. SIMMONS: I HAVE NO FURTHER QUESTIONS AT
2 THIS TIME.

3 THE COURT: MR. BYRHOLDT?

4 MR. BYRHOLDT: MAY IT PLEASE THE COURT.

5 CROSS-EXAMINATION BY MR. BYRHOLDT:

6 Q. Minor WHEN YOU SAY THESE THINGS HAPPENED,
7 WERE YOU --- WHO ALL WAS IN THE BED?

8 A. JUST ME AND HIM, BUT ONE NIGHT MY GRANDMA WAS IN
9 THERE.

10 Q. YOU ARE SAYING IT HAPPENED WHEN YOUR GRANDMOTHER
11 WAS IN BED, TOO?

12 A. YEAH.

13 Q. DID YOU REACH OVER AND WAKE HER UP?

14 A. NO.

15 Q. HOW CLOSE WAS YOUR GRANDMOTHER TO YOU?

16 A. UM, SHE WAS ---

17 Q. WAS SHE NEXT TO YOU? I'M SORRY.

18 A. YEAH, SHE WAS NEXT TO US.

19 Q. YOU ARE TELLING US TODAY THAT GRANDMA WAS THERE
20 WHEN THIS WAS GOING ON AND YOU DIDN'T SAY, "GRANDMA,
21 HELP ME"?

22 A. NO.

23 Q. "GRANDMA, WAKE UP"?

24 A. NO.

25 Q. WAS YOUR BROTHER AND SISTER EVER IN BED WITH

1 YOU ---

2 A. NO.

3 Q. --- WHEN YOU WERE WATCHING MOVIES?

4 A. NO.

5 Q. AND YOU TOLD THE POLICE OFFICER THAT "CLARENCE
6 PUT HIS PRIVATE IN MY BUTT." ISN'T THAT WHAT YOU WROTE
7 DOWN?

8 A. YES, SIR.

9 Q. NOW YOU'RE CHANGING THAT?

10 A. YEAH. I WAS CONFUSED.

11 Q. WELL, DID YOU GET CONFUSED AFTER THE POLICE
12 TALKED TO YOU?

13 A. YES.

14 Q. DID THE POLICE OFFICERS AND THE PEOPLE THAT
15 TALKED TO YOU KIND OF TELL YOU WHAT TO SAY?

16 A. NO.

17 Q. THEY DIDN'T?

18 A. NO.

19 Q. WELL, HOW DID THEY GET YOU CONFUSED?

20 A. WELL, I DON'T REMEMBER, BUT I DO REMEMBER THAT I
21 WAS CONFUSED WHEN I WAS WRITING IT ON A PIECE OF PAPER.

22 Q. DID THEY ASK YOU TO MAKE SURE YOU HAD IT DOWN
23 RIGHT?

24 A. NO.

25 Q. THEY DIDN'T TELL YOU THAT?

1 A. NO.

2 Q. AND YOU TOLD YOUR MOTHER WHEN?

3 A. IT WAS MONDAY AT SCHOOL.

4 Q. AFTER SCHOOL STARTED?

5 A. YES, SIR.

6 Q. WERE YOU LIVING WITH YOUR GRANDMOTHER AT THAT
7 TIME OR WERE YOU JUST VISITING?

8 A. I WAS VISITING.

9 Q. WHERE WERE YOU LIVING THEN?

10 A. I WAS LIVING UP THE ROAD IN SENECA ON
11 (PHONETIC) AVENUE.

12 Q. AND I THINK WHEN MS. SIMMONS ASKED YOU, YOU TOLD
13 MOSTLY EVERYTHING THAT HAPPENED?

14 A. YES.

15 Q. AND YOU HAVEN'T CHANGED ANYTHING?

16 A. NO, SIR.

17 Q. HOW MANY TIMES DID YOU TALK WITH MS. SIMMONS
18 ABOUT WHAT YOU WERE GONNA SAY HERE TODAY?

19 A. TWO.

20 Q. AND DID SHE ASK YOU THE QUESTIONS BEFORE THAT SHE
21 ASKED YOU TODAY?

22 A. YES, SIR.

23 Q. GO OVER WHAT YOU WERE GONNA SAY?

24 A. YES, SIR.

25 Q. WERE YOU EVER IN A PLAY AT SCHOOL, HAVE YOU EVER

1 BEEN IN A PLAY OR ANYTHING LIKE THAT, OR PROGRAM AT
2 SCHOOL OR CHURCH?

3 A. YES, SIR.

4 Q. WHERE THEY KIND OF REHEARSE THINGS, MAKE SURE YOU
5 GET YOUR SONG RIGHT OR SOMETHING LIKE THAT?

6 A. YES, SIR.

7 Q. IS THAT WHAT YOU DID HERE TODAY, REHEARSE THINGS
8 WITH MS. SIMMONS, KIND OF GO OVER YOUR...

9 A. YEAH.

10 MR. BYRHOLDT: BEG THE COURT'S INDULGENCE.

11 (THERE WAS A PAUSE IN THE PROCEEDINGS.)

12 MR. BYRHOLDT: THAT'S ALL THE QUESTIONS I
13 HAVE.

14 THE COURT: RE-EXAM?

15 REDIRECT EXAMINATION BY MS. SIMMONS:

16 Q. Minor WHEN YOU SAY YOUR GRANDMA WAS IN THE
17 BED ONE TIME, WAS THAT ONE TIME OR EVERY TIME THIS
18 HAPPENED?

19 A. ONE TIME.

20 Q. AND THE REST OF THE TIMES SHE WAS NOT THERE?

21 A. RIGHT.

22 Q. AND YOU DID MEET WITH ME A COUPLE TIMES BEFORE
23 YOU CAME TO COURT, RIGHT?

24 A. YES, MA'AM.

25 Q. AND DID I TELL YOU THAT YOUR JOB TODAY WAS TO

1 TELL THE TRUTH?

2 A. YES, MA'AM.

3 Q. AND DID I EVER TELL YOU HOW TO ANSWER THE
4 QUESTIONS?

5 A. YES.

6 Q. WHAT DO YOU MEAN BY THAT?

7 A. LIKE YOU TOLD ME TO, WHENEVER THEY ASKED ME A
8 QUESTION, I WASN'T TO SAY, LIKE, OTHER PEOPLE'S NAMES OR
9 STUFF LIKE THAT.

10 Q. I TOLD YOU NOT TO TALK ABOUT ANY OTHER PEOPLE; IS
11 THAT RIGHT?

12 A. RIGHT.

13 Q. OKAY. AND ONLY THINGS THAT HAPPENED TO YOU AND
14 THINGS THAT -- NOT WHAT OTHER PEOPLE SAID; IS THAT
15 RIGHT?

16 A. RIGHT.

17 MR. BYRHOLDT: OBJECT, YOUR HONOR; LEADING,
18 OR TESTIFYING.

19 MS. SIMMONS: I'M TRYING TO CLARIFY. SORRY,
20 YOUR HONOR.

21 BY MS. SIMMONS:

22 Q. BUT I NEVER TOLD YOU HOW TO ANSWER THE QUESTIONS
23 ABOUT WHAT HAPPENED?

24 A. NO.

25 MS. SIMMONS: THANK YOU, Minor

1 MR. BYRHOLDT: NOTHING FURTHER, SIR.

2 THE COURT: ALL RIGHT. YOU MAY STEP DOWN.

3 THANK YOU, MA'AM.

4 (WITNESS LEAVES STAND.)

5 THE COURT: YOU MAY CALL YOUR NEXT WITNESS.

6 MS. SIMMONS: THANK YOU, YOUR HONOR. THE
7 STATE CALLS LIEUTENANT GREG REED.

8 (WHEREUPON, THE WITNESS WAS SWORN BY THE
9 CLERK.)

10 THE COURT: ALL RIGHT. YOU MAY PROCEED.

11 MS. SIMMONS: THANK YOU, YOUR HONOR.

12 THE COURT: JUST A MINUTE, I'M SORRY.

13 LIEUTENANT, IF YOU WOULD, PLEASE, GIVE US
14 YOUR FULL NAME FOR THE RECORD, SPELLING YOUR LAST NAME.

15 THE WITNESS: GREG REED, R-E-E-D.

16 THE COURT: THANK YOU, SIR.

17 WHEREUPON,

18 GREG REED,

19 AFTER FIRST HAVING BEEN DULY SWORN, TESTIFIED AS
20 FOLLOWS:

21 DIRECT EXAMINATION BY MS. SIMMONS:

22 Q. GOOD MORNING, LIEUTENANT REED.

23 A. GOOD MORNING.

24 Q. WHERE ARE YOU EMPLOYED?

25 A. OCONEE COUNTY SHERIFF'S OFFICE.

1 Q. HOW LONG HAVE YOU BEEN AT THE OCONEE COUNTY
2 SHERIFF'S OFFICE?

3 A. A LITTLE OVER 21 YEARS.

4 Q. WHAT'S YOUR BACKGROUND AND TRAINING AND WHAT DO
5 YOU DO AT THE SHERIFF'S OFFICE?

6 A. WELL, I'M LIEUTENANT, SUPERVISING LIEUTENANT IN
7 CHARGE OF CRIMINAL INVESTIGATIONS. I STARTED WITH THE
8 DEPARTMENT IN '85, GRADUATED FROM THE CRIMINAL JUSTICE
9 ACADEMY IN '86. SINCE THAT TIME I HAVE HAD SPECIALIZED
10 TRAINING IN EVERYTHING FROM FINGERPRINTING TO BLOOD
11 SPATTER TO S.W.A.T. ENTRIES, ADVANCED HOMICIDE, CHILD
12 ABUSE, RAPE; INTERVIEWING AT SCHOOLS, SUCH AS THE
13 NATIONAL COLLEGE OF DISTRICT ATTORNEYS, THE DELAWARE
14 STATE POLICE, THE PROSECUTORS RESEARCH INSTITUTE,
15 AMERICAN INSTITUTE OF POLICE SCIENCE, THE SOUTHERN
16 POLICE INSTITUTE, AND THE METROPOLITAN POLICE INSTITUTE
17 TO NAME A FEW.

18 I'M ALSO A MEMBER OF THE SHERIFF'S DEPARTMENT AND
19 LEADER ON THE S.W.A.T. ENTRY TEAM AND A MEMBER OF THE
20 UNDERWATER RECOVERY DIVE TEAM FOR EVIDENCE.

21 Q. AND DURING THE COURSE OF THESE 20-SOMETHING
22 YEARS, HAVE YOU HAD TRAINING RELATED TO SEXUAL ASSAULT
23 CASES?

24 A. YES, I HAVE.

25 Q. AND HOW MUCH TRAINING IN THAT AREA?

1 A. I DON'T KNOW. I RECEIVED TRAINING FROM JUST
2 ABOUT ANYTHING TO DO WITH VIOLENT CRIMES. I'VE BEEN TO
3 NUMEROUS SCHOOLS, AGAIN, WHETHER IT BE MURDER, RAPE,
4 FORENSIC EVIDENCE COLLECTION, BLOOD SPATTER, LATENT
5 FINGERPRINTS, THINGS OF THAT NATURE, AS WELL AS
6 INTERVIEWING CLASS.

7 Q. HOW DID YOU BECOME INVOLVED IN THIS CASE WE'RE
8 INVOLVED IN TODAY?

9 A. SERGEANT KIRK, WHO IS WITH THE ROAD PATROL,
10 INITIALLY TOOK AN INCIDENT REPORT FROM THE COMPLAINANT
11 WHICH WAS TURNED IN TO OUR DIVISION. I ASSIGNED
12 SERGEANT GENTRY HAWK TO CONDUCT A FORENSIC INTERVIEW
13 WITH THE VICTIM, Minor AND WHICH HE DID, AND BASED
14 ON HIS INTERVIEW AND THE INFORMATION THAT HE RECEIVED
15 FROM THAT INTERVIEW, I SIGNED WARRANTS ON THE DEFENDANT,
16 CLARENCE CRITTENDON.

17 Q. WHEN YOU SENT HER FOR THE INTERVIEW WITH SERGEANT
18 HAWK, DID YOU FIND THE LOCATION OF THE EVENTS THAT SHE
19 DESCRIBED WAS IN OCONEE COUNTY?

20 A. YES, I DID, IT WAS IN OCONEE COUNTY, THE SENECA
21 AREA, LOCATED WITHIN THE BOUNDARIES OF OCONEE COUNTY.

22 Q. DID YOU FURTHER ORDER A PHYSICAL EXAMINATION OF
23 THE VICTIM IN THE CASE?

24 A. YES, I DID.

25 Q. AND WHO TAKES CARE OF THOSE PHYSICAL

1 EXAMINATIONS?

2 A. FOOTHILLS CHILD ADVOCACY CENTER AND A DR. GEER,
3 WHO WORKS FOR THEM, DONE THE EXAMINATION.

4 Q. AND DID YOU RECEIVE A REPORT BACK FROM DR. GEER
5 AFTER HE CONDUCTED THAT MEDICAL EXAMINATION?

6 A. YES, I DID.

7 Q. AND WHAT DID HIS REPORT OFFER YOU?

8 MR. BYRHOLDT: I OBJECT, YOUR HONOR; THAT
9 WOULD BE HEARSAY.

10 MS. SIMMONS: YOUR HONOR?

11 THE COURT: YES, MA'AM.

12 MS. SIMMONS: HE RECEIVED A REPORT AND I'M
13 SIMPLY ASKING IF THERE WAS ANY MEDICAL EVIDENCE IN THE
14 CASE.

15 THE COURT: WELL, IF YOU ASK HIM A QUESTION
16 THAT -- WELL, I DON'T KNOW. YOU ARE ASKING IF THE
17 REPORT REFLECTED ANY MEDICAL EVIDENCE, IS THAT IT?

18 MS. SIMMONS: I THINK I CAN REPHRASE, YOUR
19 HONOR.

20 THE COURT: LET'S DO THAT. WE DON'T WANT
21 OPINIONS OR THINGS OF THAT NATURE.

22 BY MS. SIMMONS:

23 Q. BASED UPON YOUR INVESTIGATION, DID YOU FIND ANY
24 MEDICAL EVIDENCE?

25 A. NO.

1 MR. BYRHOLDT: OBJECTION, YOUR HONOR, UNLESS
2 SHE CAN LAY A FOUNDATION FOR THIS GENTLEMAN TO TESTIFY
3 ABOUT MEDICAL EVIDENCE.

4 THE COURT: I UNDERSTAND THAT HE'S AN
5 INVESTIGATING OFFICER AND I DON'T KNOW ABOUT ANY OTHER
6 BACKGROUND HE MIGHT HAVE.

7 BY MS. SIMMONS:

8 Q. SERGEANT REED, HOW MANY TIMES DURING THE COURSE
9 OF YOUR EMPLOYMENT HAVE YOU SENT FOLKS FOR MEDICAL
10 EXAMINATIONS?

11 A. HUNDREDS.

12 Q. OKAY. AND DO YOU COMMONLY RECEIVE REPORTS BACK
13 FROM MEDICAL EXAMINATIONS?

14 A. YES, MA'AM.

15 Q. AND DO YOU COMMONLY WORK WITH THE ADVOCACY
16 CENTER?

17 A. YES, MA'AM.

18 THE COURT: APPROACH, PLEASE.

19 (WHEREUPON, COUNSEL APPROACHED THE BENCH AND
20 CONFERRED WITH THE COURT OUT OF THE PRESENCE
21 OF THE COURT REPORTER AND THE JURY.)

22 BY MS. SIMMONS:

23 Q. SERGEANT REED, LET ME REPHRASE THAT. YOU SENT
24 HER FOR AN EXAM AT FOOTHILLS ALLIANCE?

25 A. THAT IS CORRECT.

1 Q. AND DID THAT PHYSICAL EXAM PRODUCE ANY PHYSICAL
2 MEDICAL EVIDENCE IN THIS CASE?

3 A. NO, IT DID NOT.

4 Q. WAS THAT SURPRISING TO YOU BASED ON THE
5 ALLEGATIONS?

6 MR. BYRHOLDT: I ---

7 THE WITNESS: NO, IT WAS NOT.

8 BY MS. SIMMONS:

9 Q. DID YOU HAVE OCCASION TO -- AFTER THIS, DID YOU
10 INTERVIEW THE DEFENDANT?

11 A. YES, I DID.

12 Q. OKAY. AND WHEN WAS THAT?

13 A. I THINK IT WAS ON JANUARY THE 21ST OF 2004.

14 Q. AND ARE YOU FAMILIAR WITH THE DEFENDANT'S
15 CONSTITUTIONAL RIGHTS?

16 A. YES, I AM.

17 Q. AND DID YOU ADVISE HIM OF HIS CONSTITUTIONAL
18 RIGHTS?

19 A. YES, I DID.

20 MS. SIMMONS: YOUR HONOR, MAY I APPROACH THE
21 WITNESS?

22 THE COURT: CERTAINLY.

23 BY MS. SIMMONS:

24 Q. SERGEANT REED, I'M GOING TO SHOW WHAT'S BEEN
25 PREADMITTED AS STATE'S EXHIBIT ONE. WHAT IS THIS?

1 A. THIS IS A RIGHTS FORM WITH YOUR MIRANDA WARNING.

2 Q. AND DID YOU READ THOSE RIGHTS TO THE VICTIM
3 THERE?

4 A. YES, I DID.

5 Q. AND COULD YOU READ THEM TO ME EXACTLY AS YOU READ
6 THEM, GO OVER WITH ME EXACTLY AS YOU WENT OVER THEM WITH
7 HIM?

8 A. OKAY. THIS IS A RIGHTS FORM THAT'S COMMONLY USED
9 IN LAW ENFORCEMENT. AT THE TOP YOU HAVE PLACE, DATE,
10 AND TIME. THE PLACE WAS THE OCONEE COUNTY LAW
11 ENFORCEMENT CENTER, THE DATE WAS 1-21 OF '04, THE TIME
12 WAS 3:11 P.M.

13 I ALSO ASKED MR. CRITTENDON WHAT GRADE HE WENT
14 THROUGH IN SCHOOL. HE ADVISED US 12TH GRADE. I ASKED
15 IF HE COULD READ AND WRITE AND UNDERSTAND THE ENGLISH
16 LANGUAGE AND HE SAID YES.

17 THEN I READ THE STATEMENT, AND THE STATEMENT
18 SAYS: BEFORE I ASK YOU ANY QUESTIONS, YOU MUST
19 UNDERSTAND YOUR RIGHTS.

20 YOU HAVE THE RIGHT TO REMAIN SILENT.

21 ANYTHING YOU SAY CAN BE USED AGAINST YOU IN
22 COURT.

23 YOU HAVE THE RIGHT TO TALK TO A LAWYER FOR ADVICE
24 BEFORE I ASK YOU ANY QUESTIONS AND TO HAVE HIM WITH YOU
25 DURING QUESTIONING.

1 IF YOU CANNOT AFFORD A LAWYER, ONE WILL BE
2 APPOINTED FOR YOU BEFORE ANY QUESTIONS IF YOU WISH.

3 IF YOU DECIDE TO ANSWER QUESTIONS NOW, WITHOUT A
4 LAWYER PRESENT, YOU WILL STILL HAVE THE RIGHT TO STOP
5 ANSWERING AT ANY TIME. YOU ALSO HAVE THE RIGHT TO STOP
6 ANSWERING AT ANY TIME UNTIL YOU TALK TO A LAWYER.

7 THEN AT THE BOTTOM THERE'S A PLACE CALLED WAIVER
8 OF YOUR RIGHTS. THAT STATEMENT SAYS: I HAVE READ THIS
9 STATEMENT OF MY RIGHTS AND I UNDERSTAND WHAT MY RIGHTS
10 ARE. I AM WILLING TO MAKE A STATEMENT AND ANSWER
11 QUESTIONS. I DO NOT WANT A LAWYER AT THIS TIME. I
12 UNDERSTAND AND KNOW WHAT I AM DOING. NO PROMISES OR
13 THREATS HAVE BEEN MADE TO ME AND NO PRESSURE OR COERCION
14 OF ANY KIND HAS BEEN USED AGAINST ME.

15 AT THAT TIME I ASKED HIM IF HE UNDERSTANDS HIS
16 RIGHTS AND HE ACKNOWLEDGED YES. I HAD HIM TO INITIAL
17 EACH LINE OF THIS FORM AND THEN SIGN IT AT THE BOTTOM
18 WHERE HE PUT HIS SIGNATURE, AND I WITNESSED IT AT 3:13
19 P.M.

20 Q. AND DID THE DEFENDANT APPEAR TO BE UNDER THE
21 INFLUENCE OF ALCOHOL OR DRUGS AT THIS POINT IN TIME?

22 A. NO, HE DID NOT.

23 Q. DID HE APPEAR TO BE COHERENT AND KNOW WHAT WAS
24 GOING ON?

25 A. YES, HE DID.

1 Q. AND THEN WHAT DID YOU DO AFTER YOU ADVISED HIM OF
2 HIS RIGHTS?

3 A. AFTER I ADVISED HIM OF HIS RIGHTS, I INTRODUCED
4 HIM TO MICHAEL LARK, OF LARK & ASSOCIATES, SOMEONE THAT
5 WE CONTRACT WITH PERIODICALLY TO ASSIST IN INTERVIEWS,
6 AND MR. LARK INTERVIEWED HIM FOR A PERIOD OF TIME.

7 Q. AND AFTER THAT INTERVIEW, DID HE RETURN TO YOU?

8 A. YES, HE DID. AFTER THE INTERVIEW MR. LARK
9 REPORTED TO ME, AND THEN I WENT IN AGAIN TO GET
10 MR. CRITTENDON, TO TALK WITH HIM. HE ADVISED ME THAT HE
11 WOULD WRITE A STATEMENT FOR ME, AT WHICH TIME I FILLED
12 OUT THE TOP OF THE STATEMENT, LEFT THE STATEMENT WITH
13 HIM, AND CHECKED ON HIM PERIODICALLY.

14 Q. SERGEANT REED, I'M GONNA PASS UP WHAT HAS BEEN
15 PREMARKED AS STATE'S EXHIBIT TWO --

16 MS. SIMMONS: AND WE WOULD OFFER IT INTO
17 EVIDENCE.

18 MR. BYRHOLDT: NO OBJECTION, YOUR HONOR.

19 THE COURT: WITHOUT OBJECTION, STATE'S
20 EXHIBIT NUMBER TWO IS ADMITTED.

21 (STATE'S EX. # 2, VOLUNTARY STATEMENT, WAS
22 RECEIVED IN EVIDENCE.)

23 BY MS. SIMMONS:

24 Q. SERGEANT REED, WHAT IS THAT DOCUMENT?

25 A. AT THE TOP IS LISTED VOLUNTARY STATEMENT, WHICH

1 IS A VOLUNTARY STATEMENT FORM WE USE AT THE SHERIFF'S
2 OFFICE.

3 Q. AND THIS WAS UNDERTAKEN AFTER HE MET WITH
4 MR. LARK?

5 A. THAT IS TRUE.

6 Q. AND TELL ME ABOUT THE STATEMENT WRITING PROCESS.

7 A. OKAY. WHAT I DO IS FILL OUT THE TOP OF THE
8 STATEMENT. IT'S GOT I, THE UNDERSIGNED, WHICH IS
9 CLARENCE CRITTENDON; IT'S GOT HIS DATE OF BIRTH, HIS
10 ADDRESS, THINGS OF THAT NATURE, AS WELL AS MY NAME AND
11 MY POSITION THERE AT THE SHERIFF'S OFFICE.

12 I LEFT HIM IN THE ROOM TO WRITE ME A STATEMENT,
13 WHICH HE AGREED TO DO. AND I PERIODICALLY WOULD GO
14 BACK, VIEW HIM THROUGH A WINDOW. EVERY TIME I WOULD
15 VIEW HIM, IT WAS LIKE HE HAD WROTE MAYBE A SENTENCE OR A
16 SENTENCE AND A HALF.

17 AFTER APPROXIMATELY 40, 45 MINUTES, SOMETHING OF
18 THAT NATURE, I NOTICED HE'D ONLY JUST HAD A SHORT
19 PORTION WRITTEN, SO I RE-ENTERED THE ROOM AND ASKED HIM
20 IF HE WAS HAVING PROBLEMS WRITING THE STATEMENT. HE AND
21 I HAD A BRIEF CONVERSATION, AND THEN HE WROTE THE LAST
22 LINE IN THE STATEMENT.

23 Q. AND COULD YOU READ TO ME WHAT'S ALREADY BEEN
24 ADMITTED INTO EVIDENCE AS STATE'S EXHIBIT THREE?

25 A. IN THE PAST YEAR, SINCE I'VE BEEN HOME, I'VE BEEN

1 A GRANDFATHER TO Minor BABY-SITTER,
2 BABY-SITTED WITH MY WIFE, SARAH CRITTENDON. HOMEWORK
3 CHECKER, COOK, NOT ONLY Minor BUT HER SISTER MONTEA
4 (PHONETIC) AND HER BROTHER C.J. I LOVE THEM ALL WITH
5 EVERY FIBER IN ME. I MADE A PROMISE TO THEIR MOTHER
6 THAT I WOULD PROTECT THEIR CHILDREN, OR HER CHILDREN, IF
7 NEED BE WITH MY LIFE. HAVING SAID THAT I GIVE THE
8 FOLLOWING STATEMENT.

9 FIRST I WILL STOP UNTIL I TALK WITH MY FAMILY.

10 THEN HE INITIALED IT AND HE HAS SIGNED IT AT THE
11 BOTTOM AND IT WAS WITNESSED.

12 Q. TOWARDS THE END THERE HE INDICATED THAT HE WANTED
13 TO SPEAK WITH HIS FAMILY BEFORE HE SPOKE WITH YOU
14 FURTHER?

15 A. THAT'S CORRECT.

16 Q. AND AT ANY POINT DID YOUR CONVERSATION WITH HIM
17 EVER BEGIN AGAIN?

18 A. NO, IT DID NOT.

19 MS. SIMMONS: I HAVE NO FURTHER QUESTIONS AT
20 THIS TIME.

21 MR. BYRHOLDT: MAY IT PLEASE THE COURT.

22 CROSS-EXAMINATION BY MR. BYRHOLDT:

23 Q. YOU MADE CLARENCE NO PROMISES, RIGHT?

24 A. NO, SIR.

25 Q. NO THREATS?

1 A. NO, SIR.

2 Q. AND DIDN'T YOU TELL HIM THAT IF HE TALKED TO YOU
3 AND GAVE A STATEMENT, YOU WOULD GET HIM A LOW BOND FOR
4 THESE CHARGES, AND DIDN'T HE GET A \$20,000 BOND FOR
5 FIRST DEGREE CRIMINAL SEXUAL CONDUCT?

6 A. I'M NOT SURE WHAT HIS BOND WAS.

7 Q. YOU ARE SAYING YOU HAD NO INPUT INTO THAT AT ALL?

8 A. NO, SIR.

9 Q. YOU DIDN'T TALK TO THE MAGISTRATE, NOTHING?

10 A. NO, SIR. I DIDN'T KNOW THAT HE WAS LOCKED UP FOR
11 A PERIOD OF TIME.

12 Q. HE WAS IN YOUR CUSTODY, WASN'T HE?

13 A. YES. BUT I'M NOT AWARE OF WHEN AN OFFICER SERVES
14 WARRANTS.

15 Q. IN THIS CASE YOU HAVE HOW MUCH PHYSICAL EVIDENCE?

16 A. NONE.

17 Q. ANY D.N.A., ANY SEMEN?

18 A. NO, SIR.

19 Q. ANY HAIR?

20 A. NO, SIR.

21 Q. DID YOU COLLECT CLOTHING, SHEETS, ANYTHING LIKE
22 THAT FROM THE ALLEGED INCIDENT LOCATION?

23 A. NO, SIR.

24 Q. WHY NOT?

25 A. THE ACTUAL INCIDENT REPORT CAME IN TO US ON 12-16

1 OF '03, AND THE ALLEGATIONS WAS THAT THIS HAPPENED
2 MONTHS PRIOR TO THAT. AGAIN, WE'RE TALKING ABOUT ORAL
3 SEX. EVEN IF THERE WOULD HAVE BEEN EJACULATION IN THE
4 VICTIM'S MOUTH, YOU WOULD NOT FIND ANYTHING FOUR MONTHS
5 LATER.

6 PEOPLE NORMALLY WASH THEIR SHEETS AT LEAST ONCE A
7 MONTH, I WOULD CERTAINLY HOPE. IT WOULD NOT BE UNCOMMON
8 TO FIND HIS HAIR OR HIS SEMEN, IF ANY PRESENT, IN HIS
9 BED.

10 Q. BUT YOU DIDN'T EVEN BOTHER TO CHECK, DID YOU?

11 A. NO, SIR.

12 Q. DID YOU EVER CHECK ANY OF Minor CLOTHING?

13 A. NO, SIR.

14 Q. DID YOU EVER MAKE AN ATTEMPT TO FIND OUT DURING
15 ANY OF THESE ALLEGED INCIDENTS WHAT SHE WAS WEARING AT
16 NIGHT?

17 A. I DID NOT CONDUCT THE INTERVIEW, THAT WAS
18 CONDUCTED BY SERGEANT HAWK. BUT EVEN IF WE WOULD HAVE
19 KNOWN WHAT SHE WAS WEARING, AGAIN, IT BEING THE TIME
20 FRAME OF WHEN IT HAPPENED UNTIL THE TIME THAT WE GOT IT,
21 WE WOULDN'T HAVE WENT BACK AND TRIED TO FIND HER
22 CLOTHING.

23 Q. WELL, WHEN DID IT HAPPEN?

24 A. IT HAPPENED BETWEEN -- WHILE SCHOOL WAS OUT
25 BETWEEN JUNE AND SEPTEMBER OF 2003.

1 Q. AND DO YOU KNOW IF THE CLOTHES SHE WAS WEARING ON
2 ANY ALLEGED OCCASION WAS LAUNDERED OR ANYTHING ELSE?
3 DID YOU EVER ASK THE QUESTION? YOU DIDN'T, DIDN'T
4 YOU-ALL?

5 A. NO, I DIDN'T.

6 Q. AND WHOSE CASE WAS THIS?

7 A. THIS WAS MY CASE.

8 Q. AND WHAT YOU DID IS YOU HAD A LITTLE GIRL THAT
9 POINTED HER FINGER AND THAT'S WHAT YOU FIGURED WAS ALL
10 YOU NEEDED?

11 A. NO, SIR. WE ACTUALLY SENT HER FOR A MEDICAL EXAM
12 AS WELL AS A FORENSIC INTERVIEW.

13 Q. WHICH WAS NORMAL?

14 A. YES, SIR, AND THAT'S NOT OUT OF THE NORMAL.

15 Q. NO EVIDENCE, NO PHYSICAL EVIDENCE WHATSOEVER?

16 A. NONE.

17 Q. AND IN Minor STATEMENT THAT SHE WROTE, SHE
18 SAID -- SHE CLAIMED THAT CLARENCE PUT HIS PENIS IN HER
19 BUTT. HER WORDS.

20 A. THAT'S CORRECT.

21 Q. NO EVIDENCE OF THAT, THOUGH, IS THERE?

22 A. NO, SIR.

23 Q. HAVE YOU REVIEWED HER INTERVIEW WITH THE FORENSIC
24 INTERVIEWER?

25 A. YES, SIR, I DID.

1 Q. SHE ALSO TESTIFIED OR STATED IN HER INTERVIEW
2 THAT HE EJACULATED IN HER MOUTH, DIDN'T SHE? DIDN'T
3 TELL US THAT HERE TODAY, DID SHE?

4 A. NO, SIR.

5 Q. HER STORY HAS CHANGED AT LEAST TWICE, THEN,
6 CORRECT?

7 A. I DON'T KNOW THAT IT SAYS "EJACULATED" IN THE
8 INTERVIEW, THAT IT SAYS SHE TASTED SOMETHING, OR THAT
9 SHE STATED "EJACULATED."

10 Q. OKAY. I THINK THE INTERVIEWER WROTE IT DOWN AS
11 EJACULATED. ALL RIGHT? FAIR ENOUGH?

12 A. FAIR ENOUGH.

13 Q. IS THIS FUNNY TO YOU?

14 A. NO, SIR, ABSOLUTELY NOT.

15 MR. BYRHOLDT: THAT'S ALL THE QUESTIONS I
16 HAVE OF OFFICER REED.

17 THE COURT: RE-EXAM?

18 MS. SIMMONS: NOTHING FURTHER.

19 THE COURT: YOU MAY STEP DOWN. THANK YOU,
20 SIR.

21 (WITNESS LEAVES STAND.)

22 THE COURT: MAY I SEE COUNSEL?

23 (WHEREUPON, COUNSEL APPROACHED THE BENCH AND
24 CONFERRED WITH THE COURT OUT OF THE PRESENCE
25 OF THE COURT REPORTER AND THE JURY.)

1 THE COURT: MADAM FORELADY, LADIES AND
2 GENTLEMEN OF THE JURY, BEFORE WE TAKE UP THE NEXT
3 WITNESS, I'M GONNA SUGGEST WE TAKE A SHORT BREAK, AND
4 WHEN YOU ARE READY TO COME BACK, JUST KNOCK ON THE DOOR
5 AND WE'LL CONTINUE THE TRIAL AT THAT TIME. AGAIN,
6 PLEASE DO NOT UNDERTAKE THE DISCUSSION OF THE CASE AMONG
7 YOURSELVES IN ANY WAY.

8 EVERYONE ELSE REMAIN SEATED WHILE THE JURY
9 RETIRES FROM THE COURTROOM.

10 (WHEREUPON, THE JURY LEFT THE COURTROOM AT
11 11:07 A.M.)

12 THE COURT: ALL RIGHT. ANYTHING FROM THE
13 STATE BEFORE WE TAKE A RECESS?

14 MS. SIMMONS: NO, SIR.

15 THE COURT: FROM THE DEFENDANT?

16 MR. BYRHOLDT: NO, YOUR HONOR.

17 THE COURT: ALL RIGHT. WE'LL STAND AT EASE
18 FOR A FEW MINUTES.

19 (WHEREUPON, A RECESS WAS TAKEN.)

20 THE COURT: ALL RIGHT. ANYTHING FROM THE
21 STATE BEFORE WE CALL THE JURY BACK?

22 MS. SIMMONS: NO, SIR.

23 MR. BYRHOLDT: NO, YOUR HONOR.

24 THE COURT: VERY GOOD. FROM THE DEFENDANT,
25 NOTHING.

1 ASK THE JURY TO JOIN US.

2 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
3 11:23 A.M.)

4 THE COURT: LET THE RECORD REFLECT THE JURY
5 AND ALTERNATES ARE IN THE JURY-BOX.

6 MADAM FORELADY, LADIES AND GENTLEMEN OF THE
7 JURY, WE'LL NOW CONTINUE WITH THE TRIAL OF THE CASE.

8 YOU MAY CALL YOUR NEXT WITNESS.

9 MS. SIMMONS: THANK YOU, YOUR HONOR. THE
10 STATE CALLS MIKE LARK.

11 (WHEREUPON, THE WITNESS WAS SWORN BY THE
12 CLERK.)

13 THE COURT: IF YOU WOULD, PLEASE, SIR, GIVE
14 US YOUR FULL NAME FOR THE RECORD, SPELLING YOUR LAST
15 NAME.

16 THE WITNESS: CHARLIE MICHAEL LARK, L-A-R-K.

17 THE COURT: THANK YOU, SIR.

18 WHEREUPON,

19 MICHAEL LARK,

20 AFTER FIRST HAVING BEEN DULY SWORN, TESTIFIED AS
21 FOLLOWS:

22 DIRECT EXAMINATION BY MS. SIMMONS:

23 Q. GOOD MORNING.

24 A. GOOD MORNING.

25 Q. MR. LARK, WHAT IS YOUR EDUCATIONAL BACKGROUND?

1 A. I GOT A BACHELOR OF SCIENCE DEGREE FROM CLEMSON
2 UNIVERSITY, I GOT A MASTER OF BUSINESS ADMINISTRATION
3 FROM THE CLEMSON-FURMAN M.B.A. PROGRAM. ALSO, I'VE HAD
4 SCHOOLS ON CONSULTING-TYPE INTERVIEWS AS WELL AS
5 CONTINUING EDUCATION.

6 Q. AND IS THE BASIS OF YOUR BUSINESS IS WORKING AS A
7 CONSULTANT FOR INTERVIEWING PURPOSES?

8 A. YES, MA'AM.

9 Q. AND WHAT SORT OF BUSINESS AND ORGANIZATIONS DO
10 YOU WORK ON CONTRACT FOR?

11 A. I WORK ON CONTRACT WITH THE OCONEE COUNTY
12 SHERIFF'S OFFICE.

13 Q. AND ANYONE ELSE?

14 A. YES, MA'AM. I WORK FOR OTHER LAW ENFORCEMENT
15 AGENCIES, I WORK FOR LAWYER FIRMS, I WORK FOR
16 CORPORATIONS.

17 Q. DID YOU HAVE OCCASION TO WORK AS A CONSULTANT FOR
18 THE OCONEE COUNTY SHERIFF'S OFFICE BACK IN JANUARY OF
19 2004?

20 A. YES, MA'AM.

21 Q. AND HOW DID YOU BECOME INVOLVED IN THE COURSE OF
22 THIS DEFENDANT'S CASE?

23 A. SERGEANT REED AT THAT TIME, LIEUTENANT REED HAD
24 CONTACTED ME ABOUT DOING AN INTERVIEW ON MR. CRITTENDON.
25 SERGEANT REED MIRANDIZED HIM AND THEN I DID AN INTERVIEW

1 OF MR. CRITTENDON.

2 Q. SO HIS MIRANDA RIGHTS WERE READ TO HIM PRIOR TO
3 YOU SPEAKING WITH HIM?

4 A. YES, MA'AM.

5 Q. AND DID YOU ALSO HAVE HIM SIGN A CONSENT FORM TO
6 SPEAK WITH YOU?

7 A. YES, MA'AM.

8 Q. AND WHAT KIND OF QUESTIONS DID YOU ASK THE
9 DEFENDANT?

10 A. I ASKED MR. CRITTENDON QUESTIONS REGARDING
11 WHETHER OR NOT HE HAD TOUCHED Minor PRIVATE AREA
12 OR PUT HIS PENIS IN HER MOUTH OR THE QUESTIONS REGARDING
13 THE ALLEGATIONS THAT Minor WAS MAKING.

14 Q. AND DID YOU EVER THREATEN HIM OR COERCE HIM OR
15 INTIMIDATE HIM IN ANY WAY WHILE YOU WERE ASKING THOSE
16 QUESTIONS?

17 A. NO, MA'AM.

18 Q. AND DID YOU EVER PROMISE HIM ANYTHING WHEN YOU
19 WERE ASKING THOSE QUESTIONS?

20 A. NO, MA'AM.

21 Q. AND WHAT WAS HIS RESPONSE TO THE QUESTIONS YOU
22 ASKED?

23 A. MR. CRITTENDON DENIED ANY SEXUAL MOLESTATION OF
24 Minor TOWARD THE CONCLUSION OF THE INTERVIEW

25 MR. CRITTENDON STATED THAT HE HAD A DREAM AND HE AWOKE

1 FROM THIS DREAM, AND DURING THE DREAM HE WAS DREAMING
2 THAT HIS WIFE WAS PERFORMING ORAL SEX ON HIM. HE SAID
3 SOMETIMES SHE DID PERFORM ORAL SEX ON HIM WHEN HE WAS
4 ASLEEP.

5 WHEN HE WOKE UP, HIS WIFE WASN'T IN BED,
6 Minor WAS IN BED. HE SAID THAT HE COULDN'T SAY YES
7 OR NO WHETHER OR NOT HIS PENIS HAD WENT IN Minor
8 MOUTH.

9 Q. AND AFTER HE MADE THOSE STATEMENTS TO YOU, DID
10 YOU CEASE YOUR INTERVIEW WITH HIM?

11 A. YES, MA'AM.

12 Q. AND DID YOU TURN HIM OVER -- HIM BACK OVER TO
13 SERGEANT REED?

14 A. YES, MA'AM.

15 Q. AND AT THE CONCLUSION OF YOUR INTERVIEW, DID YOU
16 WRITE A REPORT MEMORIALIZING WHAT YOU JUST SAID TO US?

17 A. YES, MA'AM.

18 MS. SIMMONS: NO FURTHER QUESTIONS AT THIS
19 TIME.

20 MR. BYRHOLDT: MAY IT PLEASE THE COURT?

21 THE COURT: MR. BYRHOLDT.

22 CROSS-EXAMINATION BY MR. BYRHOLDT:

23 Q. CLARENCE DENIED ANY IMPROPER CONTACT WITH
24 Minor CORRECT?

25 A. YES, SIR.

1 Q. THROUGHOUT THE ENTIRE INTERVIEW?

2 A. YES, SIR.

3 Q. HE TOLD YOU HE HAD A DREAM AND WAS ASLEEP?

4 A. PARDON? I DIDN'T UNDERSTAND THE QUESTION.

5 Q. HE TOLD YOU HE HAD A DREAM, SO HE WAS ASLEEP
6 APPARENTLY WHEN HE WAS DREAMING?

7 A. THAT'S WHAT HE TOLD ME, THAT HE HAD A DREAM WHILE
8 HE WAS ASLEEP.

9 Q. OKAY. AND HE COULD NOT ANSWER YES OR NO ON
10 WHETHER Minor HAD EVER ON THAT OCCASION PUT HER
11 MOUTH ON HIS PENIS?

12 A. YES, SIR.

13 Q. WELL, IF YOU WERE ASLEEP, MR. LARK, COULD YOU
14 TELL THIS JURY WHAT HAPPENED WHILE YOU WERE ASLEEP?

15 A. NO, SIR.

16 Q. ARE YOU A PSYCHIATRIST?

17 A. NO, SIR.

18 Q. PSYCHOLOGIST?

19 A. NO, SIR.

20 Q. COUNSELOR?

21 A. NO, SIR.

22 Q. JUST A HIRED INTERVIEWER?

23 A. YES, SIR.

24 ~~MR. BYRHOLDT: NO FURTHER QUESTIONS.~~

25 THE COURT: RE-EXAM?

1 MS. SIMMONS: NOTHING, YOUR HONOR.

2 THE COURT: YOU MAY STEP DOWN. THANK YOU,
3 SIR.

4 (WITNESS LEAVES STAND.)

5 THE COURT: LADIES AND GENTLEMEN OF THE
6 JURY, ONE OF THE THINGS I DO AS THE TRIAL JUDGE, AS I
7 MENTIONED IN MY OPENING REMARKS, IS I MUST RULE ON THE
8 EVIDENCE, THE ADMISSIBILITY OF IT. AS I SAY, THE COURT
9 DETERMINES ADMISSIBILITY OF THE EVIDENCE, BUT YOU, THE
10 JURY, MUST DETERMINE THE EXISTENCE OF VOLUNTARINESS AND
11 WEIGHT OF ANY ALLEGED STATEMENT MADE BY THE DEFENDANT TO
12 BE GIVEN IN ANY ALLEGED STATEMENT MADE BY THE DEFENDANT.

13 YOU MUST MAKE THE ULTIMATE DETERMINATION OF
14 WHETHER OR NOT, IN FACT, THE DEFENDANT MADE THE ALLEGED
15 STATEMENT. IF YOU DETERMINE THAT THE DEFENDANT MADE THE
16 STATEMENT, YOU MUST THEN DETERMINE WHETHER THE STATEMENT
17 WAS MADE VOLUNTARILY. FINALLY, YOU WOULD DECIDE WHAT
18 WEIGHT, IF ANY, SHOULD BE GIVEN TO THE ALLEGED
19 STATEMENT.

20 YOU MUST DETERMINE WHETHER THE ALLEGED
21 STATEMENT WAS THE RESPONSE OF AN ESSENTIALLY FREE AND
22 UNCONSTRAINED CHOICE BY ITS MAKER, THE STATEMENT MUST
23 PROVE THE VOLUNTARINESS BEYOND A REASONABLE DOUBT. IF
24 YOU DETERMINE BEYOND A REASONABLE DOUBT THAT A STATEMENT
25 WAS GIVEN FREELY AND VOLUNTARILY, THEN YOU MAY GIVE THE

1 STATEMENT SUCH FURTHER CONSIDERATION AS YOU DEEM PROPER.

2 IF YOU DETERMINE THE ALLEGED STATEMENT WAS
3 NOT THE FREE AND VOLUNTARILY WILLING STATEMENT OF THE
4 DEFENDANT, THEN YOU WOULD NOT CONSIDER THE STATEMENT AS
5 EVIDENCE.

6 IN DETERMINING WHETHER A STATEMENT -- WELL,
7 IN DETERMINING WHETHER A DEFENDANT'S WILL WAS OVERCOME
8 IN OBTAINING THE STATEMENT, THE LAW REQUIRES YOU TO
9 CONSIDER WHAT IS KNOWN AS THE TOTALITY OF THE
10 CIRCUMSTANCES. YOU SHOULD CONSIDER BOTH THE
11 CHARACTERISTICS OF THE DEFENDANT AND THE CIRCUMSTANCES
12 SURROUNDING ANY QUESTION DURING INTERROGATION.

13 SOME OF THE FACTORS THE LAW SAYS YOU MAY
14 CONSIDER ARE THE AGE OF THE DEFENDANT, THE DEFENDANT'S
15 EDUCATIONAL BACKGROUND, THE DEFENDANT'S MENTAL ABILITY
16 OR CAPACITY, THE DEFENDANT'S BACKGROUND, ALONG WITH ALL
17 THE OTHER FACTS AND CIRCUMSTANCES SURROUNDING THE MAKING
18 OF AN ALLEGED STATEMENT.

19 IN DETERMINING THE VOLUNTARINESS OF ANY
20 ALLEGED STATEMENT, YOU SHOULD CONSIDER WHETHER THE
21 DEFENDANT WAS ADVISED OF AND UNDERSTOOD HIS OR HER
22 CONSTITUTIONAL RIGHTS. THE LAW REQUIRES THAT BEFORE ANY
23 INTERROGATION OR QUESTIONING OF A PERSON IN CUSTODY MAY
24 BEGIN, LAW ENFORCEMENT MUST ADVISE THE ACCUSED OF HIS
25 MIRANDA RIGHTS.

1 THIS MEANS THAT THE AUTHORITIES ADVISED THE
2 ACCUSED THAT THE ACCUSED HAS THE RIGHT TO REMAIN SILENT,
3 THAT ANY STATEMENT WOULD BE USED AGAINST THE ACCUSER IN
4 A COURT OF LAW; THAT THE ACCUSED HAS A RIGHT TO HAVE A
5 LAWYER PRESENT, THAT IF THE ACCUSED CANNOT AFFORD A
6 LAWYER, THEN A LAWYER WOULD BE APPOINTED TO REPRESENT
7 HIM OR HER WITHOUT ANY COST; AND THAT THE ACCUSED COULD
8 STOP MAKING A STATEMENT AT ANY TIME.

9 OTHER FACTORS TO BE CONSIDERED ARE THE PLACE
10 AND LENGTH OF ANY DETENTION AND THE NATURE OF THE
11 QUESTIONING.

12 YOU MUST CAREFULLY SCRUTINIZE ALL OF THE
13 SURROUNDING CIRCUMSTANCES BEFORE YOU GIVE ANY WEIGHT TO
14 AN ALLEGED STATEMENT. YOU MUST BE SATISFIED BEYOND A
15 REASONABLE DOUBT THE STATEMENT WAS MADE BY THE
16 DEFENDANT, UNINFLUENCED BY PROMISE OR REWARD OR THREAT
17 OF HARM.

18 IF YOU FIND BEYOND A REASONABLE DOUBT THAT
19 ANY ALLEGED STATEMENT WAS GIVEN VOLUNTARILY, THEN YOU
20 MUST DECIDE WHAT WEIGHT, IF ANY, SHOULD BE GIVEN TO THE
21 STATEMENT. IF YOU FIND THE STATEMENT WAS NOT VOLUNTARY,
22 THEN IN THAT EVENT YOU MUST NOT CONSIDER THE STATEMENT
23 AS EVIDENCE FOR ANY PURPOSE.

24 ALL RIGHT. MADAM SOLICITOR, YOU MAY CALL
25 YOUR NEXT WITNESS.

1 MS. SIMMONS: YOUR HONOR, IF I MAY HAVE A
2 MOMENT TO REVIEW THE EVIDENCE?

3 THE COURT: CERTAINLY.

4 (MS. SIMMONS CONFERRED WITH THE COURT
5 REPORTER OFF THE RECORD.)

6 MS. SIMMONS: YOUR HONOR, THE STATE RESTS.

7 THE COURT: ALL RIGHT. MADAM FORELADY,
8 LADIES AND GENTLEMEN OF THE JURY, I NEED TO TAKE SOME
9 MATTERS UP WITH THE ATTORNEYS, SO I'M GONNA ASK YOU TO
10 RETIRE TO THE JURY ROOM FOR A FEW MINUTES WHILE I DO
11 CONSULT WITH THEM. AGAIN, DO NOT UNDERTAKE DISCUSSION
12 OF THIS CASE AMONG YOURSELVES IN ANY WAY. YOU MAY
13 RETIRE TO YOUR JURY ROOM.

14 (WHEREUPON, THE JURY LEFT THE COURTROOM AT
15 11:33 A.M.)

16 THE COURT: ALL RIGHT. ANYTHING ELSE FROM
17 THE STATE?

18 MS. SIMMONS: NO, YOUR HONOR.

19 THE COURT: FROM THE DEFENDANT?

20 MR. BYRHOLDT: I HAVE A MOTION, YOUR HONOR.

21 THE COURT: YES, SIR.

22 DEFENDANT'S MOTION FOR DIRECTED VERDICT:

23 MR. BYRHOLDT: ON BEHALF OF THE DEFENDANT,
24 CLARENCE CRITTENDON, WE WOULD MOVE FOR A DIRECTED
25 VERDICT OF ACQUITTAL ON BOTH THE LEWD ACT AND THE C.S.C.

1 FIRST WITH A MINOR. WE DON'T THINK THERE IS SUFFICIENT
2 EVIDENCE TO GO FORWARD. THERE IS NO PHYSICAL EVIDENCE
3 IN THIS CASE. WE JUST HAVE A TOTAL LACK OF CREDIBLE
4 EVIDENCE TO GO FORWARD.

5 I KNOW THE COURT IS GONNA TELL ME THAT THEY
6 GOT Minor STATEMENT, BUT FOR PURPOSES OF THE
7 RECORD I WOULD MAKE THAT MOTION, YOUR HONOR.

8 THE COURT: ALL RIGHT. CERTAINLY. VERY
9 WELL.

10 ANYTHING FROM THE STATE?

11 MS. SIMMONS: NO, YOUR HONOR. WE WOULD
12 ARGUE THAT THERE IS SUFFICIENT EVIDENCE TO GO FORWARD TO
13 THE JURY, AND THE TESTIMONY OF A VICTIM NEED NOT BE
14 CORROBORATED.

15 THE COURT'S RULING ON DIRECTED VERDICT MOTION:

16 THE COURT: WELL, THAT'S JUST IT. IN THESE
17 CASES THE ONLY THING THAT YOU DO NEED IS THE VICTIM'S
18 TESTIMONY, AND CREDIBILITY OR THE WEIGHT TO BE GIVEN
19 THAT TESTIMONY IS FOR THE JURY TO DETERMINE, UNDER RULE
20 19(A) OF THE SOUTH CAROLINA RULES OF CRIMINAL PROCEDURE.
21 OF COURSE, I'M OBVIOUSLY NOT CONCERNED WITH THE WEIGHT
22 OF THE TESTIMONY BUT WHETHER OR NOT THERE IS SUCH
23 EVIDENCE THAT WOULD SUPPORT A GUILTY VERDICT ON EACH OF
24 THESE INDICTMENTS. THE COURT FINDS THERE IS SUFFICIENT
25 EVIDENCE TO GO TO THE JURY.

1 MR. BYRHOLDT: YOUR HONOR, COULD I HAVE A
2 MOMENT TO CONSULT WITH MY CLIENT?

3 THE COURT: CERTAINLY. BECAUSE THE NEXT
4 THING I WANTED TO ASK WAS ABOUT TESTIMONY. DO YOU WANT
5 ME TO INSTRUCT HIM, ADVISE HIM?

6 MR. BYRHOLDT: IF YOU COULD GIVE ME ONE
7 MOMENT?

8 THE COURT: CERTAINLY.

9 (MR. BYRHOLDT AND THE DEFENDANT CONFERRED OFF
10 THE RECORD.)

11 MR. BYRHOLDT: YOUR HONOR, IT'S MY INTENTION
12 THAT I DON'T BELIEVE MR. CRITTENDON IS GONNA TESTIFY,
13 NOR THAT WE WILL BE OFFERING ANY DEFENSE.

14 THE COURT: ALL RIGHT.

15 MR. BYRHOLDT: BUT I WOULD ASK YOU TO PUT
16 MR. CRITTENDON UNDER OATH AND ASK HIM TO MAKE SURE IT'S
17 HIS DECISION.

18 THE COURT: CERTAINLY.

19 COURT'S INQUIRY OF DEFENDANT RE TESTIFYING OR NOT:

20 THE COURT: ALL RIGHT. MR. CRITTENDON, IF
21 YOU WOULD, PLEASE, STAND AND RAISE YOUR RIGHT HAND.

22 (WHEREUPON, THE DEFENDANT WAS SWORN BY THE
23 COURT.)

24 THE COURT: VERY GOOD, THANK YOU, SIR.

25 AT THIS TIME I'M GOING TO EXPLAIN TO YOU

1 CERTAIN OF YOUR RIGHTS. IF YOU DO NOT UNDERSTAND
2 ANYTHING I SAY, PLEASE LET ME KNOW. IF YOU WANT ME TO
3 EXPLAIN ANYTHING IN MORE DETAIL, PLEASE LET ME KNOW. DO
4 YOU UNDERSTAND THIS?

5 THE DEFENDANT: YES, SIR.

6 THE COURT: ALSO, IF AT ANY TIME YOU NEED TO
7 CONSULT WITH YOUR ATTORNEY DURING THIS QUESTIONING,
8 PLEASE BE ADVISED YOU WILL BE PERMITTED TO DO THAT AS
9 WELL. DO YOU UNDERSTAND THAT?

10 THE DEFENDANT: YES, SIR.

11 THE COURT: ALL RIGHT. WE HAVE NOW REACHED
12 THE STAGE OF THE TRIAL WHERE YOU MAY PRESENT YOUR
13 DEFENSE. YOU HAVE THE RIGHT TO CLAIM THE PROTECTIONS
14 GIVEN TO YOU BY THE FIFTH AMENDMENT TO THE CONSTITUTION
15 OF THE UNITED STATES.

16 THIS AMENDMENT STATES, IN PART: NO PERSON
17 SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS
18 AGAINST HIMSELF. DO YOU UNDERSTAND THIS?

19 THE DEFENDANT: YES, SIR.

20 THE COURT: THIS MEANS THAT YOU CANNOT BE
21 REQUIRED TO TESTIFY IN THIS CASE. YOU HAVE THE RIGHT TO
22 TESTIFY ON YOUR OWN BEHALF IF YOU WANT TO; HOWEVER, NO
23 ONE CAN MAKE YOU TESTIFY. THIS IS A PERSONAL RIGHT AND
24 NO ONE CAN WAIVE THIS RIGHT EXCEPT YOU. DO YOU
25 UNDERSTAND THIS?

1 THE DEFENDANT: YES, YOUR HONOR.

2 THE COURT: IF YOU DECIDE TO TESTIFY, YOU
3 WILL BE SUBJECT TO THE SAME RULES THAT GOVERN OTHER
4 WITNESSES, AND YOU MAY BE EXAMINED AND CROSS-EXAMINED ON
5 ANY RELEVANT ISSUE IN THIS CASE. IN ADDITION, IF YOU
6 HAVE ANY CONVICTIONS INVOLVING DISHONESTY OR FOR FALSE
7 STATEMENT OR FOR CRIMES PUNISHABLE BY IMPRISONMENT FOR
8 MORE THAN ONE YEAR, AND THIS COURT DETERMINES THAT THE
9 PROBATIVE VALUE OF ADMITTING THIS EVIDENCE OUTWEIGHS ITS
10 PREJUDICIAL EFFECT TO YOU, THE SOLICITOR WILL BE ABLE TO
11 INTRODUCE YOUR RECORD TO ATTACK YOUR CREDIBILITY. DO
12 YOU UNDERSTAND THAT?

13 THE DEFENDANT: YES, SIR.

14 THE COURT: THE DECISION -- THIS DECISION ON
15 YOUR PART MUST BE FREELY, VOLUNTARILY AND INTELLIGENTLY
16 MADE, WITH THE KNOWLEDGE OF THE PROTECTIONS GIVEN TO YOU
17 BY THE FIFTH AMENDMENT AND THE CONSEQUENCES OF YOUR
18 DECISION TO TESTIFY. DO YOU UNDERSTAND THIS?

19 THE DEFENDANT: YES, YOUR HONOR.

20 THE COURT: IF YOU DECIDE NOT TO TESTIFY, I
21 WILL INSTRUCT THE JURY THAT THEY CANNOT GIVE THE FACT
22 THAT YOU DID NOT TESTIFY ANY CONSIDERATION WHATSOEVER,
23 AND THAT THERE IS TO BE ABSOLUTELY NO PREJUDICE TO YOU
24 BECAUSE YOU DID NOT TESTIFY. YOU MAY TALK WITH YOUR
25 ATTORNEY, YOUR FAMILY AND YOUR FRIENDS OR ANYONE ELSE,

1 BUT THE FINAL DECISION WILL BE LEFT ENTIRELY UP TO YOU.
2 DO YOU UNDERSTAND THIS?

3 THE DEFENDANT: YES, YOUR HONOR.

4 THE COURT: DO YOU UNDERSTAND ALL THAT I
5 HAVE EXPLAINED TO YOU?

6 THE DEFENDANT: YES, YOUR HONOR.

7 THE COURT: DO YOU HAVE ANY QUESTIONS ABOUT
8 WHAT I HAVE EXPLAINED TO YOU?

9 THE DEFENDANT: NO, SIR, YOUR HONOR.

10 THE COURT: HAVE YOU DISCUSSED WITH YOUR
11 LAWYER WHETHER YOU SHOULD TESTIFY OR NOT?

12 THE DEFENDANT: I HAVE.

13 THE COURT: DO YOU WISH TO TALK TO YOUR
14 LAWYER ANY MORE?

15 THE DEFENDANT: NO, SIR, YOUR HONOR.

16 THE COURT: DO YOU WISH TO TESTIFY IN THIS
17 CASE?

18 THE DEFENDANT: NO, I DO NOT, YOUR HONOR.

19 THE COURT: DO YOU HAVE ANY QUESTIONS ABOUT
20 WHAT I'VE GONE OVER? IN OTHER WORDS, YOU MAY TESTIFY IF
21 YOU WANT TO, BUT YOU DO NOT HAVE TO TESTIFY IF YOU DO
22 NOT WANT TO.

23 THE DEFENDANT: I UNDERSTAND, YOUR HONOR.

24 THE COURT: NO QUESTIONS?

25 THE DEFENDANT: NO, SIR.

1 THE COURT: ALL RIGHT, VERY WELL. I FIND
2 THAT THE DECISION OF THE DEFENDANT NOT TO TESTIFY IS
3 FREELY, VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY MADE,
4 AND I WILL INSTRUCT THE JURY THAT THEY ARE NOT TO
5 CONSIDER HIS FAILURE -- CONSIDER THE FACT THAT HE
6 EXERCISED HIS RIGHT NOT TO TESTIFY.

7 NOW, THE DEFENDANT HAVING NOT PUT UP ANY
8 EVIDENCE, AND THE DEFENDANT ---

9 MR. BYRHOLDT: EXCUSE ME, YOUR HONOR, HE HAD
10 A QUESTION.

11 THE COURT: CERTAINLY.

12 (MR. BYRHOLDT AND THE DEFENDANT CONFERRED OFF
13 THE RECORD.)

14 MR. BYRHOLDT: MY UNDERSTANDING, AFTER
15 CONVERSING WITH MR. CRITTENDON, WE INTEND NOT TO OFFER
16 ANY EVIDENCE.

17 THE COURT: AND YOUR MOTION FOR DIRECTED
18 VERDICT IS RENEWED AND IS DENIED ON THE SAME GROUND.

19 MR. BYRHOLDT: THANK YOU, YOUR HONOR.

20 THE COURT: OF COURSE, THE DEFENSE WILL HAVE
21 CLOSING ARGUMENT. ANY REASON NOT TO GO FORWARD NOW?

22 MS. SIMMONS: YOUR HONOR, MAY I HAVE A
23 FIVE-MINUTE BREAK?

24 THE COURT: CERTAINLY. ALL RIGHT, WE'LL DO
25 THAT.

1 NOW, AGAIN, THE CHARGES ARE GOING TO BE JUST
2 STRAIGHT -- I'LL TELL YOU WHAT. FIRST OF ALL, LOOK AT
3 THE PROPOSED VERDICT FORM BECAUSE I HAVE NO
4 LESSER-INCLUDED OFFENSES.

5 MR. BYRHOLDT: I'M FAMILIAR WITH YOUR
6 CHARGE.

7 (WHEREUPON, COUNSEL APPROACHED THE BENCH AND
8 CONFERRED WITH THE COURT OUT OF THE PRESENCE
9 OF THE COURT REPORTER.)

10 THE COURT: IS THERE ANYTHING FROM THE
11 STATE -- BECAUSE I'M GONNA BRING THE JURY BACK AND
12 EXCUSE THEM TO 1:15, THAT'S AN HOUR AND A HALF, AND
13 WE'LL COMPLETE THE TRIAL OF THE CASE. ANYTHING FROM THE
14 STATE?

15 MS. SIMMONS: NO, YOUR HONOR.

16 THE COURT: FROM THE DEFENDANT?

17 MR. BYRHOLDT: NO, YOUR HONOR. DO YOU WANT
18 ME TO REST ON THE RECORD AFTER YOU GIVE THE INSTRUCTION
19 OR BEFORE? BECAUSE I HAVE NOT RESTED ON THE RECORD
20 BEFORE THE JURY.

21 THE COURT: YES, YOU NEED TO REST BEFORE I
22 DO GIVE THE INSTRUCTION.

23 MR. BYRHOLDT: I'LL DO THAT.

24 THE COURT: ALL RIGHT. VERY GOOD. THANK
25 YOU FOR REMINDING ME.

1 ALL RIGHT. ASK THE JURY TO JOIN US, PLEASE.

2 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
3 11:45 A.M.)

4 THE COURT: ALL RIGHT. LET THE RECORD
5 REFLECT THAT THE JURY AND ALTERNATES ARE IN THE
6 JURY-BOX.

7 MR. BYRHOLDT?

8 MR. BYRHOLDT: MAY IT PLEASE THE COURT, THE
9 DEFENSE WOULD REST IN THIS CASE.

10 THE COURT: VERY WELL, THANK YOU, SIR.

11 MADAM FORELADY, LADIES AND GENTLEMEN OF THE
12 JURY, THE LAW DOES NOT COMPEL A DEFENDANT IN A CRIMINAL
13 CASE TO TAKE THE WITNESS STAND AND TESTIFY, AND NO
14 PRESUMPTION OF GUILT MAY BE RAISED AND NO INFERENCE OF
15 ANY KIND MAY BE DRAWN FROM THE DEFENDANT'S DECISION NOT
16 TO TESTIFY. THE LAW NEVER IMPOSES UPON A DEFENDANT IN A
17 CRIMINAL CASE A BURDEN OR DUTY OF CALLING ANY WITNESSES
18 OR PRODUCING ANY EVIDENCE OR OF TESTIFYING.

19 SO THAT CONCLUDES THE TESTIMONY AND EVIDENCE
20 IN THIS CASE. WE STILL HAVE THE ARGUMENT BY COUNSEL AND
21 THEN THE CHARGE ON THE LAW IN THIS CASE, AND THAT WILL
22 PROBABLY TAKE SOME TIME. AND I THINK WE WOULD PROBABLY
23 BE BETTER SERVED BY GOING TO LUNCH AT THIS TIME AND
24 COMING BACK ABOUT 1:15. THAT'S AN HOUR AND A HALF. NOW
25 I'M GONNA ASK THE CLERK TO GIVE YOU SOME INSTRUCTIONS

1 ABOUT THAT.

2 IF YOU WOULD, PLEASE, MADAM CLERK.

3 THE CLERK: IF YOU GO TO THE STEAK HOUSE OR
4 TO MOUNTAIN VIEW OR COUNTRY CUPBOARD AND WEAR YOUR JUROR
5 BADGE, THEY WILL CHARGE YOUR LUNCH FOR YOU. IF YOU GO
6 ANYWHERE ELSE, IF YOU'LL BRING ME YOUR TICKET, WE'LL
7 REIMBURSE YOUR CHECK. THE ONLY THING THAT I ASK IS TRY
8 NOT TO GO OVER \$10.00. I HAD ONE LADY WHO DECIDED THAT
9 SHE WAS GOING TO LUNCH, AND IT MEANT FOR HER FRIENDS,
10 AND SHE CAME BACK WITH A BILL OF ABOUT \$30.00. SO,
11 PLEASE, JUST BUY LUNCH FOR YOURSELF.

12 THE COURT: ALL RIGHT. AS I SAY, THOUGH,
13 PLEASE UNDERSTAND THAT THE CASE IS NOT COMPLETE, SO DO
14 NOT UNDERTAKE THE DISCUSSION OF THE CASE AMONG
15 YOURSELVES OR PERMIT ANYBODY TO DISCUSS IT WITH YOU.

16 ALL RIGHT. WITH THAT I WILL SEE YOU BACK AT
17 1:15 AND WE'LL CONCLUDE THE CASE AT THAT TIME.

18 EVERYONE ELSE REMAIN SEATED WHILE THE JURY
19 RETIRES FROM THE COURTROOM.

20 (WHEREUPON, THE JURY LEFT THE COURTROOM AT
21 11:47 A.M.)

22 THE COURT: ANYTHING ELSE FROM THE STATE?

23 MS. SIMMONS: NO, YOUR HONOR.

24 THE COURT: FROM THE DEFENDANT?

25 MR. BYRHOLDT: NO, YOUR HONOR.

1 THE COURT: AND AS I UNDERSTAND, THERE ARE
2 NO REQUESTS FOR CHARGES, OTHER THAN NON CORROBORATION
3 AND -- REALLY, I DON'T SEE A WHOLE LOT. DO YOU WANT
4 DIRECT AND CIRCUMSTANTIAL?

5 MR. BYRHOLDT: I DON'T THINK WE HAVE
6 CIRCUMSTANTIAL IN THIS CASE.

7 THE COURT: WE DON'T EVEN HAVE DIRECT
8 EVIDENCE AS SUCH OTHER THAN THE TESTIMONY.

9 MR. BYRHOLDT: THAT'S ALL WE HAVE.

10 THE COURT: ALL RIGHT. SO I'LL LEAVE THAT
11 OUT, TOO. I SAY I'LL LEAVE THE DIRECT AND
12 CIRCUMSTANTIAL, BECAUSE I CHARGE THE NEW -- WELL,
13 OBVIOUSLY THE NEWEST WHICH REALLY DOESN'T CREATE ANY
14 DIFFERENCES.

15 MR. BYRHOLDT: YOUR HONOR, DOES YOUR
16 CHARGE -- I KNOW THE LAST TIME I WAS BEFORE YOU, YOUR
17 CHARGE INCLUDED THAT A REASONABLE DOUBT COULD ALSO COME
18 FROM A LACK OF EVIDENCE?

19 THE COURT: REASONABLE DOUBT? NO. MY
20 REASONABLE DOUBT IS STILL MANNING, WHICH IS THE KIND OF
21 DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE
22 TO ACT. NOW, IF THEY COME BACK AND ASK FOR A FURTHER
23 DEFINITION ON REASONABLE DOUBT, THEN I WILL CHARGE
24 VICTOR V. NEBRASKA, WHICH, YOU KNOW, IS ONE. I REALLY
25 WILL FOLLOW -- OR WOULD LIKE TO -- WELL, I DO FOLLOW IT,

1 BUT I DON'T DO IT, WHERE THE COURT SAYS THE BETTER RULE
2 WOULD BE NOT CHARGING REASONABLE DOUBT AT ALL.

3 MR. BYRHOLDT: I AGREE.

4 THE COURT: BUT I CHARGE MANNING, AND THEN
5 WITH FURTHER EXPLANATION THE VICTOR V. NEBRASKA. ALL
6 RIGHT.

7 MS. SIMMONS: YOUR HONOR, FOR PURPOSES OF
8 PREPARING MY CLOSING, MAY I READ YOUR CRIMINAL SEXUAL
9 CONDUCT CHARGE, IS THERE A COPY AVAILABLE?

10 THE COURT: YOU BOTH CAN IF YOU WOULD LIKE.

11 MR. BYRHOLDT: IF I RECALL, IT ESSENTIALLY
12 JUST QUOTES THE STATUTE.

13 (OFF-THE-RECORD DISCUSSION.)

14 THE COURT: ALL RIGHT. WE'LL STAND AT EASE
15 UNTIL 1:15.

16 (A LUNCHEON RECESS OCCURRED.)

17 //

18 //

19 //

20 //

21 //

22 //

23 //

24 //

25 //

1 AFTERNOON PROCEEDINGS

2
3 THE COURT: IS THE STATE READY?

4 MS. SIMMONS: YES, YOUR HONOR.

5 THE COURT: WHERE IS THE DEFENDANT?

6 MR. BYRHOLDT: HE'S HERE.

7 (THE DEFENDANT ENTERED THE COURTROOM AT 1:22
8 P.M.)

9 MR. BYRHOLDT: THE DEFENSE IS READY, YOUR
10 HONOR.

11 THE COURT: ALL RIGHT. ASK THE JURY TO JOIN
12 US.

13 THE STATE WILL OPEN IN FULL AND THE DEFENSE
14 WILL CLOSE.

15 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
16 1:23 P.M.)

17 THE COURT: LET THE RECORD REFLECT THE JURY
18 AND ALTERNATES ARE IN THE JURY-BOX.

19 MADAM FORELADY, LADIES AND GENTLEMEN OF THE
20 JURY, WE'LL NOW COMPLETE THE TRIAL OF THIS CASE. WE
21 WILL HAVE THE ARGUMENT BY COUNSEL, WITH THE STATE GOING
22 FIRST, AND THEN THE DEFENDANT WILL CLOSE. AFTER THAT I
23 WILL GIVE YOU THE CHARGE ON THE LAW IN THIS CASE.

24 I RECOGNIZE THE SOLICITOR FOR HER CLOSING
25 ARGUMENT.

1 MS. SIMMONS: THANK YOU, YOUR HONOR.

2 CLOSING ARGUMENT ON BEHALF OF THE STATE:

3 MS. SIMMONS: GOOD AFTERNOON, LADIES AND
4 GENTLEMEN. I FIRST OF ALL WANT TO THANK YOU FOR YOUR
5 ATTENTION TODAY. YOU HAVE HEARD A LOT OF EVIDENCE; I
6 TRUST THAT YOU HAVE ALL LISTENED WELL.

7 IN THE END IT IS MY OBLIGATION TO PROVE TO
8 YOU BEYOND A REASONABLE DOUBT THAT THE DEFENDANT
9 COMMITTED THE CRIMES HE'S ACCUSED OF.

10 WHAT IS REASONABLE DOUBT? THE KIND OF DOUBT
11 THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.
12 THE JUDGE IS GONNA TALK TO YOU MORE ABOUT REASONABLE
13 DOUBT LATER.

14 BUT I WANT YOU TO KEEP IN MIND THAT
15 REASONABLE DOUBT IS NOT BEYOND ALL DOUBT, IT'S
16 REASONABLE DOUBT. IT HAS BEEN MY OBLIGATION TO PROVE TO
17 YOU BEYOND A REASONABLE DOUBT THAT THE DEFENDANT
18 COMMITTED THE CRIMES OF CRIMINAL SEXUAL CONDUCT WITH A
19 MINOR IN THE FIRST DEGREE AND LEWD ACT UPON A CHILD.

20 THE JUDGE IS GONNA CHARGE YOU ON THE LAW A
21 LITTLE BIT LATER, BUT I WANTED TO ROUGHLY GO OVER THOSE
22 THINGS WITH YOU NOW.

23 CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE
24 FIRST DEGREE REQUIRES TWO THINGS: A SEXUAL BATTERY AND
25 A CHILD UNDER THE AGE OF 11. HERE, Minor TOLD YOU

1 THAT SHE WAS SEVEN YEARS OLD WHEN THIS HAPPENED BACK IN
2 THE SUMMER OF 2003. SEVEN YEARS OLD. TODAY SHE'S 11.
3 BUT IT'S JUDGED THAT WHEN THAT OFFENSE HAPPENED, AGE
4 SEVEN.

5 SEXUAL BATTERY. IN YOUR MIND YOU MAY BE
6 THINKING THAT A SEXUAL BATTERY HAS TO BE ACTUAL SEXUAL
7 INTERCOURSE, BUT THAT'S NOT THE LAW IN SOUTH CAROLINA.
8 THERE'S DIFFERENT WAYS SEXUAL BATTERY CAN BE
9 ACCOMPLISHED: SEXUAL INTERCOURSE, CUNNILINGUS, FELLATIO,
10 ANAL INTERCOURSE, OR AN INTRUSION INTO THE GENITAL OR
11 ANAL OPENINGS OF ANOTHER. NOTICE THERE IS AN "OR" AFTER
12 EACH ONE OF THESE THINGS.

13 AT ISSUE HERE IS THE CUNNILINGUS AND
14 FELLATIO. THIS CASE IS CHARGED AS CRIMINAL SEXUAL
15 CONDUCT WITH A MINOR IN THE FIRST DEGREE BECAUSE OF THE
16 ALLEGATION OF ORAL SEX, WHICH SATISFIES SEXUAL BATTERY
17 UNDER THE STATUTE.

18 LEWD ACT UPON A CHILD, THAT'S ALSO CHARGED.
19 YOU MUST HAVE A DEFENDANT WHO IS OVER THE AGE OF 14,
20 WHICH WE HAVE; A CHILD WHO IS UNDER THE AGE OF 16,
21 AGAIN, WHICH WE HAVE; AND YOU HAVE TO HAVE A WILLFUL OR
22 LEWD OR LASCIVIOUS ACT UPON THE CHILD'S BODY, WITH THE
23 INTENT OF AROUSING OR APPEALING TO THE LUSTFUL PASSIONS
24 OR DESIRES OF THE DEFENDANT OR THE CHILD.

25 IN THIS CASE, WE HAVE BOTH OF THOSE THINGS,

1 CRIMINAL SEXUAL CONDUCT BEING THE ORAL SEX, THAT THE
2 DEFENDANT PUT HIS PENIS IN THE CHILD'S MOUTH, AND THE
3 DEFENDANT LICKED THE VAGINAL AREA OF THE CHILD, WHICH
4 SHE REFERS TO AS HER PRIVATES.

5 THE LEWD ACT WOULD BE WHEN SHE TESTIFIED TO
6 YOU THAT HE TOUCHED HER PRIVATE PARTS WITH HIS HANDS AND
7 RUBBED THEM, THAT WOULD BE THE LEWD ACT IN THIS CASE.

8 AND THE JUDGE WILL ALSO CHARGE YOU THAT
9 THERE IS A LAW IN SOUTH CAROLINA THAT TELLS YOU THE
10 TESTIMONY OF A VICTIM DOES NOT HAVE TO BE CORROBORATED.

11 THE DEFENSE IN THIS CASE HAS SHOWN YOU WHAT
12 I LIKE TO CALL A SMOKE AND MIRRORS ACT. THERE'S A LOT
13 OF SMOKE AND A BUNCH OF MIRRORS DESIGNED TO GET YOU AWAY
14 FROM WHAT'S REALLY AT ISSUE. THEY WANT TO GET YOU AWAY
15 FROM Minor , AWAY FROM WHAT REALLY MATTERS HERE.

16 THERE ARE NO EYEWITNESSES IN THIS CASE. I
17 THINK I TOLD YOU AT THE BEGINNING THERE WOULDN'T BE ANY.

18 Minor WAS THERE, SHE CAN TELL YOU WHAT HAPPENED.

19 RARELY IN A CASE WHERE IT INVOLVES SEXUAL
20 CONDUCT TOWARDS A CHILD ARE THERE ANY EYEWITNESSES.
21 THERE'S NOT A CROWD WATCHING. IT'S SOMETHING THAT
22 HAPPENS BEHIND CLOSED DOORS.

23 THIS CASE IS NOT CSI, AND I TOLD YOU AT THE
24 BEGINNING IT WOULDN'T BE. IT'S LOGICAL TO HAVE A NORMAL
25 MEDICAL EXAM WHEN A CHILD GIVES YOU AN ALLEGATION OF

1 ORAL SEX. IT'S ORAL SEX. SHE'S NOT SAYING THERE WAS
2 PENETRATION. IT'S ORAL SEX. SHE'S NOT GONNA HAVE
3 D.N.A. EVIDENCE ON HER FOUR MONTHS LATER. SHE'S NOT
4 GONNA HAVE PHYSICAL SCARS. THIS WASN'T A VIOLENT RAPE
5 LIKE YOU SEE ON T.V. IT WAS THE VIOLATION OF A LITTLE
6 GIRL'S TRUST. THERE'S NOT GONNA BE ANY MARKS FOR US TO
7 SEE.

8 THEY SAY SHE SHOULD HAVE REPORTED IT THE
9 SAME DAY. IT TOOK HER FOUR TO FIVE MONTHS TO TELL
10 SOMEBODY. SHE TOLD YOU SHE WAS SCARED.

11 REASONABLE PEOPLE IN FOUR TO FIVE MONTHS
12 WASH THEIR CLOTHES. THEY WASH THEIR SHEETS. SERGEANT
13 REED TOLD YOU HE'S BEEN AT THE OCONEE COUNTY SHERIFF'S
14 OFFICE FOR OVER 20 YEARS. HE KNOWS WHAT TO LOOK FOR.
15 HE'S BEEN TO EXTENSIVE SCHOOLING, HE HAS EXTENSIVE
16 EXPERIENCE.

17 HE KNOWS THAT THIS CASE WOULDN'T LIKELY
18 PRODUCE ANY MEDICAL EVIDENCE. HE KNOWS HE PROBABLY
19 WOULDN'T FIND D.N.A. IF HE DID FIND THE DEFENDANT'S
20 D.N.A. ON HIS SHEETS, HE LIVED THERE. WHAT GOOD WOULD
21 IT HAVE DONE?

22 TO USE THE OLD SOUTHERN TERM, HE KNOWS YOU
23 CAN'T GET BLOOD OUT OF A TURNIP. HE WORKED WITH WHAT HE
24 HAD.

25 LOOK AT THE CREDIBILITY OF THE WITNESSES.

1 OVERALL Minor HAS BEEN CONSISTENT. SHE'S BEEN
2 PRETTY DETAILED. SHE MESSED UP ONE DETAIL TODAY. SHE
3 WAS NERVOUS. SHE WAS SEVEN YEARS OLD WHEN THIS
4 HAPPENED. THE DIFFERENCE BETWEEN ON HER BUTTOCKS AND IN
5 HER BUTTOCKS, TO A SEVEN-YEAR-OLD, SHE MAY NOT EVEN HAVE
6 KNOWN THE DIFFERENCE BETWEEN ON AND IN. OR IT MAY HAVE
7 MEANT IT WAS IN THE CREASE OF HER BUTTOCKS BUT NOT
8 ACTUALLY PENETRATED. THAT WAS THE ONE DETAIL THAT WAS A
9 LITTLE OFF. BUT OVERALL SHE'S TELLING YOU THAT THIS
10 ORAL SEX HAPPENED REPEATED TIMES. SHE REMEMBERS THE
11 SPECIFIC DETAILS, THE THINGS THAT WERE ON T.V., WHEN IT
12 HAPPENED, WHERE SHE WAS.

13 LOOK AT HER MOTIVE TO LIE. THERE IS
14 NOTHING. SHE DIDN'T TELL YOU SHE HATED THE DEFENDANT.
15 SHE PRETTY MUCH TOLD YOU SHE LOOKED AT HIM AS HER
16 GRANDPA. IS HER LIFE BETTER BECAUSE SHE CAME FORWARD
17 AND TOLD THIS? THIS HAD A TREMENDOUS IMPACT ON HER.
18 IT'LL IMPACT THE REST OF HER LIFE. IT'LL IMPACT HER
19 FAMILY. SHE TOLD YOU SHE WAS AFRAID TO TELL BECAUSE HER
20 GRANDMA WOULD GET MAD. THERE'S NO MOTIVE TO LIE HERE;
21 IT DOES NOT EXIST.

22 TAKING OUR CASE APART AND LOOKING AT IT
23 PIECE BY PIECE, LET'S LOOK AT Minor THE FACTS, THE
24 DETAILS, HER CONSISTENCY. THE COURAGE IT TAKES TO COME
25 UP HERE, AND TELL 12, 14 PEOPLE YOU DON'T KNOW, WHAT

1 HAPPENED. HER DETAILS WERE PRETTY GOOD.

2 SHE SAID SHE WAS WATCHING A SCARY MOVIE, SHE
3 WAS UP LATE. IT WAS THE SUMMER BEFORE SECOND GRADE WHEN
4 SHE HAD MS. HAWK. THAT THERE WAS A PALLET IN THE FLOOR
5 MADE. THE FIRST -- WHEN SHE WAS WATCHING THE MOVIE, THE
6 FIRST TIME THE DEFENDANT PUT HIS PENIS IN HER MOUTH.
7 SHE TOLD YOU THAT THE ONE TIME HE LICKED HER PRIVATE
8 PARTS WAS IN THE BED. SHE TELLS YOU MULTIPLE TIMES THAT
9 SUMMER HE PUT HIS PRIVATES IN HER MOUTH. SHE EVEN
10 REMEMBERS THAT IT SMELLED BAD.

11 SHE SAID THAT HE TOUCHED HER PRIVATES WITH
12 HIS HANDS AND RUBBED HER. SHE REMEMBERS EVERY TIME IT
13 HAPPENED THEY WERE ALONE, EXCEPT FOR ONE TIME WHEN
14 GRANDMA WAS THERE, AND SHE WAS AFRAID TO WAKE GRANDMA
15 UP.

16 SHE'S A CHILD. SHE DID PRETTY GOOD FOR
17 REMEMBERING WHAT HAPPENED TO HER WHEN SHE WAS SEVEN, AT
18 AGE TEN. MOST OF US CAN'T REMEMBER WHAT WE DID LAST
19 WEEK, AND I THINK HER DETAILS ARE PRETTY GOOD FOR
20 SOMETHING THAT HAPPENED THREE YEARS AGO.

21 LET'S LOOK AT WHAT SERGEANT REED TOLD YOU --
22 LIEUTENANT REED, EXCUSE ME. THE DEFENDANT STARTED
23 WRITING A STATEMENT FOR HIM AND HE STOPPED. HE SAID HE
24 STOPPED TO PREPARE HIS FAMILY. YOU ARE GONNA HAVE THAT
25 STATEMENT IN EVIDENCE FOR YOU.

1 IT SAYS: HAVING SAID THAT, I GIVE THE
2 FOLLOWING STATEMENT. FIRST, I WILL STOP TILL I TALK
3 WITH MY FAMILY.

4 HE NEVER RESUMED THAT CONVERSATION WITH
5 SERGEANT REED.

6 WHAT WAS HE GONNA PREPARE HIS FAMILY FOR?

7 LOOK AT WHAT THE DEFENDANT DID SAY TO
8 MR. LARK. HE SAID: MY WIFE PERFORMS ORAL SEX ON ME
9 WHILE I SLEEP. I WAS HAVING THIS DREAM THAT SHE WAS
10 DOING THAT, AND I WOKE UP FROM THE DREAM, AND SHE WASN'T
11 THERE, BUT Minor WAS, AND I CAN'T SAY YES OR NO IF
12 MY PENIS WAS IN HER MOUTH.

13 I THINK A REASONABLE PERSON WOULD WAKE UP IF
14 THEY KNEW ANY OF THEIR PRIVATE PARTS WERE IN SOMEONE'S
15 MOUTH. THEY WOULD KNOW THE ANSWER "YES" OR "NO" TO THAT
16 QUESTION.

17 THAT STORY WITH THIS DEFENDANT ATTEMPTS TO
18 TURN EVERYTHING AROUND AND MAKE IT LOOK LIKE Minor
19 WAS GUILTY OF SOMETHING.

20 IN A LITTLE WHILE YOU'RE GONNA GO TO THAT
21 JURY ROOM AND YOU'RE GONNA BE ASKED TO DELIBERATE. THE
22 MOST IMPORTANT TOOL THAT EACH OF YOU BROUGHT WITH YOU
23 TODAY IS YOUR COMMON SENSE; YOU DIDN'T LEAVE IT OUT AT
24 THE DOOR BACK THERE BEFORE YOU CAME IN HERE; YOU BROUGHT
25 IT TO JURY DUTY WITH YOU AND YOU'RE GONNA TAKE IT BACK

1 IN THAT JURY ROOM WITH YOU.

2 YOUR COMMON SENSE TELLS YOU Minor IS
3 TELLING THE TRUTH. YOUR COMMON SENSE DOESN'T BELIEVE
4 THIS DEFENDANT'S VERSION OF THESE FACTS. YOUR COMMON
5 SENSE TELLS YOU THAT THAT MAN OVER THERE IS GUILTY.

6 TO SUM THINGS UP, THIS CASE IS ABOUT BROKEN
7 PROMISES AND BETRAYED TRUST. IN THE DEFENDANT'S OWN
8 STATEMENT HE SAYS: I PROMISED Minor MOM I WOULD
9 TAKE CARE OF HER CHILDREN.

10 HE BROKE THAT PROMISE IN A WAY MOST PARENTS
11 CAN'T IMAGINE.

12 Minor TRUSTED HIM LIKE A GRANDPA. SHE
13 TRUSTED HIM IN THE WAY LITTLE GIRLS TRUST PEOPLE, A
14 HUNDRED PERCENT, IT'S A HUNDRED PERCENT PURE AND IT'S A
15 HUNDRED PERCENT INNOCENT. HE BETRAYED HER TRUST AND
16 VIOLATED HER IN THE WORST WAYS THAT YOU CAN DO TO A
17 LITTLE GIRL. FOR GOODNESS SAKES, SHE WAS SEVEN YEARS
18 OLD. SEVEN YEARS OLD. SHE WASN'T EVEN OLD ENOUGH TO
19 UNDERSTAND WHAT HE WAS DOING.

20 TODAY Minor TRUSTED ME. SHE TRUSTED ME
21 TO COME IN HERE AND HELP HER TELL YOU HER STORY, THE
22 STORY OF WHAT HAPPENED HERE IN OCONEE COUNTY THE SUMMER
23 BEFORE THE SECOND GRADE, THE SUMMER OF 2003. SHE
24 TRUSTED ME TO PROVE TO YOU THAT THIS DEFENDANT DID ALL
25 THESE TERRIBLE THINGS TO HER.

1 AT THE END OF THIS TRIAL, RIGHT HERE AND
2 NOW, Minor IS PUTTING HER TRUST IN YOU. SHE'S
3 TRUSTING THAT YOU'RE GONNA GO IN THAT JURY ROOM ---

4 MR. BYRHOLDT: YOUR HONOR, I'M GONNA OBJECT
5 ON THAT.

6 THE COURT: I UNDERSTAND.
7 LET'S NOT MAKE ANY PERSONAL APPEALS TO
8 ANYONE.

9 MS. SIMMONS: YES, YOUR HONOR.

10 I BELIEVE THAT YOU WILL GO INTO THAT JURY
11 ROOM AND YOU WILL FIND THAT THIS DEFENDANT IS GUILTY OF
12 CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE FIRST
13 DEGREE. YOU'LL FIND HIM GUILTY OF LEWD ACT UPON A
14 CHILD. AND I WANT TO THANK YOU.

15 THE COURT: MR. BYRHOLDT?

16 MR. BYRHOLDT: MAY IT PLEASE THE COURT.
17 CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT:

18 MR. BYRHOLDT: A PERSON'S WORST NIGHTMARE:
19 THE FINGER, POINTING THE FINGER.

20 LET'S TALK ABOUT WHAT THE STATE HAS NOT DONE
21 IN THIS CASE. THEY DID NOT BRING DR. GEER, THE MEDICAL
22 DOCTOR THAT EXAMINED Minor UP HERE. THEY DID NOT
23 BRING THE FORENSIC INTERVIEWER THAT QUESTIONED HER.
24 WHY?

25 WELL, ONE REASON IS THERE'S NO EVIDENCE.

1 THE OTHER REASON WITH THE INTERVIEWER IS MAYBE HER STORY
2 HAS CHANGED. LIEUTENANT REED AT LEAST ADMITTED AT LEAST
3 TWO OCCASIONS HER STORY HAS CHANGED. THE SOLICITOR SAYS
4 THAT SHE'S SCARED, TRAUMATIZED. I SAW A YOUNG GIRL THAT
5 TOLD A STORY, DID NOT CRY, DID NOT GET UPSET, JUST PUT
6 ON HER PERFORMANCE AS THEY REHEARSED.

7 IN AN INVESTIGATION THAT WAS ABSOLUTELY
8 ZERO, NOTHING WAS DONE. THEY HAVE A STATEMENT; THAT'S
9 ALL THEY SAID THEY NEED. THEY DIDN'T EVEN GO OUT AND
10 LOOK FOR ANYTHING. THAT'S NOT HOW OUR SYSTEM OF JUSTICE
11 WORKS.

12 THE STATE HAS THE BURDEN OF PROVING THEIR
13 CASE BEYOND A REASONABLE DOUBT, BUT THE STATE ALSO HAS
14 THE BURDEN OF DOING JUSTICE. GO OUT THERE AND DO AN
15 INVESTIGATION FROM A TO Z. NOT GO OUT THERE AND SAY,
16 "THAT'S ALL I NEED. LET'S GO OUT THERE AND CHARGE
17 SOMEBODY. SOMEONE MADE A STATEMENT." THAT'S NOT HOW IT
18 WORKS.

19 REASONABLE DOUBT. THE KIND OF DOUBT THAT
20 WOULD CAUSE A REASONABLE PERSON TO HESITATE. IT COULD
21 COME FROM THE CHANGE OF STORY, IT COULD COME FROM A LACK
22 OF EVIDENCE. THAT'S FOR YOU TO DETERMINE.

23 BUT WHAT BLEW MY MIND TODAY WAS Minor
24 SAYING THIS HAPPENED WITH HER GRANDMOTHER ASLEEP IN THE
25 BED WITH HER? AND NOTHING WAS DONE, NOBODY WOKE UP,

1 NOBODY SAID A WORD? THAT'S JUST -- THAT'S INCREDIBLE.
2 BUT THAT'S THE STORY THAT THEY WANT THE 12 OF YOU GOOD
3 PEOPLE OF OCONEE COUNTY TO BELIEVE WHEN YOU GO BACK INTO
4 YOUR ROOM TO DISCUSS THIS CASE. AND ASK YOU --
5 INDIVIDUALLY, WHEN YOU GO BACK THERE, ASK YOURSELVES THE
6 FIRST QUESTION: IS THAT REASONABLE? IS THAT
7 BELIEVABLE?

8 BECAUSE THE JUDGE IS GONNA CHARGE YOU WHAT
9 CREDIBILITY MEANS IS BELIEVABILITY. JUST BECAUSE
10 SOMEONE OPENS THEIR MOUTH AND SAYS IT DOES NOT MAKE IT
11 SO, AND THAT'S WHAT THIS WHOLE CASE IS BASED ON.

12 AND ASK YOURSELVES, WHEN Minor WAS
13 TESTIFYING, DO YOU SEE FEAR? DO YOU SEE TRAUMA? DID
14 YOU SEE SOMEBODY THAT WAS UPSET? NO. IT'S NOT THERE.
15 IT'S JUST NOT THERE.

16 LET'S TALK ABOUT WHAT WE HAVE IN THIS CASE.
17 WE'VE GOT A REHEARSAL, WE'VE GOT A DOCTOR THAT DIDN'T
18 COME TO COURT; WE'VE GOT THE FORENSIC INTERVIEWER, THE
19 MOST IMPORTANT PERSON, THE PERSON THAT'S SUPPOSED TO
20 TALK TO THE CHILD AND FIND OUT WHAT HAPPENED. NOT HERE.

21 WE'VE GOT NO PHYSICAL EVIDENCE OF ANY KIND,
22 NO SEMEN, NO HAIR, NO D.N.A. WE'VE GOT A STATEMENT FROM
23 Minor SAYING "HE PUT HIS PENIS IN MY BUTT." IF THAT
24 WOULD HAVE HAPPENED, THE DOCTOR WOULD HAVE FOUND
25 EVIDENCE OF THAT AND THERE WOULD BE SOME TRAUMA. WE

1 DON'T HAVE THAT.

2 WE HAVE NO TRAUMA. WE HAVE NO PHYSICAL
3 TRAUMA, AND FROM THE WITNESS STAND TODAY, FROM ANY OF
4 THE WITNESSES WE SAW NO EMOTIONAL TRAUMA, NO
5 PSYCHOLOGICAL TRAUMA. WE JUST DIDN'T SEE IT. IT'S NOT
6 THERE BECAUSE IT DOESN'T EXIST. NO CRYING, NO EMOTIONS;
7 NOT UPSET.

8 BUT YET THE SOLICITOR SAYS SHE WAS SCARED.
9 DID THAT CHILD APPEAR SCARED TO YOU? THAT'S FOR YOU TO
10 DETERMINE. IS IT BELIEVABLE THE G... OTHER WAS F...
11 WHEN THIS HAPPENED?

12 THE JUDGE IS GONNA CHARGE . . . THE FACT
13 THAT WE PUT UP NO EVIDENCE CANNOT BE USED AGAINST US.
14 PLEASE TAKE THE JUDGE'S CHARGE NOT AS EMPTY WORDS,
15 BECAUSE THE THING THAT MAKES OUR COUNTRY DIFFERENT FROM
16 THE MIDDLE EAST, THE FORMER SOVIET UNION, IS THAT WE DO
17 NOT HAVE TO PROVE INNOCENCE BECAUSE SOMETIMES YOU JUST
18 CAN'T DO IT. TRYING TO PROVE THE NEGATIVE, YOU CAN'T
19 DO.

20 BUT THOSE WORDS HAVE MEANING. THAT
21 PRESUMPTION OF INNOCENCE STAYS WITH MR. CRITTENDON UNTIL
22 YOU 12 STRIP IT AWAY FROM HIM. AND THE FACT THAT HE
23 CHOSE NOT TO TAKE THE STAND COULD NOT ENTER INTO YOUR
24 DELIBERATIONS AT ALL.

25 BECAUSE BY SAYING "I PLEAD NOT GUILTY" HE

1 SAYS, "I DIDN'T DO IT; STATE, PROVE YOUR CASE." AND
2 WHAT ELSE COULD HE SAY ON THE STAND BUT "I DIDN'T DO
3 IT"?

4 IF ANYTHING HAPPENED DURING THIS DAY THAT
5 I'VE DONE TO OFFEND YOU -- I HOPE I HAVEN'T -- HOLD THAT
6 AGAINST ME, CHEW ME OUT AFTER THE TRIAL, BUT DO NOT HOLD
7 IT AGAINST MR. CRITTENDON. AND IF I'VE DONE SOMETHING,
8 LET ME KNOW, BECAUSE IF I'VE DONE IT, IT HAS NOT BEEN
9 INTENTIONAL.

10 THE STATE HAS THE HIGH BURDEN OF PROVING
11 EACH AND EVERY ELEMENT OF THEIR CASE BEYOND A REASONABLE
12 DOUBT. LIKE I SAY, REASONABLE DOUBT CAN BE FOUND FROM
13 WHAT YOU HEARD TODAY, AND IT CAN ALSO BE FOUND FROM WHAT
14 THE STATE DIDN'T BRING TO YOU TODAY: A LACK OF
15 EVIDENCE.

16 ON BEHALF OF MR. CRITTENDON WE THANK YOU FOR
17 THE CLOSE ATTENTION -- I'VE KIND OF WATCHED JURIES
18 DURING THIS AND YOU ALL PAID CLOSE ATTENTION. THAT'S
19 ALL THAT HE CAN DO. THIS IS HIS DAY IN COURT. HE IS ON
20 TRIAL TODAY, NO ONE ELSE IS. AND ON HIS BEHALF WE THANK
21 YOU FOR THE CLOSE ATTENTION THAT YOU PAID DURING THIS
22 TRIAL.

23 I ASK YOU ALSO TO PAY CLOSE ATTENTION TO THE
24 JUDGE'S CHARGE ON THE LAW AND HOLD THE STATE TO THE HIGH
25 BURDEN. THE FIRST QUESTION YOU SHOULD ASK WHEN YOU GO

1 OUT THERE INDIVIDUALLY IS, "DID THE STATE PROVE THEIR
2 CASE TO ME?" IF THEY DIDN'T, IF YOU HAVE A DOUBT, YOU
3 HOLD ON TO THAT, TALK COLLECTIVELY, BUT MAINTAIN YOUR
4 CONVICTION. DON'T LET SOMEONE TALK YOU OUT OF IT
5 BECAUSE YOU SAY, WELL, IT'S LATE IN THE DAY, TIME TO GO
6 HOME, TAKE CARE OF THE KIDS AND HAVE DINNER. WE ASK YOU
7 TO DO YOUR CIVIC DUTY, AND WE KNOW YOU WILL. THANK YOU
8 VERY MUCH.

9
10 THE COURT'S CHARGE TO THE JURY:

11
12 MADAM FORELADY, LADIES AND GENTLEMEN OF THE
13 JURY, AS JURORS IN THIS CASE YOU HAVE CERTAIN FUNCTIONS
14 AND RESPONSIBILITIES TO PERFORM WHICH ARE ENTIRELY
15 DIFFERENT AND SEPARATE FROM THOSE OF MINE AS THE TRIAL
16 JUDGE. I AM PROHIBITED BY OUR CONSTITUTION FROM
17 CHARGING YOU ON THE FACTS OF THE CASE. I'M ALSO
18 PROHIBITED FROM DISCUSSING THE FACTS OF THE CASE WITH
19 YOU OR IN ANY WAY INTIMATING WHAT MY FEELINGS, IF ANY,
20 ARE ABOUT THE FACTS OF THE CASE.

21 IT IS YOUR RESPONSIBILITY AND YOURS ALONE TO
22 PASS UPON ALL ISSUES OF FACT PRESENTED IN THE CASE. I
23 WOULD, THEREFORE, CHARGE YOU THAT IF DURING THE COURSE
24 OF THE TRIAL OR DURING MY CHARGE, YOU HAVE BEEN GIVEN OR
25 LEFT WITH THE IMPRESSION OR FEELING THAT I DO HAVE A

1 PERSONAL FEELING ABOUT THE FACTS OF THE CASE, I WOULD
2 SPECIFICALLY INSTRUCT YOU TO DISREGARD THAT FEELING OR
3 IMPRESSION.

4 MOREOVER, YOU ARE THE SOLE JUDGES OF WHAT
5 THE TESTIMONY WAS AND NOT THE ARGUMENT OF COUNSEL. IT
6 IS ALSO YOUR DUTY AND YOURS ALONE TO WEIGH THE TESTIMONY
7 AND EVIDENCE IN THE CASE AND TO PASS UPON THE
8 CREDIBILITY OR THE BELIEVABILITY OF THE WITNESSES.

9 IN THIS CONNECTION YOU HAVE THE RIGHT TO
10 BELIEVE ALL THAT A WITNESS TELLS YOU OR TO DISBELIEVE
11 ALL THAT A WITNESS TELLS YOU. YOU HAVE THE RIGHT TO
12 BELIEVE A PART OF WHAT A WITNESS TELLS YOU AND TO
13 DISBELIEVE A PART OF WHAT A WITNESS TELLS YOU. YOU HAVE
14 THE RIGHT TO TAKE IN CONSIDERATION ANY BIAS OR PREJUDICE
15 OR INTEREST YOU FEEL A WITNESS MIGHT HAVE IN THE CASE.

16 I SAY THIS MERELY TO EMPHASIZE THAT THE
17 WEIGHT YOU SEE FIT TO GIVE TO THE EVIDENCE, TO THE
18 TESTIMONY AND TO THE OTHER EXHIBITS, TO THE CREDIBILITY
19 OF THE WITNESSES AS WELL AS ALL ISSUES OF FACT, ARE FOR
20 YOUR SOLE DETERMINATION.

21 AS JUDGES OF THE FACTS YOU ARE THE SOLE
22 JUDGES OF THE CREDIBILITY, THAT IS THE BELIEVABILITY OF
23 THE WITNESSES WHO HAVE TESTIFIED IN THIS CASE. IN
24 PASSING UPON THEIR CREDIBILITY YOU MAY TAKE INTO
25 CONSIDERATION MANY THINGS, SUCH AS THE APPEARANCE AND

1 MANNER OF THE WITNESS ON THE STAND, SOMETIMES REFERRED
2 TO AS THE DEMEANOR OF THE WITNESSES. WAS THE WITNESS
3 FORTHRIGHT OR HESITANT? WAS THE WITNESS'S TESTIMONY
4 CONSISTENT OR DID IT CONTAIN DISCREPANCIES? WHAT WAS
5 THE ABILITY OF THE WITNESS TO KNOW THE FACTS ABOUT WHICH
6 HE OR SHE TESTIFIED? DID THE WITNESS HAVE A CAUSE OR A
7 REASON TO BE BIASED OR PREJUDICED IN FAVOR OF THE
8 TESTIMONY WHICH HE OR SHE GAVE? WAS THE TESTIMONY OF
9 THE WITNESS CORROBORATED OR MADE STRONGER BY OTHER
10 TESTIMONY AND EVIDENCE, OR WAS IT MADE WEAKER OR
11 IMPEACHED BY SUCH OTHER TESTIMONY AND EVIDENCE? AS
12 JURORS YOU HAVE THE RIGHT TO BELIEVE A SMALL PART OF A
13 WITNESS'S TESTIMONY AND DISCARD THE LARGER, AND VICE
14 VERSA.

15 DURING THE TRIAL YOU HAVE HEARD TESTIMONY
16 FROM A CHILD. WHERE A WITNESS IS A CHILD, YOU MUST
17 DETERMINE, AS WITH ANY WITNESS, WHETHER THAT TESTIMONY
18 IS BELIEVABLE. IN DECIDING BELIEVABILITY, YOU MAY
19 CONSIDER NOT ONLY MATTERS THAT I HAVE ALREADY DISCUSSED
20 WITH YOU, BUT YOU MAY ALSO CONSIDER THE AGE OF THE
21 CHILD, THE CHILD'S ABILITY TO OBSERVE AND REMEMBER
22 FACTS, AND THE CHILD'S ABILITY TO UNDERSTAND AND ANSWER
23 QUESTIONS.

24 BECAUSE YOUNG CHILDREN MAY NOT FULLY
25 UNDERSTAND WHAT IS HAPPENING HERE, IT IS UP TO YOU TO

1 DECIDE WHETHER THE CHILD UNDERSTOOD THE SERIOUSNESS OF
2 APPEARING AS A WITNESS IN THIS CRIMINAL TRIAL, WHETHER
3 THE CHILD UNDERSTOOD THE QUESTIONS, WHETHER THE CHILD
4 HAS A GOOD MEMORY, AND WHETHER THE CHILD UNDERSTANDS THE
5 DIFFERENCE BETWEEN LYING AND TELLING THE TRUTH.

6 IN ADDITION, YOUNG CHILDREN MAY BE
7 INFLUENCED BY THE WAY THAT QUESTIONS ARE ASKED. IT IS
8 UP TO YOU TO DECIDE WHETHER THE CHILD UNDERSTOOD THE
9 QUESTIONS ASKED.

10 THROUGHOUT THIS ENTIRE PROCESS YOU HAVE BUT
11 ONE SINGLE OBJECTIVE, AND THAT IS TO SEEK THE TRUTH.

12 NOW, THERE HAVE BEEN ADMITTED INTO THE
13 RECORD IN THIS CASE STATEMENTS ALLEGED TO HAVE BEEN MADE
14 BY THE DEFENDANT. BEFORE YOU MAY CONSIDER THESE
15 STATEMENTS AS EVIDENCE FOR ANY PURPOSE, YOU MUST
16 DETERMINE FOUR QUESTIONS:

17 (1) DID THE DEFENDANT MAKE THE STATEMENTS?

18 (2) WAS THE DEFENDANT WARNED OF HIS
19 CONSTITUTIONAL RIGHTS?

20 (3) DID THE DEFENDANT KNOWINGLY AND
21 INTELLIGENTLY WAIVE HIS CONSTITUTIONAL RIGHTS?

22 (4) AND WERE THE STATEMENTS GIVEN
23 VOLUNTARILY?

24 THE FACT THAT THE COURT HAS ADMITTED A
25 STATEMENT INTO EVIDENCE SHOULD NOT BE CONSIDERED BY YOU

1 AS ANY EVIDENCE WHATSOEVER THAT THE DEFENDANT MADE SUCH
2 A STATEMENT OR THAT THE REQUIRED CONSTITUTIONAL
3 STANDARDS WERE, IN FACT, PROVIDED AND WAIVED BY THE
4 DEFENDANT, OR THAT THE STATEMENT WAS VOLUNTARILY GIVEN,
5 BECAUSE THESE ISSUES ARE FOR YOU, THE JURY, TO
6 DETERMINE.

7 THE STATE MUST PROVE BEYOND A REASONABLE
8 DOUBT EACH OF THE FOUR REQUIREMENTS THAT I HAVE JUST
9 STATED TO YOU BEFORE YOU MAY CONSIDER THE STATEMENT AS
10 EVIDENCE FOR ANY PURPOSE WHATSOEVER.

11 AS TO THE FIRST REQUIREMENT, DID THE
12 DEFENDANT MAKE THE STATEMENT, IF YOU CONCLUDE THE
13 DEFENDANT DID NOT MAKE THE STATEMENT, YOU MUST THEN
14 COMPLETELY AND TOTALLY DISREGARD THE STATEMENT.

15 AS TO THE SECOND REQUIREMENT, WAS THE
16 DEFENDANT WARNED OF HIS CONSTITUTIONAL RIGHTS, WHEN AN
17 INDIVIDUAL IS TAKEN INTO CUSTODY OR OTHERWISE DEPRIVED
18 OF HIS FREEDOM OF ACTION IN ANY SIGNIFICANT WAY BY A LAW
19 ENFORCEMENT OFFICER, HE MUST BE WARNED OF CERTAIN
20 CONSTITUTIONAL RIGHTS PRIOR TO AND BEFORE ANY CUSTODIAL
21 INTERROGATION OR CUSTODIAL QUESTIONING. NOW, THESE
22 RIGHTS ARE:

23 (1) THE RIGHT TO REMAIN SILENT;

24 (2) THAT ANY STATEMENT MADE BY THE

25 DEFENDANT CAN AND WILL BE USED AGAINST THE DEFENDANT IN

1 A COURT OF LAW;

2 (3) THE RIGHT TO SELECT AN ATTORNEY OF HIS
3 CHOICE, BUT IF THE DEFENDANT IS WITHOUT THE MONEY OR
4 RESOURCES TO EMPLOY A LAWYER, THAT THE COURT WILL
5 APPOINT AND PROVIDE A LAWYER TO REPRESENT HIM WITHOUT
6 COST OR EXPENSE, IF HE SO DESIRES;

7 (4) THE RIGHT TO CONSULT A LAWYER BEFORE
8 ANSWERING ANY QUESTIONS OR MAKING ANY STATEMENT;

9 (5) THE RIGHT TO HAVE A LAWYER PRESENT AT
10 ALL TIMES DURING INTERVIEWS AND ALL INTERROGATIONS.

11 IF YOU DETERMINE THAT THESE CONSTITUTIONAL
12 WARNINGS WERE NOT GIVEN TO THE DEFENDANT PRIOR TO THE
13 INTERROGATION AND TAKING OF THE STATEMENT, OR THAT THE
14 DEFENDANT WAS NOT AFFORDED THE OPPORTUNITY TO EXERCISE
15 THESE RIGHTS, YOU MUST COMPLETELY DISREGARD THE
16 STATEMENT, AND IN THAT EVENT, YOU CANNOT CONSIDER THE
17 STATEMENT AS EVIDENCE IN ANY MANNER WHATSOEVER.

18 AS TO THE THIRD REQUIREMENT, DID THE
19 DEFENDANT KNOWINGLY AND INTELLIGENTLY WAIVE HIS
20 CONSTITUTIONAL RIGHTS, IF YOU FIND THAT THE DEFENDANT
21 DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS
22 CONSTITUTIONAL RIGHTS, THEN ANY ANSWER GIVEN BY HIM OR
23 ANY STATEMENT MADE BY HIM CANNOT BE USED AGAINST HIM AND
24 YOU MUST COMPLETELY DISREGARD ALL OF THE TESTIMONY
25 CONCERNING ANY SUCH ANSWERS OR ALLEGED STATEMENT.

1 AS TO THE FOURTH REQUIREMENT, WAS THE
2 STATEMENT GIVEN VOLUNTARILY, A STATEMENT IS NOT
3 VOLUNTARY AND MAY NOT BE USED AGAINST A DEFENDANT UNLESS
4 IT IS THE PRODUCT OF AN ESSENTIALLY FREE AND
5 UNCONSTRAINED CHOICE BY ITS MAKER. THE TRUE TEST TO BE
6 APPLIED IS WHETHER A STATEMENT IS FREELY, VOLUNTARILY,
7 AND UNDERSTANDINGLY MADE WITHOUT COMPULSION OR
8 INDUCEMENT. IN DETERMINING WHETHER OR NOT AN ALLEGED
9 STATEMENT OF THE DEFENDANT WAS VOLUNTARY, YOU MAY
10 CONSIDER ALL OF THE FACTS AND CIRCUMSTANCES SURROUNDING
11 THE TAKING OR MAKING OF THE STATEMENT.

12 WITH REGARD TO THE ALLEGED STATEMENT OF THE
13 DEFENDANT, THE STATE MUST PROVE BY EVIDENCE EACH AND
14 EVERY REQUIREMENT ABOUT WHICH I HAVE INSTRUCTED YOU
15 BEYOND A REASONABLE DOUBT BEFORE YOU CONSIDER THE
16 ALLEGED STATEMENTS AS EVIDENCE IN THIS CASE.

17 ABSENT ONE OF THE REQUIREMENTS ABOUT WHICH I
18 HAVE INSTRUCTED YOU, THE ALLEGED STATEMENT MUST BE
19 DISREGARDED COMPLETELY, AND, IN THAT EVENT, YOU WILL
20 ACCORD NO EVIDENTIARY WEIGHT TO THEM OR TO ANY PART OF
21 THEM.

22 NOW, BY THE SAME CONSTITUTION AND LAW WHICH
23 MAKES YOU THE FINDERS OF THE FACTS AND EVIDENCE, AS I
24 HAVE DISCUSSED WITH YOU, I AM AS THE JUDGE MADE THE SOLE
25 AND ONLY INSTRUCTOR IN THE LAW. YOU MUST ACCEPT AS

1 CORRECT THE LAW WHICH I CHARGE YOU AND APPLY IT TO THE
2 EVIDENCE AS YOU FIND IT AND REACH YOUR VERDICT. IF I
3 SHOULD MAKE AN ERROR IN THE LAW AS I INSTRUCT IT TO YOU,
4 THERE IS ANOTHER TIME AND PLACE WHERE THAT ERROR CAN BE
5 CONSIDERED AND, IF NECESSARY, CORRECTED, BUT FOR THE
6 PURPOSES OF THIS CASE TODAY, YOU MUST ACCEPT THE LAW AS
7 I CHARGE IT TO YOU TO BE THE CORRECT LAW.

8 NOW, THE DEFENDANT HAS PLED NOT GUILTY TO
9 THIS INDICTMENT, IN BOTH OF THESE INDICTMENTS, AND THAT
10 PLEA PUTS THE BURDEN ON THE STATE TO PROVE THE DEFENDANT
11 GUILTY. A PERSON CHARGED WITH COMMITTING A CRIME OR
12 CRIMINAL OFFENSE IN SOUTH CAROLINA IS NEVER REQUIRED TO
13 PROVE HIMSELF INNOCENT.

14 I CHARGE YOU THAT IT IS AN IMPORTANT RULE OF
15 LAW THAT THE DEFENDANT IN A CRIMINAL CASE, NO MATTER
16 WHAT THE SERIOUSNESS OF THE CHARGE MAY BE, WILL ALWAYS
17 BE PRESUMED TO BE INNOCENT OF THE CRIME FOR WHICH THE
18 INDICTMENT WAS ISSUED UNLESS GUILT HAS BEEN PROVEN BY
19 EVIDENCE SATISFYING YOU OF THAT GUILT BEYOND A
20 REASONABLE DOUBT.

21 THE PRESUMPTION OF INNOCENCE DOES NOT END
22 WHEN YOU BEGIN YOUR DELIBERATIONS, BUT IT ACCOMPANIES
23 THE DEFENDANT THROUGHOUT THE TRIAL UNTIL YOU REACH A
24 VERDICT OF GUILT BASED UPON EVIDENCE SATISFYING YOU OF
25 THAT GUILT BEYOND A REASONABLE DOUBT.

1 THE PRESUMPTION OF INNOCENCE IS LIKE A ROBE
2 OF RIGHTEOUSNESS PLACED ABOUT THE SHOULDERS OF THE
3 DEFENDANT WHICH REMAINS WITH THE DEFENDANT UNTIL IT HAS
4 BEEN STRIPPED FROM THE DEFENDANT BY EVIDENCE SATISFYING
5 YOU OF THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

6 PRESUMPTION OF INNOCENCE IS NOT A MERE LEGAL
7 THEORY; IT IS NOT JUST A LEGAL PHRASE. IT IS A
8 SUBSTANTIAL RIGHT TO WHICH EVERY DEFENDANT IS ENTITLED
9 UNLESS YOU, THE JURY, ARE SATISFIED FROM THE EVIDENCE OF
10 THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

11 NOW, REASONABLE DOUBT IS THE KIND OF DOUBT
12 THAT WOULD CAUSE A REASONABLE PERSON TO HESITATE TO ACT.

13 I INSTRUCT YOU AND I EMPHASIZE THAT WHETHER
14 THE DEFENDANT EXERCISED HIS ABSOLUTE CONSTITUTIONAL
15 RIGHT NOT TO TAKE THE WITNESS STAND AND TESTIFY IS NOT A
16 FACTOR TO BE CONSIDERED BY YOU IN ANY WAY IN YOUR
17 DELIBERATION AND IN YOUR CONSIDERATION ON THE QUESTION
18 OF WHETHER THE STATE HAS PROVEN THAT THE DEFENDANT IS
19 GUILTY OF THE CHARGES IN THE INDICTMENTS OR IS TO BE
20 FOUND NOT GUILTY. IT MUST NOT BE CONSIDERED BY YOU IN
21 ANY MANNER WHATSOEVER. THE DEFENDANT HAS THE ABSOLUTE
22 CONSTITUTIONAL RIGHT TO REMAIN SILENT, AND THE ASSERTION
23 OF THIS RIGHT MUST NOT BE CONSIDERED BY YOU IN YOUR
24 DELIBERATIONS.

25 I REPEAT: UNDER YOUR OATH YOU ARE TO DRAW

1 NO CONCLUSION WHATSOEVER FROM THE FACT THAT THE
2 DEFENDANT IN THIS CASE EXERCISED HIS CONSTITUTIONAL
3 RIGHT NOT TO TESTIFY. THE FACT THAT THE DEFENDANT
4 EXERCISED THIS RIGHT SHOULD NOT EVEN BE DISCUSSED BY YOU
5 IN THE JURY ROOM. THE BURDEN OF PROOF, AS I HAVE STATED
6 TO YOU, IS ON THE STATE. THE DEFENDANT IS NOT REQUIRED
7 TO PROVE HIS INNOCENCE. THE BURDEN OF PROOF REMAINS ON
8 THE STATE TO PROVE GUILT BEYOND A REASONABLE DOUBT.

9 NOW, CRIMINAL INTENT IS A STATE OF MIND THAT
10 OPERATES JOINTLY WITH AN ACT OR OMISSION IN THE
11 COMMISSION OF A CRIME. CRIMINAL INTENT IS A MENTAL
12 STATE.

13 CRIMINAL LIABILITY IS NORMALLY BASED UPON
14 THE CONCURRENCE OF TWO FACTORS: AN EVIL MEANING MIND
15 AND AN EVIL DOING HAND.

16 PROOF OF INTENT NECESSARILY RESTS ON
17 INFERENCE FROM CONDUCT.

18 NOW, THE INDICTMENTS ALLEGE TWO DIFFERENT
19 OFFENSES AGAINST THE DEFENDANT. THE CHARGES ARE IN
20 INDICTMENT NUMBER 2006-GS-37-927 CRIMINAL SEXUAL CONDUCT
21 WITH A MINOR IN THE FIRST DEGREE. INDICTMENT
22 2004-GS-37-509 CHARGES LEWD ACT UPON A CHILD UNDER 16.

23 EACH INDICTMENT CHARGES A SEPARATE AND
24 DISTINCT OFFENSE. YOU MUST DECIDE EACH INDICTMENT
25 SEPARATELY ON THE EVIDENCE AND THE LAW APPLICABLE TO IT,

1 UNINFLUENCED BY YOUR DECISION AS TO ANY OTHER
2 INDICTMENT. THE DEFENDANT MAY BE CONVICTED OR ACQUITTED
3 ON ONE OR BOTH OF THE OFFENSES CHARGED. YOU WILL BE
4 ASKED TO WRITE A SEPARATE VERDICT OF GUILTY OR NOT
5 GUILTY ON EACH OF THE INDICTMENTS.

6 I REMIND YOU THAT THE FACT THAT THE
7 DEFENDANT WAS ARRESTED, CHARGED, AND INDICTED IN THIS
8 CASE IS NOT EVIDENCE IN THIS CASE AND CANNOT BE
9 CONSIDERED BY YOU AS EVIDENCE OF GUILT IN THIS CASE, NOR
10 DOES IT CREATE ANY PRESUMPTION OR INFERENCE OF GUILT.
11 THE INDICTMENTS ARE SIMPLY THE FORMAL WRITTEN
12 INSTRUMENTS WHICH CONTAIN THE CHARGES MADE AGAINST THE
13 DEFENDANT. THEY ARE THE FORMAL DOCUMENTS BY WHICH THESE
14 CASES ARE BROUGHT INTO COURT.

15 NOW, IN PROSECUTIONS FOR ALLEGATIONS OF
16 SEXUAL MISCONDUCT, THE TESTIMONY OF ANY ALLEGED VICTIM
17 NEED NOT BE CORROBORATED.

18 NOW, THE DEFENDANT IS CHARGED WITH CRIMINAL
19 SEXUAL CONDUCT WITH A MINOR, FIRST DEGREE. THE STATE
20 MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT
21 ENGAGED IN A SEXUAL BATTERY WITH THE VICTIM.

22 A SEXUAL BATTERY IS SEXUAL INTERCOURSE,
23 CUNNILINGUS, FELLATIO, ANAL INTERCOURSE, OR ANY
24 INTRUSION, HOWEVER SLIGHT, OF ANY PART OF A PERSON'S
25 BODY OR OF ANY OBJECT INTO THE GENITAL OR ANAL OPENINGS

1 OF ANOTHER PERSON'S BODY, EXCEPT WHEN THE INTRUSION IS
2 ACCOMPLISHED FOR MEDICALLY RECOGNIZED TREATMENT OR
3 DIAGNOSTIC PURPOSES.

4 THE STATE MUST THEN PROVE BEYOND A
5 REASONABLE DOUBT THAT THE VICTIM WAS LESS THAN 11 YEARS
6 OLD AT THE TIME OF THE SEXUAL BATTERY.

7 CONSENT, WILLINGNESS, INDIFFERENCE, OR
8 IGNORANCE ON THE PART OF THE MINOR, IF ANY, AS TO WHAT
9 WAS TAKING PLACE DOES NOT IN ANY WAY AFFECT THE CHARGE
10 OF CRIMINAL SEXUAL CONDUCT WITH A MINOR BECAUSE AN
11 UNMARRIED WOMAN UNDER THE AGE OF 14 CANNOT LEGALLY
12 CONSENT TO SEXUAL INTERCOURSE.

13 IF YOU HAVE A REASONABLE DOUBT AS TO WHETHER
14 OR NOT THE STATE HAS PROVED THIS BURDEN AND PROVED AND
15 SHOWN ALL OF THE ELEMENTS OF CRIMINAL SEXUAL CONDUCT
16 WITH A MINOR, FIRST DEGREE, THEN YOU WOULD FIND THE
17 DEFENDANT NOT GUILTY ON INDICTMENT NUMBER
18 2006-GS-37-927.

19 ON THE OTHER HAND, IF YOU HAVE HAD NO
20 REASONABLE DOUBT THAT THE STATE HAS PROVEN EACH REQUIRED
21 ELEMENT OF CRIMINAL SEXUAL CONDUCT WITH A MINOR, FIRST
22 DEGREE, THEN YOU WOULD FIND THE DEFENDANT GUILTY ON
23 INDICTMENT NUMBER 2006-GS-37-927.

24 THE DEFENDANT IS CHARGED WITH COMMITTING A
25 LEWD ACT ON A CHILD UNDER THE AGE OF 16, AS WELL.

1 THE STATE MUST FIRST PROVE BEYOND A
2 REASONABLE DOUBT THAT THE DEFENDANT WAS OVER THE AGE OF
3 14 BUT UNDER THE AGE OF 16 AT THE TIME OF THE ALLEGED
4 MISCONDUCT.

5 NEXT, THE STATE MUST PROVE THAT THE
6 DEFENDANT WILLFULLY AND LEWDLY COMMITTED OR ATTEMPTED A
7 LEWD ACT OR A LASCIVIOUS ACT ON OR WITH THE BODY OR ITS
8 PARTS OF A CHILD UNDER THE AGE OF 16 YEARS, WITH THE
9 INTENT TO AROUSE, APPEAL TO, OR TO GRATIFY THE LUST,
10 PASSIONS, OR SEXUAL DESIRES OF THE DEFENDANT OR THE
11 CHILD.

12 WILLFULLY MEANS VOLUNTARILY AND
13 INTENTIONALLY WITH THE SPECIFIC INTENT TO DO SOMETHING.

14 LEWD MEANS OBSCENE, LUSTFUL, INDECENT, OR
15 LECHEROUS.

16 LASCIVIOUS MEANS TENDING TO INCITE LUST,
17 LEWD, INDECENT, OBSCENE, OR TENDING TO DEPRAVE THE
18 MORALS IN RESPECT TO SEXUAL RELATIONSHIPS.

19 IF YOU HAVE A REASONABLE DOUBT AS TO WHETHER
20 THE STATE HAS MET ITS BURDEN OF PROOF AND SHOWN ALL OF
21 THE ELEMENTS OF LEWD ACT UPON A CHILD UNDER 16, THEN YOU
22 WOULD FIND THE DEFENDANT NOT GUILTY ON INDICTMENT NUMBER
23 2004-GS-37-509.

24 ON THE OTHER HAND, IF YOU HAVE NO REASONABLE
25 DOUBT THAT THE STATE HAS PROVEN EACH REQUIRED ELEMENT OF

1 LEWD ACT UPON A CHILD UNDER 16, THEN YOU WOULD FIND THE
2 DEFENDANT GUILTY ON INDICTMENT 2004-GS-37-509.

3 IN SUMMARY, IF YOU HAVE A REASONABLE DOUBT
4 OF THE DEFENDANT'S GUILT ON ANY CHARGE, AFTER
5 CONSIDERING ALL OF THE EVIDENCE, THEN YOU MUST FIND THE
6 DEFENDANT NOT GUILTY ON THAT CHARGE.

7 ON THE OTHER HAND, IF YOU HAVE NO REASONABLE
8 DOUBT OF THE DEFENDANT'S GUILT AS TO A PARTICULAR
9 CHARGE, AFTER CONSIDERING ALL THE EVIDENCE, THEN YOU
10 MUST FIND THE DEFENDANT GUILTY ON THAT CHARGE.

11 NOW, MADAM FORELADY, LADIES AND GENTLEMEN OF
12 THE JURY, YOU HAVE BEEN SELECTED AS FAIR AND IMPARTIAL
13 JURORS SWORN TO IMPARTIALLY TRY AND DETERMINE THE FACTS
14 OF THIS CASE, AND WHEN YOU COMPLY WITH YOUR OATH TO DO
15 SO, THEN NO ONE WILL HAVE A RIGHT TO CRITICIZE YOUR
16 VERDICT AND YOU WILL HAVE FULLY DISCHARGED YOUR DUTY AS
17 JURORS.

18 YOU SHOULD NOT BE INFLUENCED BY OPINIONS OR
19 EXPRESSIONS OF OPINIONS, IF ANY, WHICH YOU MAY HAVE
20 HEARD ON THE OUTSIDE. YOU ARE TO DECIDE ACCORDING TO
21 THE TESTIMONY THAT YOU HAVE HEARD FROM THE LIPS OF THE
22 SWORN WITNESSES, ALONG WITH THE OTHER EVIDENCE WHICH MAY
23 HAVE BEEN INTRODUCED.

24 YOU MUST NEVER SPECULATE TO BE TRUE ANY
25 INSINUATION SUGGESTED BY A QUESTION ASKED A WITNESS. A

1 QUESTION IS NOT EVIDENCE, AND IT MAY BE CONSIDERED ONLY
2 AS IT SUPPLIES MEANING TO THE ANSWER. AS I SAID
3 EARLIER, YOU ARE THE JUDGES OF THE FACTS IN THIS CASE,
4 AND YOU WILL DETERMINE ONLY IF THIS DEFENDANT IS GUILTY
5 OR NOT GUILTY BASED UPON THE TESTIMONY AND EVIDENCE
6 PRESENTED IN THE TRIAL AND AFTER APPLYING THE LAW AS
7 I'VE GIVEN IT TO YOU.

8 IF FROM THE EVIDENCE YOU HAVE A REASONABLE
9 DOUBT AS TO WHETHER OR NOT THE DEFENDANT IS GUILTY, IT
10 IS YOUR DUTY TO ACQUIT HIM AND WRITE THE TWO WORDS "NOT
11 GUILTY." UNDER THE OATH YOU TOOK, YOU SWORE TO DECIDE
12 THIS CASE BASED ONLY AND SOLELY ON THE TESTIMONY AND
13 EVIDENCE AND LAW PRESENTED AND HEARD IN THIS COURTROOM.

14 IT IS YOUR DUTY TO LAY ASIDE ALL BIAS OR
15 PREJUDICE OR SYMPATHY YOU MAY HAVE IN REACHING YOUR
16 VERDICT. YOU HAVE NO FRIENDS TO REWARD OR ENEMIES TO
17 PUNISH IN THIS CASE.

18 I MIGHT NOTE THE WORD VERDICT COMES FROM THE
19 LATIN TERM "VEREDICTO" WHICH MEANS TO SPEAK THE TRUTH.
20 ABIDE BY YOUR OATH AND RETURN A VERDICT WHICH DOES, IN
21 FACT, SPEAK THE TRUTH.

22 NOW, MADAM FORELADY, I HAVE PREPARED A
23 VERDICT FORM FOR YOU TO USE IN THIS CASE. NOW REMEMBER,
24 ~~ANY VERDICT THAT YOU REACH HAS TO BE A UNANIMOUS~~
25 VERDICT, THAT MEANS ALL 12 MEMBERS OF THE JURY WOULD

1 HAVE TO AGREE TO THAT VERDICT.

2 NOW, MADAM FORELADY, IF YOU WILL NOTICE, WE
3 START WITH INDICTMENT NUMBER 2006-GS-37-927, CRIMINAL
4 SEXUAL CONDUCT WITH A MINOR, FIRST DEGREE. IF YOU WILL
5 NOTE, IT HAS, WE, THE JURY, UNANIMOUSLY FIND THAT THE
6 DEFENDANT, CLARENCE CRITTENDON, IS, AND THERE ARE TWO
7 POSSIBLE VERDICTS. THE VERDICT THAT COMES FIRST IS
8 GUILTY OF CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE
9 FIRST DEGREE OR THE SECOND IS NOT GUILTY. IT MAKES NO
10 DIFFERENCE WHICH ONE COMES FIRST; THE FACT IS ONE HAS TO
11 COME BEFORE THE OTHER. BUT WHATEVER VERDICT YOU REACH
12 HAS TO BE UNANIMOUS, ALL 12 MEMBERS OF THE JURY HAVE TO
13 AGREE TO WHATEVER VERDICT THAT THEY DID FIND. HOWEVER,
14 YOU WILL BE THE ONE THAT CHECKS THE APPROPRIATE BLANK.

15 AND THEN AS TO INDICTMENT NUMBER
16 2004-GS-37-509, INDICTMENT FOR LEWD ACT UPON A CHILD
17 UNDER 16, AGAIN, WE, THE JURY, UNANIMOUSLY FIND THAT THE
18 DEFENDANT, CLARENCE CRITTENDON, IS GUILTY OF LEWD ACT
19 UPON A CHILD UNDER 16 OR NOT GUILTY. WHATEVER YOUR
20 VERDICT IS, AGAIN, WOULD HAVE TO BE UNANIMOUS. BUT,
21 MADAM FORELADY, YOU WILL BE THE ONE THAT WILL CHECK THE
22 APPROPRIATE VERDICT.

23 NOW, ONCE THE VERDICT FORM HAS BEEN
24 COMPLETED, IF YOU WOULD SIGN ON THE LINE ABOVE YOUR
25 NAME. AT THAT TIME IF YOU WOULD KNOCK ON THE DOOR,

1 WE'LL ASK YOU TO COME BACK AND RECEIVE YOUR VERDICT.

2 IF YOU WOULD, PLEASE, RETURN THE VERDICT
3 FORM TO THE BAILIFF. AND I'M GONNA HAVE TO ASK YOU ONE
4 MORE TIME TO RETIRE TO THE JURY ROOM WITHOUT BEGINNING
5 YOUR DELIBERATIONS. I NEED TO TAKE UP SOME MATTERS WITH
6 THE ATTORNEYS. IT WILL ONLY TAKE ME A FEW MINUTES, BUT
7 ONCE I DO THAT I'LL SEND IN THE VERDICT FORM TOGETHER
8 WITH THE EXHIBITS. ONCE YOU RECEIVE THE VERDICT FORM
9 AND THE EXHIBITS, BEGIN YOUR DELIBERATIONS; AND ONCE YOU
10 REACH A VERDICT, AS I SAY, KNOCK ON THE DOOR AND WE'LL
11 RECEIVE YOUR VERDICT.

12 I'M GONNA HAVE TO ASK THE TWO ALTERNATES TO
13 STAY WITH US, BUT THE REMAINDER OF THE JURY PLEASE
14 RETIRE TO THE JURY ROOM.

15 (WHEREUPON, THE JURY LEFT THE COURTROOM,
16 EXCEPT FOR THE TWO ALTERNATES, AT 2:03 P.M.)

17 THE COURT: ALL RIGHT. ANY EXCEPTIONS OR
18 REQUESTS FROM THE STATE?

19 MS. SIMMONS: NO, YOUR HONOR.

20 THE COURT: FROM THE DEFENDANT?

21 MR. BYRHOLDT: NO, YOUR HONOR.

22 THE COURT: VERY GOOD. ALL RIGHT. DO LOOK
23 AT THE EXHIBITS AND BE SURE THAT ALL THE EXHIBITS THAT
24 ARE SUPPOSED TO GO BACK DO GO BACK AND THOSE THAT DO
25 NOT, DON'T.

1 ALSO CHECK THE VERDICT FORM.

2 ALL RIGHT. AS SOON AS THAT'S DONE, GIVE IT
3 TO THE BAILIFF AND HE'LL SEND IT ON BACK. WE'LL BE AT
4 RECESS WAITING FOR THE VERDICT.

5 (THE COURT CONFERRED WITH THE TWO ALTERNATE
6 JURORS OFF THE RECORD, AFTER WHICH THE TWO
7 ALTERNATE JURORS WERE EXCUSED.)

8 THE COURT: WE'LL STAND AT EASE WAITING FOR
9 THE JURY VERDICT.

10 (THE JURY STARTED DELIBERATING AT 2:05 P.M.)

11 (THERE WAS A JURY NOTE/QUESTION AT 2:10 P.M.)

12 THE COURT: WOULD COUNSEL APPROACH, PLEASE?

13 (WHEREUPON, COUNSEL APPROACHED THE BENCH AND
14 CONFERRED WITH THE COURT OUT OF THE PRESENCE
15 OF THE COURT REPORTER.)

16 (OFF-THE-RECORD DISCUSSION.)

17 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
18 2:20 P.M.)

19 THE COURT: MADAM FORELADY, I HAVE THE NOTE:
20 PLEASE PROVIDE SOLICITOR'S EVIDENCE/EXHIBIT BOARD
21 DEFINING TWO SEPARATE INDICTMENTS.

22 MADAM FORELADY, THE EXHIBIT THAT YOU ARE
23 TALKING ABOUT WAS A DEMONSTRATIVE EXHIBIT; IN OTHER
24 WORDS, IT WAS NOT ONE THAT WAS ADMITTED INTO EVIDENCE.
25 I CAN REPEAT THE CHARGE WHICH DEFINES THE CHARGES, BUT

1 YOU WILL NOT RECEIVE THAT PARTICULAR EXHIBIT. WHAT'S
2 THE DESIRE OF THE JURY? REPEAT?

3 (MEMBERS OF THE JURY CONFERRED OFF THE
4 RECORD.)

5 THE FORELADY: YES.

6 THE COURT: ALL RIGHT. INDICTMENT NUMBER
7 2006-GS-37-927 CHARGES THE DEFENDANT WITH CRIMINAL
8 SEXUAL CONDUCT WITH A MINOR, FIRST DEGREE. THE STATE
9 MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT
10 ENGAGED IN A SEXUAL BATTERY WITH THE VICTIM.

11 A SEXUAL BATTERY IS SEXUAL INTERCOURSE,
12 CUNNILINGUS, FELLATIO, ANAL INTERCOURSE, OR ANY
13 INTRUSION, HOWEVER SLIGHT, OF ANY PART OF A PERSON'S
14 BODY OR OF ANY OBJECT INTO THE GENITAL OR ANAL OPENINGS
15 OF ANOTHER PERSON'S BODY, EXCEPT WHEN THE INTRUSION IS
16 ACCOMPLISHED FOR MEDICALLY RECOGNIZED TREATMENT OR
17 DIAGNOSTIC PURPOSES.

18 THE STATE MUST THEN PROVE BEYOND A
19 REASONABLE DOUBT THAT THE VICTIM WAS LESS THAN 11 YEARS
20 OLD AT THE TIME OF THE SEXUAL BATTERY.

21 NOW, CONSENT, WILLINGNESS, INDIFFERENCE, OR
22 IGNORANCE ON THE PART OF THE MINOR, IF ANY, AS TO WHAT
23 WAS TAKING PLACE DOES NOT IN ANY WAY AFFECT THE CHARGE
24 OF CRIMINAL SEXUAL CONDUCT WITH A MINOR BECAUSE AN
25 UNMARRIED WOMAN UNDER THE AGE OF 14 CANNOT LEGALLY

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1 CONSENT TO SEXUAL INTERCOURSE.

2 IF YOU HAVE A REASONABLE DOUBT AS TO WHETHER
3 THE STATE HAS MET ITS BURDEN OF PROOF AND SHOWN ALL THE
4 ELEMENTS OF CRIMINAL SEXUAL CONDUCT WITH A MINOR, FIRST
5 DEGREE, THEN YOU WOULD FIND THE DEFENDANT NOT GUILTY ON
6 INDICTMENT NUMBER 2006-GS-37-0927.

7 ON THE OTHER HAND, IF YOU HAVE NO REASONABLE
8 DOUBT THAT THE STATE HAS PROVEN EACH REQUIRED ELEMENT OF
9 THE CRIME OF CRIMINAL SEXUAL CONDUCT WITH A MINOR, FIRST
10 DEGREE, THEN YOU WOULD FIND THE DEFENDANT GUILTY ON THAT
11 INDICTMENT.

12 NOW, INDICTMENT NUMBER 2004-GS-37-509
13 CHARGES THE DEFENDANT WITH COMMITTING A LEWD ACT ON A
14 CHILD UNDER THE AGE OF 16.

15 THE STATE MUST FIRST PROVE BEYOND A
16 REASONABLE DOUBT THE DEFENDANT WAS OVER THE AGE OF
17 FOURTEEN (14) AT THE TIME OF THE ALLEGED MISCONDUCT.

18 NEXT, THE STATE MUST PROVE THAT THE
19 DEFENDANT WILLFULLY AND LEWDLY COMMITTED OR ATTEMPTED TO
20 COMMIT A LEWD OR LASCIVIOUS ACT ON, OR WITH THE BODY OR
21 ITS PARTS OF, A CHILD UNDER THE AGE OF SIXTEEN YEARS,
22 WITH THE INTENT TO AROUSE, APPEAL TO, OR GRATIFY THE
23 LUST, PASSIONS, OR SEXUAL DESIRES OF THE DEFENDANT OR
24 THE CHILD.

25 WILLFULLY MEANS VOLUNTARILY AND

1 INTENTIONALLY WITH THE SPECIFIC INTENT TO DO SOMETHING.

2 LEWD MEANS OBSCENE, LUSTFUL, INDECENT, OR
3 LECHEROUS.

4 LASCIVIOUS MEANS TENDING TO INCITE LUST,
5 LEWD, INDECENT, OBSCENE, OR TENDING TO DEPRAVE THE
6 MORALS IN RESPECT TO SEXUAL RELATIONS.

7 IF YOU HAVE A REASONABLE DOUBT AS TO WHETHER
8 THE STATE HAS MET ITS BURDEN OF PROOF AND SHOWN ALL THE
9 ELEMENTS OF LEWD ACT UPON A CHILD UNDER 16, THEN YOU
10 WOULD FIND THE DEFENDANT NOT GUILTY ON INDICTMENT NUMBER
11 2004-GS-37-0509.

12 ON THE OTHER HAND, IF YOU HAVE NO REASONABLE
13 DOUBT THAT THE STATE HAS PROVEN EACH REQUIRED ELEMENT OF
14 LEWD ACT UPON A CHILD UNDER 16, THEN YOU WOULD FIND THE
15 DEFENDANT GUILTY ON INDICTMENT NUMBER 2004-GS-37-0509.

16 NOW, DO YOU NEED ANY FURTHER INSTRUCTIONS?

17 (MEMBERS OF THE JURY CONFERRED OFF THE
18 RECORD.)

19 THE FORELADY: NO, SIR.

20 THE COURT: VERY GOOD. IF YOU WOULD,
21 PLEASE, RETIRE AND CONTINUE YOUR DELIBERATIONS.

22 (WHEREUPON, THE JURY LEFT THE COURTROOM AT
23 2:25 P.M.)

24 THE COURT: ANY EXCEPTIONS OR REQUESTS FROM
25 THE STATE?

1 MS. SIMMONS: NO, YOUR HONOR.

2 THE COURT: FROM THE DEFENDANT?

3 MR. BYRHOLDT: JUST FOR PURPOSES OF THE
4 RECORD, I WILL TAKE EXCEPTION THAT IT TAKES JUST A
5 CODIFIED VERSION OF THE STATUTE AND CHARGES THAT, AND IT
6 PLACES UNDUE EMPHASIS ON THAT PORTION OF THE CHARGE.

7 THE COURT: ALL RIGHT. VERY WELL. DULY
8 NOTED.

9 ALL RIGHT. WE'LL STAND AT EASE AWAITING A
10 VERDICT.

11 (THE JURY CONTINUED THEIR DELIBERATIONS AT
12 2:25 P.M.)

13 (THERE WAS A JURY NOTE/QUESTION AT 3:21 P.M.)

14 THE COURT: ALL RIGHT. MAY I SEE COUNSEL,
15 PLEASE?

16 (WHEREUPON, COUNSEL APPROACHED THE BENCH AND
17 CONFERRED WITH THE COURT OUT OF THE PRESENCE
18 OF THE COURT REPORTER.)

19 THE COURT: I'VE HAD A SIDE-BAR WITH THE
20 ATTORNEYS. I HAVE RECEIVED A NOTE FROM THE JURY: CAN
21 WE PLEASE SEE THE TRANSCRIPTS FROM THE DEFENSE ATTORNEY
22 CONCERNING THE DREAM INCIDENT FROM THE INVESTIGATOR?
23 THANK YOU. FORELADY.

24 I'M GOING TO ASK THE JURY TO COME BACK
25 BECAUSE IT SAYS TRANSCRIPTS FROM THE DEFENSE ATTORNEY

1 CONCERNING THE DREAM INCIDENT. I DON'T KNOW IF THEY
2 MEAN THE TESTIMONY OF MR. LARK OR THE CROSS-EXAMINATION,
3 DIRECT TESTIMONY OF MR. LARK OR CROSS-EXAMINATION BY
4 MR. BYRHOLDT. SO I'M GOING TO ASK THEM WHICH THEY WANT,
5 THEN WE'LL TRY TO PLAY IT FOR THEM. WE MIGHT NEED TO
6 SEND THEM BACK OUT WHILE WE FIND IT, BUT AT LEAST WE'LL
7 SEE WHERE THEY WANT TO GO.

8 ANYTHING FROM THE STATE BEFORE I BRING THE
9 JURY BACK?

10 MS. SIMMONS: NO, YOUR HONOR.

11 THE COURT: FROM THE DEFENDANT?

12 MR. BYRHOLDT: NO, YOUR HONOR.

13 THE COURT: ALL RIGHT. ASK THE JURY TO JOIN
14 US, PLEASE.

15 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
16 3:30 P.M.)

17 THE COURT: MADAM FORELADY, LADIES AND
18 GENTLEMEN OF THE JURY, I'VE RECEIVED A MESSAGE: CAN WE
19 PLEASE SEE THE TRANSCRIPTS FROM THE DEFENSE ATTORNEY
20 CONCERNING THE DREAM INCIDENT FROM THE INVESTIGATOR?

21 I'M NOT EXACTLY SURE WHAT YOU WANT, MADAM
22 FORELADY.

23 THE FORELADY: THE TESTIMONY CONCERNING
24 THE -- WHAT WAS TALKED ABOUT WITH THE DREAM.

25 THE COURT: ALL RIGHT. LET ME ASK YOU. I

1 UNDERSTAND THE WITNESS, MR. LARK, TESTIFIED TO A
2 STATEMENT ALLEGEDLY MADE BY THE DEFENDANT. HE WAS
3 EXAMINED ON DIRECT EXAMINATION BY MS. SIMMONS AND THEN
4 ON CROSS-EXAMINATION BY MR. BYRHOLDT. IS THAT WHAT WE
5 ARE TALKING ABOUT, EITHER OR BOTH OF THOSE TESTIMONIES?

6 THE FORELADY: BOTH.

7 THE COURT: BOTH, ALL RIGHT.

8 MADAM COURT REPORTER, WOULD THAT BE
9 DIFFICULT TO LOCATE THE DIRECT FIRST AND THEN JUST RUN
10 IT INTO THE CROSS?

11 (OFF-THE-RECORD DISCUSSION BETWEEN THE COURT
12 AND THE COURT REPORTER.)

13 THE COURT: ALL RIGHT. IF YOU WILL BEAR
14 WITH US.

15 (OFF-THE-RECORD DISCUSSION BETWEEN THE COURT
16 AND THE COURT REPORTER.)

17 (THE REQUESTED TESTIMONY, DIRECT EXAMINATION
18 AND CROSS-EXAMINATION OF MICHAEL LARK, WAS
19 PLAYED BACK FOR THE JURY.)

20 THE COURT: ALL RIGHT. MADAM FORELADY, IS
21 THERE ANYTHING MORE YOU WOULD LIKE TO HEAR AT THIS TIME?

22 THE FORELADY: NO. THAT'S GOOD.

23 THE COURT: GREAT. ALL RIGHT. JUST RETIRE
24 AND CONTINUE YOUR DELIBERATIONS.

25 (WHEREUPON, THE JURY LEFT THE COURTROOM AT

1 3:39 P.M.)

2 THE COURT: ANYTHING FURTHER FROM THE STATE?

3 MS. SIMMONS: NO, YOUR HONOR.

4 THE COURT: FROM THE DEFENSE?

5 MR. BYRHOLDT: NO, YOUR HONOR.

6 THE COURT: ALL RIGHT.

7 (THE JURY CONTINUED DELIBERATIONS AT 3:40

8 P.M., AND A VERDICT WAS REACHED AT 3:46 P.M.)

9 THE COURT: ALL RIGHT. IT'S MY
10 UNDERSTANDING THAT THEY'VE REACHED A VERDICT.

11 IT'S MY UNDERSTANDING THAT THE JURY HAS
12 REACHED A VERDICT. NOW, LET ME REMIND EVERYBODY IN THIS
13 COURTROOM THAT WHATEVER THAT VERDICT IS, THERE WILL BE
14 NO OUTBURSTS. IF SOMEBODY FEELS THAT THEY CANNOT
15 CONTROL THEIR EMOTIONS, THEY ARE TO LEAVE AT THIS TIME;
16 OTHERWISE, I WILL CONSIDER IT AS CONTEMPT OF COURT AND
17 IT WILL BE TREATED APPROPRIATELY.

18 ALL RIGHT. ASK THE JURY TO RETURN.

19 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
20 3:52 P.M.)

21 THE COURT: MADAM FORELADY, I UNDERSTAND THE
22 JURY HAS REACHED A VERDICT?

23 THE FORELADY: YES.

24 THE COURT: IF YOU WOULD, PLEASE, HAND IT UP
25 TO THE BAILIFF.

1 THE FORELADY: (COMPLIES.)

2 THE COURT: MADAM CLERK, IF YOU WOULD PLEASE
3 PUBLISH THE VERDICT.

4 VERDICT OF THE JURY:

5 THE CLERK: THE STATE VERSUS CLARENCE
6 CRITTENDON, 2006-GS-37-927 AND 2004-GS-37-509. IN
7 2006-GS-37-927, CRIMINAL SEXUAL CONDUCT WITH A MINOR,
8 FIRST DEGREE: WE, THE JURY, UNANIMOUSLY FIND THAT THE
9 DEFENDANT, CLARENCE CRITTENDON, IS GUILTY OF CRIMINAL
10 SEXUAL CONDUCT WITH A MINOR, FIRST DEGREE.

11 INDICTMENT NUMBER 2004-GS-37-509, LEWD ACT
12 UPON A CHILD UNDER 16: WE, THE JURY, UNANIMOUSLY FIND
13 THAT THE DEFENDANT, CLARENCE CRITTENDON, IS GUILTY OF
14 LEWD ACT UPON A CHILD UNDER 16.

15 LADIES AND GENTLEMEN OF THE JURY, IF THIS
16 WAS YOUR VERDICT AND IS STILL YOUR VERDICT, PLEASE
17 SIGNIFY BY RAISING YOUR RIGHT HAND.

18 THE RECORD WILL SHOW THAT ALL 12 RAISED
19 THEIR HAND.

20 THE COURT: ALL RIGHT. IS THERE ANYTHING
21 FROM THE STATE BEFORE I DISMISS THE JURY?

22 MS. SIMMONS: NO, YOUR HONOR.

23 THE COURT: FROM THE DEFENDANT?

24 MR. BYRHOLDT: NO, YOUR HONOR.

25 THE COURT: VERY GOOD. MADAM FORELADY,

1 LADIES AND GENTLEMEN OF THE JURY, I AM NEVER CONCERNED
2 WITH A VERDICT, ONLY HOW THAT VERDICT IS REACHED. AND
3 IN THIS CASE I CAN ASSURE YOU I'M SATISFIED THAT YOU
4 GAVE BOTH THE STATE AND THE DEFENDANT A FAIR TRIAL; AND
5 IN REACHING A VERDICT IN ACCORDANCE WITH YOUR FINDING OF
6 THE FACTS AND YOUR CONSCIENTIOUS OBSERVANCE OF THE LAW
7 YOU HAVE DONE YOUR DUTY AS JURORS IN AN APPROPRIATE AND
8 A VERY FINE FASHION, AND I THANK YOU FOR YOUR SERVICE
9 TODAY.

10 I KNOW YOU HAD OTHER PLACES YOU'D RATHER
11 HAVE BEEN FOR THE LAST THREE DAYS; HOWEVER, IT'S
12 ABSOLUTELY ESSENTIAL THAT WE HAVE CITIZENS SERVING OUR
13 JUSTICE SYSTEM. IF WE DID NOT HAVE CITIZEN
14 PARTICIPATION, IT WOULD NOT BE AS EFFECTIVE AS IT IS,
15 AND I CAN ASSURE YOU THAT IT IS.

16 I WISH THERE WAS SOMETHING I COULD DO FOR
17 YOU. I UNDERSTAND THAT, AS I SAY, YOU'D RATHER HAVE
18 BEEN SOMEWHERE ELSE. BUT ABOUT THE ONLY THING I CAN
19 SAY, IF YOU WILL REMEMBER THE OTHER DAY, I GUESS IT WAS
20 MONDAY, I ASKED HOW MANY HAD SERVED ON A JURY IN THE
21 LAST THREE YEARS. WELL, YOU WON'T HAVE TO SERVE FOR
22 ANOTHER THREE YEARS, AT LEAST. BUT I DO HOPE THAT YOUR
23 SERVICE WASN'T WITHOUT SOME BENEFIT BECAUSE, AS I SAY,
24 IT'S ABSOLUTELY ESSENTIAL AND I DO APPRECIATE IT.

25 WITH THAT YOU ARE EXCUSED, AND I THINK I'M

1 GONNA EXCUSE YOU FOR THE BALANCE OF THE WEEK, TOO,
2 BECAUSE WE'VE GOT SOME OTHER THINGS WE NEED TO TAKE UP.
3 BUT Y'ALL HAVE SERVED WELL IN THESE TWO DAYS AND I WANT
4 TO THANK YOU FOR THAT SERVICE.

5 MADAM FORELADY, I DO NEED TO SEE YOU,
6 THOUGH, FOR SOME PAPERWORK IF YOU COULD STAY A MINUTE.

7 EVERYONE ELSE WILL BE EXCUSED, AND AGAIN,
8 THANK YOU VERY MUCH. Y'ALL HAVE A WONDERFUL HOLIDAY AND
9 A VERY MERRY CHRISTMAS.

10 (WHEREUPON, THE JURY WAS EXCUSED AT 3:55
11 P.M.)

12 (THE COURT CONFERRED WITH THE FORELADY OFF
13 THE RECORD, AFTER WHICH THE FORELADY WAS
14 EXCUSED.)

15 THE COURT: ALL RIGHT. IF THE DEFENDANT
16 WILL COME AROUND, PLEASE. HAVE WE GOT THE SENTENCING
17 SHEETS?

18 MS. SIMMONS: YES, YOUR HONOR.

19 THE COURT: ALL RIGHT. IS THERE ANYTHING
20 FROM THE STATE?

21 MS. SIMMONS: JUDGE, HIS PRIOR RECORD AT THE
22 APPROPRIATE TIME.

23 THE COURT: ALL RIGHT.

24 MS. SIMMONS: 1987, THREE COUNTS OF
25 STRONG-ARM ROBBERY; 1988, FRAUDULENT CHECK; 1988, EIGHT

1 COUNTS OF FRAUDULENT CHECK; 1989, FORGERY; 1990,
2 PROBATION REVOCATION ON THE STRONG-ARM ROBBERY; 1992,
3 UNLAWFUL CARRYING OF A PISTOL; 1993, FORGERY; 1993,
4 FORGERY; 1994, FORGERY; 1995, POSSESSION OF CRACK
5 COCAINE; 1995, FORGERY; 1997, DRIVING UNDER SUSPENSION
6 THIRD OR MORE; 1996, COMMISSION OF A LEWD ACT ON CHILD;
7 1998, DRIVING UNDER SUSPENSION; 1999, POSSESSION OF
8 MARIJUANA; AND DURING THE PENDENCY OF THIS ACTION HE WAS
9 CHARGED FOR FAILURE TO REGISTER AS A SEX OFFENDER.

10 JUDGE, WE WOULD RESPECTFULLY REQUEST THAT
11 YOU CONSIDER THE MAXIMUM SENTENCE IN THIS CASE.

12 THE COURT: ALL RIGHT. WHAT IS THE MAXIMUM
13 SENTENCE, OR THE RANGE OF SENTENCES?

14 MS. SIMMONS: TEN TO 30 YEARS, YOUR HONOR.

15 THE COURT: ALL RIGHT. ANYTHING ELSE FROM
16 THE STATE?

17 MS. SIMMONS: NO, YOUR HONOR.

18 THE COURT: ANYTHING FROM THE VICTIMS?

19 MS. SIMMONS: I'VE SPOKEN WITH THE VICTIM'S
20 MOTHER, AND SHE INDICATES THAT SHE DOES NOT WISH TO
21 SPEAK.

22 THE COURT: VERY WELL.

23 MR. BYRHOLDT, WHAT DO YOU HAVE TO SAY ON
24 BEHALF OF MR. CRITTENDON?

25 MR. BYRHOLDT: YOUR HONOR, THIS WAS A TOUGH

1 CASE. YOU WERE HERE, YOU HEARD THE TRIAL. ESSENTIALLY,
2 YOU KNOW, WHAT WE HAVE IS THE, YOU KNOW, THE VICTIM'S
3 TESTIMONY AND THAT WAS IT; NO PHYSICAL EVIDENCE, NOTHING
4 ELSE.

5 I THINK MR. CRITTENDON WANTS TO ADDRESS THE
6 COURT, AND THEN I WILL HAVE, YOU KNOW, A FINAL SAY.

7 THE COURT: LET ME BE SURE THAT I UNDERSTAND
8 NOW. ON THE CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE
9 FIRST DEGREE, THE MINIMUM SENTENCE IS TEN YEARS AND THE
10 MAXIMUM SENTENCE IS 30 YEARS?

11 MR. BYRHOLDT: THAT'S CORRECT, YOUR HONOR.

12 THE COURT: LEWD ACT UPON A CHILD UNDER 16,
13 THE MAXIMUM SENTENCE IS 15 YEARS AND A FINE OF UP TO TEN
14 THOUSAND DOLLARS?

15 MR. BYRHOLDT: THAT IS CORRECT, YOUR HONOR.

16 MS. SIMMONS: THAT'S CORRECT, YOUR HONOR.

17 THE COURT: VERY GOOD. MR. CRITTENDON,
18 ANYTHING YOU WOULD LIKE TO SAY, SIR?

19 THE DEFENDANT: NO, SIR.

20 THE COURT: MR. BYRHOLDT, ANYTHING FURTHER?

21 MR. BYRHOLDT: YOUR HONOR, I WOULD JUST ASK
22 THE COURT TO TAKE ALL THE FACTORS IN CONSIDERATION AND
23 PASS A SENTENCE THAT'S FAIR AND JUST. I'VE DEALT WITH
24 YOUR HONOR FOR 25 YEARS. I KNOW THAT YOU'RE NOT GONNA
25 PENALIZE HIM FOR GOING TO TRIAL, YOU'RE GONNA FASHION A

1 SENTENCE THAT'S FAIR AND JUST FOR ALL PARTIES.

2 THE COURT: ONE PROBLEM -- NOT A PROBLEM --
3 BUT ONE OF THE RAMIFICATIONS, YOU MIGHT SAY, OF A TRIAL
4 IS AT A PLEA NORMALLY I DON'T HEAR AS MUCH -- WHEN I SAY
5 "I," A JUDGE DOESN'T HEAR AS MUCH ABOUT FACTS AND OTHER
6 PARTICULAR CIRCUMSTANCES. IN A PLEA THE COURT IS REALLY
7 CONCERNED WITH WHETHER OR NOT THERE ARE SUFFICIENT FACTS
8 TO SUSTAIN, SUPPORT THE PLEA.

9 IN A TRIAL, MORE IS ELICITED THAN WOULD
10 OTHERWISE BE DONE IN A PLEA, SO I DON'T THINK ANYONE IS
11 EVER GONNA BE PENALIZED, AND AS MR. BYRHOLDT HAS
12 MENTIONED; HE AND I HAVE KNOWN EACH OTHER LONGER THAN
13 THAT, I'M AFRAID.

14 MR. BYRHOLDT: YES, SIR.

15 THE COURT: AND WE MET A LOT OF TIMES IN,
16 NOT THIS COURTHOUSE BUT IN THESE SAME PROCEEDINGS, AND
17 I'M A GREAT BELIEVER IN A TRIAL, AND THAT'S THE LAST
18 THING THAT I WOULD EVER WANT TO DO, AS AN INDIVIDUAL AND
19 A MEMBER OF THE JUDICIARY.

20 HOWEVER, THE COURT MUST CONSIDER WHAT IT HAS
21 LEARNED DURING THE TRIAL OF THIS CASE AS WELL AS WHAT
22 THE RECORD OF THE DEFENDANT IS.

23 YOU KNOW, THE MAXIMUM SENTENCE IN THIS CASE
24 WOULD BE, IF I SENTENCED HIM CONSECUTIVELY ---

25 MR. BYRHOLDT: 45 YEARS.

1 THE COURT: --- 45 YEARS AND \$10,000.

2 ARE YOU SURE YOU DON'T HAVE ANYTHING TO SAY,
3 MR. CRITTENDON? ANY REASON I SHOULD NOT IMPOSE THE
4 MAXIMUM?

5 THE DEFENDANT: YOUR HONOR, THEY OFFERED ME
6 SEVEN YEARS, AND I CHOSE NOT TO TAKE IT BECAUSE I DID
7 NOT DO IT. I TOOK MY CHANCES.

8 THE COURT: WELL, IT'S NOT A LOTTERY AND
9 IT'S NOT A CHANCE. IT'S JUST THAT, AS I SAY ---

10 THE DEFENDANT: I NEVER THOUGHT THAT IT
11 WOULD COME TO THIS. I STAND BEFORE YOU.

12 THE COURT: WELL, THE THING IS, IF YOU
13 WANTED TO LOOK AT IT OBJECTIVELY, THE HARD PART OF THE
14 CASE FOR THE COURT HAS ALREADY BEEN ACCOMPLISHED AND
15 THAT IS THE FACTUAL FINDING. NO MATTER WHAT I MIGHT
16 HAVE THOUGHT ABOUT THE EVIDENCE, I THOUGHT THERE WAS
17 SUFFICIENT EVIDENCE TO GO FORWARD TO THE JURY, AND THE
18 JURY HAS MADE THE DECISION. I WILL LIVE WITH THE
19 DECISION REGARDLESS OF WHAT BE MY OPINION.

20 BUT HERE THEY HAVE FOUND THAT YOU HAVE NOT
21 ONLY COMMITTED ACTS UPON A MINOR, AND ONE UNDER 11, BUT
22 APPARENTLY FROM YOUR RECORD YOU HAVE A PROPENSITY FOR
23 THAT.

24 THE DEFENDANT: THAT WAS BEFORE.

25 THE COURT: THAT'S WHAT I'M ASKING. I'M

1 SEEKING ALL THE HELP I CAN GET.

2 THE DEFENDANT: I WAS CHARGED ONCE BEFORE.
3 I TOOK A PLEA TO AVOID THIS SAME INSTANCE FOR THE SAME
4 REASON: I DIDN'T DO IT. THEY OFFERED ME PROBATION, I
5 TOOK IT THEN.

6 I DIDN'T DO THIS. THEY OFFERED ME SEVEN
7 YEARS, BUT THIS TIME I CHOSE TO FIGHT IT. EVEN THOUGH I
8 KNEW I HAD -- MY RECORD IN THE END MAY HAVE DONE ME IN,
9 BUT I STILL CHOSE TO FIGHT IT BECAUSE I DID NOT DO IT.

10 MR. BYRHOLDT: YOUR HONOR, THAT IS WHAT
11 MR. CRITTENDON TOLD ME WHEN I WAS APPOINTED ON THIS
12 CASE. I TALKED TO HIM ABOUT HAVING A PRIOR SEX OFFENSE
13 ON HIS RECORD AND HIS SEXUAL OFFENDER STATUS, AND HE
14 SAID HE COPPED A DEAL THAT TIME, AND FELT IT WAS NOT
15 FAIR TO LIVE WITH HIMSELF.

16 AND I CAUTIONED HIM ABOUT THE EXPOSURE HE
17 HAD ON THIS CASE, BUT HE MAINTAINED HIS INNOCENCE FROM
18 DAY ONE AND THROUGHOUT THIS WHOLE -- YOU KNOW, THAT'S
19 WHERE, YOU KNOW, WE PUT FORWARD THIS TRIAL EFFORT.

20 THE COURT: ANYTHING FURTHER,
21 MR. CRITTENDON?

22 THE DEFENDANT: NO, SIR, YOUR HONOR.
23 SENTENCE OF THE COURT:

24 THE COURT: INDICTMENT NUMBER

25 2004-GS-37-509, THE STATE OF SOUTH CAROLINA VERSUS

1 CLARENCE ELIJAH CRITTENDON, THE SENTENCE OF THE COURT IS
2 THAT THE DEFENDANT BE COMMITTED TO THE STATE DEPARTMENT
3 OF CORRECTIONS FOR A TERM OF 15 YEARS PLUS PAY THE COSTS
4 AND ASSESSMENTS AS APPLICABLE.

5 INDICTMENT NUMBER 2006-GS-37-927, THE
6 SENTENCE OF THE COURT IS THAT THE DEFENDANT, CLARENCE
7 ELIJAH CRITTENDON, BE COMMITTED TO THE STATE DEPARTMENT
8 OF CORRECTIONS FOR A TERM OF 30 YEARS, PLUS PAY THE
9 COSTS AND ASSESSMENTS AS APPLICABLE. THE SENTENCES ARE
10 TO RUN CONCURRENT.

11 GOOD LUCK TO YOU, SIR.

12 MR. BYRHOLDT: THANK YOU, YOUR HONOR.

13 MS. SIMMONS: THANK YOU, JUDGE.

14 (THE TRIAL WAS CONCLUDED AT 4:09 P.M.)

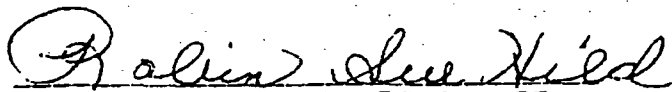
15 ***** END OF REQUESTED TRANSCRIPT *****
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CERTIFICATE OF COURT REPORTER

I, THE UNDERSIGNED, ROBIN SUE HILD, FCRR, RPR,
OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT
OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT
THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE
TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND THE
EVIDENCE INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE,
RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR
OCONEE COUNTY, SOUTH CAROLINA, ON THE 11TH DAY AND THE
12TH DAY OF DECEMBER, 2006.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL NOR INTEREST TO ANY PARTY HERETO.

APRIL 30, 2007



ROBIN SUE HILD, FCRR, RPR
CIRCUIT COURT REPORTER

Article 8

ORIGINAL

STATE OF SOUTH) IN THE COURT OF GENERAL
CAROLINA) SESSIONS
)
COUNTY OF OCONEE) INDICTMENT NO:
2004-GS-37-509

STATE OF SOUTH)
CAROLINA)
PLAINTIFF,) TRANSCRIPT OF RECORD
-VS-) BOND HEARING
)
CLARENCE CRITTENDON,)
DEFENDANT.)

OCTOBER 29, 2004
WALHALLA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE J.C. NICHOLSON, JR., JUDGE.

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

KIM WELCHEL, ESQ.
ATTORNEY FOR THE STATE

N. GRUBER SIRES, ESQ.
ATTORNEY FOR THE DEFENDANT

ROBIN SUE HILD, FCRR, RPR
CIRCUIT COURT REPORTER
POST OFFICE BOX 9
WALHALLA, SC 29691

STATE V. (RENCE CRITTENDON

INDEX

WITNESSES

PAGE

NO WITNESSES WERE CALLED.

COURT'S QUESTIONING OF VICTIM'S MOTHER

3

STATEMENT OF DEFENDANT'S PRIOR RECORD BY SOLICITOR

5

CERTIFICATE OF COURT REPORTER

8

EXHIBITS

NO.

DESCRIPTION

ID.

EV.

NO EXHIBITS WERE INTRODUCED.

1 ***** START OF REQUESTED TRANSCRIPT *****

2 (WHEREUPON, THE BOND HEARING COMMENCED AT
3 11:21 A.M.)

4 MR. SIRES: THIS IS CLARENCE CRITTENDON. H
5 HAD BEEN SHOWING UP FOR ROLL CALL; THEY'VE BEEN SENDING
6 HIM A CARD OR SOMETHING NOTIFYING HIM. MS. PRUITT HAS
7 BEEN TALKING WITH HIM, TOO, ABOUT IT; AND, OF COURSE,
8 SHE'S NO LONGER WITH MY OFFICE. AND HE DIDN'T SHOW UP
9 THIS LAST TERM AND THEY ISSUED A BENCH WARRANT BECAUSE
10 CLARENCE WAS TALKING TO THE POLICE, I THINK, OR TALKING
11 TO SOMEBODY DOWNTOWN. HE HASN'T BEEN IN ANY TROUBLE OR
12 ANYTHING. WE WOULD ASK THAT HE BE ALLOWED TO GO BACK
13 OUT ON HIS BOND.

14 THE COURT: WHAT WAS THE ORIGINAL BOND?

15 THE DEFENDANT: 20,000.

16 MS. WELCHEL: 20,000 SURETY, YOUR HONOR.

17 THE VICTIM'S MOTHER IN THIS CASE IS HERE.

18 THE COURT: OKAY. I'LL BE GLAD TO HEAR FROM
19 HER.

20 COURT'S QUESTIONING OF VICTIM'S MOTHER:

21 VICTIM'S MOTHER: MY NAME IS MARY HALLMAN
22 (PHONETIC).

23 THE COURT: HOLD ON ONE SECOND.

24 MS. HAWKINS?

25 VICTIM'S MOTHER: HALLMAN.

STATE V. LARENCE CRITTENDON

1 **THE COURT:** ALL RIGHT, MS. HALLMAN, I'D BE
2 GLAD TO HEAR FROM YOU.

3 **VICTIM'S MOTHER:** I JUST DON'T THINK YOU
4 SHOULD LET HIM BACK OUT.

5 **THE COURT:** LET ME ASK YOU THIS: WHILE HE
6 WAS OUT, DID HE BOTHER YOU OR THE CHILD? DID HE HAVE
7 ANY CONTACT WITH YOU AT ALL?

8 **VICTIM'S MOTHER:** NO, HE DIDN'T BOTHER ME.

9 **THE COURT:** HE DIDN'T BOTHER YOU AT ALL, NO
10 CONTACT?

11 **VICTIM'S MOTHER:** NONE.

12 **THE COURT:** WELL, LET ME ASK YOU THIS: WHY
13 DO YOU THINK I SHOULDN'T LET HIM OUT IF HE DIDN'T BOTHER
14 YOU WHEN HE WAS OUT THE FIRST TIME?

15 **VICTIM'S MOTHER:** I JUST DON'T THINK HE'S
16 SAFE FOR OTHER CHILDREN.

17 **THE COURT:** WHAT'S YOUR RELATIONSHIP BETWEEN
18 YOU AND HIM, MA'AM?

19 **VICTIM'S MOTHER:** HE IS MY MOTHER'S HUSBAND.

20 **THE COURT:** HE IS YOUR MOTHER'S HUSBAND?

21 **VICTIM'S MOTHER:** CORRECT.

22 **THE COURT:** SO YOUR DAUGHTER WAS EXPOSED TO
23 HIM THAT WAY?

24 **VICTIM'S MOTHER:** YES, SIR.

25 **THE COURT:** OKAY. ANY OTHER MINOR

1 CHILDREN -- IS HE STILL LIVING WITH YOUR MOTHER?

2 VICTIM'S MOTHER: NO.

3 THE COURT: ARE THEY SEPARATED?

4 VICTIM'S MOTHER: YES.

5 THE COURT: DO YOU KNOW WHERE HE'S STAYING
6 NOW?

7 VICTIM'S MOTHER: NO, I DON'T.

8 THE COURT: OKAY, THANK YOU. ANYTHING ELSE?

9 VICTIM'S MOTHER: NO.

10 THE COURT: WHAT KIND OF PRIOR RECORD DOES
11 HE HAVE?

12 STATEMENT OF DEFENDANT'S PRIOR RECORD BY SOLICITOR:

13 MS. WELCHEL: YOUR HONOR, HIS PRIOR RECORD
14 INCLUDES AN ARMED ROBBERY CONVICTION FROM 1987, NUMEROUS
15 FRAUDULENT CHECKS, FORGERY, UNLAWFUL POSSESSION OF A
16 HANDGUN, FORGERIES, ABOUT SEVEN MORE FORGERIES; A PISTOL
17 VIOLATION, POSSESSION OF CRACK COCAINE, COMMITTING A
18 LEWD ACT UPON A CHILD.

19 THE COURT: HOW OLD OF A CASE IS THIS? IT'S
20 WHAT...

21 MS. WELCHEL: HE WAS ARRESTED, YOUR HONOR,
22 IN JANUARY.

23 MR. SIRE: JANUARY THE 9TH, 2004.

24 THE COURT: JANUARY 9TH, 2004. OKAY. WHEN
25 DO YOU THINK YOU ALL WILL BE ABLE TO DISPOSE OF THE

STATE V. LAWRENCE CRITTENDON

1 CASE?

2 MS. WELCHEL: YOUR HONOR, I CAN LOOK AT THE
3 CASE. I HAVE NOT HAD THE OPPORTUNITY TO WORK ON IT
4 MYSELF. I'LL BE GLAD TO LOOK AT IT AND SEE IF I CAN GET
5 IT UP FOR THE DECEMBER TERM.

6 THE COURT: OKAY. ALL RIGHT. ANYTHING
7 ELSE?

8 MR. SIRES: NO.

9 THE COURT: ALL RIGHT. WHAT I'M GOING TO DO
10 IS LIFT HIS BENCH WARRANT AND CONTINUE HIM ON HIS
11 \$20,000.00 BOND.

12 (OFF-THE-RECORD DISCUSSION BETWEEN COURT AND
13 CLERK OF COURT.)

14 THE COURT: JUST PUT ON HERE "BENCH WARRANT
15 LIFTED"?

16 THE CLERK: JUST BENCH WARRANT, REMAIN ON
17 APPROPRIATE BOND, AND WE CAN DO AN ORDER TO RELEASE
18 MR. CRITTENDON.

19 THE COURT: MR. CRITTENDON?

20 THE DEFENDANT: YES.

21 THE COURT: I'M GOING TO PUT ON HERE NO
22 CONTACT WITH THE VICTIM OR VICTIM'S FAMILY, DO YOU
23 UNDERSTAND, AS A CONDITION OF YOUR BOND.

24 THE DEFENDANT: YES, SIR.

25 MR. SIRES: HERE'S THE WARRANTS.

STATE V. (LRENCE CRITTENDON

1 **THE CLERK:** THANK YOU.

2 **THE COURT:** I THINK THAT OUGHT TO DO IT
3 BECAUSE ALL SHE'S GOT TO DO IS SEND A RELEASE TO THE
4 JAIL TO LET HIM OUT.

5 **MR. SIRES:** YES, SIR.

6 **THE COURT:** ALL RIGHT.

7 (WHEREUPON, THE BOND HEARING WAS CONCLUDED)
8 11:25 A.M.)

9 ***** END OF REQUESTED TRANSCRIPT *****

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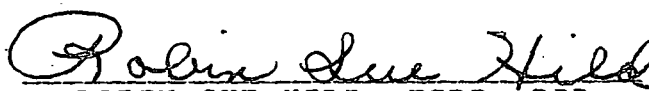
STATE V. (LRENCE CRITTENDON

CERTIFICATE OF COURT REPORTER

I, THE UNDERSIGNED, ROBIN SUE HILD, FCRR, RPR,
OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT
OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT
THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE
TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND THE
EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED
CASE, IN THE COURT OF GENERAL SESSIONS FOR OCONEE
COUNTY, SOUTH CAROLINA, ON THE 29TH DAY OF OCTOBER,
2004.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL NOR INTEREST TO ANY PARTY HERETO.

NOVEMBER 30, 2007


ROBIN SUE HILD, FCRR, RPR
CIRCUIT COURT REPORTER

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of Oconee)Clarence E. Crittendon Jr. 266744)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

2008-CP-371471

FILED OCONEE
SALLIE C. SMITH
CLERK OF COURT
2008 DEC 17 P 4:16INSTRUCTIONS 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 McCormick Correctional Institute. 386 Redemption Way, McCormick SC. 29899
2. Name and location of Court which imposed sentence Oconee Co. Court of General Sessions, Walhalla SC. 291691
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) 2004-GS-37-509

ENTERED
30/12/08
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- (b) 2006- GS-37- 927
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) December 12, 2006 15yrs. Concoment
- (b) December 12, 2006 30yrs.
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Appeal dismissed per request of Applicant
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. October 09 2008
- 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) _____

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Trial Counsel
- (b) Prosecutorial Misconduct, Harassment and Vindictive Prosecution
- (c) Subject Matter Jurisdiction
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attachment
- (b) See Attachment
- (c) See Attachment
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. N/A
- iii. N/A
- iv. N/A
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. N/A
- iii. N/A

iv. N/A

(c) the disposition thereof:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(d) the date of each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. N/A

iii. N/A

iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. N/A

iii. N/A

(b) the proceedings in which each ground was raised:

i. N/A

ii. N/A

iii. N/A

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) N/A
 (b) N/A
 (c) N/A

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

(a) your arraignment and plea? Yes
 (b) your trial, if any? Yes
 (c) your sentencing? Yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
 (e) preparation, presentation or consideration of any petitions, motions or 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. Gruber Sires, Public Defender Office M. Walhalla SC. 29691
 ii. Bruce Byrholdt Anderson SC. 29622
 iii. Kathrine Hudgins Appellate Defense Columbia SC. 29210
 (b) the proceedings at which each such attorney represented you:
 i. Arraignment
 ii. Jury Trial
 iii. Appeal

19. State clearly the relief you seek in filing this application:

Sentence be Vacated, Conviction be reversed or set aside, new
trial Order or if applies, indictments dismissed and any other
relief the Court deems fit

20. Are you now under sentence from any other court that you have not challenged?

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Oconee)

I, Clarence E. Crittendon Jr., 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.

(Signature) 2116744

SWORN to and subscribed before me this 5
day of Dec., 2008.

Joyce L. Young (L.S.)
Notary Public

My Commission Expires: 8-28-2011

2008 DEC 17 P 4 16

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT

ENTERED
COMPUTER

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Clarence E. Cottendon Jr., 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.

Clarence E. Cottendon Jr. 266744
Applicant

SWORN or affirmed to and subscribed before me this
5 day of Dec, 2008.

Joyce L. Young
Notary Public

My Commission Expires: 8-28-2011

FILED-OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 DEC 17 P 4 16

ENTERED
COMPUTER

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

Clarence E. Crittendon, Jr., #266744,)

Applicant,

V.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE 10TH JUDICIAL CIRCUIT
Case No.: 2008-CP-37-1471

RETURN AND REQUEST FOR APPOINTMENT OF COUNSEL

FILED
CLERK OF COURT
2009 APR -8 P 5:12

Respondent, making its Return to the application for post conviction relief (PCR) filed December 17, 2008, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Applicant was indicted at the March 2004 term of the Oconee County Grand Jury for lewd act upon a child under sixteen (2004-GS-37-0509) and criminal sexual conduct with minor-first degree (2006-GS-37-0927). Bruce Byrholdt, Esquire, represented him. On December 12, 2006, Applicant underwent trial, pursuant to which he was found guilty as indicted. The Honorable Alexander S. Macaulay concurrently sentenced him to confinement for thirty (30) years for lewd act upon a child and fifteen (15) years for criminal sexual conduct with minor-first degree.

A timely Notice of Appeal was filed on Applicant's behalf. On October 6, 2008, the Court of Appeals issued an Order of Dismissal and Remittitur dismissing the appeal because Appellant withdrew the appeal.

Attached herewith and incorporated herein by reference are the records of the Oconee County

ENTREPRENEUR

Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the appellate court records, and the trial transcript will be forwarded upon receipt.

II.

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to investigate applicant's claim the there was a violation of the Speedy Trial Act.
 - b. Counsel failed to investigate whether or not he was set up.
 - c. Counsel failed to object to re-indictment prior to trial.
 - d. Counsel failed to call a medical expert.
 - e. Counsel failed to object to prosecutor's improper comments made during closing arguments alluding to Applicant's right not to testify.
 - f. Counsel failed to request a jury charge of the lesser-included offense of assault and battery of a high and aggravated nature.
2. Prosecutorial misconduct.
3. Lack of subject matter jurisdiction.

III.

In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). First, a PCR applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115 at 117, 386 S.E.2d 624 at 625 (1989), citing Strickland.

Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; Alexander, 303 S.C. at 541-42, 402 S.E.2d at 485. The Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, Id. Applicant must overcome this presumption in order to receive relief. Cherry, Id.

Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant also alleges prosecutorial misconduct. Prosecutorial misconduct is not an issue for post conviction relief. Rather, this allegation is a direct appeal issues that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicants burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201 (1989).

V.

The Applicant has claimed that the trial court lacked subject matter jurisdiction due to defects in his indictment. Defects in the indictment do not affect subject matter jurisdiction. See State v.

Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002).

The indictment is a notice document, and any challenges to its sufficiency must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). *See also* S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. *See Gentry, supra*; Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

In post-conviction relief, an Applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003). A claim of this nature is subject to the procedural bars in the Uniform Post-Conviction Procedure Act – notably the statute of limitations and successiveness. *See* S.C. Code §§ 17-27-45 and -90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. *See Brown v. State*, 343 S.C. 342, 540 S.E.2d 846 (2001), *overruled in part by Gentry, supra*. However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, supra, 610 S.E.2d at 499; *See also* S.C. Const. Art. V, § 7. Thus, the Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. The Applicant’s conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

VI.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the State requests that an attorney be appointed to represent the Applicant and that a hearing be held.

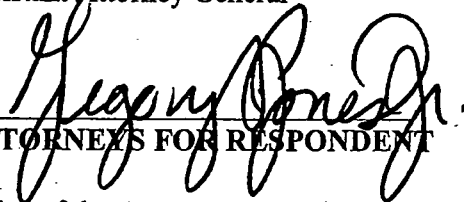
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

GREGORY P. JONES, JR.
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

March 31, 2009.

The South Carolina Court of Appeals

The State,

Respondent,

OCT 6 2008

v.

Clarence E. Crittendon,

Appellant.

ATTORNEY GENERAL'S
OFFICE

The Honorable Alexander S. Macaulay
Oconee County

Trial Court Case No. 2004-GS-37-00509, 2006-GS-37-00927

ORDER of DISMISSAL AND REMITTITUR

The above entitled case is pending on appeal in this Court. It appears that Appellant, with full understanding of all possible consequences of this action and with agreement of counsel, wishes to withdraw the appeal and moves the Court for an Order dismissing the appeal.

IT IS ORDERED that the above captioned appeal be and hereby is dismissed. The case is REMITTED to the Clerk of Court for Oconee County.

IT IS FURTHER ORDERED that unless Appellant makes arrangements with the Clerk of the Court of Appeals for other disposition, the Record on Appeal and final briefs in this case will be destroyed on October 13, 2008.

KAYE G. HEARN, CHIEF JUDGE

BY

V. Claire Allen, Deputy
Clerk

Columbia, South Carolina

October 6, 2008

Original to: The Honorable Sallie C. Smith
cc: Appellate Defender Kathrine H. Hudgins
Clarence E. Crittendon # 266744
Assistant Deputy Attorney General Salley W. Elliott
Christina Theos Adams, Esquire



HENRY McMASTER
ATTORNEY GENERAL

April 1, 2009

FILED OCONEE, SC
CLERK OF COURT
2009 APR - 8 P 5:12

The Honorable Sallie C. Smith
Oconee County Clerk of Court
Post Office Box 678
Walhalla, South Carolina 29691

Re: Clarence Crittendon #266744 v. State of South Carolina
2008-CP-37-01471

Dear Sir/Madam:

Enclosed please find the original Return in the above-captioned case, Clarence Crittendon v. State, for filing in your office.

Sincerely,


Gregory P. Jones, Jr.
Assistant Attorney General

GPJjr/las

Enclosures

cc: Clarence Crittendon #266744 w/enclosures

This is
"Return"
Do not add
any papers to
this Pkg

State of South Carolina

County of Oconee

In the Court of Common Pleas

Clarence Crittendon,

Applicant,

-vs-

State of South Carolina,

Respondent.

2008-CP-37-01471

October 3, 2011

Transcript of Record

BEFORE:

The Honorable J. Cordell Maddox, Jr., Judge

APPEARANCES:

R. Mills Ariail, Jr., Esquire
Attorney for the Applicant

Kaelon E. May, Esquire
Attorney the State

Renee H. Tollison
Circuit Court Reporter

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Clarence Crittendon v. State of South Carolina 2008-CP-37-1471
PCR Hearing October 3, 2011
Opening Statement by Ms. May

3

1 October 3, 2011

2 (WHEREUPON, court convened with all parties present
3 and the following proceedings were had commencing at
4 approximately 12:00 p.m.)

5 THE COURT: Okay.

6 MS. MAY: Your Honor, we'd like to call
7 Clarence Crittendon v. State. It's case number 2008-CP-
8 37-1471. This case comes from a P.C.R. application filed
9 December 17th, 2008, by Mr. Crittendon. Mr. Crittendon
10 was charged with lewd act upon a child under sixteen and
11 criminal sexual conduct with a minor in the first degree.
12 On December 12, 2006, Mr. Crittendon underwent trial in
13 which he was found guilty. The Honorable Judge Macaulay
14 sentenced him to thirty years for the lewd act and
15 fifteen years for the criminal sexual conduct first
16 degree. I'm sorry. Fifteen years for the lewd act and
17 thirty years for criminal sexual conduct to run
18 concurrent.

19 A notice of appeal was filed on Mr. Crittendon's
20 behalf. And on October 6, 2008, the Court of Appeals
21 dismissed Mr. Crittendon's appeal.

22 And I'll turn it over to Mr. Ariail.

23 THE COURT: All right. Yes, sir?

24 MR. ARIAIL: Yes, Your Honor, in regards to
25 this, Mr. Crittendon has filed a lengthy P.C.R.

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Clarence Elijah Crittendon, Jr. - Direct Examination by Mr. Ariail

4

1 application. I don't know if you have a copy of it, but

2 ---

3 THE COURT: I do.

4 MR. ARIAIL: And we would begin by calling him
5 as our first witness.

6 THE COURT: Okay.

7 (WHEREUPON, the witness was duly sworn.)

8 THE COURT: Mr. Crittendon, if you would, give
9 us your full name just for the record.

10 THE WITNESS: Clarence Elijah Crittendon.

11 THE COURT: All right. Yes, sir?

12 **CLARENCE ELIJAH CRITTENDON, JR.,**

13 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

14 DIRECT EXAMINATION

15 BY MR. ARIAIL:

16 Q. Mr. Crittendon, you've heard some of the background
17 information in regards to your case that the Attorney
18 General just put up. In regards to this -- go back
19 through a little bit of background with regards to this
20 case. You initially had Mr. Gruber Sires as your
21 ~~attorney; is that correct?~~

22 A. Yes, sir.

23 Q. Okay. And I think you were arrested on this
24 sometime ---

25 A. January 2004.

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Clarence Elijah Crittendon, Jr. - Direct Examination by Mr. Ariail

5

1 Q. January 2004. And he represented you from, I
2 believe, January 2004 up until ---

3 A. June 2006.

4 Q. There you go. And then at that time, Mr. Byrholdt
5 was appointed or ---

6 A. Acquired.

7 Q. --- I guess took over; is that correct?

8 A. Yes.

9 Q. Okay. So he began to represent you at that time.
10 Now, throughout the time after you were arrested, were
11 you out on bond for some time?

12 A. I was.

13 Q. How long were you out on bond?

14 A. From February of '04 till June of '06.

15 Q. Okay. And what happened in June of '06?

16 A. I was stopped by an officer who claimed I had a
17 bench warrant that was issued for me failing to appear in
18 court in March of '06.

19 Q. Okay. And you were arrested at that time and I
20 guess placed in the Oconee County Detention Center; is
21 that correct?

22 A. Yes.

23 Q. Okay. What happened? Did you go for a bond hearing
24 or a decision in regards to, I guess, a revocation of
25 your bond? Is that what happened?

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
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6

1 A. At that time, I was -- about a week after being
2 incarcerated in Oconee County, I was taken up before a
3 judge for the bond hearing, for the bond revocation
4 hearing. And at that time, Attorney Sires had admitted
5 his work involving in this case -- that he hadn't looked
6 at the case in a number of years because he thought at
7 the same time as I did that the case no longer existed.
8 And once we found out it did, at that time, I asked for
9 him to be relieved from my case because of that. And Mr.
10 Byrholdt was appointed approximately two weeks later.

11 Q. Okay. During that bond hearing or bench warrant
12 hearing, you've got an allegation in your application
13 that there was some type of invoking of a speedy trial, a
14 motion for speedy trial?

15 A. So we have to back up a couple of years first. The
16 first time I was stopped was in October of '04. I was
17 stopped and told I had a bench warrant for missing court.
18 At that time, I was brought into the Oconee County
19 Detention Center where I was housed for approximately
20 three weeks until I was able to come in front of judge.

21 ~~At that time, I was brought in front of a judge on~~
22 that bond revocation hearing. And it was found out that
23 at that time I was picked up mistakenly.

24 Q. Okay.

25 A. They were actually looking for my brother.

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
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7

1 Q. Okay.

2 A. And it was at that time that I had explained to the
3 judge that I had lost my job because I had been
4 incarcerated at that time for about three weeks waiting
5 to get in front of a judge about this bond hearing. And
6 so he, at that time, reinstated my bond. But we were
7 asked -- the State was asked at that time could they be
8 prepared to dispose of my case by December. They agreed
9 to a December date. Me and Attorney Sires agreed that we
10 would be ready by December. All parties were in
11 agreement. At that time, I was re-released on bond and
12 released.

13 Q. Okay. And I've gone -- and we've discussed this --
14 I guess it was a transcript you had in regards to this
15 bond -- bench warrant hearing; is that correct?

16 A. The transcript ---

17 Q. October 29, 2004; is that correct?

18 A. October 29, 2004, under Judge Nicholson. Judge
19 Nicholson.

20 Q. Judge Nicholson; is that correct? And as a part of
21 that, there's some discussion in regards to this being
22 heard or trying to be heard by December of that year?

23 A. December, yes, sir.

24 Q. Is there any other information in regards to you
25 invoking that motion for a speedy trial or anything else

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8

1 you filed?

2 A. No, because at the time I did not -- I wasn't even
3 aware at the time that it had anything to do with a
4 speedy trial violation. I had no idea exactly what that
5 was. I just assumed -- the judge said, y'all are either
6 going to try me -- try him by December because you caused
7 him to lose his job. He's been out for eight months.
8 You picked him up unjustly. You're either going to try
9 him by December or I'm going to dispose of his case.

10 Q. Okay. And after that, Mr. Sires, he never moved to
11 dismiss based upon failure to try you either?

12 A. No, sir.

13 Q. Okay. Then you got Mr. Byrholdt. Did you talk to
14 him in regards to a speedy trial?

15 A. I did.

16 Q. What was the discussion in regards to that?

17 A. I had mentioned that the judge had said something
18 about trying me by the end of December of '04 or by
19 December, and if they didn't, that my case would be
20 dismissed.

21 Q. Okay. What was his discussion with you ---

22 A. I think he said something along the lines to me that
23 that's probably not true because a judge don't have that
24 kind of power.

25 Q. Okay.

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
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9

1 A. Once it's been indicted.

2 Q. Okay. And you have alleged that as an issue. Why
3 is the speedy trial an issue in this case?

4 A. Because at the time -- again, at the time, I did not
5 -- I wasn't aware of what speedy trial or that there was
6 such a thing called a speedy trial. And so after being
7 incarcerated for a while, I was able to study and look
8 some of this stuff up. Because in my heart I still felt
9 that maybe if this is what the judge said, then this is
10 what they were supposed to do, try me by this date or my
11 case would be dismissed. Because November of '04 was the
12 last time that I was called back for roll call. I was
13 never called back to Walhalla for any kind of roll call.

14 The next time I heard anything from Walhalla was
15 June of '06, almost over two years later, when I heard
16 anything again about this case. I didn't even know that
17 I was even called in March of '06 as they claim. They
18 claim I was called in March of '06 for roll call. And I
19 wasn't here, so they issued a bench warrant for me. But
20 that's the last time I had heard from anything about
21 Walhalla in this case at all.

22 That's the other reason why I was asking for Mr.
23 Sires to be released from the case. This is the first
24 time I'm hearing anything else about this case is June of
25 '06.

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10

1 Q. Okay. My question -- I was trying to get into the
2 specifics of exactly what happened during that two-year
3 period to say you were prejudiced. Did you have a
4 witness?

5 A. I had a witness that passed away for complications
6 of cancer. She passed away in January of '06.

7 Q. Okay. What was her name?

8 A. Her name was Sarah Hill. She was my mother-in-law.

9 Q. What information did she have about your case?

10 A. Ms. Hill, along with two other people who I have on
11 a witness list, was at my home the morning that my step-
12 daughters had came over. We had been fighting and
13 arguing pretty much all week. And the day before, I had
14 to have -- I had called the police on them the day before
15 and had them removed from my home. I mean, they don't
16 stay -- they didn't stay with us. But they were over
17 there causing -- they were over there. They had sticks,
18 bats, different things of that nature because I had been
19 gone for about a week without letting their mother know.
20 I was cheating on their mother, and they knew it. They
21 had seen me somewhere.

22 And to avoid confrontation, I called the police.
23 The police came, had them removed from the house. The
24 next day they came back. And then there were threats
25 made against my life and to the point where they was

1 like, if you -- either you're going to leave or we're
2 going to get you put away for the rest of your life so we
3 won't have to worry about you anymore.

4 Q. To summarize this somewhat for the Court to make
5 sure we understand is that you were married to Ms. Sarah
6 Crittendon; is that correct?

7 A. I was.

8 Q. And as part of that, I guess, the allegation in this
9 case, your -- I guess it was your step-granddaughter ---

10 A. Yes.

11 Q. --- came over and lived with you. And there was
12 some issue before these charges were filed that -- I
13 guess it was Ms. Crittendon's daughter?

14 A. Yes.

15 Q. What was her name?

16 A. Mary Ann Hollman (phonic) and Monique Hollman.

17 Q. Okay. They had come over and said that you either
18 leave our mother or something is going to happen to you
19 in regards to that; is that correct?

20 A. Yes.

21 Q. Okay. And that was before these charges were filed?

22 A. That was before these charges were filed.

23 Q. Okay. And as part of that, they had made some
24 threats to you, and you think that that was relevant to
25 the credibility of, I guess ---

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Clarence Elijah Crittendon, Jr. - Direct Examination by Mr. Ariail

12

1 A. The threats were made. And -- but at the end of the
2 threats, they gave me a thirty-day ultimatum of the time
3 frame I had to leave before they would go into action and
4 they would put their plan in motion against me.

5 Q. Okay. And who -- and Ms. Hill was clearly one of
6 those individuals who had seen that; is that right?

7 A. Yes.

8 Q. Who were the other individuals?

9 A. Timothy Crittendon, my brother, and his then
10 girlfriend, Tiffany Birch.

11 Q. Tiffany Birch. Okay. And Ms. Hill died in that
12 interim before your trial; is that correct?

13 A. Yes.

14 Q. Okay. Now, in regards to this investigation, this
15 incident that happened, did you have a discussion with
16 Mr. Byrholdt in regards to that? That is, did you tell
17 him about all this stuff that happened?

18 A. I did.

19 Q. Okay. And what discussions did you have with him in
20 regards to that?

21 ~~A. After he'd taken over the case, there were some~~
22 letters and stuff that I had sent to Mr. Sires explaining
23 from start to finish how this all came about. We had
24 talked about the letters, about the possibility of the
25 three that were left testifying. Not the possibility,

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1 but the three testifying on my behalf. Because again, it
2 turned out that it was a credibility issue. Now that I
3 know, it turns out it's a credibility issue. At the
4 time, I just knew I had three witnesses that heard these
5 conversations that knew that I was -- it was a
6 possibility that this was a whole entire setup.

7 Q. Okay. Now, you put as this, I guess your
8 discussions in regards as to Mr. Byrholdt in regards to
9 this, how -- what did he do with that information?

10 A. He wrote the names down. Said he would discuss --
11 he would look into speaking with those witnesses.

12 Q. Okay. Did he come back to you with any information?
13 Could he locate them?

14 A. No. No, sir.

15 Q. He could not?

16 A. No. He never came back to me on it.

17 Q. Okay. And at trial, I know you did not testify at
18 the trial of the case?

19 A. No, sir.

20 Q. Okay. And at trial you also -- there was no
21 witnesses called on your behalf; is that correct?

22 A. No, sir.

23 Q. Did you have a discussion with Mr. Byrholdt in
24 regards to that?

25 A. No, sir, I didn't. I don't know what exactly

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
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14

1 happened with the witness deal, but, no, we had a
2 discussion about me testifying. And it was said that
3 because of my record, I would probably -- it would
4 probably be in my absolute best interest not to testify,
5 because -- again, I'm not a lawyer, but he's -- at the
6 time, he's telling me, your record comes out when you
7 testify.

8 Q. Right.

9 A. And so he felt it was best for me not to testify.

10 Q. And I read your -- we were back here this morning,
11 and I read you a part of your transcript during trial
12 that indicated that y'all -- when the judge informed you
13 of your right to testify. And then there's information
14 in here in regards to your -- apparently an off-the-
15 record discussion between you and Mr. Byrholdt in regards
16 to testifying and presenting evidence. Do you remember
17 -- there's a statement in here that says that Mr.
18 Byrholdt says, my understanding after conversing with Mr.
19 Crittendon we intend not to offer any evidence. And I
20 was asking you what you remember in regards to that.

21 A. The only thing I can remember to that is I know he
22 asked me -- we decided that I wouldn't testify. Now,
23 does that mean offer any evidence? No. I meant I wasn't
24 going to testify, but I had three other witnesses that
25 could have testified. But it's not that I did not intend

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
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15

1 to offer any evidence. I did not intend to testify
2 myself.

3 Q. Okay. And so prior to, I guess, that point, you had
4 told him -- what you're saying today is that you wanted
5 to call witnesses to testify on behalf of what they heard
6 in the yard, I guess?

7 A. Yes.

8 Q. Okay. And the witnesses you had were Tim
9 Crittendon, Tiffany Birch, and, I guess, Sarah Hill?

10 A. After she passed, we changed the list from her to
11 put my wife on the list. And at the time, again, she
12 wasn't there. She had no relevant testimony to that fact
13 until after trial had begun, and there were some things
14 that came to light in the trial that she could have
15 testified to.

16 Q. Right. And let me go into that real quick and we'll
17 go on. Because your wife would have testified to
18 numerous allegations in regards to her being in the bed
19 with you while certain -- some of these acts had
20 occurred; is that correct?

21 A. Yes.

22 Q. And also, in regards to movies that were viewed at
23 your house?

24 A. Yes.

25 Q. Okay. What was -- was she going to provide

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
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1 testimony saying that, I guess, you never watched the --
2 no movies like this were ---

3 A. Yes. Her testimony would have pretty much refuted
4 the possibility of any -- or anything other than G-rated
5 movies were in our house.

6 Q. Okay.

7 A. Also, her testimony would have refuted the fact that
8 anyone slept in our bed besides us. No one ever slept in
9 our bed with us besides us. They had their own room.
10 They never, at no time, slept in the same bed. But this
11 was all said in court through her testimony. But without
12 her testifying, there was no way to refute those facts.

13 Q. And you had this discussion with Mr. Byrholdt; is
14 that correct?

15 A. No. By then, we're already in trial.

16 Q. Okay.

17 A. I had no idea what they were going to say at trial.
18 And until it was said, I didn't know what -- how the
19 relevance to my wife's testimony would have been to the
20 case until this was said.

21 ~~Q. Okay. And I thought you had indicated to me that~~
22 you had -- did you ever have a discussion with Mr.
23 Byrholdt in regards to ---

24 A. About what the other witnesses would have said, yes.

25 Q. But not about what Ms. Crittendon could have said?

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
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17

1 A. No.

2 Q. Now, you allege as part of your P.C.R. application
3 that there was some medical testimony or medical report
4 that could have been utilized or medical expert to help
5 you defend your case; is that ---

6 A. Yes.

7 Q. Okay. And from my understanding, there was no
8 forensic evidence showing that any type of a -- any of
9 the allegations had occurred; is that correct?

10 A. Yes.

11 Q. Okay. How do you believe that a forensic expert or
12 medical expert was going to benefit you, or what
13 discussions did you have with Mr. Byrholdt in regards to
14 that?

15 A. And again, I did not have a discussion with Mr.
16 Byrholdt in regards to a medical expert. This is
17 information that I've come -- it's -- since I've been
18 incarcerated and has been able to study up on law and how
19 it pertains to my case in particular.

20 Q. All right.

21 A. The reason I say the medical expert would have been
22 relevant is because there was no physical evidence.
23 There was no -- there was, I think, a mental evaluation
24 done and a physical evaluation done of the alleged
25 victim. And the results -- the report basically said

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1 there was no evidence of abuse. Now, sitting in court, I
2 can say that. That don't mean you'll believe me. They
3 could say that. That don't mean you could believe them.
4 But a medical expert who has twenty, twenty-five, thirty
5 years in the business sits in front of a jury and says,
6 this is what I see on this paper. Okay? This is --
7 again, it was all about credibility at that time.

8 Q. Okay.

9 A. That just bolsters the credibility of what I was
10 saying from the beginning. Because if you'll note also,
11 her statement changed at least two different times
12 beforehand. That's why the medical expert's opinion
13 would have made -- mattered so much also.

14 Q. Okay. So that would have been in addition to the
15 cross-examination that Mr. Byrholdt had in regards to it?

16 A. Yes.

17 Q. Okay. Now, are there -- and I've gone through and
18 tried to summarize these as much as we can. What other
19 issues do you have in regards to the counsel you got from
20 Mr. Byrholdt?

21 ~~A. Well, again -- and I mean -- and again, all this is~~
22 in -- afterwards because, again, I had no idea about the
23 law or how to apply it whatsoever. All this was what I
24 found out after I was incarcerated.

25 Q. Okay.

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1 A. There was a issue with the indictments because
2 somehow or another, I think it's -- I was re-indicted or
3 direct re-indicted at one point. But the indictments
4 from the original indictments changed. The wording from
5 the original indictment to the new indictment had
6 changed.

7 Q. Okay.

8 A. And I think that would have -- should have become an
9 issue at trial because I think from what I've read, you
10 have -- this is something you have to address before the
11 jury's sworn in. This is something that had to have been
12 done, that should have been done in the pretrial motions.
13 This should have been looked into because the indictments
14 shouldn't have changed. There shouldn't have been no
15 reason to change it other than the fact that her
16 statements changed.

17 Q. Okay. Now, I know we've got your brother here today
18 to testify in regards to your case. Anything else before
19 I call him as a witness?

20 A. Can we go back just a bit here? I'd like to go back
21 just a bit, back again to this speedy trial issue.
22 Because the reason I made that my first claim is because
23 the same reason. As I said, this is a issue that had to
24 be brought up before the jury was sworn in. Again, I did
25 not know that, nor did I know anything about a speedy

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1 trial act.

2 I also went through some meticulous inquiries.

3 There's certain things that -- I think it's Barkabee

4 Wingo (phonic), some Barka (phonic) factors that has to

5 be in place before this can even be relevant. And I want

6 to make sure we get it for the record. All the factors

7 are seemingly in place. We've already noted that -- I

8 have it here actually. The earliest would have been

9 March of '06 which would have put it at seventeen months

10 since the last time I made an appearance in court after

11 we had went to the bond hearing and they said try him by

12 December or we're going to dispose of his case.

13 The next time I was in court was June of '06, which

14 would have been twenty months past the original date that

15 they were supposed to have tried me. The time I finally

16 went to court was December '06, twenty-six months after

17 the original date that they were supposed to try me. By

18 looking through the Barka factors and the relevance,

19 they're saying anything beyond one year is presumptively

20 prejudicial and triggers the other three remaining

21 ~~factors, length of the delay, reason for the delay,~~

22 prejudice to the Defendant.

23 If we move on to the length of the delay. Again,

24 now, there's a length of a delay anywhere between

25 seventeen and twenty-six months with the exception of the

1 two weeks that I have asked for one lawyer to be
2 dismissed and the other lawyer took over. Because during
3 that time, that would have been excludable time. That is
4 the only time differential that they have for the non-
5 excludable time required to activate the other remaining
6 factors in this case.

7 Now, the reason for the delay, I've tried -- I've
8 written the Solicitor's office. I've written different
9 people trying to get an angle on the reason why my case
10 in particular was delayed beyond December of '04. And to
11 know I have absolutely no -- I could get no answer other
12 than the fact that they would call me when they were
13 ready for me. And which they never did.

14 I couldn't even get the -- I tried to get the paper
15 from the Clerk of Court saying, okay, here it shows --
16 this is the last time we called you for roll call, this
17 is the next time we call you for roll call, just to be
18 able to have to say here is the difference.

19 Because again, I can understand that this is not for
20 guilt or innocence, but I have to prove everything I say
21 in this courtroom because I'm on this side now. And I
22 need to be able to prove everything I allege, which is
23 another reason why I was sort of wary about coming today
24 because we're still short two witnesses here today. The
25 subpoenas were out, but they're not here.

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1 And again, the reason of the delay, you have to look
2 into the Solicitor's department to ask and find out why I
3 was delayed so long in coming to court. The prejudice is
4 clear. I lost a key witness. I lost a key witness. And
5 unfortunately, it was to cancer. But she was an absolute
6 imperative that her testimony got on the record because
7 she was that ---

8 Q. And you've submitted that as a lot of -- part of
9 your application and the case law surrounding it, so I
10 think we've got that ---

11 A. It's just -- that's only because I want it to be
12 understand [sic]. It's not something that I knew at the
13 time, but it's something that I had mentioned to him at
14 the time. I also have submitted some faxes that I have
15 sent to him asking about this. So it's not something
16 that he wasn't aware of because I had mentioned it
17 several times.

18 Q. Okay. I have no further questions.

19 THE COURT: All right. Yes, ma'am?

20 MS. MAY: I have no questions.

21 THE COURT: All right.

22 Thank you, sir. You can step down. And just for
23 the record, his application's part of the record. I'm
24 going to review it.

25 MR. ARIAIL: Okay. The next witness we have is

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Timothy Crittendon - Direct Examination by Mr. Ariail

23

1 Mr. Tim Crittendon.

2 (WHEREUPON, the witness was duly sworn.)

3 THE COURT: Sir, if you would, give us your
4 name, full name for the record.

5 THE WITNESS: Timothy Crittendon.

6 **TIMOTHY CRITTENDON,**

7 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

8 DIRECT EXAMINATION

9 BY MR. ARIAIL:

10 Q. Mr. Crittendon, in regards to -- this is your
11 brother, correct? Clarence?

12 A. Yes, sir.

13 Q. Okay. I want to take you back to an incident you
14 witnessed, I think, involving Mr. Crittendon outside of
15 his home back sometime -- would have been in 2003. Do
16 you remember or recall that incident where I guess there
17 was some individuals, some ladies that made some threats
18 against him?

19 A. Yes, sir.

20 Q. Okay. What do you recall?

21 A. I had just pulled back up with Rico. And that same
22 time she had pulled up, and like she had like went in the
23 house. See, first she exchanged some words with Rico,
24 then she went in the house. And when she went in the
25 house, I heard them start arguing and stuff. And I heard

1 her say that, I wish you would stop playing me like that.
2 You know what I'm saying? This stuff is going to stop.
3 And then she started screaming, talking about, you gonna
4 leave my mama. And I was like -- you know, I'm sitting
5 down looking. I'm like, okay. And she kept saying, you
6 gonna leave my mama. You gonna leave my mama. I'm tired
7 of you treating me like this. I'm tired of you treating
8 me like this. You gonna leave my mama. So he kept
9 telling her to go ahead.

10 So finally they got outside the door, and she kept
11 beating on the door, talking about you gonna start acting
12 like this with me. You gonna start acting like this with
13 me. You gonna leave my mama. So he's like, they called
14 the police. Then the police came. The police made them
15 leave. And that was really about the size of the
16 incident right there.

17 Q. Okay. But what threats were made by, I guess, the
18 ladies? First of all, who was the lady that made the
19 threat?

20 A. Sheka (phonic) was the one making the threats. She
21 kept saying that if you don't -- you got thirty days to
22 leave. If you don't leave in thirty days, then you ain't
23 gonna like what I'm gonna do. She said that a few times.
24 Then she was like, well ---

25 MS. MAY: Your Honor, can we clarify who she

1 is?

2 THE COURT: Yeah. I think he said Sheka. Is
3 that her name?

4 MR. ARIAIL: Sheka.

5 MS. MAY: Okay.

6 Q. Now, Sheka would be the mother of ---

7 A. No.

8 Q. It would be Monique. Is that her name?

9 A. Yeah.

10 Q. Monique?

11 A. Yeah.

12 Q. Okay. And she was the mother of the alleged victim
13 in this case; is that right?

14 A. The mother of the alleged victim?

15 Q. Yeah. The girl in this case, do you remember that?

16 A. Uh-huh (affirmative).

17 Q. Okay. Is that correct?

18 A. Uh-huh (affirmative).

19 Q. That would be Minor (phonic) Minor is that
20 right?

21 A. Uh-huh (affirmative).

22 Q. Okay. So she was making the threats or statements
23 to Mr. Crittendon; is that right?

24 A. Yes, sir.

25 Q. And this was before he was, I guess, arrested or

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Timothy Crittendon - Direct Examination by Mr. Ariail

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1 charged with anything involving Ms. Minor is that
2 right?

3 A. Yes, sir.

4 MR. ARIAIL: Your Honor, I have no further
5 questions.

6 THE COURT: All right. Any questions?

7 MS. MAY: No questions, Your Honor.

8 THE COURT: All right.

9 Thank you, sir. You can step down. I appreciate
10 it.

11 MR. ARIAIL: Your Honor, no further witnesses
12 or anything else. I've got an amended to the post -- an
13 amendment to his post-conviction relief that I would like
14 to make it a part of the record.

15 THE COURT: Okay. Y'all don't have any
16 objection to this?

17 (Off record discussion)

18 MR. ARIAIL: We would submit that, and that
19 would be our case, Your Honor.

20 THE COURT: All right.

21 MS. MAY: No objection.

22 THE COURT: Without objection. And I'll take
23 that under review too.

24 (WHEREUPON, Applicant's Exhibit Number 1 was marked
25 and admitted into evidence.)

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Bruce Byrholdt - Direct Examination by Ms. May

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1 THE COURT: All right. Yes, ma'am?

2 MS. MAY: I'd like to call Mr. Byrholdt.

3 (WHEREUPON, the witness was duly sworn.)

4 THE COURT: You'd better spell that strange
5 last name.

6 THE WITNESS: B-Y-R-H-O-L-D-T.

7 THE COURT: Thank you.

8 BRUCE BYRHOLDT,

9 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

10 DIRECT EXAMINATION

11 BY MS. MAY:

12 Q. Mr. Byrholdt, how long have you been practicing
13 criminal law?

14 A. Thirty-one years.

15 Q. And do you recall how the charges against Mr.
16 Crittendon arose?

17 A. He was charged with criminal sexual conduct first
18 degree with a minor and lewd act. And I took over the
19 case in July of, I think it was 2006. The end of July.

20 Q. And were you appointed at that point or were you
21 retained?

22 A. I was appointed as substitute when Mr. Crittendon
23 asked that Gruber Sires be relieved.

24 Q. Okay. And once you were appointed, do you recall
25 meeting with Mr. Crittendon and discussing this case?

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1 A. I met with Mr. Crittendon on numerous occasions
2 while he was housed at the Oconee County Detention
3 Center, and we discussed all aspects of it. He did give
4 me the name of two people to talk to. One was a Tiffany,
5 I believe it's Birch. He gave me phone numbers,
6 addresses. She would not talk to us. She would not
7 cooperate in any way whatsoever. And then prior to
8 trial, he gave me his brother's name, about the alleged
9 incident that he claimed, you know, happened. This was
10 in retaliation. And at the time of trial, Mr.
11 Crittendon's brother was incarcerated at S.C.D.C. And
12 with a prior, pretty good record, I didn't know how
13 credible he'd be as a witness in a trial.

14 The main thing that Mr. Crittendon and I had talked
15 about was, you know, the incident that was complained of,
16 you know, the ten-year-old victim. I said, if she comes
17 to court, you know, you're going to be in big trouble.

18 He had a prior criminal record. He was already on
19 the sex offender registry. And all the way up to the day
20 of trial, Mr. Crittendon said, well, she won't come to
21 court. She won't testify. And that ten-year-old girl
22 got up on the stand up on the fourth floor and pointed
23 her finger at Clarence and told the jury what had
24 happened.

25 Now, her story did change. I tried to cross-examine

1 her on it. But you know, when a ten-year-old girl points
2 at somebody and, you know, claims, you know, what
3 happened, that's going to be hard to overcome that.

4 Q. Okay. And with regard to the speedy trial issue,
5 did you ever discuss that with Mr. Crittendon, or did he
6 ever ---

7 A. It was discussed briefly. This case went to trial
8 within a four-month period of me being retained or me
9 being appointed. And I mean, I've raised speedy trial
10 once or twice in thirty years. I've never had a case
11 dismissed. And the problem with this is they had re-
12 indicted it. Why, I don't know. I mean, my gut feeling
13 was there was a change in administrations. They had some
14 additional evidence, and that's why they put the new
15 indictment out.

16 Q. And based on your experience, did you see an issue
17 with him being re-indicted?

18 A. No. And I never saw anything that said this charge
19 was going to be dismissed if it wasn't tried back in, you
20 know, '04 or whenever it was. I mean, most judges, when
21 they have bond hearings, try and get a feel for when this
22 case is going to come up because they don't want to keep
23 people incarcerated, you know, while they could be out on
24 bond. But I -- you know, like I say, this case went to
25 trial within four months of me taking over the case.

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1 Q. I believe Mr. Crittendon testified earlier that
2 there was no forensics. Did you file a discovery motion?

3 A. Yeah. I had the discovery from Gruber Sires. We
4 went through all of that. To me, I mean, when the
5 officers testified that there was, you know, no hard
6 evidence other than the statement of the victim, the
7 medical report -- I mean, if the claim is oral sex,
8 you're not going to have any abuse. It's not like a rape
9 case where you might have, you know, tearing or bruising
10 or something like that.

11 And the other one was digital penetration or
12 fondling, and you're not going to have physical abuse on
13 that. And you know, to put a witness up just to say what
14 the State had already said. And like I say, if I'm not
15 putting up evidence, I want the last argument. I want
16 the last thing the jury hears is, you know, my take on
17 the facts of the case, trying to point out
18 inconsistencies in the victim's statement, which we did,
19 trying to show reasonable doubt.

20 Q. So you didn't feel the need to hire a medical
21 expert?

22 A. I thought it was totally unwarranted in this case.

23 Q. Mr. Crittendon testified earlier about, I believe
24 that Sarah Crittendon might have -- Sarah was going to
25 testify about one of the alleged incidents her being in

1 bed during it. And did you bring that out in your
2 closing argument, that fact, or at some point in the
3 trial?

4 A. I don't recall that. But like I said, the problem
5 we had was that there was a statement that Clarence had
6 given about a dream, that he woke up and the only one in
7 bed with him was the ten-year-old girl. And you know, I
8 don't recall, you know, that being brought out during the
9 trial. I don't recall Clarence even talking to me about
10 that during the trial.

11 Q. If the transcript reflects that you did bring that
12 out, would you defer to the transcript?

13 A. I definitely would defer to the transcript. It was
14 years ago.

15 Q. Okay. And did you -- were you able to conduct an
16 investigation?

17 A. Yeah. We did. We did everything we could. And I
18 mean, I thought Tiffany would have been important because
19 apparently she's someone in the family that didn't have a
20 criminal record, but we could not get her to cooperate at
21 all. She wouldn't return phone calls. We tried
22 subpoenas. We tried every way to try and contact her.
23 She just was not going to be part of this in any way,
24 shape or form.

25 Q. Okay. And I believe one of the issues in Mr.

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1 Crittendon's application is about the prosecutor's
2 alleged improper comments. I believe it specifically
3 alluded to his right not to testify, the smoke-and-
4 mirrors comment. Do you ---

5 A. I think that was more a comment on me rather than a
6 comment on Clarence.

7 Q. You didn't see an issue to object to?

8 A. I don't think there was an issue to object. I mean,
9 there's been closing arguments much worse than that where
10 nobody said anything. And it was just a hard case to
11 try.

12 Q. And were there any plea negotiations in this case?

13 A. There were. I mean, it was kind of a strange case
14 because normally in a case of this type, what you're
15 worried about is your client being put on a sex offender
16 registry. Mr. Crittendon was already on that. I had a
17 recommendation. I had talked the prosecutor into --
18 initially, she was up to fifteen years. We got her down
19 to a seven-year sentence. And Mr. Crittendon just said
20 he wasn't going to plead guilty to anything. He wasn't
21 going back to prison.

22 Q. So you discussed all the negotiations with him?

23 A. Yes, ma'am.

24 Q. And it was -- was it his choice not to plead and
25 proceed to trial?

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1 A. It was his choice.

2 Q. Okay. And y'all -- did y'all discuss the State's
3 evidence prior to trial?

4 A. Yeah. Went over everything we had. I mean, like I
5 said, what I told him -- this case was about was a ten-
6 year-old girl getting on the stand. They had no physical
7 evidence of any kind.

8 Q. Okay. Just one last thing. I believe there's an
9 issue of whether you failed to investigate whether he was
10 set up. Was that -- did y'all discuss that?

11 A. We discussed it. But the issue in this case was how
12 they were going to use it. I mean, this ten-year-old
13 girl made a pretty darn good witness. I mean, it's hard
14 to cross-examine her, although I thought I did a good job
15 going after the changes in her story. But her -- I mean,
16 she had a -- she'd gave a handwritten statement to the
17 police, you know, right after the incident occurred that
18 was pretty graphic. And her story substantially didn't
19 change for all practical purposes.

20 Q. And there's one last issue about failure to request
21 a jury charge of assault and battery of a high and
22 aggravated nature. Did you feel that was warranted or
23 that you could even request that?

24 A. I mean, you've got to have legitimate grounds for
25 raising that. And with the allegations of oral sex, that

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Bruce Byrholdt - Cross-examination by Mr. Ariail

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1 did not fall within the gambit of assault and battery of
2 a high and aggravated nature with indecent liberties.

3 MS. MAY: I have no further questions.

4 THE COURT: Yes, sir?

5 CROSS-EXAMINATION

6 BY MR. ARIAIL:

7 Q. Mr. Byrholdt, in regards to the investigation, I
8 guess, of some of the claims that Mr. Crittendon has
9 raised, I guess there was one in regards to talking with
10 some witnesses, a Tim Crittendon, Tiffany Birch, Sarah
11 Crittendon. Did you talk with any of those individuals?

12 A. I did not. I did not -- I tried to talk to Timothy.
13 The numbers I got went unanswered. And then I found out
14 at trial that he was incarcerated. And at that point, I
15 didn't think it would be beneficial. I tried on multiple
16 occasions to get with Tiffany Birch, but was just totally
17 unsuccessful.

18 Q. Right.

19 A. I had numbers. I talked to her one time. She would
20 not -- you know, I'm not getting involved. I don't know
21 anything.

22 Q. Did you have any discussions with him in regards to
23 your strategy of not calling them and being able to close
24 last or ---

25 A. Yeah, we discussed that. I said, you know, the only

1 thing they have is the victim's testimony. And again,
2 like I say, you know, he thought until the day of trial
3 that she was not going to -- for whatever reason, was not
4 going to show up for court. Unfortunately, I told him
5 that morning, I said, she's here in court, and my
6 understanding she's going to get on the stand and
7 testify. And she did.

8 Q. And based on what you've heard from Mr. Crittendon,
9 your strategy was you didn't think it was best to call
10 them anyway in this case?

11 A. I don't think it -- I think we're going to -- the
12 worst thing to deal with, in my opinion, with a jury is
13 when you try and give them something that's just not out
14 there. You know, all that's going to do is make them
15 angry. Because of the change in story, we had a slight
16 chance on reasonable doubt, but it was slight. And
17 Clarence was aware of that going in.

18 Q. Okay. And the speedy trial issue in regards to
19 that, did you ever file any documents or invoke a speedy
20 -- a motion for speedy trial or anything like that?

21 A. I did not. I did not. Like I said, this trial went
22 -- it was probably one of the quickest I've ever gone
23 from being appointed to going to trial on a serious
24 criminal charge.

25 Q. Did you ever see anything or get anything that says

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1 that it was invoked or a discussion in regards to that?

2 A. None whatsoever.

3 Q. Okay.

4 A. And I told Mr. Crittendon, he was -- in my opinion,
5 he didn't want a speedy trial. I mean, I've raised it, I
6 think, in one other case in thirty years. And in that
7 one, it didn't work out either.

8 Q. So in this case -- and you had discussions with him
9 -- in regards to the best way to handle this was to, I
10 guess, cross-examination through, I guess, the alleged
11 victim, was the best strategy you were going to take?

12 A. When it went to trial, that was the only strategy.
13 Prior to that, my recommendation and the strongest I
14 could do was, that was a heck of a deal, seven years.
15 But that was his choice. And you know, he made the
16 choice.

17 Q. All right.

18 MR. ARIAIL: I have no further questions, Your
19 Honor.

20 THE COURT: All right. Anything else?

21 MS. MAY: No, sir.

22 THE COURT: All right.

23 Thank you, sir. You can step down.

24 MS. MAY: Nothing further.

25 MR. ARIAIL: I don't have anything further,

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1 Your Honor.

2 THE COURT: All right. I'll take it under
3 advisement. I'll review the application and also the
4 amendment to the application and let y'all know.

5 Okay. Thanks.

6 (WHEREUPON, the hearing ended at approximately 12:58
7 p.m.)

8 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

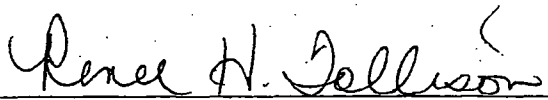
1 CERTIFICATE OF REPORTER

2 I, the undersigned Renee H. Tollison, Official Court
3 Reporter for the Tenth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all
6 the proceedings had and evidence introduced in the
7 trial/hearing of the captioned case, relative to appeal,
8 in the Circuit Court for Oconee County, South Carolina,
9 on the 3rd day of October 2011.

10 This transcript may contain quoted material. Such
11 material is reproduced as read by the speaker.

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

14 January 10, 2014

15 
16

17 Circuit Court Reporter

The Oconee County Court of General Sessions

Post Conviction Relief Application From
Oconee County Circuit Court

The Honorable Alexander S. Macaulay, Presiding Judge

Case No: 2008-CP-371471

Clarence E. Crittendon #266744,

Applicant

v.

The State of South Carolina,

Respondent

AMENDMENT TO POST CONVICTION RELIEF

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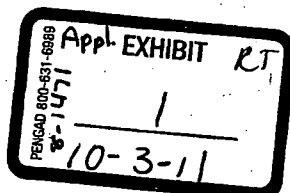


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28 U.S.C. § 2255

Strickland v. Washington, 466 U.S. 668 (1984)

Beasley v. United States, 491 F.2d 687 (1974)

STATEMENT OF ISSUE

1. Was trial Counsel ineffective for failing to object to Solicitor's Vouching of State's Witness?

ARGUMENT

● In the exercise of Applicant Crittendon's Constitutional right, Applicant proceeded to jury trial on December 12, 2006 with the Honorable Alexander S. Macaulay presiding. (*State v. Charles Crittendon*, 2004-65-37-509, 2006-65-37-727) During the course of trial, the State presented testimony from its Sole Witness and alleged Victim, (T. Tr. p. 79-91) At the close of the trial, the Assistant Solicitor, Lindsey Simmons, gave closing argument for the State. (T. Tr. p. 134, line 3-25, / p. 135-142) During Closing Summation, ass. solicitor Simmons vouched for the credibility of State's witness's testimony thereby insinuating into the record for the Jury to consider, the solicitor's own personal opinion and feelings. (T. Tr. p. 139, ln. 16-20 / p. 75, ln 4-5) The result of this manifest error committed by Solicitor Simmons infected the trial with unfairness to the point as to call into question the resulting outcome.

In Matthews v. State, (S.C. 2002) 350 S.C. 272, 565 S.E.2d 766, the Court held that defense counsel rendered ineffective assistance by failing to object to Solicitor's comments vouching for credibility of State's witness during summation. Counsel's failure to object prejudiced his client in that the jury was faced with confusing, mass trial characterized by improperly admitted evidence and evidence against defendant was not overwhelming.

ARGUMENT (cont.)

- The Jury could have also drawn an adverse inference from the comments thereby also prejudicing the defendant. Defense Counsel cannot assert trial strategy as a defense to ineffective assistance claim for failure to object to comments which constitute an error of law and are inherently prejudicial.

The same is said in Gilchrist v. State, (S.C. 2002) 350 S.C. 221, 565 S.E.2d 281 in that the court held that counsel was ineffective in his erroneous failure to object to State's opening statement vouching for credibility of State's witness.

- In the South Carolina Rules of Court under Post Trial Matters, Rule 22. addressing the jury it states: "In arguing before a jury, no attorney shall address or refer to by name, or otherwise make any personal appeal to any or all members of the jury." Trial counsel failure to object to ass. Solicitor's misconduct and move for a mistrial, negated trial court from issuing any sort of curative instruction being given in an effort to correct the misconduct.

- In McMann v. Richardson, 397 U.S. at 771, the court held that "where the defense is substantially weakened because of the unawareness on the part of defense counsel of a rule of law basic to the case, the accused is not given the

ARGUMENT (cont.)

Effective representation guaranteed him by the Constitution. "Defense Strategy and tactics which lawyers of Ordinary training and skill in Criminal law would not consider competent deny the defendant the effective assistance of Counsel.

The Prosecutions Closing argument must be confined to the evidence in the record and not appeal to the personal biases of the Jurors nor can they contain personal opinions of the prosecution. This is a basic rule of law that governs Closing arguments that defense counsel should be aware of and readily challenge upon violation of because it jeopardizes the defendants right to a fair trial. Trial Counsel's failure to object to and move for a mistrial pursuant to prosecutor's misconduct or at the least move for some sort of curative instruction to be given by trial court, rises to the level of inadequate performance and inadequate performance by trial counsel would render a conviction void.

An applicant convicted without the effective assistance of counsel required under the Six Amendment of the United States Constitution is entitled to relief under 28 U.S.C. § 2255.

ARGUMENT (cont.)

Section 2255 of Title 28 U.S.C. provides in relevant part:

A prisoner in custody under sentence of a court established by act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States...

Or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. If the

court finds . . . that there has been such a denial or infringement of the

Constitutional rights of the prisoner as to render the judgment vulnerable to

collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or release him or grant a new trial or correct the sentence as may appear appropriate . . .

Using *Strickland* to test trial attorney's performance, applicant submits that evidence and statements within the transcript of record satisfy the

two prong test. *Strickland v. Washington*, 466 U.S. 668 (1984) (When a

convicted defendant complains of the ineffectiveness of counsel's assistance,

the defendant must show that counsel's representation fell below an objective standard of reasonableness. And but for counsel's errors, there was a

ARGUMENT (cont.)

reasonable probability that the outcome of the proceedings would have been different.) A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In light of these facts, applicant request that this court grant relief in the Post Conviction Relief action in that applicant's sentence be vacated, the conviction be reversed or set aside and applicant be awarded a new trial.

CONCLUSION

The Prosecution, in vouching for the Credibility of it's sole witness against Applicant violated a basic rule of law regarding closing arguments that any Attorney with ordinary skill and a basic knowledge of trial procedures should be aware of. Trial Counsel's performance is below the objective standard of reasonableness for his failure to object to prosecution's misconduct, especially in light of there was not overwhelming evidence presented against Applicant.

In Beasley v. United States, 491 F.2d 687 (1974) the court held that, "each case must stand on it's own merits, and our application of Constitutional rules must always relate back to the language and policies of the Constitution. The law demands objective explanation, so as to ensure the even dispensation of justice." "The right to have the assistance of Counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from it's denial."

Applicant Crittendon was denied the effective assistance of Counsel gauranteed by the Six Amendment of the Constitution and as such ask that Post Conviction Relief be granted.

Amendment, Post Conviction Relief Brief to Oconee County
Oconee County General Sessions, Alexander S. Macaulay, Presiding Judge

C.A. No.: 2008-CP-37.1471

Clarence E. Crittendon #266744

Applicant.

v.

The State of South Carolina

Respondent.

Certificate of Service

I Certify that a true copy of this Amendment, Post Conviction Relief has been served on Sallie C. Smith, Clerk of Court of Oconee County, P.O. Box 678, Walhalla SC 29691, and Karen P. Ballenger, Esq., Post office box 490, Walhalla SC 29691. I further certify that I, Clarence E. Crittendon, am the Applicant in the above captioned matter and that regular communication by mail exist within the State of South Carolina between myself and respondent and this is a proper circumstance for service by mail.

Sworn and Subscribed Before Me

This 21 Day of May 2009

Jennifer C. Frankler
Notary Public of South Carolina

My Commission Expires: 01-31-2010

S/ Clarence E. Crittendon #266744
Clarence E. Crittendon #266744

261 F.3d 210 (2nd Cir. 2001)
Kenneth G. Pavel, Petitioner-Appellant,

v.

**Melvin L. Hollins, Superintendent, Oneida Correctional Facility; Eliot L. Spitzer,
 Attorney General of New York State, Respondents-Appellees.**

Docket No. 99-2410

August Term, 2000

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Argued: April 4, 2001

Fully Submitted: May 3, 2001

Decided: July 25, 2001

Appeal from a judgment of the United States District Court for the Northern District of New York (Thomas J. McAvoy, then-Chief Judge), denying petitioner Kenneth G. Pavel's application for a writ of habeas corpus on the ground that Pavel was not convicted in state court in violation of his federal right to effective assistance of counsel.

On appeal, Pavel emphasizes that his trial attorney (1) did not prepare a defense, on the theory that the charges against Pavel would be dismissed at the close of the prosecution's case; (2) failed to call two important fact witnesses, with the content of whose putative testimony the attorney was familiar; and (3) did not call as a witness a medical expert. In these circumstances, Pavel argues, his right to effective assistance of counsel was violated.

We agree. Accordingly, we reverse the judgment of the District Court, vacate the state court judgment of conviction, and remand the cause. On remand, the District Court shall issue a writ of habeas corpus to Mr. Pavel on the thirtieth calendar day after the issuance of our mandate unless New York State has, by that point, taken concrete and substantial steps to expeditiously retry him.

James V. O'Gara (Kevin C. Walker, of counsel), Kelley Drye & Warren, LLP, New York, NY, for appellant.

Marlene O. Tuczinski, Assistant Solicitor General (Nancy A. Spiegel, Assistant Solicitor General, Peter H. Schiff, Senior Counsel, of counsel; Eliot Spitzer, Attorney General of the State of New York, on the brief), Office of the Solicitor General of the State of New York, for appellees.

Before: KEARSE and CABRANES, Circuit Judges, and TRAGER, District Judge.*

JOSE A. CABRANES, Circuit Judge:

Petitioner-appellant Kenneth G. Pavel ("Pavel") has been held for more than ten years pursuant to a state court judgment of conviction in the custody of state correctional authorities, most recently that of Respondent-Appellee Melvin L. Hollins, Superintendent of the Oneida Correctional Facility. Over five years ago, on February 7, 1995, Pavel petitioned for a writ of habeas corpus under 28 U.S.C. §2254 in the United States District Court for the Northern District of New York (Thomas J. McAvoy, then-Chief Judge). Pavel argued that the state court judgment of conviction was entered in violation of his rights under the Sixth Amendment to the United States Constitution because his trial attorney provided him with ineffective assistance. Pavel's petition was denied, and judgment was entered accordingly.

On appeal, Pavel emphasizes that his trial attorney (1) did not prepare a defense, on the theory that the charges against Pavel would be dismissed at the close of the prosecution's case; (2) failed to call two important fact witnesses, with the content of whose putative testimony the attorney was familiar; and (3) did not call as a witness a medical expert. In these circumstances, Pavel argues, his right to effective assistance of counsel was violated.

Irresponsible not to address

We agree. Accordingly, we reverse the judgment of the District Court, vacate the state court judgment of conviction, and remand the cause. On remand, the District Court shall issue a writ of habeas corpus to Mr. Pavel on the thirtieth calendar day after the issuance of our mandate unless New York State has, by that point, taken concrete and substantial steps to expeditiously retry him.

I. BACKGROUND

In the spring of 1989, Pavel was arrested and accused of sexually abusing his children-Matthew Pavel ("Matthew"), then age seven, and David Pavel ("David"), then age five (collectively, "the boys"). The accusations were brought to the attention of the police by Pavel's then-wife, Margaret Pavel ("Ms. Pavel"), with whom he was engaged in a series of marital disputes, and who had recently been denied sole custody over Matthew and David.

Upon his arrest, Pavel contacted Sanford Meltzer ("Meltzer"), the attorney who had represented him in connection with the marital disputes. Meltzer noted that there was little if any physical evidence that Pavel had sexually abused the boys in the manner that they alleged.¹ Accordingly, Meltzer did not prepare a defense; instead, he planned to move to dismiss the charges against Pavel at the close of the prosecution's presentation of its evidence, and was confident that the trial judge would grant the motion.²

Pavel pleaded not guilty, a bench trial commenced, and at the close of the prosecution's evidence, Meltzer moved to dismiss the charges against Pavel. In relevant part, the motion was denied.

Meltzer, as noted, had not prepared for this eventuality. Accordingly, he had little choice-he put Pavel on the stand, and then rested without calling any other witnesses.³

On October 18, 1989, the state trial judge found Pavel guilty of some of the charged crimes and, on November 27, 1989, held a sentencing hearing, at which Pavel contended that he was innocent. Pavel was sentenced principally to two consecutive 4 - 12 year terms of incarceration, and was remanded to prison.

Pavel was paroled almost nine years later-on August 25, 1998. One of the conditions of his parole was that Pavel "cooperate fully" with a particular sex-offender program. As part of the program, Pavel was required to admit having committed the crimes for which he was convicted. He refused to do so, see PAVEL AFFIDAVIT (executed April 20, 2001) at ¶4 ("Because I did not commit the acts of which I was convicted, I have steadfastly refused to admit to them."), and was therefore returned to prison on November 15, 1999. He is there now.

Before assessing Pavel's Sixth Amendment claim, we pause briefly to provide a fuller account of the procedural history of this case, and of the evidence presented at trial.

A. RELEVANT PROCEDURAL HISTORY

As noted above, following a bench trial in Onondaga County Court, New York (John W. Brandt, Judge), Pavel was convicted on October 18, 1989 of sodomizing, sexually abusing, and endangering the welfare of his children. A judgment of conviction was entered, and within one calendar year, the state's direct-appeals process had run its course: The judgment was affirmed by the Appellate Division, Fourth Department, *People v. Pavel*, 163 A.D.2d 834 (1990), and leave to appeal was denied by a Judge of the New York Court of Appeals, *People v. Pavel*, 76 N.Y.2d 862 (1990).

On July 27, 1992 in Onondaga County Court, Pavel moved pursuant to New York Criminal Procedure Law § 440.10(1)⁴ to vacate the judgment of conviction ("the §440.10 motion"). One of the bases of the §440.10 motion was Pavel's claim that Meltzer had provided him with ineffective assistance of counsel. After oral argument, at which Pavel was represented by Jeffrey S. Cook and James V. O'Gara of the New York law firm Kelley Drye & Warren, the §440.10 motion was denied. Leave to appeal from the denial was itself denied on April 1, 1993 by a Judge of the Appellate Division, Fourth Department.

On February 7, 1995, Pavel petitioned for a writ of habeas corpus in the District Court, arguing, *inter alia*, that Meltzer had provided ineffective assistance of counsel. The petition was denied as procedurally barred, and judgment was entered accordingly on August 16, 1996. Pavel then applied for a Certificate of Appealability, and his application was denied in a December 23, 1996 Decision and Order entered by Judge McAvoy.

Approximately one month later, Pavel moved this Court for a Certificate of Appealability. We ruled by summary order that Pavel's claims were not procedurally barred and remanded the cause to the District Court, by mandate entered July 10, 1997, for a determination of the petition on the merits.

On June 16, 1999, Judge McAvoy again dismissed Pavel's habeas petition, this time on the merits, and on July 20, 1999, he denied for a second time Pavel's motion for a Certificate of Appealability.

On October 19, 1999, Pavel moved in the Court of Appeals for another Certificate of Appealability. By order dated July 24, 2000, we granted the motion on the question of whether "appellant [Pavel] was denied effective assistance of trial counsel if, as he alleges, his counsel, assuming that his motion to dismiss would be granted, failed to prepare a defense."

That is the question now before us.

B. TRIAL EVIDENCE

The prosecution's evidence at trial consisted principally of the testimony of five witnesses, which we summarize briefly here.

First, seven-year old Matthew testified under oath that Pavel had anally sodomized him every Saturday during the four months from December 1988 until mid-April 1989. Matthew testified also that he and David spent a week-long vacation, from Saturday, April 15, 1989 until Saturday, April 22, 1989, with Pavel, at the Florida apartment of Clothilde Pavel, Pavel's mother and the boys' grandmother. Matthew testified that he was anally sodomized at least twice during that trip—at least one of the incidents, Matthew testified, took place in Clothilde Pavel's bathroom, while she was making breakfast.⁵ Following the trip, Matthew testified that he and David told Ms. Pavel, their mother, about Pavel's alleged sodomizing of them. The police were informed of the accusations; five days after returning from Florida, Matthew and David were given physical examinations, and Pavel was arrested. Matthew then spoke with a therapist named Constance McKinstry ("Ms. McKinstry") and the prosecutor about Pavel's alleged sex abuse.

Second, five-year old David testified as an unsworn witness. His testimony was, as might be expected, frequently non-responsive or confused.⁶ But some of David's testimony was clear; David testified unambiguously that he was anally sodomized at least three times during the 12 days before he was examined by a doctor in connection with the charges against Pavel, and that one of those episodes took place in the bathroom of the Florida apartment. At one point in his testimony, David strongly suggested that he was sodomized three times a day during the Florida trip. The prosecutor asked the following question: "You said it happened in Florida too. Do you remember how many times it happened in Florida?" David answered: "When we had lunch, breakfast and dinner."

Third, Ms. McKinstry, who is not a licensed psychologist, testified that when she first began meeting with the boys on March 14, 1989, she believed that they suffered from "[a]djustment disorder with anxious mood." Ms. McKinstry testified that she began to suspect "the possibility" that they were being sexually abused in mid-April of 1989, when Matthew, during therapy sessions, began hitting a three and a half foot tall yellow dummy on a label located in the dummy's genital area. Thereafter, Ms. McKinstry testified, Matthew and David talked with her during their weekly therapy sessions about Pavel's sexual abuse. Ms. McKinstry did not discuss the boys' allegations with Pavel.

Fourth, Ms. Pavel testified that, on the day the boys returned from Florida, Matthew began singing songs about his "peeny" when she was giving the boys a bath. Matthew's singing, Ms. Pavel testified, prompted a series of questions and a conversation in which the boys described Pavel's alleged sexual abuse.

Fifth, the prosecution called a medical expert, Dr. Celeste Madden ("Dr. Madden"). Dr. Madden testified that she reviewed the records of the physical examination of the boys that had been conducted on April 27, 1989, five days after they returned from Florida. She did not examine the boys herself. Dr. Madden observed that the records of the physical examination of Matthew showed no relevant physical abnormalities, while the records of David's physical examination indicated only that he had "mild perianal arrhythmia," which Dr. Madden described as "discoloration of the skin, redness around the anal area." Dr. Madden testified that it was "possible" that diarrhea could cause such "redness." She testified also that David's "discoloration" was "consistent" with his account of sexual abuse, and that Matthew might have been anally sodomized as he described without any physical indication of the sodomy remaining after the fact.

At the close of the prosecution's case, Pavel testified in his own defense. His testimony consisted almost entirely of denials of the boys' accusations. In addition, Pavel referred briefly to David's having diarrhea during the Florida visit with Clothilde Pavel:

Q:...Did either child become ill on the trip to Florida?

A: Matthew had a cough and sore throat while we were down in Florida and David also had diarrhea at least one day that we were down there, yes.

Q: And did that take care of itself?

A: It seemed to work itself out, yes.

II. DISCUSSION

A. STANDARD OF REVIEW

We review *de novo* the District Court's denial of Pavel's petition for a writ of habeas corpus. See, e.g., *Boyette v. Lefevre*, 246 F.3d 76, 88 (2d Cir. 2001).

Similarly, we owe no deference to the state courts' determination that the judgment of conviction was not entered in violation of Pavel's federal right to effective assistance of counsel. The federal habeas corpus statute was amended in 1996 by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. Law No. 104 132, 110 Stat. 1214. Pursuant to AEDPA, a federal habeas court assessing a state prisoner's federal claim must defer in some circumstances to a state court judgment that denied the claim "on the merits." 28 U.S.C. §2254(d) ("§2254(d)"). However, because the habeas petition now before us was filed before AEDPA's effective date of April 24, 1996, §2254(d) has no bearing on this case, and we review the petition under the standards dictated by "pre-AEDPA law." *Slack v. McDaniel*, 529 U.S. 473, 482 (2000). Under those standards, pure questions of law are reviewed *de novo*, as are mixed questions of law and fact, see, e.g., *Miller v. Fenton*, 474 U.S. 104, 112 (1985); state court factual findings are "presumed... correct" absent certain circumstances, see 28 U.S.C. §2254(d) (1994) (enumerating these circumstances). In this case, there are no relevant state court factual findings. Accordingly, there is no basis under "pre-AEDPA law" for deferring to the state courts' denial of Pavel's Sixth Amendment claim.

B. CONSTITUTIONAL PRINCIPLES

As noted above, Pavel contends that he was convicted in state court in violation of the Sixth Amendment to the United States Constitution, which vests persons charged with crimes with the right to "the Assistance of Counsel." U.S. CONST. amend. VI. The right to "Assistance of Counsel" encompasses the right to effective "Assistance of Counsel," see, e.g., *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970), and applies to the states as a component of the right to "due process of law" secured by the Fourteenth Amendment to the United States Constitution, *Evitts v. Lucey*, 469 U.S. 387, 394 (1985).

To establish that he was convicted in violation of his right to effective assistance of counsel, a claimant must satisfy both prongs of the two-part test articulated *Strickland v. Washington*, 466 U.S. 668 (1984).

This test is "rigorous," Lindstadt v. Keane, 239 F.3d 191, 199 (2d Cir. 2001), and "highly demanding," Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). To satisfy it, a claimant must show both that "counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687.

As to the first prong, to determine whether an attorney's conduct was deficient, "[t]he court must...determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690 (emphasis added). As to the second prong, to establish that he was "prejudiced" by his attorney's constitutionally deficient performance, a claimant must "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. A "reasonable probability" in this context is one that "undermine[s] confidence in the outcome." *Id.*

We consider each of these prongs in turn.

C. ANALYSIS

1. MELTZER'S PERFORMANCE

Pavel claims that Meltzer's representation of him was unprofessional to the point of being constitutionally "deficient." Strickland, 466 U.S. at 687. We agree.

As discussed below, Meltzer's representation of Pavel was flawed in three distinct ways. Because we conclude, that the cumulative weight of these flaws deprived Pavel of his Sixth Amendment rights, see post at [28:16-19], see, e.g., Lindstadt, 239 F.3d at 199 (holding that for Sixth Amendment purposes attorney errors must be considered "in the aggregate"), we do not consider whether some of these flaws-standing alone, or in combination with one another-could adequately support our conclusion that Meltzer's representation of Pavel was constitutionally deficient.

a. FAILURE TO PREPARE A DEFENSE

First, Meltzer decided not to prepare a defense for Pavel solely because he was confident that, at the close of the prosecution's presentation of its evidence, the trial judge would grant Meltzer's motion to dismiss the government's charges against Pavel. That Meltzer opted not to prepare a defense based entirely on this rationale militates strongly in favor of the conclusion that his representation of Pavel was constitutionally deficient.² Harris v. Reed, 894 F.2d 871, 878-79 (7th Cir. 1990); United States ex rel. Cosey v. Wolff, 562 F.Supp. 140, 143-46 (N.D. Ill. 1983), *aff'd* in relevant part on opinion below by United States ex rel. Cosey v. Wolff, 727 F.2d 656 (7th Cir. 1984), overruled on other grounds by United States v. Payne, 741 F.2d 887, 891 n.4 (7th Cir. 1984); Osborn v. Shillinger, 861 F.2d 612, 626 (10th Cir. 1988) (holding that an attorney's performance was deficient under Strickland's first prong where, *inter alia*, the attorney failed to prepare for state court "death penalty phase" proceedings because he believed that he could convince the prosecutor not to seek the death penalty); Blake v. Kemp, 758 F.2d 523, 535 (11th Cir. 1985) (Elbert P. Tuttle, Judge) (holding that an attorney's performance was deficient under Strickland's first prong where, *inter alia*, the attorney failed to prepare for state post-conviction proceedings because he believed that his client would not be convicted); Jackson v. Calderon, 211 F.3d 1148, 1161-62 (9th Cir. 2000); Sneed v. Smith, 670 F.2d 1348, 1354 (4th Cir. 1982); Gomez v. Beto, 462 F.2d 596, 597 (5th Cir. 1972).

b. FAILURE TO CALL IMPORTANT FACTS WITNESSES

Next, Pavel notes that Meltzer decided not to call two fact witnesses-Clothilde Pavel and Dr. Ralph Berry III ("Dr. Berry")-with whose putative testimony he was familiar before the trial began.³ Pavel contends that this decision was an extraordinarily poor one, and we agree.

Before explaining why, we pause briefly to note that Meltzer's decision not to call particular witnesses related to trial strategy, United States v. Luciano, 158 F.3d 655, 660 (2d Cir. 1998) ("[t]he decision not to call a particular witness is typically a question of trial strategy"), and that we have been especially hesitant

to disturb such "strategic" decisions.⁹ See, e.g., *id.*; *Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983). See generally *Strickland*, 466 U.S. at 690 ("strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable").

However, this hesitation to challenge a lawyer's "strategic" decisions has no place here. Meltzer stated that he opted not to prepare a defense and not to call any witnesses other than Pavel solely because he believed that the motion to dismiss would be granted. It is apparent from this explanation that Meltzer's decision as to which witnesses to call was animated primarily by a desire to save himself labor to avoid preparing a defense that might ultimately prove unnecessary.¹⁰ Meltzer's decision not to call any witnesses other than Pavel was thus "strategic" in the sense that it related to a question of trial strategy—which witnesses to call. And it was "strategic" also in that it was taken by him to advance a particular goal.

That goal, however, was mainly avoiding work—not, as it should have been, serving Pavel's interests by providing him with reasonably effective representation. Therefore, although Meltzer's decision was "strategic" in some senses of the word, it was not the sort of conscious, reasonably informed decision made by an attorney with an eye to benefitting his client that the federal courts have denominated "strategic" and have been especially reluctant to disturb.¹¹

Accordingly, the hesitation to disturb "strategic" decisions described above has no bearing on this case. There are many ways properly to assist a client. See ante n.9. But making important decisions with no regard for a client's interests is not one of them. That much is perfectly clear without the benefit of hindsight. See *id.*

We turn now to an assessment of Meltzer's decision not to call either Clothilde Pavel or Dr. Berry.

(i) Clothilde Pavel

Pavel, David, Matthew, and Clothilde Pavel spent a week at the Florida apartment of Clothilde Pavel just before Pavel was arrested; the boys testified that during that week they were sodomized by Pavel.

Pavel argues that Meltzer should have called Clothilde Pavel. We agree.

The record before the District Court showed that Clothilde Pavel explained that had she been called at trial, she would have testified as follows:

On Wednesday, April 19, 1989, we drove back to my apartment in Boynton Beach at the conclusion of our trip to Disneyworld. At the beginning of this 2-3 hour drive, David, the younger child, became extremely agitated because he needed to go to the bathroom. After searching along the road for a rest-stop we found an International House of Pancakes restaurant. Immediately after we pulled into the parking lot, and before Kenneth [Pavel] could get out the door, David ran out of the car and into the restaurant. Kenneth chased after him and they returned shortly thereafter at which point Kenneth informed me that David had had trouble with his bowels and that his stomach was obviously very upset. At the time we thought nothing of it and attributed his upset stomach to the fact that he had eaten too much at breakfast and lunch and had been badly frightened on the Space Mountain ride at Disneyworld.

This testimony would have been valuable to the defense. It would have tended to corroborate Pavel's testimony that Matthew had diarrhea during the Florida trip, see ante 215, thereby bolstering the defense's theory that there was a wholly innocent explanation (an upset stomach) for the only species of physical evidence (slight redness in David's anal area) that so much as suggested that either of the boys had been sexually abused in Florida in the manner that they described.

More importantly, in addition to her testimony about David's gastrointestinal difficulties, Clothilde Pavel would have testified that although Matthew stated that Pavel had sodomized him in the bathroom while she busied herself "cooking" breakfast, and David suggested that he was sexually abused in Florida during mealtimes—"lunch, breakfast and dinner"—she did not "cook" breakfast during the week in Florida. Rather, she noted, breakfast consisted of "cold cereals or other foods that required little or no preparation." Thus,

Meltzer could have argued, with some force, that it would have been difficult to sodomize Matthew or David, unnoticed, in the relatively small apartment, and in the short time that it takes to pull together a breakfast of cold cereal, or one that otherwise requires "little or no preparation."

Clothilde Pavel stated also that it was "equally unlikely that the acts which were supposed to have occurred could have occurred while I was preparing any other meal as the two boys spent virtually all their time in front of the television set in the living room when we were not at the beach." And in a similar vein, although Matthew testified that he was sodomized in the bathroom during breakfast-time, and David testified that he too was sexually abused in the bathroom, Clothilde Pavel stated that the boys were alone in the bathroom with Pavel only at night (when he helped them brush their teeth), and then only with the door open. Indeed, Clothilde Pavel stated she was "quite certain that Kenneth [Pavel] had no opportunity to abuse the boys at any time during their visit with me in Florida as the four of us literally spent all of our time together."¹²

If she had given this testimony, Clothilde Pavel would have served as something of an alibi witness for Pavel. Her testimony would have damaged the credibility of the boys' assertions that Pavel had sexually abused them as charged in the indictment. It would have suggested that Pavel could not have abused the boys in Florida, as they claimed, because Pavel was not in the right place (in the bathroom with the boys) at the right time (during breakfast, or even during other meals).

"[T]he Constitution does not oblige counsel to present each and every witness that is suggested to him." United States v. Balzano, 916 F.2d 1273, 1294 (7th Cir. 1990). But in light of the testimony that Clothilde Pavel would have offered and in light of the fact that Meltzer knew of this testimony before trial, Meltzer's decision not to call Clothilde Pavel was an error of extraordinary magnitude.

First, there is simply no suggestion in the record that there was any reason not to put Clothilde Pavel on the stand, and "an attorney's failure to present available exculpatory evidence is ordinarily deficient, unless some cogent tactical or other consideration justified it." Griffin v. Warden, 970 F.2d 1355, 1358 (4th Cir. 1992) (internal quotation marks omitted) (collecting cases); Brecheen v. Reynolds, 41 F.3d 1343, 1368 (10th Cir. 1994) (similar).

And second, Meltzer's decision not to put Clothilde Pavel on the stand was based on an inadequate investigation.¹³ As noted above, Meltzer was familiar with the basic contours of Clothilde Pavel's testimony before the trial—presumably because he had spoken about the matter with Pavel. But Meltzer never followed-up on what he learned of Clothilde Pavel's putative testimony with Clothilde Pavel herself: Meltzer never contacted her with regard to her putative testimony, and never inquired into whether she might be willing to testify on Pavel's behalf.

Meltzer should have done both things. It should have been obvious to Meltzer from the outset that Pavel's trial—like many sex abuse trials—was going to be a so-called "credibility contest," in which the word of the defendant's alleged victims (David and Matthew) would be set against the word of the defendant (Pavel), and in which there would be no substantial circumstantial evidence. See generally Brian L. Schwalb, Note, Child Abuse Trials and the Confrontation of Traumatized Witnesses: Defining "Confrontation" to Protect Both Children and Defendants, 26 HARV. C.R.-C.L. L. REV. 185, 186 (1991) ("often it is only the child and the [alleged] abuser who know what transpired"). In such cases, it should be perfectly obvious that it will almost always be useful for defense counsel to speak before trial with readily-available fact witnesses whose non-cumulative testimony would directly corroborate the defense's theory of important disputes. Accordingly, when Meltzer learned before trial that Clothilde Pavel might well be such a witness, he should have taken affirmative steps to discuss the case with her.¹⁴ Meltzer should not have relied only on what he had learned from Pavel. United States v. Moore, 554 F.2d 1086, 1093 (D.C. Cir. 1976) (stating that "counsel's anticipation of what a potential witness would say does not excuse the failure to find out," in the context of an attorney who failed to contact a particular witness because the attorney was confident as to what the witness would say). Rather, at the very least, Meltzer should have directly contacted Clothilde Pavel to learn more about the testimony that she would have offered, and to determine whether she might serve as a suitable witness based, inter alia, on his assessment of her credibility. But Meltzer simply did not contact Clothilde Pavel. Indeed, there is no indication in the record that Meltzer conducted any substantial, affirmative investigation into Clothilde Pavel's potential testimony.¹⁵

In sum, Meltzer knew, before the trial, that Clothilde Pavel would have provided useful testimony with regard to David's stomach troubles and, more importantly, would have provided non-cumulative testimony that was "akin to an alibi." Lindstadt, 239 F.3d at 200-01. In light of this knowledge, Meltzer's decision not to call Clothilde Pavel was flawed because it was not based on either a plausible strategic calculus or an adequate pre-trial investigation.

(ii) Dr. Berry

As noted above, the defense's theory was that Pavel was not guilty of the charged crimes, and that Matthew and David were accusing Pavel of sexual abuse because they had been manipulated into doing so by their mother, Ms. Pavel, who wanted to gain custody of them. See ante n.3.

If the factfinder—here, the state trial judge—were to accept this defense, he would have to accept as true an extraordinarily unflattering portrait of Ms. Pavel. But the only evidence presented at trial that supported such a view of Ms. Pavel was Pavel's general speculations about her character—speculations that were necessarily self-serving and that would inevitably be discounted as such by the judge. Meltzer's failure to introduce any evidence from a disinterested source in support of the theory that Ms. Pavel was manipulating the boys was a substantial gap in the defense's presentation. And, as Meltzer knew before trial, that gap could have been filled easily by calling Dr. Berry.

Dr. Berry was a psychiatrist and court-appointed mediator who conducted a number of counseling sessions in September and October of 1988 with Pavel and Ms. Pavel to help them resolve their custody dispute over the boys. Dr. Berry would have been prepared to testify at trial as follows:

It... appeared to me that the stress [Ms. Pavel] experienced as a result of the marital situation resulted in problems with [Ms. Pavel's] psychological functioning and memory. For example, [Ms. Pavel] would take very extreme positions regarding visitation and subsequently deny having taken those positions.

Further, [Ms. Pavel] showed a historical distrust and dislike of men that negatively affected her judgment and sense of reality and resulted in paranoia. When disagreed with, [Ms. Pavel] showed a rapid propensity to accuse [Pavel] and me of colluding against her. [Ms. Pavel] also accused [Pavel] of marital rape although, when pressed, she admitted that she did not express to [Pavel] her disinterest or reluctance to engage in sexual relations with him.

This testimony would have buttressed Meltzer's argument that Ms. Pavel fabricated her trial testimony by implying that she was quite hostile to the accused. (Indeed, Dr. Berry's testimony would have suggested that Ms. Pavel's hostility to Pavel had previously manifested itself in seemingly unfounded claims that he was a sex abuser.)

It would have been within the discretion of the trial court to admit such evidence of Ms. Pavel's hostility, see post n.21, and it should have been obvious to Meltzer that such evidence would have been useful to the defense.¹⁶ See generally Lindstadt, 239 F.3d at 203 (describing, in a similar context, the "exceeding importan[ce]" in a "credibility contest" of "the testimony of neutral, disinterested witnesses") (internal quotation marks omitted); Crisp, 743 F.2d at 585 (noting the importance of "[h]aving independent witnesses corroborate a defendant's story"). Meltzer's explanation for why he opted not to put Dr. Berry on the stand is inadequate, see ante at II.C.1.b, and on appeal respondents do not advert to any possible strategic consideration that could conceivably have counseled against having Dr. Berry testify. Meltzer's decision not to call Dr. Berry was therefore another factor that contributes to our conclusion that counsel's cumulative errors made his performance constitutionally deficient. See, e.g., Hart v. Gomez, 174 F.3d 1067, 1071 (9th Cir. 1999) (holding that counsel provided constitutionally ineffective assistance where, inter alia, "[h]aving chosen to pursue [a particular] line of defense," counsel did not introduce readily-available evidence that would have corroborated that line of defense, and there was no plausible strategic reason for his not introducing the evidence).

c. FAILURE TO CALL A MEDICAL EXPERT

Finally, we believe that Meltzer's performance was deficient to the extent that he did not call a medical expert to testify as to the significance of the physical evidence presented by the prosecution. This decision might well have been beyond reproach if it had been based on appropriate strategic considerations, or had been made by Meltzer following a sufficient investigation. But that was not the case.

First, as noted above, Meltzer decided not to put on a medical expert for reasons that had nothing to do with serving Pavel's interests. See ante II.C.1.b. Therefore, the considerations that animated Meltzer's decision not to call a medical expert cannot be described as truly "strategic."

Second, Meltzer's decision not to call a medical expert was deficient because it was not based on pre-trial consultation with such an expert. See generally ante n.13 (describing the relationship between pre-trial investigation and the propriety of decisions related to matters of trial strategy). Meltzer should have consulted an expert; as to why, Lindstadt is again relevant.

In that case, as noted above, see ante n.15, a defendant was convicted of sexually abusing his daughter. The only physical evidence that the prosecution introduced was the testimony of a physician, who testified (1) that he observed some bumps, clefts, and scars in the alleged victim's vaginal area, and (2) that a "Boston study" and a "review" conducted by another physician established that there was a link between sexual abuse and the bumps, clefts, and scars. The defense attorney failed to obtain either the "Boston study" or the "review," and he failed to consult with an expert before trial about the prosecution's physical evidence. We characterized this pair of failures as one of the two "[more] compelling" sets of errors that supported our conclusion that the trial attorney had provided constitutionally ineffective assistance.

This case is substantially similar to Lindstadt. Both cases were essentially "credibility contests": In both cases, the only witnesses to the alleged abuse were its victims and the defendant, and there was no substantial circumstantial evidence of abuse. When a sex abuse case boils down to such a "credibility contest," physical evidence will often be quite important. Indeed, "many" sex abuse cases are "close...on the evidence," Swofford v. Dobucki, 137 F.3d 442, 443 (7th Cir. 1998), and when a case hinges all-but-entirely on whom to believe, an expert's interpretation of relevant physical evidence (or the lack of it) is the sort of "neutral, disinterested" testimony that may well tip the scales and sway the fact-finder. Williams, 59 F.3d at 682 ("In a credibility contest, the testimony of neutral, disinterested witnesses is exceedingly important."). Because of the importance of physical evidence in "credibility contest" sex abuse cases, in such cases physical evidence should be a focal point of defense counsel's pre-trial investigation and analysis of the case against his client. And because of the "vagaries of abuse indicia," such pre-trial investigation and analysis will generally require some consultation with an expert.¹⁷

For two reasons, that requirement applied here. First, there is no indication in the record that Meltzer had the education or experience necessary to assess relevant physical evidence, and to make for himself a reasonable, informed determination as to whether an expert should be consulted or called to the stand. United States v. Tucker, 716 F.2d 576, 581 (9th Cir. 1983) (holding that, in a complex fraud case, "it should have been obvious to a competent lawyer that the assistance of an accountant [was] necessary"); Knott, 671 F.2d at 1212-13 (noting that counsel may be found to be ineffective for failing to consult an expert where "there is substantial contradiction in a given area of expertise," or where counsel is not sufficiently "versed in a technical subject matter...to conduct effective cross examination").

Second, there is an obvious, commonsense mismatch—which Meltzer himself recognized before trial—between (1) Matthew and David's medical indications (nothing abnormal about Matthew, and mild "redness" in David's anal area) and (2) the allegations against Pavel (that he anally sodomized the boys once a week for four months, and that he did so with even greater frequency in the days leading up to the examination of the boys).¹⁸ But in the face of this glaring mismatch a reasonably professional attorney would not have sat on his hands, confident that his client would be acquitted. He would have consulted and been prepared to call an expert to drive this disparity home. Holladay v. Haley, 209 F.3d 1243, 1251-52 (11th Cir. 2000) (holding that an attorney's investigation is not "reasonable" within the meaning of Strickland when the facts of a case supply him with "notice" that a particular line of pre-trial investigation may substantially benefit his client, and he does not pursue it).

As to this point, the Eleventh Circuit's decision Holsomback v. White, 133 F.3d 1382 (11th Cir. 1998), is instructive. In that case, the habeas petitioner was convicted in state court of crimes related to the sex abuse of his children. The petitioner claimed that he received ineffective assistance because "his trial counsel[] fail[ed] to conduct any [pre-trial] investigation into the conceded lack of medical evidence [against the petitioner], including [trial counsel's] failure to consult with any physicians concerning the significance of the lack of medical evidence in the case." See *id.* at 1386. The Eleventh Circuit agreed, see *id.* at 1387, explaining:

Although [the petitioner] had been accused of sodomizing his son repeatedly over a period of several years beginning when [the boy] was only four years old and continuing until he was nine, a rectal examination performed shortly after the last alleged incident of sodomy found no medical evidence of sexual abuse. Despite this apparent inconsistency, however, counsel consulted no physician in order to ascertain the significance of the lack of medical evidence. Moreover,.... despite the fact that counsel himself viewed the case essentially as a swearing match, turning entirely on whether the "jury believe[d] the child," he made no effort to support [the petitioner's] claim of innocence with disinterested medical testimony or other medical evidence suggesting that [the boy's] allegations were not credible. In particular, counsel declined to contact either the physician who had examined [the boy] shortly after the last alleged incident of sodomy or [the boy's] family physician during the period of the alleged sexual abuse, both of whom were readily identifiable to him as potential sources of such disinterested testimony....

...Had counsel interviewed the doctors, a subsequent tactical decision not to call them might have fallen well within "the wide range of reasonable professional assistance." Strickland, 466 U.S. at 489. Having conducted no investigation into the significance of the lack of medical evidence that [the boy] had been sexually abused, however, [the petitioner's] counsel could not have made an informed tactical decision that the risk that the doctors might equivocate on the stand outweighed "what potential benefit might come from [their testimony]." Because counsel never actually spoke with the physicians, he remained entirely unaware...of whether and to what extent their testimony might have helped [the petitioner's] case. In these circumstances, we cannot say that counsel's decision not even to contact the physicians as part of his pre trial investigation was professionally reasonable.

Id. at 1387-88; Schell v. Witek, 218 F.3d 1017, 1028-30 (9th Cir. 2000) (in a case in which fingerprint evidence was the "only" evidence against the defendant, remanding for an evidentiary hearing as to whether defense attorney failed to consult with a fingerprint expert before trial, and stating that such a failure could have constituted ineffective assistance of counsel).

* * *

In light of the cumulative weight of the three serious flaws in Meltzer's representation of Pavel described above, we hold that Meltzer's representation did not fall within the Sixth Amendment's "wide range" of adequate assistance. See Strickland, 466 U.S. at 690. We must therefore consider whether Pavel was prejudiced by Meltzer's poor lawyering.

2. PREJUDICE

Under Strickland, an ineffective assistance of counsel claimant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Here, the standard is met. As an initial matter, we note that in attempting here to show that Meltzer's performance was not deficient, the State emphasizes that the evidence that it mustered at trial against Pavel was relatively weak. See, e.g., ante n.18. We agree. It therefore follows that confidence in the judgment of conviction entered against Pavel may be "undermine[d]" here by a relatively smaller quantity of prejudice than might ordinarily suffice.

Kimmelman, 477 U.S. at 368 (noting that a decision based on ignorance of relevant facts and "mistaken beliefs" was not based on "strategic considerations"); Smith v. Stewart, 189 F.3d 1004, 1010 (9th Cir. 1999) (holding that an attorney's decision not to pursue certain evidence was not "strategic" where, inter alia, it was based on a lack of understanding of what constituted such evidence); and Williams, 59 F.3d at 680 ("[b]ecause of his ignorance, counsel was... unable... to make any strategic decision[]"); and Crisp v. Duckworth, 743 F.2d 580, 587 (7th Cir. 1984) (contrasting an attorney's "general polic[y]" of how to defend a case with "strategic decisions," which are "decisions based on the specific facts of a given case"). As noted, the Supreme Court has explained that "[s]trategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. 690-91; see also post n.13. But "virtually unchallengeable" does not mean wholly unchallengeable, Phoenix v. Matesanz, 233 F.3d 77, 82 n.2 (1st Cir. 2000), and decisions that are not reasonably informed have emphatically not been "made after thorough investigation of law and facts."

As to decisions made with an eye to helping a client: See, for example, Moore, 194 F.3d at 615 (describing a "strategic" decision as, inter alia, a decision "that... is expected... to yield some benefit or avoid some harm to the defense"); and Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (contrasting a "strategic[]" choice with an attorney's "abdica[ing] his responsibility to advocate his client's cause") (internal quotation marks omitted).

12. Clothilde Pavel would have testified also that during their week in Florida she noticed "nothing out of the ordinary" and perceived no indications that sexual abuse was taking place. Indeed, Clothilde Pavel believed that the boys were in good spirits-upon their arrival in Florida, she stated that "[f]ar from being upset at the thought of spending time on vacation with their father, Matthew and David were extremely happy and energetic."

13. The Supreme Court has explained the relationship between an attorney's pre-trial investigation and the choices that he makes with regard to matters of trial strategy:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. 690-91 (emphasis added).

14. See Lindstadt, 239 F.3d at 200-01 (collecting cases); see also, e.g., Williams, 59 F.3d at 681 (holding, in the context of a sex-abuse case that turned on a "credibility contest," that a defense attorney provided ineffective assistance where, inter alia, (1) he failed to investigate the home in which the alleged assault had taken place and did not interview its occupants, and (2) had he done so, "th[e] evidence would have indicated that... the alleged assault could not have taken place as claimed") (internal quotation marks omitted); Noble v. Kelly, 89 F. Supp. 2d 443, 463 (S.D.N.Y. 2000) (holding that, in the absence of a strategic explanation, the failure to properly call an alibi witness constituted constitutionally ineffective counsel); cf. Crisp, 743 F.2d at 584 ("Though there may be instances when the decision not to contact a potential defense witness is justified, an attorney who fails even to interview a readily available witness whose noncumulative testimony may potentially aid the defense should not be allowed automatically to defend his omission simply by raising the shield of trial strategy and tactics") (internal citations omitted).

15. As to the inadequacy of Meltzer's investigation, our recent decision in Lindstadt v. Keane is instructive. In Lindstadt, a man was convicted in state court of sexually abusing his daughter; his defense was that he had not done so, and that his daughter was manipulated and coached by his wife, with whom he had been enmeshed in a custody dispute. The man subsequently applied for a writ of habeas corpus on a theory of ineffective assistance of counsel, and we granted the writ. Of the two "[more] compelling" errors made by trial counsel in that case, Lindstadt, 239 F.3d at 202, one was his failure to conduct an adequate pre-trial investigation. Because of this failure to properly investigate, the attorney did not notice that his client was

not living in a particular house during the period in which he had allegedly lived there and sexually abused his daughter. We explained, in part, why this failure was important:

Counsel's errors prevented [the habeas petitioner] from offering something akin to an alibi: [the petitioner] was not living with his daughter in December 1985 [when he allegedly sexually abused her]. Brown v. Myers, 137 F.3d 1154, 1156 57 (9th Cir. 1998) (taking it as given that a failure to adequately investigate alibi claim or witnesses constitutes ineffective counsel); Bryant v. Scott, 28 F.3d 1411, 1418 (5th Cir. 1994) (holding that a failure to adequately investigate alibi witnesses constitutes ineffective counsel); Nealy v. Cabana, 764 F.2d 1173, 1177 78 (5th Cir. 1985) (same). . . .

Lindstadt, 239 F.3d at 200-01 (emphasis added).

16. Indeed, it is clear that Meltzer believed that the evidence would have been useful. During his cross-examination, Meltzer attempted but repeatedly failed to elicit from Ms. Pavel evidence that Dr. Berry would have provided had Dr. Berry been asked to testify. For example, Meltzer knew that Dr. Berry would have testified that "Margaret showed a historical distrust and dislike of men that negatively affected her judgment and sense of reality and resulted in paranoia." Presumably hoping to introduce such information into evidence, Meltzer asked the following question: "M[rs. Pavel, did you tell Dr. Berry that men are out to get you?" Similarly, while cross-examining Ms. Pavel, Meltzer sought unsuccessfully to introduce into evidence a letter that Dr. Berry assertedly wrote about her to a third party-Meltzer apparently believed that the letter contained negative comments about Ms. Pavel, and, in some part, contradicted her testimony.

17. Lindstadt, 239 F.3d at 201 (citing Beth A. Townsend, *Defending the "Indefensible": A Primer to Defending Allegations of Child Abuse*, 45 A.F.L. REV. 261, 270 (1998) ("It is difficult to imagine a child abuse case. . . where the defense would not be aided by the assistance of an expert.")). United States v. Tornowski, 29 M.J. 578, 580 (1989) ("There is little question that child sexual abuse cases often present a fertile, indeed, a necessary, area for expert assistance.") (collecting cases).

18. As respondents explain in their appellate brief, "[s]urely, the absence of physical trauma or injury is stunning in light of the ages of the victims, the fact that they alleged [Pavel] engaged them in anal intercourse on a weekly basis over a four-month period, and the fact that the last act allegedly occurred within days of their. . . examination."

19. The "indicia of false allegations" described in the Guidelines, and present here, were (1) that a parent first suggested to the therapist that her children were being abused, (2) that one of the allegedly abused children was a pre-schooler, and (3) that there was an ongoing custody battle between the parent who brought the children to the therapist and the parent accused of abusing the children.

20. Dr. Kaplan also noted that the boys were not interviewed using a standardized questionnaire, and opined that

the use of a standardized protocol when interviewing young children who are alleged to be the victims of sexual abuse is critical because it insures that the interviewer will not use leading questions which unduly influence the child or suggest a desired response. In this instance, it is apparent that leading questions were used throughout the children's numerous interviews. . . . Given this history of numerous, improperly conducted interview sessions with both boys, as a professional child psychiatrist experienced in the evaluation of claims of sexual abuse, I would consider the boys' stories inherently unreliable.

21. Respondents contend that Clothilde Pavel's testimony would not have been admissible at Pavel's trial because it was not relevant. Mrs. Pavel's putative testimony, respondents note, related to events that assertedly took place in Florida, and Pavel was not indicted based on those events. This argument is based on no citations to New York law, and it is wholly unpersuasive: Evidence that tended to demonstrate that the boys were not telling the truth about Pavel's sexual abuse was undoubtedly relevant here, People v. Warner, 382 N.Y.S.2d 377, 378-79 (3d Dep't 1976) ("[a]ny evidence which is helpful in getting at the truth of the material issue is relevant even though it is only a link in the chain of facts which must be proved to make the proposition at issue appear more or less probable") (emphasis added), especially in light of the fact that the boys testified at great length during their direct examinations as to what allegedly had

happened to them in Florida. Respondents argue also that the testimony of both Clothilde Pavel and Dr. Berry would not have been admissible at trial because it concerned the "collateral" matters of whether the testimony of the boys and Ms. Pavel was credible. This argument is not persuasive and as to Clothilde Pavel's testimony, it borders on the frivolous. People v. Hudy, 538 N.Y.S. 2d 197, 207 (1988) ("extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground") abrogated on other grounds by Carmell v. Texas, 529 U.S. 513 (2000); People v. Beavers, 514 N.Y.S.2d 235, 238 (1st Dep't 1987) ("evidence [is not] collateral when it tends to impeach a witness's credibility with respect to the very issues the jury is asked to resolve").

22. According to her uncontroverted affidavit, Dr. McHugh has evaluated, examined, and/or treated approximately 5,000 sexually-abused children, and she has authored, inter alia, "the standard medical protocol in suspected child sexual abuse cases in the First Department [of the New York state court system]."

23. Respondents argue that no defense expert would have been permitted to testify at trial because "[e]xpert opinion testimony is not admissible for matters that can be determined by a juror using common sense and life experiences. Consequently, a medical expert witness called to testify that the lack of injury to the children was an indication the acts were not committed properly would not have been allowed simply because the particular subject matter clearly does not require any particular medical expertise." This argument is utterly without merit. We know of no authority for the proposition that the defense is not permitted to call an expert to interpret particular medical records after the prosecution has been given an opportunity to call its own expert to interpret the medical records. People v. Cronin, 60 N.Y.2d 430, 432, 470 N.Y.S.2d 110, 111 (1983) (Judith Kaye, Chief Judge) ("Both sides may of course cross examine and impeach the opposition's experts, and adduce different opinions through their own experts.") (emphasis added). Respondents do themselves no credit by claiming that the petitioner should be kept in prison on the basis of this all-but-frivolous argument, and the similarly trivial arguments as to Clothilde Pavel's testimony described in footnote 21.

With this point in mind, we note that each of the above-described flaws in Meltzer's representation, see ante II.C.1, prejudiced Pavel.

First, if Meltzer had so much as attempted to prepare a defense here, one of his initial steps would presumably have been to find ways to poke holes in the testimony of Ms. McKinstry. He would have been able to do so. Attached to Pavel's habeas petition is an affidavit from Dr. Sandra Kaplan, a physician at Cornell University Medical College. Dr. Kaplan's affidavit states that Ms. McKinstry's evaluation of the boys was conducted in a manner that was flatly inconsistent with the relevant, publicly available guidelines of the American Academy of Child and Adolescent Psychiatry ("the Guidelines"). See Lindstadt, 239 F.3d at 201-02 (assuming that had the relevant trial attorney performed an adequate pre-trial investigation, the defense would have discovered various articles published in scientific journals). For example, Dr. Kaplan noted that Ms. McKinstry was unqualified to evaluate allegations that the boys had been abused because she (1) lacked requisite professional qualifications, and (2) was serving as the boys' therapist, and "[a]s the boys' therapist, Ms. McKinstry had a professional obligation not to serve as an evaluator with respect to allegations of sexual abuse involving her patients." Moreover, Dr. Kaplan noted that in cases of alleged intra-family sex abuse such as this one, in which there are discernible "indicia of false allegations,"¹⁹ the Guidelines require an "evaluator" of abuse allegations to "obtain a history from the perspective of each parent" (which Ms. McKinstry did not do) and/or to conduct joint sessions with both parents and the children present (which, again, Ms. McKinstry did not do). Similarly, Dr. Kaplan noted that the boys were interviewed repeatedly concerning their father's alleged abuse, and that "the [G]uidelines warn [that] multiple interviews merely encourage the child to create a story to meet the demands of [interviewing] adults for more information."²⁰ See generally, e.g., Jacqueline Miller Beckett, Note, The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials, 82 GEO. L.J. 1605, 1606 (1994) ("many children have trouble distinguishing fact from fiction and are willing to lie if they are rewarded for telling such stories") (collecting sources, id. at 1633-37).

Second, for the reasons stated above, see ante II.C.1.b.(i)-(ii), if Meltzer had put Clothilde Pavel and Dr. Berry on the stand, their testimony would have substantially buttressed the defense's theory of the case—even if a skilled prosecutor could have suggested that some of the details of Clothilde Pavel's testimony were presented in an arguably hyperbolic fashion.²¹ See 3/27/92 AFFIDAVIT OF CLOTHILDE PAVEL ¶5 (stating that Clothilde Pavel, Pavel, and the boys "literally spent all of our time together" during the Florida trip) (emphasis added).

Third, had Meltzer conducted an adequate pre-trial investigation of the physical evidence against Pavel, and sought a medical expert who might have testified on behalf of the defense, there can be little doubt that Meltzer would have come across and called to the stand a physician such as Dr. Margaret McHugh—a physician with extensive experience in, inter alia, evaluating and/or treating victims of child abuse.²² In an affidavit submitted in the state-court post-conviction proceedings, Dr. McHugh stated unequivocally that the boys' medical condition was simply not "consistent"—as Dr. Madden had testified—with their having been repeatedly anally sodomized with the frequency that they described:

I have reviewed the Grand Jury and trial testimony of Matthew and David Pavel....

....

It is my opinion, to a reasonable degree of medical certainty, that the clinical findings regarding Matthew and David are inconsistent with their testimony. Repetitive sexual attacks of the nature described by the boys, by an adult male without the use of a lubricant and/or sedation would be expected to result in clinical evidence such as tearing injuries and abrasions to each child's anus and rectum which would [have been] apparent on gross examination.

I have also reviewed the testimony of Dr. Celeste Madden. Dr. Madden testified that the absence of any abnormal findings in Matthew's physical examination is not inconsistent with the crimes of sodomy and sexual abuse. Given the boys' testimony, however, it is highly improbable that such repeated attacks within five (5) days of the exam would leave no physical evidence.

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... [As to David, on whom a "mild perianal erythema" was noticed,] "[c]learly, the numerous acts of sodomy described by David would be expected to result in more than a mild erythema, i.e., a slight red discoloration.

(Emphasis Added)

In light of the weakness of the prosecution's trial evidence, see ante at 225, Dr. McHugh's opinion casts a long shadow over this case.²³ And in combination with the other points described above, see ante at 225-28, it leads us to a disturbing conclusion: Had Meltzer performed in a constitutionally effective manner, there is-at the very least-a "reasonable probability" that Pavel would not have been convicted of the crimes with which he was charged, and for which he has been punished these past eleven and a half years.

* * *

Before concluding, we pause briefly to commend Kelly Drye & Warren, which took on this matter pro bono publico over eight years ago, and has now seen it through. Kelly Drye's work on this case has been tenacious and consistently skillful, and by providing their client with superbly effective assistance of counsel, the firm has acted in the best traditions of our profession.

IV. CONCLUSION

For the reasons stated above, we hold that the state judgment of conviction against petitioner-appellant Kenneth G. Pavel was entered in violation of his rights under the Sixth Amendment to the United States Constitution. Accordingly, we

- (1) reverse the judgment of the District Court,
- (2) vacate the state court judgment of conviction,
- (3) and remand the cause.

On remand, the District Court shall issue a writ of habeas corpus to Mr. Pavel on the thirtieth calendar day after the issuance of our mandate unless New York State has, by that point, taken concrete and substantial steps to expeditiously retry Pavel.

The mandate shall issue forthwith. If further proceedings arising from Pavel's habeas petition are required in this Court, the parties shall inform the Clerk of this Court. Jurisdiction will then be automatically restored to this Court without need for a new notice of appeal. United States v. Jacobson, 15 F.3d 19, 21 22 (2d Cir. 1994). After jurisdiction is restored, the Clerk shall set an expedited briefing schedule, and the matter will then be heard by this panel on letter briefs.

NOTES:

* The Honorable David G. Trager of the United States District Court for the Eastern District of New York, sitting by designation.

1. The boys were examined by a medical doctor soon after Pavel was arrested. They testified that they had been anally sodomized once a week for four months, and more frequently in the twelve or so days prior to their physical examinations. But Matthew's examination showed no relevant physical abnormality, and David's examination revealed only mild redness in his anal area. See post I.B.

2. In a June 15, 1995 affidavit submitted in connection with the habeas corpus petition filed by Pavel's new counsel, Meltzer explained:

Prior to the trial of the criminal case against Mr. Pavel, I concluded that the State's case was without merit because I felt that the medical evidence was insufficient to sustain a conviction. As a result, I did not prepare a defense for Mr. Pavel, believing instead that a motion to dismiss the State's case at the close of its evidence in chief would be granted by the Court.

3. In his summation, Meltzer argued that Ms. Pavel had "coached" the boys and "manipulated" them into accusing their father of sexual abuse so that she could obtain sole custody over them. In support of this theory, Meltzer noted that both boys repeatedly described their father's alleged sexual abuse using the same phrase—"he put his peeny in our brown spot"—and that seven-year old Matthew defined a "peeny" in surprisingly formal terms—as "hav[ing] a scrotum."

4. New York Criminal Procedure Law § 440.10(1) ("§ 440.10") reads in pertinent part as follows:

§ 440.10 Motion to vacate judgment

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

...

(h) The judgment was obtained in violation of a right of the defendant under the constitution of . . . the United States.

Section 440.10 is "designed to . . . embrace all extant non-appellate post-judgment remedies and motions to challenge the validity of a judgment of conviction," 11A PETER PREISER, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK, CRIMINAL PROCEDURE LAW 424 (1994), the most prominent of which in this century has been the writ of error coram nobis, see generally Stanley Fuld, *The Writ of Error Coram Nobis*, 117 N.Y. L.J. 2212 (Jun. 5, 1947). Although it codifies common-law collateral remedies, § 440.10 does not wholly displace them, see, e.g., *People v. Bachert*, 69 N.Y.2d 593, 516 N.Y.S.2d 623 (1987) ("[T]he Legislature did not expressly abolish the common-law writ of coram nobis or necessarily embrace all of its prior or unanticipated functions within [§ 440.10.]", and it does not encompass habeas corpus and certiorari remedies. See N.Y. CIVIL PRACTICE LAW AND RULES, §§ 7001-7012 (McKinney 1998) (describing these remedies): One leading commentator has summarized the basic differences between a § 440.10 motion and habeas corpus as follows:

A [§ 440.10 motion] must be brought in the court where the defendant was convicted and, unlike state habeas corpus, cannot be brought in the court of another county where the defendant happens to be detained. But of the eight grounds for the [§ 440.10] motion to vacate judgment, the only one common to both that motion and state habeas corpus is lack of trial jurisdiction of the action that resulted in the conviction or lack of jurisdiction of the person of the defendant. The other grounds for the motion to vacate judgment do not qualify for habeas corpus, because the only immediate relief that could be granted on those grounds is a new trial or a new appeal; as distinguished from immediate release from custody, which is the basis for a writ of habeas corpus.

11A PREISER, *supra*, at 424-25 (citations omitted).

5. At one point, Matthew testified that Pavel anally sodomized him in New York on the morning that Pavel picked the boys up to take them to Florida. At another point, Matthew testified that no such sodomy occurred.

6. The following colloquy is representative:

Q: When did [Pavel's abuse] start, David?

A: I don't know.

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Q: When did it stop, David?

A: I don't know either.

Q: How many times did it happen, David?

A: (No response.)

Q: Do you have an answer for me, David?

A: I don't know.

7. Our inquiry into Meltzer's performance is not at an end simply because his decision not to prepare a defense, or to put on any witnesses other than Pavel, was not, in fact, based on strategic considerations. See, e.g., Kimmelman, 477 U.S. at 385 (holding (1) that counsel did not take certain actions because of strategic considerations and (2) then conducting a Strickland analysis—that is, then determining whether failure to take the relevant actions was "contrary to prevailing professional norms"). See post at 217-19.

8. Neither of these decisions was made by Meltzer at the behest of Pavel. Meltzer decided "unilaterally" not to call Clothilde Pavel or Dr. Berry, and he did not consult with Pavel regarding any matters of trial strategy.

9. This special reluctance is, *inter alia*, prophylactic. Although it is clear *ex ante* that, in most cases, an attorney can provide constitutionally adequate assistance to his client by pursuing any number of trial strategies, see Strickland, 466 U.S. at 689, strategic choices made by an attorney whose client ends up being convicted have a way of looking especially inadequate in the bright light of hindsight. Knott v. Mabry, 671 F.2d 1208, 1212 (8th Cir. 1982) ("Human nature is such that most people think they have a better understanding of the demands of an event after it has happened. Trial of law suits is peculiarly susceptible to hindsight appraisal of another lawyer's endeavors."). But our focus in analyzing the performance prong of Sixth Amendment ineffective-assistance-of-counsel claims must be on the reasonableness of decisions when they were made, not on how reasonable those decisions seem in retrospect. See, e.g., United States v. Bayless, 201 F.3d 116, 130 (2d Cir. 2000). Our articulated reluctance to hold that an attorney's strategic choices were constitutionally deficient helps us to focus us on this imperative—it disciplines our analysis by serving as a useful counterbalance to the unconscious, inevitable impact of hindsight on our decision-making. Cf. Strickland, 466 U.S. at 689 (establishing a "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" "[b]ecause of the difficulties inherent" in "eliminat[ing] the distorting effects of hindsight").

10. There is no suggestion in the record that Meltzer opted not to prepare a defense so that he could invest more energy in other aspects of his criminal representation of Pavel. Similarly, there is no indication that Meltzer decided not to put on any witnesses other than Pavel because he believed that pursuing such a course would serve Pavel's interests. See, e.g., Lema v. United States, 987 F.2d 48, 54 (1st Cir. 1993) ("Where the prosecution's case is less than compelling. . . the risk of 'rocking the boat' may warrant a decision by trial counsel to forego the presentation of further defense testimony, even favorable testimony.") (citing Johnson v. Lockhart, 921 F.2d 796, 800 (8th Cir. 1990)).

11. As to "conscious" decisions: See, for example, Moore v. Johnson, 194 F.3d 586, 610 (5th Cir. 1999) (holding that a particular decision could not be labeled "strategic" where, *inter alia*, the attorney had "no idea" why the decision had been taken); Bean v. Calderon, 163 F.3d 1073, 1079 (9th Cir. 1998) (noting that a decision cannot be characterized as "strategic" where it was a result only of "confusion"); and Loyd v. Whitley, 977 F.2d 149, 158 & n.22 (5th Cir. 1992) (distinguishing between "strategic judgment calls" and "plain omissions") (collecting cases); and United States v. Gray, 878 F.2d 702, 712 (3d Cir. 1989) ("counsel's behavior was not colorably based on tactical considerations but merely upon a lack of diligence").

As to "reasonably informed" decisions: See, for example, Williams v. Taylor, 529 U.S. 362, 395 (2000) (noting that a decision based on a legal misunderstanding was not animated by "strategic calculation");

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
Case No.: 2008-CP-37-1471

Clarence E. Crittendon, Jr., #266744,

Applicant,

v.

State of South Carolina.

Respondent.

ORDER OF DISMISSAL

FILED OCONEE, SC.
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JAN 17 PM 11 18

COPY

COPY Fr: 2004-88-37-509

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed December 17, 2008. Respondent made its Return on March 31, 2009. An evidentiary hearing into the matter was convened on October 3, 2011, at the Oconee County Courthouse. The Applicant was present at the hearing and was represented by R. Mills Ariail, Jr., 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 and offered the testimony of Tim Crittendon. The State offered the testimony of Bruce Byrholdt, Esquire (Mr. Byrholdt) Applicant's trial counsel. This Court also had before it the records of the Oconee County Clerk of Court, the transcript of the proceedings against the Applicant, records of Applicant's prior appeal proceedings, and the Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Applicant was indicted at the March 2004 term of the Oconee County Grand Jury for lewd act upon a child under sixteen (2004-GS-37-0509) and criminal sexual conduct with minor-first degree (2006-GS-37-0927). Bruce Byrholdt,

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Esquire, represented him. On December 12, 2006, Applicant underwent trial, pursuant to which he was found guilty as indicted. The Honorable Alexander S. Macaulay concurrently sentenced him to confinement for thirty (30) years for lewd act upon a child and fifteen (15) years for criminal sexual conduct with minor-first degree.

A timely Notice of Appeal was filed on Applicant's behalf. On October 6, 2008, the Court of Appeals issued an Order of Dismissal and Remittitur dismissing the appeal because Appellant withdrew the appeal.

In his current application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to investigate applicant's claim the there was a violation of the Speedy Trial Act.
 - b. Counsel failed to investigate whether or not he was set up.
 - c. Counsel failed to object to re-indictment prior to trial.
 - d. Counsel failed to call a medical expert.
 - e. Counsel failed to object to prosecutor's improper comments made during closing arguments alluding to Applicant's right not to testify.
 - f. Counsel failed to request a jury charge of the lesser-included offense of assault and battery of a high and aggravated nature.
2. Prosecutorial misconduct.
3. Lack of subject matter jurisdiction.

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Applicant's Testimony

At the PCR hearing Applicant testified that he was initially appointed Gruber Sires, Esquire as his attorney, that Mr. Sires represented Applicant from June 2004 to June 2006, and that Mr. Byrholdt was appointed to represent Applicant in July 2006. Applicant testified that he was out on

bond from February 2004 to June 2006, that in June 2006 Applicant was stopped by a police officer because a bench warrant for Applicant's arrest had been issued. Applicant testified that he appeared before a judge for a bond revocation hearing, that Applicant's attorney dropped the ball, and that Applicant believed the case against him no longer existed. Applicant testified that in October 2004 he was stopped by a police officer and informed that a bench warrant for Applicant had been issued, but that this was a mistake. Applicant testified that the judge reinstated Applicant's bond, that the judge asked the state when the case would be ready for trial, and that the October 29, 2004 transcript reflects the discussion between the parties and the judge regarding trying to have Applicant's case heard in December of 2004. Applicant testified that he spoke with his trial counsel (Mr. Byrholdt) about a speedy trial motion, that Applicant's counsel informed Applicant the judge does not have the power to set a date for trial, and that there was a speedy trial issue but that Applicant was not aware of what the speedy trial act was.

Applicant testified that he requested Mr. Sires be relieved as his counsel, that during the two-year time period one of Applicant's witnesses (Applicant's step-mother) passed away and was not available to testify at trial. Applicant testified that he had been fighting with his step-daughter and the mother of the victim prior to the allegations, that it was alleged Applicant was cheating on his wife, and that Applicant's wife's daughter threatened Applicant. Applicant testified that he was given an ultimatum by his wife's children to leave his wife within thirty (30) days or else action would be taken against Applicant. Applicant testified that he discussed the prior dispute between him and his step-children with his attorney and that Applicant discussed three (3) witnesses testifying on his behalf with his attorney.

Applicant testified that his attorney wrote the names of the three witnesses down but that Applicant's counsel never followed up with the witnesses or Applicant. Applicant testified that he

did not testify at trial, that there was no defense presented at trial, and that Applicant and trial counsel discussed Applicant not testifying due to Applicant's prior record. Applicant testified that he recalled the judge informing him of his right to testify and not testify and that Applicant decided not to testify. Applicant testified that he informed his attorney that he wished to call the following three people to testify at trial in Applicant's defense: Tim Crittendon, Sarah C., and Tiffany Burch. Applicant testified that he did not discuss his wife's (Sarah C.) potential testimony with his counsel but that Applicant did inform his counsel what Mr. Crittendon and Ms. Burch's testimony would be. Applicant testified that he did not discuss using a medical expert with his attorney, that there was no physical evidence, and that the medical report reflected no evidence of abuse. Applicant testified that the victim's testimony changed two times prior to trial.

Applicant testified that subsequent to his trial he discovered that regarding his indictment issue that this must be addressed prior to the jury being sworn and that the indictment issue should have been looked into by his attorney. Applicant testified that regarding the speedy trial issue, this must be brought up before the jury is sworn in and that March of 2006 was the last appearance Applicant made until the day of his trial. Applicant testified that he was prejudiced by the length of delay in bringing his case to trial, that Applicant wrote the solicitor's office asking for the reason for the delay but received no answer, and that Applicant lost a key witness during this delay.

Tim Crittendon's Testimony

At the PCR hearing Tim Crittendon testified that he is the Applicant's brother, that he recalled the incident from 2003 regarding the threats made against Applicant. Tim Crittendon testified that Applicant's step-daughters kept telling Applicant to leave their mother alone, that the police were called, and that the mother of the victim was the person making the threats against Applicant.

Mr. Byrholdt's Testimony

At the PCR hearing counsel testified that he has been practicing law for thirty-one (31) years, that he took over Applicant's case in July of 2006, and that Applicant was charged with criminal sexual conduct 1st degree and lewd act upon a minor. Counsel testified that he was appointed to represent Applicant, that he met with the Applicant numerous times, and that he and Applicant discussed all aspects of the case together. Counsel testified that Tiffany Burch would not cooperate, that Applicant gave counsel his brother's name (Tim Crittendon) but that at the time of trial Tim Crittendon was incarcerated. Counsel testified that he tried to contact Tiffany Burch but that she refused to get involved. Counsel testified that he discussed Applicant's prior record with Applicant and that Applicant believed the victim would not testify at trial, however the victim did testify at trial. Counsel testified that Applicant's case went to trial four (4) months after counsel took over Applicant's case. Counsel testified that Applicant was re-indicted prior to trial and that counsel did not find any problems or issues regarding the indictments. Counsel testified that he filed a discovery motion, received the discovery materials from the state, and reviewed the discovery materials with the Applicant. Counsel testified that the investigating officers testified at trial, that the medical report reflected there was no physical evidence, and that counsel did not need to employ a medical expert for Applicant's case.

Counsel testified that Applicant gave a statement about his 'dream' to the police and through counsel's investigation he tried to interview Tiffany Burch but was unable to do so. Counsel testified that he did not have any grounds on which to base an objection on during the state's closing arguments. Counsel testified that he engaged in plea negotiations on the Applicant's behalf, that the Applicant was already on the sex offender registry, and that the state offered Applicant a seven (7) year plea deal. Counsel testified that he discussed all plea negotiations with the Applicant. Counsel

testified that he discussed the state's evidence with the Applicant, that the victim was a good witness, and that the victim had given a handwritten statement. Counsel testified that there were not any grounds to request a lesser-included offense charge. Counsel testified that there was a slight chance of a not-guilty verdict based on reasonable doubt and that counsel discussed this with Applicant. Counsel testified that there was no speedy trial issue, that Applicant's right to a speedy trial was never invoked, and that as a matter of trial strategy neither counsel nor Applicant wanted a speedy trial. Counsel testified that that he has only seen one (1) speedy trial motion in his thirty-one (31) year experience as an attorney and that the motion was denied. Counsel testified that at trial he brought out of the fact that Sarah C. was in bed during one of the alleged incidents claimed by the victim.

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 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.

1. Ineffective Assistance of Counsel

a. Counsel failed to investigate Applicant's claim that there was a violation of the Speedy Trial Act

This Court finds that Applicant's allegation that trial counsel was ineffective for failing to investigate Applicant's claim that there was a violation of the Speedy Trial Act is without merit. Counsel testified and the record reflects that counsel was appointed to represent Applicant in July 2006 and that Applicant's case went to trial in December 2006. Counsel testified that he did not find a speedy trial issue in his review of the Applicant's case and that Applicant's right to a speedy trial

was never invoked. The Applicant asserts that on October 29, 2004, his right to a speedy trial was invoked. Specifically, Applicant points to the following statement made by the judge, "When do you think you all will be able to dispose of the case?" The state replied that they would attempt to have the case heard during the December 2004 term of court. (Tr. p.6-7). This Court finds that there was no violation of the speedy trial act. Applicant's trial took place four (4) months after counsel was appointed.

To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). Here, the Applicant could not point to any specific matters regarding the speedy trial act that counsel failed to discover which would have resulted in a different outcome for Applicant. This Court finds that Applicant offered no evidence at the PCR hearing that counsel could have found that would have been likely to have any outcome more favorable to the Applicant. The Applicant did not produce any witnesses or offer any other evidence from which this Court could conclude that the outcome of the case would likely have been different, had that evidence been developed.

Furthermore, a reviewing court should consider four factors when determining whether a defendant has been deprived of his or her right to a speedy trial: 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of the right; and 4) prejudice to the defendant. Barker v. Wingo,

407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); see also *State v. Brazell*, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997). These four factors are related and must be considered together with any other relevant circumstances. *Barker*, 407 U.S. at 533, 92 S.Ct. 2182. "Accordingly, the determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." *Pittman*, 373 S.C. at 549, 647 S.E.2d at 155. Therefore, this Court finds that there has been no neglectful delay prejudicial to Applicant to any great degree other than the fact in and of itself there had been a delay. This allegation is denied and dismissed.

b. Counsel failed to investigate whether or not Applicant was set-up

This Court finds that Applicant's allegation that counsel was ineffective for failing to investigate whether Applicant was set-up is without merit. Applicant alleges that counsel failed to interview Sarah C., Tim Crittendon, and Tiffany Burch. Applicant also alleges that counsel failed to present the testimony of these three witnesses at trial. Applicant presented the testimony of Tim Crittendon at the PCR hearing and Mr. Crittendon's testimony concerned an incident that took place prior to the incident(s) for which Applicant was found guilty of at trial. Counsel testified that Tim Crittendon's testimony would not have been helpful at Applicant's trial. To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998). The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." *Easter v. Estelle*, 609 F.2d 756, 759 (5th Cir. 1980). When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must show specific prejudice resulting from counsel's alleged lack of time

to prepare. United States v. Cronic, 466 U.S. 648 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). This Court finds the Applicant offered no evidence at the PCR hearing that counsel could have found that would have been likely to have any outcome more favorable to the Applicant. The Applicant did not produce any witnesses or offer any other evidence from which this Court could conclude that the outcome of the case would likely have been different, had that evidence been developed. Tim Crittendon's testimony does not provide any support to Applicant's assertion that he was set-up.

Furthermore, prejudice from counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief hearing. 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). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). The 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 witnesses' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Counsel testified that he tried to contact Tiffany Burch, but that she did not want to cooperate or get involved. Sarah C., Applicant's wife at the time of the incident, passed away prior to Applicant's trial, however counsel testified that he was able to bring out the issue that Applicant wanted Sarah C. to testify to at trial. While Applicant presented Tim Crittendon's testimony at the PCR hearing, this Court finds that the testimony would have provided nothing more for the defense. Tiffany Burch was not presented for testimony at the PCR hearing by Applicant. This Court finds that Applicant has failed to show counsel's performance was deficient, and that the Applicant was prejudiced by counsel's alleged

deficiency. Therefore, this Court finds that these allegations are denied and dismissed.

c. Counsel failed to object to re-indictment prior to trial

This Court finds that Applicant's claim that counsel was ineffective for failing to object to the re-indictment prior to trial is without merit. Counsel testified that Applicant was re-indicted prior to trial and that based on counsel's review of the indictments he did not find any problems or issues with the indictments or the fact that Applicant was re-indicted. This Court finds that Applicant has failed to provide any basis on which counsel failed to object to the re-indictment. This Court has reviewed the indictments and finds no errors exist. Counsel testified that he reviewed the indictments and the elements of the charges with Applicant. This Court finds that Applicant has failed to show that counsel's performance was deficient and any resulting prejudice. Therefore, this Court finds that this allegation is denied and dismissed.

d. Counsel failed to call a medical expert

This Court finds that Applicant has failed to meet his burden of proof in showing that counsel was ineffective for failing to call a medical expert at Applicant's trial. Counsel testified that he filed a discovery motion, received the discovery materials, and reviewed the discovery materials with Applicant. Counsel testified that the investigating officers testified at trial and that the medical report reflected there was no physical evidence. Counsel testified that based on his experience with criminal sexual conduct cases, his review of the discovery, and his discussion with Applicant that counsel decided there was no need to employ a medical expert for Applicant's case. Prejudice from counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief hearing. 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). The Applicant's mere

speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). The 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 witnesses' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court finds that Applicant did not present any testimony from a medical expert at the PCR hearing. The Applicant has failed to show counsel's performance was deficient and that Applicant was prejudiced by counsel's alleged deficiency. Therefore, this Court finds that this allegation is denied and dismissed.

e. Counsel failed to object to prosecutor's improper comments made during closing arguments alluding to Applicant's right not to testify

The Applicant alleges that counsel was ineffective for failing to object to the prosecutor's improper comments made during closing arguments alluding to Applicant's right to testify. Specifically, Applicant directs this Court's attention to the following statement made by the solicitor in closing argument. "[t]he defense in this case has shown you what I like to call a smoke and mirrors act. There's a lot of smoke and a bunch of mirrors designed to get you away from what's really at issue. They want to get you away from [the victim], away from what really matters here." (Trial tr. p.136, lines 11-15). It is impermissible for the prosecution to comment directly or indirectly upon the defendant's decision not to testify at trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). However, even improper comments on a defendant's decision not to testify do not automatically require reversal if they are not prejudicial to the defendant. Id. The defendant bears the burden of demonstrating that improper comments on his decision not to testify deprived him of a fair

trial. This Court finds 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 341 (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 that any comments by the solicitor so infected the trial that a new trial is warranted. This Court is not convinced that the solicitor's comments even reach the level of being improper, but certainly there is no evidence that Applicant was prejudiced. Additionally, this Court does not find that Mr. Byrholdt was ineffective for failing to object. He provided rational explanation as to why he did not object and this Court accepts Mr. Byrholdt's reasoning as to why he did not object. Therefore, this allegation is denied and dismissed.

f. Counsel failed to request a jury charge of the lesser-included offense of assault and battery of a high and aggravated nature

This Court finds that Applicant's allegation that counsel as ineffective for failing to request a jury charge of the lesser-included offense of assault and battery of a high and aggravated nature is without merit. Counsel testified that there were not any grounds on which to base a request for the lesser-included offense of assault and battery of a high and aggravated nature. For a defendant to be entitled to a jury instruction on a lesser-included offense, there must be some evidence in the record that would tend to show that the defendant is guilty of the lesser rather than the greater offense. State v. Fields, 356 S.C. 517, 589 S.E.2d 792 (Ct. App. 2003); State v. Funchess, 267 S.C. 427, 229

S.E.2d 331 (1976). The possibility that the jury might believe some of the State's case and not the rest is an insufficient argument for a lesser-included offense instruction. Funchess, 267 S.C. at 430, 229 S.E.2d at 332. Furthermore, the Applicant's defense was that he did not participate in the incident at all. In such circumstances, a lesser-included offense instruction would not be warranted. See Moultrie v. State, 354 S.C. 646, 583 S.E.2d 436 (2003) (where defendant's defense was that he never assaulted the victim at all, a lesser-included offense charge was not warranted). Applicant has failed to show that counsel's performance was deficient and any resulting prejudice. Therefore, this Court finds that this allegation is denied and dismissed.

2. Prosecutorial Misconduct

The Applicant alleges that the state committed prosecutorial misconduct by not notifying Applicant of intent to dismiss the original indictment with the intent to file a direct re-indictment and/or that the original indictment was never dismissed by the state. Applicant also alleges that comments made by the solicitor in closing argument alluded to Applicant's right not to testify constituted prosecutorial misconduct. This Court has already found that the solicitor's comments made in closing argument did not amount to commenting on Applicant's right not to testify and therefore were not improper, thus Applicant cannot prove prosecutorial misconduct. This Court finds that this allegation is denied and dismissed. As to Applicant's prosecutorial misconduct claim regarding the direct indictment, this Court finds that the Applicant has failed to meet his burden. It is Applicant's burden to prove actual prosecutorial misconduct. Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201 (1989). Applicant asserts the issue of vindictiveness in the form of prosecutorial retaliation through the re-indictment for criminal sexual conduct in the 1st degree. In order for the presumption of prosecutorial retaliation (or the 'Pearce' presumption) to apply, [Applicant] must show there is a 'reasonable likelihood' that retaliation was motive behind the bringing the additional

charges. Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002). This Court finds that no additional charges were ever brought against Applicant. Applicant was indicted in 2004 for criminal sexual conduct 1st degree, but this charge was later dismissed and Applicant was re-indicted in 2006 for the same charge. This Court finds the Applicant was properly re-indicted and that Applicant cannot prove prosecutorial misconduct, therefore this allegation is denied and dismissed.

3. Lack of Subject Matter Jurisdiction

Applicant asserts that the Oconee County Court of general sessions did not have jurisdiction over the subject matter of direct indictment 2004-GS-37-509 because the indictment was not taken before the clerk of court for Oconee County and clock stamped and dated so as to be put upon the court docket to be disposed of as due process dictates. This Court finds that the indictments against the Applicant were all true-billed by the Oconee County Grand Jury. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363, S.C. 93, 610 S.E.2d 494 (2005). However, an Applicant may challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343, S.C. 342, 540 S.E.2d 846 (2001, *overruled in part by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)). However, “[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters.” Gentry, supra, 610 S.E.2d at 499; *See also* S.C. Const. Art. V, § 7. Thus, the Applicant must present evidence that his case is of some class over which the Circuit Court does not have the authority to preside. The Applicant’s conviction involved a criminal charge in General Sessions Court. Thus, the Circuit Court had subject matter jurisdiction. Therefore, this allegation is denied and dismissed.

V. CONCLUSION

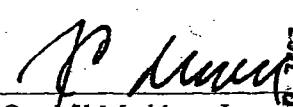
Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post conviction relief. Therefore, this application for post conviction relief must be denied and dismissed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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 5th day of January, 2012


J. Cordell Maddox, Jr.
Presiding Judge
Tenth Judicial Circuit

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 JAN 17 AM 11 19

Anderson, South Carolina

FORM 5
FILED OCT 10 2012
BEVERLY H. WHITFIELD
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE) 2012 OCT 10 P 12:16)
Full name and prison number (if any) of Applicant)
CLARENCE ELIJAH CRITTENDON, 266744)
v.)
State of South Carolina)

IN THE COURT OF COMMON PLEAS
2012 CP 37-893
APPLICATION FOR
POST-CONVICTION RELIEF

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 _____ MCCORMICK CORRECTIONAL INSTITUTION
2. Name and location of Court which imposed sentence _____ OCONEE CO. COURT OF GENERAL SESSIONS
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) _____ 2004-GS-37-0509
 - (b) _____ 2006-GS-37-0927
 - (c) _____ 2008-CP-37-01471
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) _____ DECEMBER 12, 2006 30 years.
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty N/A
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere N/A
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SOUTH CAROLINA COURT OF APPEALS
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed: DISMISSED CASE IN ORDER TO
FILE POST-CONVICTION.
- 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 so appealing: N/A
- (a) Filed Post-Conviction Relief Application
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: POST CONVICTION RELIEF ATTORNEY FAILED TO FILE APPEAL FROM POST-CONVICTION RELIEF HEARING.

- (a) _____
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) _____ PCR Attorney failed to file Appeal to SC. Supreme Court as directed by
- (b) _____ Applicant.
- (c) _____
12. Prior to this application have you filed with respect to this conviction: POST-CONVICTION RELIEF
- (a) any petition in a State Court under South Carolina Law? _____ APPLICATION
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____ N/A
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____ N/A
- (d) any other petitions, motions or applications in this or any other Court? _____ N/A
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof: POST-CONVICTION RELIEF APPLICATION
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____ DOONEE COUNTY COURT OF GENERAL SESSIONS
- ii. _____
- iii. _____
- iv. _____
- (c) the disposition thereof: DENIED RELIEF ON ABOLITION.
- i. _____ ATTORNEY FAILED TO FILE APPEAL WITHIN TIME FRAME TO
- ii. _____ SOUTH CAROLINA SUPREME COURT.
- iii. _____

iv. _____

(d) the date of each such disposition: ~~1/1/12~~ January 17, 2012

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 have filed? NO

15. If you answered "yes" to (14) identify: N/A

(a) which grounds have been presented: N/A

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised: N/A

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 reasons why such ground has not previously been presented: N/A

(a) _____

(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? _____
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____ PCR

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. R. MILLS ARIAIL JR. E39, 11 NORTH IRVINE STREET, GREENVILLE SC 29601
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. POST CONVICTION RELIEF HEARING.
 - ii. _____
 - iii. _____

19. State clearly the relief you seek in filing this application: SEEK TO FILE BELATED APPEAL TO
SOUTH CAROLINA SUPREME COURT.

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

2012 . CP. 37. 893

VERIFICATION

County of OCONEE)

CLARENCE CATTENDON, 266744

I, , 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.

Clarence Cattendon 266744

SWORN to and subscribed before me this 28
day of Sept, 2012.

J. Franklin (L.S.)
Notary Public

My Commission Expires: 12-16-2019

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 OCT 10 P 12:16

2012 .CP. 37. 893

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

CLARENCE CRITTENDON, 266744

I, _____, 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.

31 [Signature] 266744
Applicant

SWORN or affirmed to and subscribed before me this

28th day of 28 Sept, 2012.

[Signature]
Notary Public

My Commission Expires: 12-16-2017

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 OCT 10 P 12:16

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

2012 OCT 10 P 12:16

IN THE COURT OF COMMON PLEAS

2012 CP. 37.893

CLARENCE ELIJAH CRITTENDON, #266744,

Applicant,

Vs.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE.

I, CLARENCE ELIJAH CRITTENDON, do certify that a copy of applicant's Post-Conviction Relief Application and Brief has been served on Beverly H. Whitfield, Clerk of Court, Oconee County, at the following address: Post Office Box 678 Walhalla South Carolina, 29691.

St. Clarence E. Crittendon 266744

Sworn and Subscribed before me

This 28 day of Sept, 2012

J. F. Hamilton

NOTARY PUBLIC OF SOUTH CAROLINA

My Commission Expires: 12-16-2019

FILED OCONEE, SC
 BEVERLY H. WHITFIELD
 CLERK OF COURT
 STATE OF SOUTH CAROLINA
 COUNTY OF OCONEE
 IN THE COURT OF COMMON PLEAS

2012 OCT 10 P 12:16

2012 CP 37.893

CLARENCE EIJAH CRITTENDON, #266744,

Applicant,

Vs.

STATE OF SOUTH CAROLINA,

Respondent.

POST-CONVICTION RELIEF BRIEF

NOW COMES the Applicant, who having had a Post-Conviction Relief hearing Oct. 3, 2011, in the Oconee County Court of General Sessions, the Honorable J. Cordell Madley presided.

After the PCR hearing, in October of 2011, Applicant sent a letter to his PCR attorney, R. Mills Ariail, Jr. Esq., instructing him that if the ruling on the PCR application came down as a denial of the application that the attorney was to file first a Rule 59(e) under the South Carolina Rules of Court to then be followed by an Appeal to the South Carolina Supreme Court. The letter to the PCR attorney was sent prior to the ruling therefore the attorney was responsible to carry out the Applicants request to file both actions.

The right to seek appellate review of the denial of a Post-Conviction Relief Application is expressly authorized by State law. S.C. Code Ann. § 17-27-100 (1985), and Supreme Court Rule 50(9). Wilson v. State, 559 S.E.2d 581 (2002) states, "The statute of limitations defense does not apply to a claim that an Applicant was denied their right to a review of a denial of a PCR." Odom v. State, 523 S.E.2d 753 (1999) states, "An Applicant is entitled to an appeal if the PCR Judge affirmatively finds that the Applicant did not waive appellate review."

Ineffective Assistance of Post-Conviction Relief Counsel can be claimed under Austin v. State, 409 S.E.2d 395 (1991), where as, "Austin recognizes a general exception to the rule where prior PCR counsel fails to appeal the denial of the application."

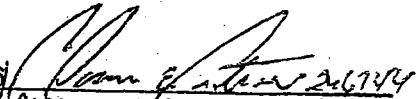
The evidence presented by Applicant shows that the timely request was made by the Applicant to his PCR attorney to file, not only an Appeal, but also a Rule 59(e) should the Applicants application be denied. Neither request was honored by PCR Counsel within the prescribed time frames allowed

by South Carolina law thereby constituting ineffective assistance of PCR
Counsel.

The Applicant seeks to file a belated Appeal to the South Carolina
Supreme Court in the form of Writ of Cert as well as a Rule 59(e).

If It Please The Court.

Respectfully,


CLARENCE E. CRITTENDON, # 266744

PRO SE. APPLICANT

MCCORMICK CORR. INST.

386 REDEMPTION WAY

MCCORMICK, SC. 29889

DATE: 9/23/2012

CLARENCE E. CRITTENDON
 SCD# 266744, F4A, Rm. 256
 McDORMICK CORR. INST.
 386 REDEMPTION WAY
 McDORMICK, SOUTH CAROLINA 29899

R. MILLS ARIAIL, JR.
 ATTORNEY-AT-LAW
 11 NORTH STREET, SUITE 11
 GREENVILLE, SOUTH CAROLINA

DATE: OCTOBER 24, 2011

RE: CLARENCE CRITTENDON V. STATE OF SOUTH CAROLINA
 C.A/No. : 2008-CP-37-01471

Counselor:

PCR Court did not go well at all, nor did you bother to tell me that you and my trial attorney were such good friends. That is a bit of information I really think you should of revealed to me, that way I could of asked for different representation.

You were not prepared. The one witness that you actually managed to get to court, you didn't bother to prep. Bottom line is you did not do your job. Oh don't misunderstand please. I'm not upset with you. I studied years waiting for that one chance. My PCR hearing. I'm upset with myself for not

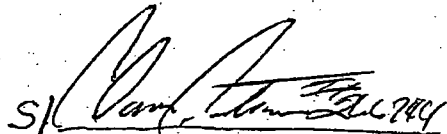
dismissing you knowing I knew you were unprepared so you see, I share blame.

We both know this PCR will be shot down. So Counselor, if you

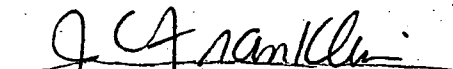
WISH not to hear from me again, this is what I need you to do. When the Judge dismisses my PCA, and we both know he will, I want you to file a Rule 59(e) before the ten (10) day deadline expires. After which you need to file a notice of appeal to the South Carolina Supreme Court.

Regardless, I am innocent. You don't believe that. I don't care. What I do care about is that until you complete the above instructions, the South Carolina Rules of Court as well as the State Bar Association states you are still my attorney and as such have an obligation to me as your client.

I expect to hear from you as soon as you've received word from the court. DO NOT LET your deadline pass.


CLARENCE E. CRITTENDON, JR.

Sworn Before Me This 24 day
OF October, 20


NOTARY PUBLIC SOUTH CAROLINA

My Commission Expires: 12.16.2019

JULY 12, 2012

CLARENCE ELIJAH CRITTENDON

SCDC # 266744 F4A - 198

MCC.I - 386 REDEMPTION WAY

MCCORMICK, SOUTH CAROLINA, 29899

R. MILLS ABRAHAM, JR. ESQ.

ATTORNEY-AT-LAW

11 NORTH IRVINE ST., Suite 11

GREENVILLE, SC. 29601

CJA No. 2008-CP-37-01471

RE: STATUS OF NOTICE OF APPEAL FROM PCA.

Dear Counselor:

I have been waiting to hear from the Appeals Court regarding the Appeal from my Post Conviction Relief hearing which I asked you to be sure to file.

Please respond to me at the above address and let me know that you did in fact file said Appeal as I requested.

Thank you for your time and responding.

Sincerely,

Clarence E. Crittendon
CLARENCE E. CRITTENDON #266744

Sworn before me

This 12 day of July, 2012

Jaya L. Young
NOTARY PUBLIC SOUTH CAROLINA

My Commission Expires: 10 11 2021

CLARENCE E. CRITTENDON #266744
 McCormick B.I. F4A Am 11.8
 3816 REDEMPTION WAY
 McCormick, South Carolina 29899

R. MILLS ABRAHAM, JR. ESQ.
 Attorney - At - Law
 11 North Irvine St., Suite 11
 Greenville, South Carolina 29601

DATE: AUGUST 15, 2012

RE: STATUS OF APPEAL FROM POST-CONVICTION RELIEF

Dear Sir:

I still haven't heard anything from your office. Once again I am asking
 Did you file the appeal from my post-conviction relief hearing as I requested
 of you and if so please let me know when because of this date, I haven't
 heard anything from the SC Supreme Court.

Please respond.

SWORN and SUBSCRIBED before me

This 15 day of August, 2012

Joe L Young
 NOTARY PUBLIC SOUTH CAROLINA

My Commission Expires: 10 11 2021

SINCERELY,

Clarence E. Crittendon #266744
 CLARENCE E. CRITTENDON #266744

PCR INFORMATION QUESTIONNAIRE

NAME: CLARENCE E. CRITTENDON

DATE: _____

SCDC#: 2166744

1. See questionnaire.

2. See questionnaire.

3. First meeting with trial Attorney I was given a Discovery packet and was told by attorney that I would receive a bond. We discussed witnesses who needed to be called to testify. We also discussed the fact that in October of 2004 that I was picked up on a bench warrant that turned out was wrongly issued by the state and how because of my being in the County Jail for 2 weeks because of the State's mistake, the judge reinstated my original bond and ordered a trial to be given in December of 2004.

Trial Attorney told me that a judge could not order a trial. I believed him. Did not understand the Speedy trial Act then. Trial Attorney asked if I wanted for him to negotiate a plea deal.

I told him no because I was not guilty. Attorney said he could probably get them down to 5 years. I still said no because I was not guilty.

I also told Attorney that I'd taken 3 lie detector test and passed at least two. Before being told I'd failed the third. I told Attorney there were originally 4 witnesses but my Mother-in-Law had passed away in January of 2006 from cancer. She along with Tiffney Birch and my Brother

Tim Crittendon were all present when step-daughters threatened to set me up. Told Attorney of great importance the witnesses testimony was. There are faxes sent to Attorney from me through the Detention Center stating these facts.

At the end of the first meeting attorney stated he would get me a bond hearing and he was going to make sure the witnesses were spoken with.

2nd MEETING

Months after 1st meeting with trial attorney and after sending several faxes regarding status of case. Whether he'd talked to the witnesses and whether he'd seen to a bond hearing as he told me he would. He wasn't returning phone calls or answering faxes. So I sent him a fax saying I wanted to accept a plea which in fact wasn't true just to see if he would finally answer. Attorney showed up at the jail hours after that fax was sent. We got to arguing because it's three months later and he hadn't talked to any witnesses or requested a bond hearing as he'd promised. Seemed the only reason he'd come was he thought I wanted to plea. We argued loudly about how I wanted him to proceed so we walked away. He also told me to write my own argument pertaining to the bond hearing which I did.

3rd MEETING.

A week before the third and final meeting I was called to court for a bond hearing I and not my attorney, talked to the judge concerning a bond. The judge ruled that since there was a term of court starting the next week that the state needed to bring my case up or at that time a bond would be issued to me. It is December of 2006 and my case had lingered on since January of 2004. My Attorney told me I had nothing to worry about that the state was not ready to try my case, however, the next week my case was called. Even though I sent a fax to my Attorney telling him that just in case they did try my case, he should see to the witnesses and have them ready for court just in case. And that one of the witnesses, my Brother Tim Crittendon had been brought to the County and he could get him there yet when the trial started, he hadn't talked to any of the witnesses and did not have any of them there, knowing I wasn't going to testify made the witnesses that much more important.

Although the states key witness changed her story twice on the stand and admitted

3rd MEETING CONT.

On the stand that she was confused as to what she was suppose to say and that she was told what to say, There were no witnesses called in my defense. At the time I didn't know that a trial is basically like a fight. If you don't defend yourself in a fight you get beat up or you lose. So I lost. I had Evidence to show I was set up I had witnesses but none of it got to the jury.

1st MEETING

PER Attorney came here to McCormick, We talked concerning how my attorney didn't call any witnesses for me and how I had a statement from one witness about what they would of testified to and how Trial Attorney never tried to contact him about testifying and had he of known he would of testified.

We discussed the other witnesses and their importance for this per. My wife, Sara Crittendon, how her testimony would of showed that at no time did the victim ever sleep in the bed with us although there was a claim by the victim. The other witness, Tiffney Birch, She was in the room the day the people threatened to set their plan in motion so her testimony was of great importance. The most important witness of all would of been my mother-in-law because she was also there in the room but she had passed away from battling cancer in January of 2006. But had the state tried me in December of 2004 as the court had ordered in October of 2004, All the witnesses needed for my case was available.

I gave the PER attorney all this information in our first and only meeting before the hearing. He was suppose to subpoena the three remaining witnesses for the PER hearing. Yet come the day of the hearing, the only person he had there was my Brother Tim Crittendon

1st MEETING cont.

Who was incarcerated on lock up at Perry Corn Inst. He come in court with hair everywhere and a yellow dirty jumpsuit. Not a good look for a witness.

The PCR attorney did not send a server or an investigator to serve the subpoenas. He sent them in the mail. That doesn't ensure that they get them and will come to court. And without their testimony there was no chance to prove my Trial attorney was ineffective because these witnesses testimony would of proven my case.

After the PCR hearing was over and I knew that nothing I wanted in the way of issues were presented. He didn't even argue the Speedy Trial issue correctly which he could have. So after the hearing I sent to him a letter stressing how badly I thought the hearing went and that I felt the PCR was going to be turned down and that if that was the case, I wanted him to file a Motion 59(e) before the 10 day time limit expired to be followed up with an Appeal to the State Supreme court. After not hearing from PCR Attorney for months I wrote numerous letters of inquiry to him on the status of the 59(e) and appeal. It turned out he never filed either.

I have all this information and evidence but it does me no good unless I win a new trial.

4. Trial By Jury.

December 12, 2006 I was found guilty and sentenced to 30 yrs.

If the PCR court fails to address a claim as required by S.C. Code Ann. § 17-27-80, Counsel for the applicant must make a motion to alter or amend the Judgment. S.C.R. Civ. P. 59(e).

11.

B.) Prosecutor never notified petitioner of intent to dismiss original indictment. Prosecutor had original indictment dismissed on the pretense of good faith in order to make way to reindict with indictment that coincided with prosecutor's evidence.

Prosecutor made improper comments during closing argument alluding to petitioner not testifying or presenting a case.

C.) After being True billed by the Grand Jury of Oconee County and being signed by Grand Jury foreman, indictment no. * 2004-GS-37-509 was not, as due process dictates, submitted for clock stamp and date to Clerk of Court as to be placed on Court docket.

Attachment to PCR Application.

II.

A) Trial Counsel failed to call in to question the sufficiency of the Direct Reindictment before Jury was sworn in.

Trial Counsel failed to investigate Client's Claim of ~~assertion~~ of Speedy Trial Right and make motion to Court for STA to be ruled upon.

Trial Counsel failed to do pre-trial Investigation into Client's Claim of being set up. Failed to depose of the two remaining fact witnesses whose testimony would of bolstered petitioner's Claims of being set up.

Because case was a Credibility Contest, Counsel failed to employ a medical expert for defense to explain that medical exam found no evidence of abuse.

Failed to object to prosecutor's improper comments in closing argument that alluded to defendant not testifying or presenting a case.

Failed to advise Client that the lesser included offense of ABHIAN could of been requested of the Court by petitioner to be charged to Jury.

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Clarence E. Crittendon, Jr., #266744

2012-CP-37-0893

Applicant,

v.

**PARTIAL RETURN
AND MOTION TO DISMISS**

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed October 10, 2012, the Respondent would show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. Applicant was indicted at the March 2004 term of the Oconee County Grand Jury for lewd act upon act upon a child under sixteen (2004-GS-37-0509) and criminal sexual conduct with a minor – first degree (2006-GS-37-0927).

Bruce Byrdholdt, Esquire, represented Applicant at trial. On December 12, 2006, Applicant was found guilty at trial as indicted. The Honorable Alexander S. Macaulay sentenced Applicant to thirty (30) years for lewd act upon a child and fifteen (15) years for criminal sexual conduct with a minor – first degree to run concurrently. A timely Notice of Appeal was filed on the Applicant's behalf. On October 6, 2008, the Court of Appeals issued an Order of Dismissal and Remittur dismissing the appeal after Applicant withdrew his appeal.

2008-CP-37-1471

The Applicant subsequently filed an application for post-conviction relief (PCR) on December 17, 2008. Applicant alleged he was being held unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel"
 - a. Counsel failed to investigate Applicant's claim that there was a violation of the Speedy Trial Act
 - b. Counsel failed to investigate whether or not he was set up
 - c. Counsel failed to object to re-indictment prior to trial
 - d. Counsel failed to call a medical expert
 - e. Counsel failed to object to prosecutor's improper comments made during closing arguments alluding to Applicant's right not to testify
 - f. Counsel failed to request a jury charge of the lesser-included offense of assault and battery of a high and aggravated nature.
2. "Prosecutorial misconduct"
3. "Lack of subject matter jurisdiction"

An evidentiary hearing was heard before the Honorable J. Cordell Maddox, Jr., at which Applicant was present and was represented by R. Mills Arial, Jr., Esquire. By Order dated January 17, 2012, Judge Maddox denied and dismissed Applicant's application.

II.

In Applicant's current application for post-conviction relief, the Applicant alleged he was being held unlawfully for the following reasons:

1. "PCR attorney failed to file appeal to S.C. Supreme Court as directed by Applicant."

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, the South Carolina Department of Corrections' records and the prior PCR records by reference. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

There is no constitutional right to appointed counsel for collateral review of a conviction.

Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth

Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under § 17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation" Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Upon information and belief the Respondent does not request an evidentiary hearing on the matter of the Applicant's entitlement to an Austin Review. Austin, 305 S.C. 453, 409 S.E.2d 395.

IV.

The Court should summarily dismiss the current Application because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90.

(1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or

was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, Respondent moves for a summary dismissal of the application because it is successive.

V.

The Respondent submits that this Application for Post-Conviction Relief should also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed ~~within one year after the entry of a judgment of conviction or~~ within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on September 13, 1976. The Applicant was therefore required to file his PCR application by July 1, 1996. This Application was filed on March 7, 2011, which was well over fourteen (14) years after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VII.

WHEREFORE, Respondent moves to consent to solely an ineffective assistant of counsel claim pursuant to Austin.

Respectfully submitted,

ALAN WILSON
Attorney General

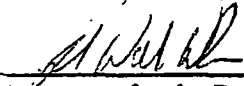
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

JOHN W. WHITMIRE
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

Columbia, South Carolina

COPY

FILED OCONEE, SC IN THE COURT OF COMMONS PLEAS
 BEVERLY H. WHITFIELD
 CLERK OF COURT CASE NO: 2012-CP-37-893

COUNTY OF OCONEE)

2013 JAN 14 A 9:37)

Clarence Crittendon, SCDC # 266744,)
 Applicant,)

AMENDMENTS TO
 POST CONVICTION
 RELIEF APPLICATIONS

vs.)

THE STATE OF SOUTH CAROLINA,)
 Respondent.)

The applicant hereby amends answers to number 9 and number 10 of his Application for Post-Conviction Relief to state the following:

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(A) The Applicant was denied effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Article I, Section 14 of The South Carolina Constitution.

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

(a) The applicant was provided with deficient representation by his attorney, in that the conduct of his attorney was objectively unreasonable under the circumstances. Strickland v. Washington, 466 U.S. 668 (1984). The outcome of the applicant's proceeding was prejudiced, and it is reasonable probable that the outcome would have been different had counsel's performance not been deficient. Strickland, 466 U.S. at 694. Defense counsel was ineffective based on one or more of the following:

1. My defense attorney failed to conscientiously discharge his professional responsibilities while he was handling my case.
 2. My defense attorney failed to effectively challenge the arrest and seizure of Applicant.
 3. My defense attorney failed to act as my diligent, conscientious advocate.
 4. My defense attorney failed to give me his complete loyalty.
 5. My defense attorney did not have my best interest in mind while he was supposed to be investigating and preparing my case.
 6. My defense attorney failed to serve my cause in good faith.
 7. My defense attorney neglected the necessary investigations and the preparation of my case.
 8. My defense attorney did not do the necessary factual investigations on my behalf.
 9. My defense attorney did not do the necessary legal research.
 10. My defense attorney did not conscientiously gather any information to protect my rights.
 11. My defense attorney did not try to have my case settled in a matter that would have been to my best advantage.
 12. My defense attorney did not advise me of all my rights or take any of the actions that were necessary to protect preserve them; knowing that I was not versed in the law.
 13. My defense attorney, knowing I was illiterate in the law, never properly ascertained whether or not I actually understood or comprehended all of the issues that were involved in my case.
 14. My defense attorney never properly consulted with me or kept me informed with what was going on as far as my case was concerned.
-
15. My defense attorney never explained to me or discussed with me any of the elements of the crime charged.
 16. My defense attorney never made any attempt to ascertain whether or not I actually knew what the elements fo the crime charged were

or whether or not I understood exactly what the term "criminal element" actually meant.

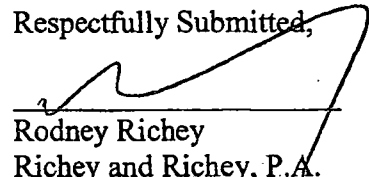
17. My defense attorney never explained to me or discussed with me how the elements of the crime charge and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State V. Boyd.
18. My defense attorney never informed me of any of the defenses that were available to me.
19. My defense attorney never intended to offer any defense to the court on my behalf.
20. My defense attorney never explained to me or discussed with me any kind of defense strategy.
21. My defense attorney never explained to me or discussed with me any of the tactical choices that they either made or were planning to make.
22. My defense attorney dictated to me exactly how my case was going to be handled and offered no alternative options.
23. My defense attorney failed to properly acquaint themselves with the law and the facts surrounding my case and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts.
24. Because of my defense attorney's gross neglect and his many legal errors no defense at all was put in issue for me during the Court proceedings.
25. My defense attorney did not subject the prosecution's case to any adversarial testing.
26. My defense attorney failed to oppose the prosecution's case with any adversarial litigation.
27. My defense attorney failed to function as the government's adversary in any sense of the word.
28. My defense attorney failed to pursue any of the legal recourse that were available to him.

29. The attorney that represented me on this charge in Court failed to function as the counsel that the Constitution's Sixth Amendment Guarantees.
30. My defense attorney failed to call alibi witnesses on my behalf which would have proven my innocence.
31. My defense attorney failed to appeal my case after I was convicted when I wanted to appeal.

His counsel's representation was not within the range and scope of competence demanded by Strickland and its progeny.

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show first, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Sosebee v. Leeke, S.C. 362, F. 2nd 221 (1987), citing Strickland v. Washington 46 S.E.2D. 813 (1984), See also Butler v. State 286 S.C. 441, 334 S.E. 2d 813 (1985), also, Hill v. Lockhart 474 U.S. 88 (1985).

Respectfully Submitted,



Rodney Richey
Richey and Richey, P.A.
Post Office Box 10916
Greenville, South Carolina 29603
Attorney for the Applicant

January 11, 2013

STATE OF SOUTH CAROLINA FILED OCONEE, SC IN THE COURT OF COMMONS PLEAS
 COUNTY OF OCONEE BEVERLY H. WHITFIELD CASE NO: 2012-CP-37-893
 CLERK OF COURT

2013 JAN 14 A 9:37

Clarence Crittendon, SCDC # 266744,

AFFIDAVIT OF SERVICE

vs.

THE STATE OF SOUTH CAROLINA

I certify that I have served the Amendments to PCR Application on the State of South Carolina by depositing copy of it in the United States Mail, postage prepaid, on January 11, 2013, addressed to their attorney of record, Office of Attorney General State of South Carolina, Post Office Box 11549, Columbia, SC 29211-1549.

Respectfully submitted:

Tina Garduno

Tina Garduno, paralegal
 Richey and Richey, P.A.
 Post Office Box 10916
 Greenville, South Carolina 29603

Sworn to before me on
 January 11, 2013

[Signature]

Notary Public of South Carolina

My Commission Expires: 7/15/2013

State of South Carolina

County of Oconee

In the Court of Common Pleas

Clarence Crittendon,

Applicant,

-vs-

State of South Carolina,

Respondent.

2012-CP-37-00893

September 16, 2013

Transcript of Record

BEFORE:

The Honorable R. Lawton McIntosh, Judge

APPEARANCES:

Rodney W. Richey, Esquire
Attorney for the Applicant

John W. Whitmire, Esquire
Attorney the State

Renee H. Tollison
Circuit Court Reporter

INDEX

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Clarence Elijah Crittendon, Jr.				
Richey	4		7	
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<< -- >>

Opening Statements
Certificate of Reporter

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EXHIBITS

No	DESCRIPTION	ID	EV
A-1	Letter of 7/12/12	5	5

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
PCR Hearing September 16, 2013
Opening Statement by Mr. Whitmire

3

1 (WHEREUPON, court convened with all parties present
2 and the following proceedings were had commencing at
3 approximately 9:54 a.m.)

4 MR. WHITMIRE: May it please the Court, Your
5 Honor.

6 THE COURT: Yes, sir.

7 MR. WHITMIRE: The matter before this Court is
8 Clarence Crittendon v. State of South Carolina, 2012-CP-
9 37-893. Mr. Crittendon filed his application for post-
10 conviction relief October 10th, 2012. Mr. Crittendon was
11 indicted and went to trial on charges for lewd act and
12 C.S.C. He was represented by Mr. Byrholdt. He was
13 convicted and sentenced by Judge Macaulay.

14 Mr. Crittendon did file notice of appeal but
15 subsequently withdrew that appeal. He did file timely
16 notice of application for post-conviction relief. A
17 hearing was held on that matter on October 3rd, 2011.
18 The State was represented by Kaelon May; Mr. Crittendon
19 was represented by Mills Ariail. Judge Maddox denied the
20 relief in an order dated, I believe it is, January 5th,
21 2012. Mr. Crittendon did not appeal Judge Maddox's
22 decision.

23 Today Mr. Crittendon has filed a second application
24 alleging Mr. Mills was ineffective for failing to file a
25 notice of appeal from that decision.

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Clarence Elijah Crittendon - Direct Examination by Mr. Richey

4

1 THE COURT: So the sole issue is whether or not
2 we have an Austin appeal?

3 MR. RICHEY: Yes, sir.

4 THE COURT: Okay, sir. All right. Are you
5 ready to proceed, Mr. Richey?

6 MR. RICHEY: Yes, sir.

7 THE COURT: All right. Would you call your
8 first witness?

9 MR. RICHEY: We call Mr. Crittendon.

10 CLARENCE ELIJAH CRITTENDON,

11 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

12 DIRECT EXAMINATION

13 BY MR. RICHEY:

14 Q. Would you state your full name, please?

15 A. Clarence Elijah Crittendon.

16 Q. Mr. Crittendon, you were before the court on a post-
17 conviction relief case, is that correct, back in 2012?

18 A. Yes.

19 Q. And during that case, who represented you?

20 A. Mr. Mills Ariail, Jr.

21 Q. Okay. What are you currently in the Department of
22 Corrections for?

23 A. C.S.C. and lewd act.

24 Q. And what was your sentence?

25 A. Thirty years.

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Clarence Elijah Crittendon - Direct Examination by Mr. Richey

5

1 Q. You've got to speak up a little bit.

2 A. Thirty years.

3 Q. Okay. Thirty years. And this post-conviction
4 relief, did you want to appeal the ruling from the court?

5 A. Yes.

6 Q. And did you contact or did you talk to Mr. Ariail?

7 A. I did not talk to him specifically. I sent him a
8 letter prior to the ruling on the post-conviction.

9 Q. And that letter, you had requested he file a 59(e)
10 motion; is that correct?

11 A. Yes.

12 Q. And let me pass this up to you. I'm going to pass
13 this letter up to you, and I want you to look at this
14 letter. Is this a letter that you had sent -- one of the
15 letters that you had sent Mr. Ariail in regards to filing
16 an appeal?

17 A. Yes, it is.

18 Q. And did you -- had you sent him anything prior to
19 that?

20 A. Yes, I did.

21 MR. RICHEY: I'm going to offer this as
22 Applicant's Number 1.

23 THE COURT: Any objection, Mr. Whitmire?

24 MR. WHITMIRE: No, Your Honor.

25 (WHEREUPON, Applicant's Exhibit Number 1 was marked

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Clarence Elijah Crittendon - Cross-examination by Mr. Whitmire

6

1 and admitted into evidence.)

2 Q. Is there any way that you could believe that Mr.
3 Ariail could believe that you did not want to appeal
4 under any circumstances?

5 A. Had I not sent him a letter prior to the post-
6 conviction relief ruling coming down, I would have said I
7 would not have had an opportunity. But I sent him a
8 letter, and it is notarized.

9 Q. And tell me, kind of in that letter the process that
10 you wanted him to follow in terms of the appeal. Did you
11 want him to do something prior to that appeal?

12 A. After the P.C.R. hearing, I felt that the P.C.R. did
13 not go my way. That is why I sent him the letter. I
14 asked about a 59(e) being filed so I could -- so the
15 court could alter or amend anything that needed to be
16 done to that particular P.C.R. I also asked him to
17 follow up with the appeal.

18 Q. Okay. And from your knowledge, was that ever done?

19 A. No.

20 Q. Okay. Answer any questions the Attorney General has
21 for you.

22 CROSS-EXAMINATION

23 BY MR. WHITMIRE:

24 Q. Mr. Crittendon, do you recall receiving notice that
25 Judge Maddox denied your application for post-conviction

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Clarence Elijah Crittendon - Redirect Examination by Mr. Richey

7

1 relief?

2 A. I do.

3 Q. And do you recall writing your attorney asking for a
4 59(e)?

5 A. I do.

6 Q. Do you recall your attorney writing you back in
7 regards to the appeal?

8 A. After ...

9 Q. January 12th.

10 A. After the ruling?

11 Q. Uh-huh (affirmative).

12 A. Yes.

13 Q. Do you recall your attorney explained to you that
14 you had thirty days to declare your notice to appeal?

15 A. Yes.

16 Q. And when did you respond to your attorney about
17 wanting the appeal from that letter?

18 A. I probably wrote him a month or two after that
19 letter.

20 Q. No further questions, Your Honor.

21 THE COURT: Redirect?

22 REDIRECT EXAMINATION

23 BY MR. RICHEY:

24 Q. Your intent was to appeal at all times, correct?

25 A. Yeah. I wrote the letter prior to the ruling asking

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Mills Ariail, Jr. - Direct Examination by Mr. Richey

8

1 about the appeal. I did receive a letter from Mr. Ariail
2 after the ruling stating that the ruling went against me
3 and asked if I wanted to appeal.

4 Q. And then ---

5 A. I wrote him subsequently saying I had already asked
6 you about the appeal.

7 Q. And that letter that you're talking about had the
8 59(e) motion?

9 A. Yes.

10 Q. Did you get a response?

11 A. Dated and notarized.

12 Q. Did you get a response about the 59(e) motion?

13 A. No.

14 Q. Thank you.

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

16 MR. RICHEY: Call Mr. Ariail.

17 MILLS ARIAIL, JR.,

18 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

19 DIRECT EXAMINATION

20 BY MR. RICHEY:

21 Q. Sir, will you state your name, please?

22 A. Mills Ariail.

23 Q. And Mr. Ariail, do you recall representing Mr.
24 Crittendon at a P.C.R. hearing?

25 A. Yes, I did.

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Mills Ariail, Jr. - Cross-examination by Mr. Whitmire

9

1 Q. And you heard the testimony about Mr. Crittendon
2 wanting to file an appeal in the case?

3 A. Yes, I did.

4 Q. Did -- were you ever contacted by him about filing
5 an appeal?

6 A. I represented him in the hearing, the P.C.R.
7 hearing. I think that was in October 2011, if I'm not
8 mistaken. I got a letter from him, I think he submitted
9 as part -- the letter you put in, that was sent to me, I
10 think, sometime before we had gotten a decision from
11 Judge Maddox in the case. So it was after the hearing
12 but before we got the decision.

13 Q. And in that letter, did he request that you file a
14 59(e) motion?

15 A. He requested a 59(e). Yeah, I think he did. I
16 don't have it in front of me, but I think he did. That
17 and also he references filing an appeal after that.

18 Q. Okay. All right. Okay. Thank you. No other
19 questions.

20 CROSS-EXAMINATION

21 BY MR. WHITMIRE:

22 Q. Mr. Ariail, did you write Mr. Crittendon in regards
23 to that 59(e)?

24 A. I think at that time I didn't have the order of
25 dismissal. We had discussed that we didn't have the --

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Mills Ariail, Jr. - Cross-examination by Mr. Whitmire

10

1 we had to find out what the judge was going to decide
2 first before I could even figure out if we needed to do a
3 59(e) or an appeal. That didn't come down, I think,
4 until January 12th or something of 2012 at which time I
5 sent him the letter. And the letter I sent to him
6 basically says, you have a right to appeal. If you
7 choose, please contact me. Or if you have any questions
8 regarding the order. I mean, I had reviewed the order.
9 My basic -- my understanding was there were no grounds to
10 do a 59(e) or an appeal on.

11 Q. So his request for an appeal was premature in that
12 letter?

13 A. Oh, certainly. When he sent it to me, I think --
14 and I don't have the date of the letter. But he had sent
15 it to me clearly before I had received the order from
16 Judge Maddox. Order of dismissal.

17 Q. Mr. Ariail, can you explain your general practice in
18 P.C.R. cases with appealing?

19 A. Yeah. I mean, the practice was -- I mean, we had
20 discussed it. I clearly had had a conversation with him
21 and will acknowledge that we discussed an appeal. My

22 issue was I didn't feel there were any appellate grounds
23 that were there. I gave him the option of being able to
24 let me know if he -- after he reviewed the order if he
25 still wanted to appeal. I sent him that letter and

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Mills Ariail, Jr. - Cross-examination by Mr. Whitmire

11

1 didn't hear anything from him in regards to my letter. I
2 know he said he sent me a letter. I have nothing in my
3 file showing he sent me a letter saying file an appeal
4 until I got a letter from him, I think it was, on July
5 12, 2012 requesting the status -- I guess requesting the
6 status of his appeal, at which time I sent him a letter
7 back and told him that I hadn't filed an appeal because I
8 hadn't heard from him. And second of all, I didn't
9 believe there were any appellate grounds in that.

10 Q. If he would have requested an appeal in a timely
11 fashion, would you have filed a notice?

12 A. Well, that's my standard practice is if he would
13 have said within the thirty-day period to file an appeal
14 after reviewing the order, I would have put a notice of
15 intent to appeal in and then contacted S.C.C.I.D. and let
16 them know that they were going to handle it.

17 Q. And did you advise Mr. Crittendon of the statute of
18 limitations regarding declaring your notice for appeal?

19 A. At some point I think we had discussed -- I don't
20 have it in any of my letters. But you know, I told him I
21 think there was a thirty-day period of someone to be able
22 to file an appeal. Normally, he was pretty responsive to
23 me with letters, so I was waiting for him to get back.

24 Q. I believe you said that Mr. Crittendon wrote you
25 half a year later?

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Mills Artail, Jr. - Cross-examination by Mr. Whitmire

12

1 A. The letter I had -- the letters I have in the file
2 from him are July 12th, 2012, and August 15th, 2012. And
3 basically are asking about the status of the appeal which
4 I responded to and let him know that there was no appeal
5 because I hadn't filed it because I hadn't heard back
6 from him.

7 Q. Last question. Is post-conviction relief a good
8 part of your practice?

9 A. Oh, yes.

10 MR. WHITMIRE: No further questions, Your
11 Honor.

12 THE COURT: Any further on redirect?

13 MR. RICHEY: No questions.

14 THE COURT: Let me ask you something, Mr.

15 Artail. The letter you received from the Applicant that
16 was a half year later, or whatever time frame it was
17 after the thirty days had expired, did it say what Mr.
18 Crittendon just testified to, that I've already asked you
19 to do an appeal?

20 THE WITNESS: Let's see. I have it right here
21 if you want to review it, Judge. He says, I've been

22 waiting to hear from the appeals court regarding the
23 appeal -- regarding the appeal from my post-conviction
24 relief hearing which I asked you to be sure to file.

25 Please respond to me at the above address to let me know

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Mills Ariail, Jr. - Cross-examination by Mr. Whitmire

13

1 that you did in fact file the said appeal as I requested.
2 That was the July 12th one. I have an August 12th
3 letter.

4 THE COURT: Okay. Thank you.

5 THE WITNESS: Thank you.

6 THE COURT: Anything further as a result of my
7 questions from either the Applicant or the State?

8 MR. RICHEY: No, sir.

9 MR. WHITMIRE: No, Your Honor.

10 THE COURT: Thank you. May this witness be
11 excused?

12 MR. RICHEY: Yes, sir.

13 MR. WHITMIRE: Yes, sir.

14 THE WITNESS: Thank you, Judge.

15 THE COURT: Yes, sir.

16 Mr. Richey, do you have any further witnesses?

17 MR. RICHEY: No, sir.

18 THE COURT: Mr. Whitmire, do you have any
19 witnesses?

20 MR. WHITMIRE: The State rests, Your Honor.

21 THE COURT: All right. Let me say this. I
22 understand the position taken by Mr. Ariail in this case
23 clearly. As lawyers, he did what he was supposed to do
24 by informing Mr. Crittendon of his right to have an
25 appeal. And not having heard anything back from Mr.

Clarence Crittendon v. State of South Carolina 2012-CP-37-893
Mills Ariail, Jr. - Cross-examination by Mr. Whitmire

14

1 Crittendon in the time frame, one was not perfected. I
2 can understand that.

3 At the same time, it seems to me that Mr. Crittendon
4 did want an appeal in this case. It was just a matter of
5 lack of proper communication. And looking at the
6 petition, the State didn't oppose the belated appeal
7 solely. And I'm going to grant that. In finding that,
8 however, specifically on the record I'm finding that Mr.
9 Ariail did not do anything improper by not perfecting the
10 appeal because under the facts of this case, when the
11 request came in from Mr. Crittendon earlier, it was
12 premature. And he did not perfect it in time -- or he
13 did not notify Mr. Ariail in time for him to perfect a
14 timely appeal.

15 That being said, I'm going to ask that you prepare
16 me an order, Mr. Whitmire.

17 MR. WHITMIRE: Yes, Your Honor, I'll do a
18 proposed order.

19 THE COURT: Thank you, gentlemen.

20 MR. RICHEY: Thank you, Your Honor.

21 (WHEREUPON, the hearing ended at approximately 10:09
22 a.m.)

23 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

1 CERTIFICATE OF REPORTER

2 I, the undersigned Renee H. Tollison, Official Court
3 Reporter for the Tenth Judicial Circuit of the State of
4 South Carolina, do hereby certify that the foregoing is a
5 true, accurate, and complete transcript of record of all
6 the proceedings had and evidence introduced in the
7 trial/hearing of the captioned case, relative to appeal,
8 in the Circuit Court for Oconee County, South Carolina,
9 on the 16th day of September 2013.

10 This transcript may contain quoted material. Such
11 material is reproduced as read by the speaker.

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

14 January 10, 2014

15

16

17

Renee H. Tollison

Circuit Court Reporter

JULY 12, 2012

CLARENCE E. CRITTENDON

SCDC # 266744 F4A - 198

M.C.T. - 396 REDEMPTION WAY

McCORMICK, SOUTH CAROLINA, 29899

B. MILLS ABRAHAM, JR. - ESQ.

ATTORNEY-AT-LAW

11 NORTH IRVING ST., Suite 11

GREENVILLE, SC. 29601

CJA No. 2008-CP-37-01471

RE: STATUS OF NOTICE OF APPEAL FROM PCA

Dear Counselor:

I have been waiting to hear from the Appeals Court regarding the Appeal from my Post-Conviction Relief hearing which I asked you to be sure to file.

Please respond to me at the above address and let me know that you did in fact file said Appeal as I requested.

Thank you for your time and responding.

Sworn before me

This 12 day of July 2012

Jaya L. Young
 NOTARY PUBLIC SOUTH CAROLINA

My Commission Expires: 10 11 2021

Sincerely,

Clarence E. Crittendon
 CLARENCE E. CRITTENDON #266744

(Copy)



CLARENCE E. CRITTENDON #266744

McCORMICK B.I. F4A Rm 11B

3916 REDEMPTION WAY

McCORMICK, South Carolina 29899

R. MILLS ABRAHAM, JR. ESQ.

Attorney - At - Law

11 North Irvine St., Suite 11

Greenville, South Carolina 29601

DATE: AUGUST 15, 2012

RE.: STATUS OF APPEAL FROM POST-CONVICTION RELIEF

Dear Sir:

I still haven't heard anything from your office. Once again I am asking. Did you file the appeal from my post-conviction relief hearing as I requested of you and if so please let me know when because of this date, I haven't heard anything from the SC Supreme Court.

Please respond.

SUBORN and SUBSCRIBED before me

This 15 day of August, 2012

Joseph L. Young
NOTARY PUBLIC SOUTH CAROLINA

My Commission Expires: 10 11 2021

SINCERELY,

Clarence E. Crittendon #266744
CLARENCE E. CRITTENDON #266744

COURT OF COMMON PLEAS AND GENERAL SESSIONS **EXHIBIT RECORD AND RECEIPT FORM**

PLAINTIFF Clarence Crittendon
 DEFENDANT State
 CASE NO. 2012 CP-37-893
 DATE 9-16-13
 DATE ENDED 9-16-13

ATTORNEY Rodney Richey
 ATTORNEY Walt Whitman
 JUDGE R. Lawton McIntire
 COURT REPORTER Renee Tollison

PLAINTIFF'S EXHIBITS

NO	DESCRIPTION	ID.	EV
1	Letter of 7-12-12		✓
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DEFENDANT'S EXHIBITS

NO	DESCRIPTION	ID.	EV
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FILED OCTOBER 30
 BEVERLY H. WHITFIELD
 CLERK OF COURT
 2013 SEP 16 PM 3 38

Renee Tollison
 COURT REPORTER

B. J. Whitman
 CLERK OF COURT

PAGE 1 OF 1

DATE 9-16-13

STATE OF SOUTH CAROLINA)

COUNTY OF OCONEE)

Clarence E. Crittendon,
S.C.D.C. No. 266744,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2013-37-893

**ORDER OF DISMISSAL
GRANTING APPELLATE REVIEW
PURSUANT TO AUSTIN v. STATE¹**FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 OCT 31 PM 1 37

This matter comes before the Court by way of an Application for post-conviction relief (PCR) filed October 10, 2012. The Respondent made its Partial Return and Motion to Dismiss on January 25, 2013. The matter was scheduled for an evidentiary hearing on September 16, 2013 at the Oconee County court house. Applicant was present and represented by Rodney Richey, Esq. Respondent was represented by Walt Whitmire, Esq., of the Office of The Attorney General.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. Applicant was indicted at the March 2004 term of the Oconee County Grand Jury for lewd act upon a child under sixteen (2004-GS-37-0509) and criminal sexual conduct with minor-first degree (2006-GS-37-0927). Bruce Byrholdt, Esquire, represented him. On December 12, 2006, Applicant underwent trial, pursuant to which he was found guilty as indicted. The Honorable Alexander S. Macaulay

¹ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)

concurrently sentenced him to confinement for thirty (30) years for lewd act upon a child and fifteen (15) years for criminal sexual conduct with minor-first degree.

A timely Notice of Appeal was filed on Applicant's behalf. On October 6, 2008, the Court of Appeals issued an Order of Dismissal and Remittitur dismissing the appeal because Appellant withdrew the appeal.

2008-CP-37-1471

In his first Application, Applicant alleged that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel
 - a. Counsel failed to investigate applicant's claim the there was a violation of the Speedy Trial Act.
 - b. Counsel failed to investigate whether or not he was set up.
 - c. Counsel failed to object to re-indictment prior to trial.
 - d. Counsel failed to call a medical expert.
 - e. Counsel failed to object to prosecutor's improper comments made during closing arguments alluding to Applicant's right not to testify.
 - f. Counsel failed to request a jury charge of the lesser-included offense of assault and battery of a high and aggravated nature.
2. Prosecutorial misconduct.
3. Lack of subject matter jurisdiction.

The Applicant was present at the hearing and was represented by R. Mills Ariail, Jr., 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 and offered the testimony of Tim Crittendon. The State offered the testimony of Bruce Byrholdt, Esquire (Mr. Byrholdt) Applicant's trial counsel. The Honorable J. Cordell Maddox, Jr., denied and dismissed the Application with prejudice in an order dated January 5, 2012. Applicant did not appeal.

2013-37-893

In Applicant's current application for post-conviction relief, the Applicant alleged he was being held unlawfully for the following reasons:

1. "PCR attorney failed to file appeal to S.C. Supreme Court as directed by Applicant."

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's 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 exhibits from the prior proceedings, and, 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.

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, (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 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. at 668, 104 S.Ct. at 2064. 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, supra. 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.

I.

This Court finds PCR counsel was ineffective for failing to file a notice of appeal from the PCR judge's order of dismissal. Applicant testified he requested an appeal. Applicant submitted correspondence to that effect. PCR counsel testified Applicant wrote him and requested a Rule 59, SCRCP, motion along with an appeal prior to the PCR judge issuing the order the dismissal. PCR counsel testified the request was premature. After the order was issued, PCR counsel directed correspondence to Applicant regarding the matter of an appeal. PCR counsel testified Applicant failed to respond. Thus as a result, PCR counsel did not file a notice of appeal on Applicant's behalf. This Court finds counsel was deficient because it was objectively and subjectively reasonable to believe Applicant desired an appeal although he made a premature request. Therefore, this this Court denies and dismisses this Application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Applicant withdrew any and all other allegations.

IT IS THEREFORE ORDERED:

1. ~~That this current Application for Post-Conviction Relief be dismissed.~~
2. That the Applicant is granted an appeal from the denial of her first PCR application – filed March 29, 2011 and captioned 2008-CP-

32-2692.

AND IT IS SO ORDERED this

15

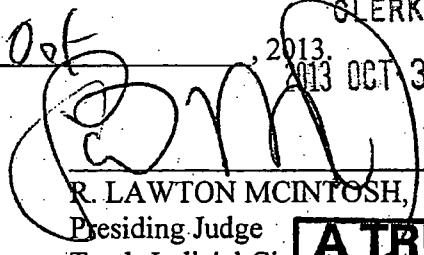
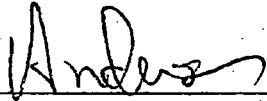
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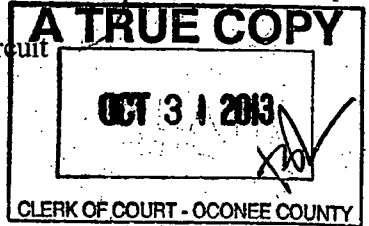
, 2013.

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT

2013 OCT 31 PM 1 37


R. LAWTON MCINTOSH,
Presiding Judge
Tenth Judicial Circuit

, South Carolina



WITNESSES

OCS/D/REED

M. L. C. Reed

ARREST WARRANT NO. H-520816

- 12 -

ACTION OF GRAND JURY

True Bill

Clarence Crittendon

Member of Grand Jury

3/16/04

VERDICT

The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS
MARCH 2004

TERM

WDH

THE STATE

vs.

CLARENCE ELIJAH CRITTENDON

Indictment for

CRIMINAL SEXUAL CONDUCT - FIRST DEGREE

16-03-0652[0160]

Member of Petit Jury

Date:

DRUANNIE WHITT, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT
FIRST DEGREE
16-03-0652[0160]
MARCH 16, 2004

At a Court of General Sessions, convened on _____
the Grand Jurors of OCONEE County present upon their oath:

CRIMINAL SEXUAL CONDUCT - FIRST DEGREE

That Clarence Elijah Crittendon did in Oconee County on or between May 1, 2003 and September 1, 2003, engage in sexual battery, to wit: Cunnilingus and fellatio upon the body of Minor without her consent.

The defendant used aggravated force to accomplish the sexual battery and/or the victim submitted to the sexual battery by the defendant under circumstances where she was also the victim of forcible confinement and/or kidnapping.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

Dwaine White

SOLICITOR

345

WITNESSES

OCS/D/REED

M. L. Carothers

DOCKET NO. 2004-GS-37-509

The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS
MARCH 2004

TERM

WDH THE STATE

ARREST WARRANT NO. DIRECT

CLARENCE ELIJAH CRITTENDON
vs.
CLARENCE ELIJAH CRITTENDON

ACTION OF GRAND JURY

True Bill

3/16/04

Verdict of Grand Jury

Indictment for

LEWD ACT UPON A CHILD

UNDER SIXTEEN

16-15-140 [2468]

VERDICT

Guilty

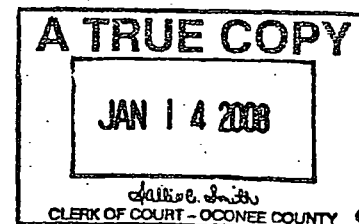
VERDICT

VERDICT

VERDICT

Wayne J. Hartung 12/12/06
of Petit Jury Date:

DRUANE WHITE, SOLICITOR



STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

INDICTMENT FOR

LEWD ACT UPON A CHILD
UNDER SIXTEEN
16-15-140 [2468]
MARCH 16 2004

At a Court of General Sessions, convened on _____

the Grand Jurors of OCONEE County present upon their oath:

**LEWD ACT UPON A CHILD UNDER THE AGE OF
SIXTEEN**

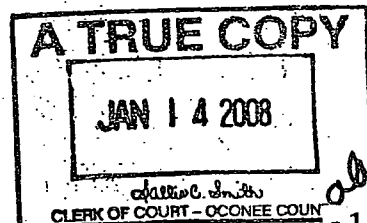
THAT CLARENCE ELIJAH CRITTENDON DID IN OCONEE COUNTY,
SOUTH CAROLINA, ON OR BETWEEN MAY 1, 2003 AND SEPTEMBER 1,
2003, WILLFULLY AND LEWDLY COMMIT OR ATTEMPT A LEWD OR
LASCIVIOUS ACT UPON OR WITH THE BODY^{Minor}

, A FEMALE CHILD UNDER THE AGE OF SIXTEEN (16),
WITH THE INTENT OF AROUSING, APPEALING TO, OR GRATIFYING
THE LUST OR PASSIONS OR SEXUAL DESIRES OF HIMSELF OR OF THE
CHILD. ALL IN VIOLATION OF SECTION 16-15-140, CODE OF LAWS OF
SOUTH CAROLINA (1976), AS AMENDED.

Against the peace and dignity of the State, and contrary to the statute in such case made and
provided.

Quana White

SOLICITOR



347

WITNESSES

OCS/REED

M.L. Candless

ARREST WARRANT NO. H520816

DIRECT RE:

ACTION OF GRAND JURY

True Bill

7-18-06

Walter Simmons
Foreman of Grand Jury

VERDICT

Guilty

Clarence E. Crittendon
Foreman of Petit Jury
Date: *12/12/06*

DOCKET NO. 2006-GS-37-101

The State of South Carolina,

County of OCONEE

COURT OF GENERAL SESSIONS

JUL 18 2006

TERM 2006

LSS

THE STATE

VS.

CLARENCE ELLIAH CRITTENDON

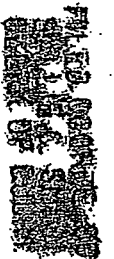
Indictment for

CRIMINAL SEXUAL CONDUCT WITH
MINOR (FIRST DEGREE)

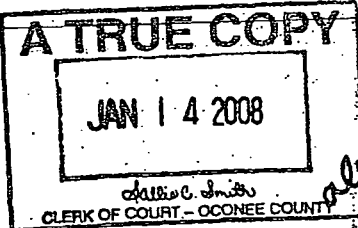
16-3-655(A)(1)

(385)

LINDSEY S. SIMMONS, ASSISTANT SOLICITOR



2006 JUL 18 P 3:23



FORM 32 (12/87)

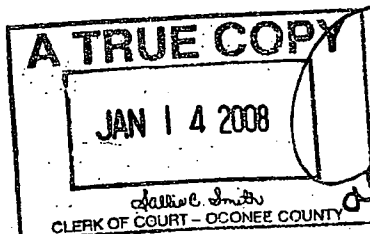
STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

INDICTMENT FOR
CRIMINAL SEXUAL CONDUCT
WITH MINOR (FIRST DEGREE)
16-3-655(A)(1) (385)

At a Court of General Sessions, convened on JUL 18 2006
the Grand Jurors of OCONEE County present upon their oath:

THAT CLARENCE ELIJAH CRITTENDON DID IN OCONEE COUNTY, SOUTH CAROLINA, ON OR ABOUT MAY 1, 2003 AND SEPTEMBER 1, 2003, WILLFULLY AND UNLAWFULLY COMMIT THE CRIME OF CRIMINAL SEXUAL CONDUCT WITH A MINOR IN THE FIRST DEGREE BY ENGAGING IN SEXUAL BATTERY WITH A MINOR, (Minor DOB _____), WHO WAS LESS THAN ELEVEN (11) YEARS OF AGE, TO WIT: THE DEFENDANT DID PLACE HIS PENIS INTO THE MOUTH OF THE VICTIM; IN VIOLATION OF SECTION 16-3-655(A)(1) [FORMERLY 16-3-655(1)], CODE OF LAWS OF SOUTH CAROLINA (19760, AS AMENDED.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



[Signature]
SOLICITOR