

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James R. Barber, III, Circuit Court Judge

Case No. 2012-CP-40-4268
Appellate Case No. 2014-000374

Andrea Person, #00338104,.....Petitioner,

v.

State of South Carolina.....Respondent.

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1 SAUL KASSIN - IN CAMERA, after being
2 duly sworn, testified as follows:

3 THE WITNESS: Saul Kassin.

4 THE COURT: Can you spell your last name, please?

5 THE WITNESS: K-A-S-S-I-N.

6 DIRECT EXAMINATION:

7 BY MS. PRINGLE

8 Q Good morning, Dr. Kassin.

9 A Good morning.

10 Q Dr. Kassin, where -- where do you live?

11 A I live in Massachusetts, Williamstown, Massachusetts.

12 Q Is that where you're from?

13 A I'm from New York City.

14 Q And where are you currently employed and in what
15 capacity?

16 A I'm a Distinguished Professor of Psychology at John
17 Jay College of Criminal Justice. I'm also now a part time
18 professor of psychology at Williams College in
19 Massachusetts.

20 THE COURT: I can barely hear you.

21 THE WITNESS: All right.

22 THE COURT: You just need to speak up a little bit
23 louder, please.

24 THE WITNESS: Sure. I'm a Distinguished Professor of
25 Psychology at the John Jay College of Criminal Justice in

1 New York, and I'm also a part-time professor at Williams
2 College in Massachusetts.

3 BY MS. PRINGLE

4 Q And when you say "distinguished", does that have --
5 what does that mean? Does that have a meaning?

6 A The University of New York has a small number of
7 positions that they often will recreate, and they are
8 distinguished professorships. John Jay College, which is
9 part of the city; University of New York has roughly five
10 or six of those, and I'm one of those. It's a
11 Distinguished Professorship, which comes with certain
12 advantages.

13 Q And what is your educational background?

14 A I have a Bachelor of Science degree from Brooklyn
15 College, a masters in P.h.D. at the University of
16 Connecticut.

17 Q Where did you perform your post-op or course work?

18 A I performed post-op course work for one year at the
19 University of Kansas, and then for one year at Stanford
20 University.

21 Q And your Doctor of philosophy is in what field?

22 A Social psychology.

23 Q How long have you been practicing as a psychologist,
24 social psychologist?

25 A I got my P.h.D. in 1978 and had it since then.

1 Q Obviously, you're still presently working in that
2 capacity?

3 A Yes.

4 Q And can you explain to the Court the difference
5 between a social psychologist, and I guess a clinical
6 psychologist, or is there a difference?

7 A Sure. A clinical psychologist is a mental health
8 practitioner whose interest is in mental illness, the
9 diagnosis and treatment of mental disorders.

10 Social psychologist is an experimental psychologist
11 focused in on research on associate influences and human
12 behavior. So social psychologists study the processes of
13 persuasion, compliance, obedience to authority.

14 Q And so would that mean that in your work, you
15 actually perform studies yourself?

16 A Correct.

17 Q All right. Have you received any significant awards,
18 honors, in your field?

19 A Yes.

20 Q Tell the Court about some of those.

21 A Well, I was recently awarded from the American
22 Psychological Association a President Citation award for
23 my work on false confessions.

24 I was recently president of the American
25 Psychology-Law Society. I received funding from the

1 National Institute of Child Development, funding from the
2 MacArthur Foundation.

3 Q U.S. Supreme Court Fellowship award?

4 A Correct. In 1984 and 1985, I was awarded the Supreme
5 Court Fellowship. The following year I was awarded the
6 fellowship at Stanford University.

7 Q You said the American Psychological Association
8 awarded you the President Citation, and that was in what
9 area?

10 A For my work on confessions.

11 Q Okay. And how long have you been studying
12 confessions and police interrogation tactics and
13 techniques?

14 A My interest started in 1980 for publication that
15 referred to confessions in 1980. I was seriously involved
16 starting in the 1980s.

17 Q Have there been any gaps since then? I mean, have
18 you consistently studied this issue, this area, since
19 then?

20 A Yes.

21 Q I know you also have other areas of interest, as
22 well; is that correct?

23 A Yes, but my focus has been on confessions.

24 Q Your primary focus is on false confessions?

25 A Yes.

1 Q Professional affiliations, organizations to which is
2 you belong?

3 A I am a member, as well as a fellow, of the American
4 Psychological Association, which is the largest
5 organization representing the discipline of psychology
6 with roughly 155,000 members.

7 I am a member, also elevated to fellow, of the
8 American Psychology-Law Society, which is a division of
9 forensic psychology associated with A.P.A.

10 It is the area -- it is the group that is most
11 directly relevant to the work on confessions. This is the
12 group of forensic psychology. Roughly, they have 1,100 or
13 1,200 members, and I'm a fellow for the Association of
14 Psychological Science, or A.P.S., which is a group of more
15 than 20,000 scientists in psychology that have kind of
16 splintered off the A.P.A. to create an organization that
17 is uniquely associated with the science of psychology.

18 Q All right. You may woven this into there somewhere
19 and I missed it, but the connection between them, the
20 A.P.A., is the American Psychological Association,
21 correct?

22 A Correct.

23 Q And the connection between the A.P.A. and
24 psychologists is what?

25 A A.P.A. is the largest and oldest organization for

1 professional psychology. There are 155,000 members. It
2 represents an umbrella of all the sciences of psychology,
3 as well as the clinical and mental health aspect of the
4 field.

5 Roughly 20 years ago, a group of scientists
6 splintered off of A.P.A., which created an organization of
7 A.P.S., which relates the science only of psychology
8 without the mental health practitioners. That group now
9 has roughly 20-or-so-thousand members.

10 In addition, that most relevant group is a division
11 of the A.P.A. This is a division of the American
12 Psychology-Law Society, with roughly 1,100 or 1,200
13 members, and they represent people who specialize in
14 forensic psychology.

15 Q Okay. And you're a member of all of those
16 organizations, the A.P.A., the Association for Psychology
17 of Science, and the American Psychology-Law Society?

18 A Correct.

19 Q Have you written any books on the issue of
20 confessions, police interrogations, and techniques --

21 A I --

22 Q And/or in the area of psychology?

23 A Well, I've written a number of books at various
24 levels. I've written basic psychology textbooks that are
25 used in colleges and universities. I've written a basic

1 social psychology textbook, also used in colleges and
2 universities, and then I've written a number or edited a
3 number of scholarly books focused on aspects of psychology
4 in the legal system. I've coauthored one book on
5 confessions.

6 Q And that is Wrightsman, L.S., and Kassin, 1993?

7 A Correct.

8 Q And that would be called Confessions in the
9 Courtroom?

10 A Correct.

11 Q Dr. Kassin, would you agree that you have authored or
12 coauthored in the area of psychology, and that one in the
13 specific area of confessions, 12 books, is my count, from
14 your curriculum vitae?

15 A Correct, unless you count -- unless you count the
16 fact that some of those textbooks have gone into multiple
17 editions. There is an eighth edition of one and four
18 editions of another.

19 Q All right. Have you also written book chapters for
20 other books that were not authored -- the book was not
21 authored by you, but you have written book chapters?

22 A Yes.

23 Q Dr. Kassin, I have 21 book chapters. Does that sound
24 about right --

25 A That's about right.

1 Q -- that you've written? And among those, in 2009,
2 Confessions, Evidentiary Reliability of, Wylie's
3 Encyclopedia of Forensic Science?

4 A Correct.

5 Q And also 2009, coauthored with Redlich?

6 A Yes.

7 Q A.D. Suggestibility and False Confessions Among
8 Juveniles, and that was in 2009?

9 A Correct?

10 Q Encyclopedia of Psychology and the Law, you wrote an
11 article on false confessions in 2008 --

12 A Correct.

13 Q -- coauthored? In 2008, Encyclopedia of Psychology
14 and the Law, Juries and Confession Evidence?

15 A Yes.

16 Q And so, there are literally 21, but some of those
17 relate to confessions. Some of those relate to basic
18 psychology, correct?

19 A Correct.

20 Q Have you also -- we've talked about books. We talked
21 about book chapters. Have you also had articles in the
22 area of psychology and/or false confessions, police
23 interrogation, tactics, and techniques published, articles
24 in journals?

25 A Yes.

1 Q Can you tell us, you have one recently published in,
2 I believe, July of 2009, the White paper?

3 A Yes.

4 Q Can you describe the White Paper for the jury what
5 that is and what that means?

6 A The White Paper is a special -- a specially created
7 paper for the American Psychology-Law Society. The
8 American Psychology-Law Society, which represents forensic
9 psychology -- in 2006, the executive committee authorized
10 the writing of the White Paper, which is a policy paper on
11 police interrogations and confessions.

12 I was the person elected to write that Write Paper
13 and to assessable a White Paper writing committee. That
14 paper was finally published and posted online in, I
15 believe July or August of this past summer.

16 It will be published in Law of Human Behavior, which
17 is the flagship journal of the organization, and I believe
18 that is scheduled at the start of the year 2010.

19 It is a -- it is a White Paper. It's a policy piece
20 that has to get vetted through the -- through the
21 organization in order to be accepted.

22 It must be voted on by the executive committee after
23 having gone through a series of processes, which is the
24 assembling of the committee followed by the assembling of
25 a review committee of scientific advisors who are not

1 associated with the area per se. They're basic scientists
2 in that study.

3 The article that we produced, the draft that we then
4 produced, the draft that we then produced, was presented
5 at two open hearings, posted online for eight months for
6 comments from the membership.

7 In light of all of that, it was then revised,
8 submitted to Law and Human Behavior, reviewed by the peer
9 review system, by the editor and reviewers, ultimately
10 accepted and voted on by the Executive Committee. It is
11 the second White Paper this organization has ever
12 authorized.

13 Q Has ever authorized?

14 A Yes.

15 Q And this White Paper, is it called Police Induced
16 Confessions, Risk Factors, and Recommendations?

17 A Yes.

18 Q And this was coauthored by yourself, Steven Drizen,
19 Thomas Grisso. I don't know if Mr. -- how to say
20 Mr. Gudjonsson's first name.

21 A Gisli Gudjonsson.

22 Q Gisli, and it's G-I-S-L-I?

23 A Correct.

24 Q Gudjonsson, G-U-D-J-O-N-S-S-O-N?

25 A Correct.

1 Q Richard Leo, and Allison Redlich, and is this that
2 White Paper, a copy of that White Paper?

3 A Yes, it is.

4 Q And you provided this to me?

5 A Yes.

6 MS. PRINGLE: Your Honor, may I hand up a copy of the
7 White Paper?

8 THE COURT: Yes.

9 MS. PRINGLE: And I apologize to the Court. I have
10 marked on the White Paper, but it's nothing --

11 MR. MEADORS: Do you have an extra copy?

12 MS. PRINGLE: I do not. I can get one.

13 MR. MEADORS: Do you have the vitae?

14 (Pause).

15 Your Honor, I wasn't provided a copy of his resume.
16 Could I have one of those, too?

17 MS. PRINGLE: No.

18 MR. MEADORS: What did she say?

19 (Pause).

20 Excuse me.

21 BY MS. PRINGLE

22 Q In addition to the White Paper, in 2009, did you also
23 coauthor an article called Interviewing Suspects,
24 Practice, Science, and Future Directions and Legal and
25 Criminological Psychology?

1 A Yes.

2 Q In 2009, also did you coauthor an article on the
3 Presumption of Evidentiary Independence. Can Confessions
4 Corrupt Eyewitness Identifications?

5 A Yes.

6 Q In 2008, an article called the Psychology of
7 Confessions?

8 A Yes.

9 Q And that was in the Annual Review of Law and Social
10 Science?

11 A Correct.

12 Q And is there anything about that that is of note
13 about that particular publication?

14 A Well, the Annual Review of Law and Social Science, it
15 -- they recruit chapters in areas that they believe have
16 reached a certain level of maturity, and they want review
17 under a periodic basis. So I was invited by the editors
18 to write that chapter.

19 Q And I'm not going to keep going because -- would you
20 agree that you have six pages in your curriculum vitae of
21 articles that you have authored or coauthored? Does that
22 sound about right?

23 A That sounds about right.

24 Q Beg the Court's indulgence.

25 (Pause).

1 Okay. All of the publications that we're talking
2 about, and you spoke about this in some detail about the
3 White Paper, but all of the publications that we're
4 talking about, are those peer review?

5 A Virtually all of them on the list are peer review. I
6 think that list might also include that article that I
7 wrote to the New York Times, for example, which would not
8 be peer reviewed in the scientific sense.

9 It's reviewed in a different sense, but other than
10 that -- and perhaps one or two others -- those are peer
11 review journals.

12 Q And the ones that I've asked about are peer review
13 journals?

14 A They're not only peer review journals. They're
15 highly selective journals.

16 Q And what does peer reviewed mean?

17 A Peer review means that you submit -- you collect your
18 data. You conduct a study, and you submit the study for
19 publication. Typically, you submit it to the editor of
20 the journal.

21 In most journals, the submission is blind, which is
22 to say that you are to excise your name from the cover,
23 and it's occluded. Essentially, you get a behind review.

24 The editor then sends the manuscript out to three or
25 four editorial consultants or reviewers. They come back

1 with feedback, either a thumbs up, thumbs down, or submit
2 -- resubmit and revise.

3 On the basis of the decision, the editor makes a
4 decision to accept or reject a paper. Most of the
5 journals that are on the list of those that I published
6 have rejection rates up around 70 or 80 percent; sixty,
7 70, 80, even higher in some cases, percent.

8 They have what is known as a very high impact factor,
9 which is a metric that is used to determine how
10 influential a journal is by the extent to which the
11 articles published in that journal are cited in other
12 journals, in other scientific journals.

13 So these are journals that -- that author -- in order
14 to be published in, has to undergo this process of peer
15 review. Typically, it's -- it's a process that takes
16 anywhere between two months and two years.

17 Q Okay. I ask you just -- I'm not going to go through
18 this extensive list, but I'm going to ask you about a
19 couple of more -- a couple of more that are recent.

20 Did you author an article in Current Directions in
21 Psychological Science in 2008 caused "False Confessions,
22 Cause and Consequences, and the Implications for Reform"?

23 A Yes, I did.

24 Q In 2008, did you offer -- did you author an article
25 in criminal justice and behavior called "Confession

1 Evidence, Common Sense Myths and Misconceptions"?

2 A Yes.

3 Q And the last one that I want to ask you about,
4 Doctor, is did you coauthor in 2007 in Law and Human
5 Behavior an article entitled Police Interviewing and
6 Interrogation, a Self-Report Survey of Police Practices
7 and Beliefs"?

8 A Yes.

9 Q Are there any other articles of note that I have not
10 asked you about that I should?

11 A There is an article in 2004 published in
12 Psychological Science and the Public Interest. It is a
13 flagship journal of the American Psychological -- of the
14 Association for Psychological Science, A.P.S.

15 And they, too -- it's journal that the authors are
16 invited to write because the topic seems to have achieved
17 some level of maturity, and there is, if you read through
18 the pages of the journal, they talk about the vetting
19 process that is required, and they require it to be
20 coauthored.

21 It is a coauthored article with Gisli Gudjonsson, who
22 is a British social -- a British clinical psychologist.

23 The reason I think that is significant is that he and
24 I come from very different but complementary perspectives
25 on a field. He focuses on individual differences, mental

1 health issues, clinical issues, diagnosis. And I focus on
2 research on social situations an interrogation. So I
3 think that's a significant article in the sense that it
4 coheres the two perspectives on the field.

5 Q Okay. And that was in 2004 with Mr. Gudjonsson?

6 A Correct.

7 Q And is there any other article that you would like to
8 mention that I've not -- well, I would ask you, your first
9 publication was in 1980, and I think you mentioned that
10 before, correct?

11 A Yes.

12 Q And that one was called prior -- or titled Prior
13 Confessions and Mock Juror Verdicts in the Journal of
14 Applied Social Psychology?

15 A Correct.

16 Q Have you -- and I'm really not sure if we covered
17 this or not. Have you given presentations, offered
18 papers, at professional conferences in your field?

19 A Yes.

20 Q In addition -- and when I -- when I say in your
21 field, I'm comparing psychological association to other
22 psychologists.

23 A Well, it depends. I mean, my field -- I'm a
24 psychologist, first and foremost, but because of the work
25 I do in forensic psychology, I often make presentations,

1 not only to groups of psychologists and academics and
2 researchers, but I have often been asked to speak at
3 medical schools, forensic psychiatrists, at law schools,
4 to law enforcement groups.

5 I've given workshops, for example, at N.Y.P.D., New
6 York City Police Department. So the work I do has taken
7 me out of the psychologist realm, and often I'm making
8 presentations to different attorneys or law professors or
9 law enforcement officers.

10 Q And am I correct that you also give presentations
11 to -- at judicial conferences to judges?

12 A Yes.

13 Q Correct? And among those universities to which you
14 have given presentations, is Columbia Law School one?

15 A Yes.

16 Q Tufts University?

17 A Yes.

18 Q New York University School of Law?

19 A Yes.

20 Q And just New York University. I have that, correct?

21 A Yes, several.

22 Q Is that the extent of that list, or is that a
23 lengthy -- are there --

24 A No. I've given talks at Harvard and several law
25 schools, medical schools. That's not a full list. I

1 think the full list would probably be on the final or next
2 to final pages of the C.V.

3 Q The Cumberland School of Law?

4 A Correct.

5 Q Yes, Ohio State University?

6 A Yes.

7 Q You said New York Police Department.

8 A Yes.

9 Q And you actually presented to senior detectives at
10 N.Y.P.D.?

11 A Yes, yes.

12 Q At whose request?

13 A At the request of the training division, N.Y.P.D.

14 Q And one of the judicial conferences was the
15 Massachusetts District Court Judge's Conference?

16 A Correct.

17 Q You presented to the New York State Bar Association?

18 A Yes.

19 Q You've presented also internationally, correct?

20 A Yes.

21 Q I noticed in Sweden, in Scotland; is that correct?

22 A Yes.

23 Q Stanford University?

24 A Yes.

25 Q Again, Benjamin Cardoza School of Law?

1 A Correct.

2 Q Have you -- and have I missed anything in your
3 qualifications that are applicable? I'm going to ask you
4 about your prior testimony in just a moment.

5 A No.

6 Q All right. Have you been qualified as a social
7 psychologist and as an expert in the field of
8 interrogation practices and confessions prior to today?

9 A Yes.

10 Q In court?

11 A Yes.

12 Q Have you been qualified in state courts?

13 A In some, yes.

14 Q Have you been qualified in Federal Court?

15 A Yes.

16 Q Have you been qualified in military courts?

17 A Yes.

18 Q How many -- have you been qualified in South
19 Carolina?

20 A Yes.

21 Q How many times have you been qualified in South
22 Carolina?

23 A I don't recall the number of times I went to a
24 hearing, but I've testified at three trials and one
25 post-conviction hearing, I believe, in South Carolina.

1 Q And are those three trials -- one is State vs., I
2 think, Billy Wayne Cope?

3 A Yes.

4 Q C-O-P-E, in 2004?

5 A Yes.

6 Q State vs. Myers in 2001?

7 A Yes.

8 Q State vs. Dennis Stevens in 1998?

9 A Yes.

10 Q And then you took those cases. Were you -- did you
11 provide testimony in the -- on the issue of false
12 confessions, police interrogation, tactics, and
13 techniques?

14 A I did.

15 Q One thing I forgot to ask you: The courses that you
16 teach, just -- I'm going to run them off, and you tell me
17 if this is correct: Introductory psychology?

18 A Yes.

19 Q Social psychology?

20 A Yes.

21 Q Psychology and the law?

22 A Yes.

23 Q Research methods?

24 A Correct.

25 Q Psychology of evidence?

1 A Yes.

2 Q Processes of adjudication?

3 A Yes.

4 Q Confession evidence?

5 (There was no response).

6 MS. PRINGLE: Your Honor, at this time, it would be
7 my position that he would be qualified in the field of
8 social psychology, and the field of interrogation
9 practices and confessions.

10 I'm not sure exactly how you want me to proceed at
11 this point, but that is the area in which we would offer
12 him.

13 THE COURT: Social psychology and I'm sorry?

14 MS. PRINGLE: The field of interrogations practices,
15 and confessions; police interrogation practices, and
16 confessions.

17 THE COURT: Any voir dire at this point?

18 MR. MEADORS: I'll do that in front of the jury, Your
19 Honor. Again, we are contesting the field on this type of
20 reliability. I said awhile ago, I will stipulate to his
21 knowledge in the field. I said that, just talking.

22 MS. PRINGLE: Your Honor, and that -- I'm not trying
23 to delay things, but I believe that given what I've been
24 required to establish, I had to qualify him.

25 THE COURT: Yes, ma'am.

1 BY MS. PRINGLE

2 Q I want to go through some factors as to scientific
3 reliability and basis of this field.

4 A Uh-huh.

5 Q And let me ask you this: What is false confession?

6 A False confession is a combination of an admission of
7 guilt followed by a narrative story that associates that
8 guilt with an event that is given by an innocent person.

9 Q And is this a field of study in your -- in the
10 psychological community?

11 A The study of confessions in general is a field of
12 study, and a sub field of that is a study of false
13 confessions.

14 Q All right. And is that field of study and that
15 subfield based on science?

16 A No. It's based on 100-plus years of psychology.

17 Q All right. When you say it's based on 100-plus years
18 of psychology, what are you talking about?

19 A The principles of psychology don't stop in the
20 interrogation room. And psychology has been an
21 experimental science now for about 100 years.

22 Some of those principles that we've learned in those
23 100 years tell us that for -- very simply, for example,
24 that people are very highly responsive to reward and
25 punishment; that people can be placed under such great

1 stress that they become very short term in their focus and
2 don't think about long-term consequences; that people are
3 subject to influence by -- at the hand of authority
4 figures; that people become short-term focused under
5 various other circumstances.

6 It's -- there's just a field of psychology that has
7 spanned literally 100 years that has looked at these
8 phenomenon, not only in laboratory settings but in
9 classrooms, in the workplace, in military settings. And
10 these are the principals that carry us into the
11 interrogation room.

12 What happens in a police interrogation room is not an
13 insulated event. In fact, if you read through
14 interrogation manuals, you'll see that there are
15 psychological underpinnings.

16 In fact, the most popular manual that is used has a
17 chapter on the course psychological principles underlying
18 interrogation.

19 So the practice of interrogation and the consequence
20 of it, what happens to a person in that state is derivable
21 from a general knowledge in psychology.

22 In addition to that, a subfield has essentially
23 become very important recently, which looks not only at
24 those general principles, but how those principals relate
25 specifically in an interrogation context.

1 Q All right. And you have written another article that
2 I didn't ask you about, I don't think. It's titled
3 "Expert Testimony on the Psychology of Confessions, a
4 Pyramidal Framework of the Relevant Science"?

5 A Yes.

6 Q I want to ask you some questions about that. In this
7 article you describe a pyramid or the general framework.
8 And so leading off from what you just talked about these
9 basic core principles of psychology, what is this
10 pyramidal framework?

11 A The pyramidal framework is something that -- that I
12 wrote about, because the study of false confessions so
13 violates common sense and intuition that I think it was
14 important to place it in a broader framework.

15 The pyramid essentially states that you can derive
16 what happens, and you can predict something about
17 confessions first at the very base by appealing to the
18 basic principles of psychology. So I had mentioned a
19 couple: The fact that people are highly responsive to
20 reward and punishment; the fact that people in particular
21 are responsive to short-term rewards and punishments;
22 people are very myopic in the way they make decisions
23 about how to maximize their self-interest.

24 Those are the kinds of principles that have developed
25 over the years in psychology, but believe it or not,

1 beginning with rat and pigeon studies and then working its
2 way up through humans in various studies. So at the base
3 of the pyramid is just basic psychology, which can inform
4 us about the study of confessions.

5 Q So let me just interrupt you briefly. So the -- I
6 think just to sum up what you're saying is that this field
7 of studying, police interrogation tactics, and techniques
8 springs from, and is a subpart, really, of those basic
9 principles.

10 A Oh yes. And, in fact, the first -- the first
11 material written in modern-day psychology about false
12 confessions was written by Harvard psychology professor by
13 the name of Hugo Munsteberg in 1908.

14 He wrote a book that contained chapters on untrue
15 confessions. So this science and the application of basic
16 psychology to it goes back, literally, 100 years.

17 Q Okay.

18 A And so that's the base of the pyramid. At the
19 pinnacle of the pyramid is all of the case studies that
20 people have become familiar with over the years.

21 These are the studies that you find having to do with
22 the study of wrongful convictions. We know that people
23 have been wrongfully convicted. We know that a percentage
24 of those wrongfully convicted had confessed. These were
25 innocent people who confessed, and so at the top of the

1 pyramid are stories --

2 Q Can I stop you before you get to the top of the
3 pyramid? How -- you said this is based on actual cases,
4 historical facts, whether recent or not so recent. How do
5 we know that? And could you talk a little bit about the
6 D.N.A. exonerations and how that has --

7 A Sure. And the D.N.A. exonerations represent one way
8 of knowing. Currently, I believe the innocence project
9 has reported on 245 D.N.A. exonerations. Those are
10 exclusively in rape and murder cases where D.N.A. traces
11 tend to be left.

12 Those cases represent the tip of an iceberg, because
13 those are the small fraction of the cases in which there
14 is D.N.A. available. So there were 245 individuals who
15 had been convicted, whose convictions were overturned,
16 because when D.N.A. tests were done years later, it turns
17 out they were excluded. They were not the donors of that
18 D.N.A.

19 Those are the innocence project cases, and in those
20 cases, roughly 25 percent of them, false confessions were
21 a contributing factor.

22 Q Okay. Twenty-five percent of the total D.N.A.
23 exonerations of which we are aware today had confessions
24 in those cases.

25 A Correct.

1 Q Is that what you're saying?

2 A Correct.

3 Q And go on as far as how we actually know this.

4 A So that's one way we know that there is a false
5 confession, but there are several others. In studies in
6 which some researchers have looked at aggregated -- they
7 have conducted what I would call aggregated case studies.

8 They have combined a number of cases, and what you
9 find in those cases is one way we know that false
10 confessions occur is when somebody confesses to a crime,
11 and then it turns out the crime was never committed.
12 There are a number of those on record.

13 There was an individual, for example, in Texas whose
14 girlfriend disappeared. He confessed to her murder, and
15 then she showed up alive in Tucson, Arizona.

16 Q Okay. And that's -- that's one example, but there
17 are actually examples like that that go back to the 1800s.
18 Did I read that in some of your articles?

19 A They go -- they go back further than that, and they
20 can be found not only in the criminal justice setting, but
21 in corporate loss prevention settings, and in military
22 settings. I think everybody is familiar with American
23 prisoners of war over the years being forced to confess to
24 crimes and deeds they did not commit.

25 Q Okay.

1 A So we know that false confession -- and so false
2 confessions, they occur all over the world. They have
3 occurred throughout human history as far as you can trace
4 them. The Salem witch trials of 17th century illustrate
5 50, mostly women, who had confessed to being witches
6 because of the ways in which they were being interrogated.

7 Q So the way that we know and the basis for this, we've
8 gone through basic psychological Principles of Psychology;
9 the middle of this pyramid, which would be actual cases,
10 aggregated case studies, and are there -- when you say
11 aggregated case studies including -- have there been any
12 empirical research or studies or experimental research and
13 studies --

14 A Well, I haven't talked about the middle of the
15 pyramid yet. I'm still at the top.

16 Q Okay.

17 A How do you know if the confession you have is a false
18 one? D.N.A. is one way, the crime never happened is
19 another way. In some cases, somebody confesses to a
20 crime, and then it turns out it was physically impossible
21 for them to have committed the crime.

22 Q Okay.

23 A So there was one individual in Florida who confessed
24 to a murder of a classmate. It turns out, however, that
25 he was in Brazil at the time, and he had dental x-rays to

1 prove it.

2 Q Okay. So actual cases is -- actual cases would be --

3 A Yes.

4 Q -- one basis for how we know?

5 A Correct.

6 Q And then talk to us about the middle, which is
7 Forensic Studies of Interviewing Interrogations and
8 Confessions?

9 A This is the area that has developed most quickly in
10 the last 25 years or so. There are a number of research
11 methods that are used to study confessions.

12 In some cases, we bring the phenomenon that we see
13 out there in the real world into a laboratory, and we try
14 to conduct laboratory scientific experiments in which we
15 hold some variables constant, vary other variables, look
16 at the effects of those variables on some outcome measure,
17 perhaps confessions, do the statistical comparisons and
18 publish the result.

19 In some cases, the research involves -- and I've done
20 some of this -- surveying police officers about their
21 experiences and observations and impressions.

22 In some cases, it involves interviewing prisoners who
23 have confessed or resisted confession. In some cases, it
24 involves observational studies, live or a videotape of
25 actual interrogations.

1 So there are a number of different methodologies that
2 are used specifically to study what happens in
3 interrogation and with what effect, and that constitutes
4 the middle of that pyramid.

5 Q Okay. Okay. We talked about this during your
6 qualifications to some extent. This -- this field of
7 study, this field of science that we're talking about,
8 you -- you said something a little bit earlier about it
9 had reached a certain level of maturity. What did you
10 mean by that?

11 A The field is embedded in psychology. It is embedded
12 in social psychology. It is embedded in aspects of
13 criminology, but what I mean about having reached a
14 certain level of maturity, there are been, over the years
15 now, hundreds of empirical studies of confessions and
16 interviewing and confessions.

17 So if you'll look, for example, at Gisli Gudjonsson's
18 2003 book, I believe there are close to 1,000 references
19 to empirical studies.

20 What happens in the field at that point is because
21 there is such a body of literature, people start to
22 conduct reviews of that literature, scholarly books are
23 written. Scholarly chapters are written.

24 The field has achieved a certain level of maturity in
25 the sense that it is, in a sense, not only making --

1 making important inroads in the scholarly community but in
2 the implied community, as well, which is why the White
3 Paper, for example, was authorized.

4 The White Paper would not have been authorized. That
5 was a very bold step for an organization that tends to be
6 conservative about this. This was only their second White
7 Paper.

8 So there are a number of metrics like that to
9 suggest -- for example, the American Psychological
10 Association has written, and again, they have a long
11 history of doing this, an amicus brief in the State of
12 Pennsylvania in which they cite much of this research.

13 So it is clear that the area has reached a certain
14 level of maturity that it is generally accepted across
15 science as I could measure, I think, by the three
16 important professional organizations.

17 Q And we're talking specifically about the study of
18 false confessions, police interrogations, tactics, and
19 techniques?

20 A Correct.

21 Q I think you've answered this many times, but you're
22 not the only one writing about this, correct?

23 A No. In fact, there are -- if I were to do a count, I
24 would estimate between 80 and 100 researchers who have
25 been all over the world publishing this research, and

1 again, it's an international enterprise at this point.
2 This is not an American phenomenon.

3 Q And at the end of the White Paper -- or not the White
4 Paper. You've written another article titled "The
5 Psychology of Confessions". This one was published in the
6 Annual...

7 A Annual Review of Law and Social Science.

8 Q Okay. And at the end of this, are there numerous
9 references and citations to other authors and individuals
10 studying this area?

11 A Yes, yes.

12 Q I'd like to hand this up, Your Honor, if I may.
13 (Pause).

14 In addition to the books that you've written,
15 Gudjonsson has a very well-known book; is that right?

16 A Gudjonsson wrote a book initially in 1992 on the
17 psychology of interviewing interrogation and confessions.
18 He then revised it in light of all of the research in
19 2003.

20 Q Okay. So --

21 A There's a book that's about to come out in 2009 that
22 comes as a result of a professional conference held in El
23 Paso, Texas.

24 Q So the research and the empirical studies were
25 somewhere in place in 1992, but they continued to evolve;

1 and, in fact, and he issued a revised edition in 2003?

2 A Correct.

3 Q And another one is about to come out?

4 A Yes.

5 Q And the significance -- what is the significance of
6 that book in the -- in your scientific community, the
7 Gudjonsson book is...

8 A Well, it's something of a handbook. It -- it covers
9 extensively and comprehensively the field. Again, he is a
10 clinical psychologist, so he largely focuses on mental
11 health issues and aspects that make him vulnerable, but he
12 also has chapters on interrogations practices and
13 situations and circumstances that make people vulnerable.

14 Q All right. So it's safe to say that this has been --
15 is there any way to quantify how much this has been peer
16 reviewed in your community, this area of study?

17 A Every one of the articles cited is -- or virtually
18 every one. I mean, I guess that some articles cited
19 referred to newspaper articles, but most of the articles
20 cited from the scientific journals are cited out of per
21 review situations.

22 Q And it's not just you being peer reviewed. All of
23 these other articles that are being published in these
24 journals and publications are being peer reviewed also?

25 A Correct.

1 Q There's no way to give a number. I mean, thousands
2 of articles on this area? .

3 A I don't have a number, but it's certainly well over
4 1,000. And the National Science Foundation has funded
5 much of this research.

6 Q What's the National Science Foundation?

7 A National Science Foundation is the governmental
8 organization that funds science, and much of the science
9 they have funded in the behavioral sciences comes out of
10 the law and social sciences division. A number of my
11 colleagues have had funding from N.S.F., National Science
12 Foundation.

13 Q Okay.

14 A It is --

15 Q So the National Science Foundation considers this
16 area of study a science?

17 A Yes.

18 Q It then fair to say, although I believe you addressed
19 this, that this is accepted generally in your scientific
20 community and the psychological community?

21 A Yes.

22 Q Are -- how many times have you testified?

23 A I don't testify much. Somewhere between 15 and 20.

24 Q All right. Are you the only individual testifying in
25 cases as to the area of false confessions, police

1 interrogations?

2 A No. Some experts testify far more than I do.

3 Q And are you actually familiar with certain
4 individuals all over the country who testify in other
5 courts?

6 A I know many of them, yes.

7 Q And talk to me a little bit, to the extent that it's
8 necessary, and again, I think you addressed this somewhat,
9 quality control procedures within this field of study.

10 A Uh-huh.

11 Q Are there any in place?

12 A Well, when you -- when an article is sent out -- when
13 a study is conducted and an article is sent out for
14 publication, what comes back is a fairly rigorous level of
15 scrutiny over the methods that were employed.

16 "Do you use the right methods in collecting the
17 data?"

18 "Did you have the proper control groups?"

19 "Did you collect the correct measures?"

20 "Were you measuring the right kinds of behaviors?"

21 "Then once the data were collected, did you use the
22 right statistical tests to analyze those data and to make
23 the proper comparisons and conclusions?"

24 All of that is factored into the decision the editor
25 makes as to whether or not to accept an article for

1 publication.

2 If an article falls short of those dimensions, that
3 article is not accepted. So that's peer review on an
4 individual level.

5 Now, imagine a potentially popular or interesting
6 study is peer reviewed and published, if it's important
7 enough, others will then go back and try to replicate that
8 study.

9 So what you'll start to see in the literature as it
10 grows is replications of that basic result, and others
11 will publish that same study or small variations of that
12 study in different settings. And ultimately, that's how
13 the body of literature grows. Eventually, there is enough
14 of a body that the people start to review the entire
15 literature.

16 Q So peer review and quality control are sort of
17 connected?

18 A They're absolutely connected.

19 Q All right. And the one thing that --

20 A The same is true -- quality control is what is used
21 as the filter at the National Science Foundation.

22 Q And one of our factors, Doctor, is consistency with
23 the methods of recognized law and procedures. Do you have
24 tight rituals and control groups that actually are
25 utilized in this field?

1 A Yes. If I were to construct a laboratory experiment,
2 and I would be missing a proper control group that I would
3 need to draw a certain conclusion, that paper would likely
4 not get published.

5 If I conducted an observational study, but I didn't
6 have checks on the reliability of my observers to make
7 sure that different observers would code the interaction
8 in the same way, I would probably not get published.

9 It doesn't mean that every paper is perfect, but when
10 you look at the literature as a whole, and certainly, no
11 single experiment can prove a single point.

12 But when you look at the body as a whole, different
13 researchers in different places using different methods
14 and coming up with very similar findings and conclusions,
15 that becomes the metric of what you're looking for in the
16 well developed body of literature.

17 Q All right. Is this a fair statement, and if it's
18 not, it's Mr. Strickler's fault --

19 A Okay.

20 Q -- but peer review publication, replication of
21 studies, that does constitute a scientific method, or what
22 you could characterize as scientific methodology?

23 A Correct.

24 Q All right. And that would be the same, scientific
25 methodology, in something like D.N.A. analysis, or if

1 you're looking also something physical like blood spatter
2 D.N.A. or something like that, it's the same thing, same
3 approach?

4 A Correct. The scientific method applies to many of
5 the experiments that are conducted, both the field and in
6 the laboratory setting, but keep in mind there are also
7 nonscientific but other ways of gaining knowledge that are
8 used, for example, in criminology where the predominant
9 method is to go out in the field and do a firsthand
10 observation.

11 So there are also those kinds of observational data.
12 It is when you put the whole corpus together, the
13 individual and intensive case studies that you get, for
14 example, from the Innocence Project; the very specific
15 experiments in field settings and laboratory settings, and
16 interview settings; combine all of that with basic
17 psychology and the principles that we're familiar with,
18 and I think that's where you find the entire body that we
19 call the science.

20 Q And when you testified in the cases in which you
21 testified in South Carolina, and everybody in here is
22 familiar with Cope and Myers. I don't see a case on
23 Dennis Stephens, but I know you testified in that case, as
24 well.

25 In Cope and Myers, at least -- also, we are aware

1 that some actual cases you were limited to some extent,
2 but you were allowed to go into actual cases in -- in some
3 of your testimony, correct?

4 A Correct.

5 Q And your testimony in both of those cases was
6 lengthy?

7 A I believe it was.

8 Q Do you remember?

9 A I don't remember, but I believe it took the better
10 part of an afternoon.

11 MR. MEADORS: Your Honor.

12 MS. PRINGLE: That's all that I would have.

13 MR. MEADORS: Just a few questions.

14 Were you done?

15 MS. PRINGLE: I'm done, yes. I'm sorry.

16 CROSS-EXAMINATION:

17 BY MR. MEADORS

18 Q Hi, Doctor.

19 A Hi.

20 Q Thank you. Give me one second.

21 (Pause).

22 You might can anticipate this question, but I think
23 you've been asked before -- and no hard feelings, Doctor,
24 to start off with -- the Psychology of Confession Evidence
25 that you wrote, you're familiar with that article?

1 A Yes, 1997.

2 Q The failure to say that in here as a result -- let's
3 see. You were -- I think you were being asked in one of
4 these cases. I think Cope, I'm not sure. One of them. I
5 mean, you remember being asked about this article, I'm
6 sure, whether or not it qualifies as scientific field.

7 They basically quoted out of your article, as a
8 result of this neglect the current empirical foundation
9 may be too meager to support recommendations for reform or
10 qualifies a subject to scientific knowledge, according to
11 the criteria recently articulated by the United States
12 Supreme Court, Daubert vs. Merrell Dow Pharmaceuticals.
13 Do you remember that?

14 A Yes.

15 Q And your answer was correct?

16 A Really, you'd have to go back to create the better
17 context, but yes, my answer was correct.

18 Q So you were saying, and Cope was then -- but you were
19 saying then, at least in this article, that you didn't
20 think it was -- met the Daubert?

21 A No. I didn't say that about the entire literature.
22 In my call for additional research, it was clear that some
23 aspects of the science are relevant, but some were not.

24 Q Which are?

25 A Well, for example, we know a lot about lie detection,

1 human lie detection and credibility assessment. We know
2 the factors that increase or decrease accuracy.

3 Q And what did you say about lie?

4 A Credibility assessment and human lie detection.
5 That's a very well-developed area, and it has been for 40
6 years.

7 We know a good deal about certain types of risk
8 factors, but we know less about others. One of my sources
9 of -- I don't want to call it dissatisfaction, but my hope
10 is that we will in the future be able to use the
11 laboratory to create -- essentially, to build a better
12 mouse trap in order to create maximally effective methods
13 of interrogation.

14 Q Because you don't have that now?

15 A We're working on it.

16 Q I understand that, but you don't have it now.

17 A We don't have the answer to how to create the perfect
18 interrogation; that is correct.

19 Q That's part of the problem of why it's not reliable,
20 Doctor.

21 A The findings we talked about in the courtroom are
22 absolutely reliable. These are findings that are embedded
23 in 100-plus years of psychology in addition to this
24 literature.

25 Q Back to the rats and the pigeons. You said earlier

1 you --

2 A It would includes rats and pidgeons and children and
3 adults from all --

4 Q Explain the rats and pidgeons to me.

5 A Well, when the field of psychology began, one of the
6 ways in which psychologists became interested in how to
7 effectively learn and remember and responsive to reward
8 and punishment was to do certain kinds of experiments with
9 rats and pigeons that you couldn't do with people for
10 obvious, ethical reasons.

11 So they developed certain laws of reinforcement
12 showing if you reward people at a certain interval, at
13 certain numbers of times, they become very, very
14 predictable and patterned in their behavior.

15 So at the start of the 20th Century, right up to the
16 1930s, many behavioral psychologists were using rats and
17 pigeons.

18 Well, subsequent to the 1930s and '40s, most
19 psychologists were dissatisfied with that and started to
20 take those same principles and apply them in human
21 settings, and that's where they moved from the rats and
22 the pigeons on through human behavior.

23 Ironically, what you would find is despite that
24 shift, the principles and patterns often remain very much
25 the same.

1 Q Would you agree that there's generally no accepted
2 theory within the scientific -- let me ask you this.
3 You've gone back and forth, is this science or psychology?

4 A Psychology -- psychology is a science, and it depends
5 on how the data are collected. Psychological methods
6 of -- science is not defined by the content. It is
7 defined by the procedures and methods and protocols that
8 were used, and whether in the end the conclusion you draw
9 is the conclusion you can draw. That requires conducting
10 clean experts, experiments that have reliability, internal
11 validity, external validity.

12 Q And you can't -- and there are no studies like that
13 that exist to base your testimony on today, none?

14 A No. Actually, what my testimony would be today,
15 there are studies that do that.

16 Q Okay. Name them.

17 A Well, which -- which ones do you want?

18 Q No. You're the expert, or trying to be. You tell
19 me.

20 A Okay. I --

21 Q What is the clean, imperial study, pristine, pure?
22 That's what, kind of, empirical means, isn't it? If you
23 look at it and determine --

24 A There is no single study. There is a body of
25 research. Here is what we know about false confessions:

1 If you were to ask me, can you quantify the prevalence of
2 false confessions, I would say, "In all honesty, no."

3 I fact, I wouldn't trust an estimate. I think in an
4 effort to give an estimate is dishonest. Does that mean
5 there is not a science? No.

6 I can tell you what we do know about the numbers. I
7 can tell you what percentage of Innocence Project cases
8 are comprised of false confessions.

9 I can tell you when you survey, because I've done
10 this to police officers and asked them, "In your
11 experience and training, how often, or what percentage of
12 innocent people that you've seen have confessed?" They
13 estimate under five percent; 4.78 percent is their
14 estimate.

15 Can I finish?

16 Q Yes, sir. That's why I raised my hand.

17 A Okay.

18 Q Go ahead.

19 A I can tell you a number of -- I can give you a number
20 of parameters, and in the end, I will be honest and tell
21 you from all of that, I can't derive an incidence rate,
22 but are you better off knowing what I know about the
23 numbers than not? I think you are.

24 Q What you described, like talking to the police
25 officer, doing that, and all of that going into the basis

1 of your knowledge, that is clearly anecdotal evidence. I
2 mean, you've got to agree with that.

3 A No, I wouldn't.

4 Q You wouldn't agree?

5 A No.

6 Q So all of this telling, "This happened" or "this
7 might happen here," that's not anecdotal?

8 A No. When you conduct a survey, they can analyze the
9 data, and then you do the right comparisons, you can --
10 you can both describe it, in some cases, looking at
11 differences.

12 So let's talk, for example, at a study that looks at
13 an aggregate of false confession cases, a study that looks
14 at 125 false confession cases.

15 Q What is that study?

16 A That study is by Steven Drizen and Richard William
17 (phonetic) published in 2004. It's not -- it's not a
18 psychology study per se, but it's an aggregated case study
19 which it has some -- I think some important utility.

20 They look at that study, and they find, for example,
21 that there is a disproportionate number of juveniles in
22 that population of false confessions, disproportionate
23 compared to the percent of juveniles you would expect to
24 find in the system.

25 Now, that tells them something about the

1 vulnerability of juveniles in this system. Alone, that
2 study can't be used to make that point, but when you
3 conduct experiments with children of different ages where
4 you vary nothing but their age, and you look at the
5 difference in their responses, you can start to understand
6 that vulnerability.

7 So by using multiple methods, I would never pin any
8 conclusion on a single study, but by using multiple
9 methods, there is a concept that we have in science called
10 convergent validity.

11 If you study a phenomenon from different angles and
12 ways using different methods and come up with
13 approximately the same result, it suggests there's a
14 strong signal there.

15 Q That study you mentioned, in 2004, there were
16 approximately how many, 60 cases?

17 A 125.

18 Q 125. And how do cases -- who decided which case
19 you'd put into that? And, as a matter of fact, I think
20 you were trying to imply to Her Honor there were empirical
21 studies. Are you saying -- is this what you're calling an
22 empirical study?

23 A Don't confuse empirical --

24 Q Just answer --

25 A (unintelligible).

1 Q -- my --
2 THE COURT REPORTER: I'm sorry --
3 (unintelligible).
4 -- can you guys speak one at a time, and can --
5 THE WITNESS: Yes.
6 THE COURT REPORTER: -- you --
7 THE WITNESS: This is --
8 THE COURT REPORTER: -- slow down --
9 THE WITNESS: -- an empericial --
10 THE COURT REPORTER: -- a little --
11 THE WITNESS: -- study --
12 MR. MEADORS: You're saying --
13 THE COURT REPORTER: -- bit. Thank you.
14 BY MR. MEADORS
15 Q You're saying it's an empirical study?
16 A Yes.
17 Q All right.
18 A It is an empirical study.
19 Q Go ahead and explain.
20 A By any scientist's definition, that is an empirical
21 study because it deals in the numbers. It doesn't -- it
22 doesn't look at a single case study, but it aggregates
23 over a set of case studies in order to draw some
24 conclusions.
25 So, for example, they aggregated and found that

1 juveniles are overrepresented in that population. Can
2 that study alone be used to suggest that juveniles are
3 uniquely vulnerable? No. Because there are a number of
4 alternative explanations.

5 One of the reasons we do scientific research is
6 because, you know, I can look at a wrongful conviction
7 involving a confession, and I can have my own ideas as to
8 why that innocent person confessed, but those are my
9 ideas.

10 I can even talk to that innocent person and get his
11 explanation for why he confessed, but that's his
12 explanation. Even that is not something we can rely on.
13 So you have to take those cases, use them as a basis for
14 doing further research and then go ahead and conduct
15 interviews, surveys, experiments, observations.

16 Q In that 2004 study, is that the one where it turned
17 out a large percentage of the folks weren't convicted
18 either because they weren't arrested, and it was just
19 clearly incredible confessions they had given, and a lot
20 of them weren't even arrested?

21 I've got your transcript. You talked about this
22 before.

23 A I don't remember the numbers of people who were
24 arrested. There are criteria for selecting the 125 false
25 confessions was simple. It had to be an unambiguous false

1 confession. That meant it met four criteria: The crime
2 never happened, it was physically impossible for this to
3 have been the person --

4 Q The crime never happened?

5 A Correct.

6 Q That's what you're basing your opinion on, the crime
7 never happened? This study is about crimes that didn't
8 happen?

9 A Can I finish?

10 Q Sure.

11 A There are 125 false confessions. On the question of
12 how did they derive that sample of false confessions, I
13 believe that was your question.

14 Confession qualified as a false confession: If it
15 turned out that a person confessed to a crime, and then it
16 turned out that the crime was never committed, they
17 confessed to a crime that didn't happen. That's a pretty
18 good indication of a false confession.

19 A second criterion they used is that a person
20 confessed to a crime, and then it turned out it was
21 physically impossible for that person to have committed
22 that crime.

23 A third is that the actual perpetrator was
24 identified.

25 And a fourth is that D.N.A. or some additional

1 evidence came in to exonerate that person. Those cases,
2 whether they were postarrest, preprosecution, post
3 conviction, whatever that various status, they fit one of
4 those criteria.

5 Q Okay.

6 A They were proven false confessions.

7 Q Who collected them?

8 A They just took whatever they could find.

9 Q But a lot of those folks in that study or that -- but
10 they chose which one to go out and take meeting those
11 criteria. It wasn't just that --

12 A They had large numbers of possible false confessions.
13 In fact, they had large numbers of confessions to choose
14 from and ended up picking only those that the evidence was
15 clear was proof of a false confession.

16 In other words, they excluded what might have, or
17 should have been, or could have been, a false confession.
18 They adopted a stringent criteria, which is why the number
19 was as low as 125, but they wanted to be sure that they
20 didn't bring in any confessions that turned out to be good
21 ones.

22 Q And those were clearly false because in some cases,
23 the crime hadn't even been committed. Is that --

24 A In some of those cases, yes.

25 Q Actually, a large portion of them.

1 A No, a very small number.

2 Q And that -- you're taking that study where you're
3 actually going out and looking for cases where you know
4 it's a false confession and trying to come in and use that
5 as a basis of knowledge to talk about all confession.

6 A No.

7 Q Where a crime occurred. You're not?

8 A No, that's not what it is. They're simply trying to
9 describe --

10 Q No, no.

11 A -- the --

12 Q Excuse me. I'm not saying that's what they did. I'm
13 saying that's what you're trying to do, saying that's a
14 study.

15 A I said this before on direct, and I'll say it again.
16 I will not pin a conclusion on any single study or any one
17 or two studies.

18 These conclusions are derived from a convergence of
19 evidence, from a range of methodologies and a range of
20 studies.

21 Q That's what I'm trying to get at.

22 A Yes.

23 Q That is what you're basing it on. That is not proven
24 reliable. Certainly not scientific reliable, and what's
25 the other study, while we get to that? You said one or

1 two studies. What's the other one, is it the D.N.A.?

2 A There are hundreds of studies. I don't know what --

3 Q Well, name them. What's the one, besides this one
4 with Leo, where you look for all false confessions?

5 What's the other one?

6 A There is not another one. There are hundreds of
7 others. If you -- the exhibits, the articles, provide
8 reference segments. I can talk about some of them. Some
9 of them involve observational studies.

10 Some of them involve -- for example, I'll take Gisli
11 Gudjonsson, who I had coauthored with. Gisli Gudjonsson
12 has interviewed people. He has interviewed prisoners. He
13 has interviewed people at various ages. He would ask, for
14 example, prisoners, "Have you ever confessed to a crime
15 that you didn't commit?" And --

16 Q What did they say?

17 A 12 percent said they had.

18 Q That's not an empirical study, going and asking
19 prisoners whether or not they falsely confessed, Doctor.

20 A That --

21 Q You're not going to say that on the record for the
22 record, are you?

23 A What I am going to say is that 12 percent tells me --
24 that 12 percent of prisoners claim they had confessed to
25 that crime they didn't commit. Now, that's what that fact

1 tells me.

2 Does it tell me there is a disparity between that
3 number and the fact that police officers that we have
4 sampled, 631 of them, estimate that 4.78 percent of
5 innocent people, in their experience, confessed? No.
6 That's not a disparity. That's a different number, and
7 that's why I would never pretend to take two numbers like
8 that and arrive and extrapolate at some prevalence rate.

9 Q Talking -- I'm sorry. Go ahead. I didn't mean to.
10 Go ahead.

11 A These are numbers. These are numbers that provide us
12 with knowledge. Whether that knowledge leads us to draw
13 very precise conclusions or not is another -- it's another
14 question.

15 Q You can't even draw very precise conclusions from it.

16 A We can. I can draw precise conclusions about the
17 kinds of factors. I talked, for example, about Drizen and
18 Leo and the overrepresentation of juveniles.

19 Drizen and Leo doesn't enable us to say that
20 juveniles are overrepresented just based on their study,
21 but when you look at the corpus of development psychology
22 research on juveniles and the risks that they are at in a
23 variety of studies, laboratory, field studies, not only
24 Drizen and Leo, again, a very clean portrait is painted.

25 That's why the American Psychological Association,

1 the Association for Psychological Science, and the
2 American Psychology Law Society all believe that there is
3 general acceptance on that point that juveniles are
4 overrepresented.

5 Q Would you agree with me that taking to the prisoner
6 there -- and it was only 12 percent who said they falsely
7 confessed.

8 A Twelve per---

9 Q That's not bad.

10 A Twelve percent say they false confessed. I'm not
11 even -- and I wouldn't even -- I'm not even going to take
12 the next step to tell you that if 12 percent said it, that
13 is not an overestimate or an underestimate.

14 Q I follow you on that. I do follow you on that.

15 A No. That's a number. Anecdotal evidence is one
16 person tells me a story. When I interview hundreds and
17 out of the hundreds, I arrive at a number of 12 percent.

18 That's not anecdotal. That is empirical. Empirical
19 simply means you're converting your data collection into
20 numbers for descriptive purposes at the very least.

21 Q You can't take a bunch of anecdotal evidence and make
22 it an empirical study, Doctor. If go back in the world,
23 let's say like any -- if you're trying to take -- test a
24 drug --

25 A All right.

1 Q Don't you have to have a controlled environment?

2 A It depends on the conclusion you're trying to draw.

3 Q Exactly.

4 A Now, Gisli Gudjonsson goes out, and he interviews
5 college students, university students, high school
6 students of varying ages, and he asks them the question,
7 "Have you ever confessed to a crime you didn't commit,"
8 and he finds, as he has found, that the younger and less
9 educated they get, the higher that number goes. That is
10 an empirical study, and that is a controlled study,
11 because all kids from the same location but of different
12 ages were asked the same question. Differences in the
13 numbers reflect differences in their age.

14 Q And they could be lying.

15 A They could be lying at ten years old. They could be
16 lying at 20 years old.

17 Q Okay.

18 A But it's an empirical study with the proper controls.

19 Q If I asked you this before, I'm sorry. Do you agree
20 there is generally no accepted theory within the
21 scientific community as to the opinion as to whether
22 frequency of false confessions occur? You agree with
23 that?

24 A I don't understand the question.

25 Q Is there a frequency out there when this has

1 occurred? Can you tell me --

2 A Can I give you a single number?

3 Q That's the easiest way to say it.

4 A No.

5 Q Okay.

6 A No.

7 Q And this other D.N.A. case you're talking about with
8 the Innocence Project, I mean, is that an empirical study
9 about the Innocence Project?

10 A No. Again, what it is, is an aggregate. They have
11 245 case studies. They have gone back over those case
12 studies, and in a sense, they have autopsied them looking
13 for common factors.

14 Imagine you have a problem in medicine. You have a
15 group of patients. They all seem to have the same sort of
16 illness. You go back, and you study those patients lives
17 to see what it is they have in common and what is
18 different. The work that comes out of the Innocence
19 Project is no different than that type of medical
20 research.

21 Q If they were all targeted cases, also, where people
22 either said, "I'm innocent," or there's D.N.A. involved,
23 that's how they got the cases.

24 A No. Actually, the 245 cases represent a subsample.
25 They have had thousands of prisoners writing them pleading

1 their innocence. The only prison -- the only cases they
2 take is if there was D.N.A. that can test that.

3 Q That's what I meant to say.

4 A Yeah. And when they go back and test the D.N.A., not
5 every time does the prisoner who is claiming he's
6 innocent, turn out to be innocent.

7 Q Correct.

8 A In roughly 50 percent of those cases. The number
9 varies from 45 to 60 percent, and roughly, I'll say 50
10 percent of the cases, the D.N.A. test affirms guilt.

11 Q And I guess what I'm trying to say, if I'll let me
12 finish this, and you correct me if I'm wrong, but if
13 you're trying to base your opinion based on empirical
14 studies involving statements, then I guess you want them
15 all to involve statements.

16 That D.N.A. case, the Innocence Project, the 245,
17 only about -- your number has gone up a little bit, but
18 only about 20-or-so percent even involved a statement in
19 this case.

20 A Twenty or 25 percent.

21 Q So how can you take that and say, "Based on that,
22 this is an empirical study that I'm going to come inhere
23 and give my opinion about." This -- that's not fair.
24 That whole study wasn't even about statements.

25 A It depends on the conclusion I'm drawing. If I come

1 in here to simply state, to give you a sense of the
2 parameters of false confessions you should know, that in
3 wrongful conviction cases where D.N.A. is present, 20 to
4 25 percent of those cases contain confessions as a
5 contributing factor. That's my statement.

6 I'm not drawing any additional conclusions. However,
7 I believe that every decision maker, particularly in an
8 important context like this one, is better off having that
9 information than not having it. I'm not adding anything
10 to it. I'm presenting the data.

11 Q And that will be up to the judge, if she finds it's
12 reliable, whether you get to do that or not, sir, but I
13 mean, again, this D.N.A. study, not even all the cases
14 that you are saying is an empirical study involved the
15 statements. That's true, isn't it?

16 A The Innocence Project is not an empirical study. It
17 is a source of information. It is -- they have not
18 published that. It sits on their website. You know, you
19 can learn from that website that 80 percent of their cases
20 involve eyewitness misidentifications.

21 Q So that's not an empirical study?

22 A It's not an empirical study. However, it is possible
23 for somebody to draw an empirical study by studying those
24 case files. Again, in the same way that a medical
25 researcher would take a population of sick people who have

1 a common illness and study the common denominators to see
2 how they're similar and how they're different, this is
3 exactly the kind of work that comes out of that Innocence
4 Project.

5 Q Those are blind studies, though. Yours isn't a blind
6 study. That's the difference.

7 A No, they're not blind studies. These are people that
8 -- if the medical community, when they study a population
9 of sick people, they know they're sick.

10 Q Exactly, and they're choosing them blind. In drug
11 tests when they do a clinical study --

12 A That's different. That's different.

13 Q How is --

14 A That's --

15 Q That's your --

16 A Of course, that's different, but now you're talking
17 about placebo control groups.

18 Q Exactly.

19 A Well, but that's an experiment. That's a scientific
20 experiment where you hold constant certain aspects of your
21 population, and you vary certain variables.

22 So, for example, if I want to draw the very precise
23 conclusion that smoking cigarettes causes cancer, I would
24 have to go out and study groups of people, some of whom
25 smoke, some of whom do not. That begins to look like a

1 scientific study.

2 In fact, to most people's surprise, it is not,
3 because smokers and nonsmokers differ in any number of
4 ways. So how do you go back and do that?

5 Either you statistically control for those other
6 differences, so that statistically you can determine that
7 smoking, and only smoking, is responsible for the
8 difference in cancer rate, or you can do animal studies,
9 as is often the case, as is often funded, in which you
10 randomly assign animals to receive or not receive the
11 nicotine equivalent of smoke. And you then look at the
12 differences there, as well.

13 Q I understand --

14 A Those are controls -- I'm sorry.

15 Q I'm sorry.

16 A Those are the controlled studies, but the goal there
17 is to draw a causal conclusion that smoking causes cancer.

18 You can't go to the Innocence Project website and
19 draw causal conclusions. You can develop and generate an
20 idea that you can then try to get converging evidence for,
21 but what you can get from it is a sense: How many false
22 confessions are there in that sample, and when they occur,
23 what other factors were present in those cases?

24 So you can start to look at that -- at that level at
25 some hypothesis test. It doesn't make that the ultimate

1 final study. It's a data point. Every study is a single
2 data point.

3 Q This is why you said back in 1997, you couldn't meet
4 Daubert. Everything you're saying right now on it,
5 Doctor.

6 A I didn't say that in those terms, and again, if you
7 bring it back into context --

8 Q I will.

9 A And let me -- let me point out in 1997, of course, I
10 said that, and I would have -- and I would have said it at
11 any moment.

12 Q So you did say it in '97?

13 A With regard to certain aspects of the field, and I --
14 the reason I'm comfortable saying that is for those
15 aspects of the field that are not generally accepted, I
16 wouldn't give testimony to those factors. The factors
17 that do have general acceptance, I am happy to testify to,
18 if allowed.

19 Q And --

20 A So that's the difference, and what they also say,
21 1997 was 12 years ago. The reason Gudjonsson updated his
22 book was because of the hundreds of new studies that were
23 conducted all over the world. What I said in 1997 doesn't
24 apply in 2009.

25 Q So far I've heard two studies from him. One of them

1 you said the Innocence Project doesn't qualify as an
2 empirical study, Doctor. Do you --

3 A The Innocence Project is not a study. It's not a
4 study that I've cited in any article.

5 Q So the one I've heard about is the Jones study.
6 That's the only one I've heard about the 125,
7 specifically. In that one, you're specifically looking
8 for people that you know falsely confessed, and you
9 know -- I mean, that's the only study you're citing
10 particularly at all.

11 A No. I mean, there are hundreds of studies. You
12 know, where do I begin?

13 Q Name them.

14 A Okay. There are studies on let's say --

15 Q Specifically.

16 A Yeah, I'm going to take a factor. Let's take a risk
17 factor. I'm going to take a risk factor on the
18 presentation of false evidence. It turns out that when
19 you mislead people about reality by bringing people into
20 an insulated situation -- I'm sorry.

21 (Pause).

22 Q I'm just getting water. Do you want some water?

23 A When you bring somebody -- when you bring somebody
24 into a situation and you mislead them about reality --
25 either by having Confederates come in and present a

1 different version of reality, or by changing information
2 that you give them, or by providing them with false
3 feedback about their bodily behavior, and any number of
4 ways that psychologists have done this -- it turns out
5 that when you misled people about reality, you can produce
6 profound changes in their behavior, including leading them
7 to confess to something they didn't do, and leading them
8 not only to confess, but in some cases, to believe they
9 did it.

10 Now --

11 Q What's the name of --

12 A There is --

13 THE COURT REPORTER: I'm sorry. What? I didn't --

14 BY MR. MEADORS

15 Q What's the name of that study?

16 A Which study?

17 Q What you're just talking about.

18 A I can give you ten studies that show this: Kassin
19 and Keitchel (phonetic) was one; Nash and Wade is another.
20 You know, I would go to the references section of an
21 article and find the corpus of those studies.

22 I would talk about placebo control group studies in
23 medicine where the reason that the effect of lying to
24 somebody about evidence is so profound, and so well known
25 in science, that in order to get a drug tested and

1 approved at the F.D.A., there has to be a placebo control
2 group.

3 What that means is not only does the patient not know
4 if what he or is she is getting is the drug or a sugar
5 pill, but neither does the patient's doctor know.

6 Q Okay.

7 A And the reason we do that is because of the power of
8 suggestion. If you lie to somebody and tell them they're
9 taking a pill that works when it doesn't, you're going to
10 get a certain number of cures as a result of that. That
11 is the level of profundity of this issue about false
12 evidence.

13 You can change people's visual perceptions. You can
14 change people's memories for their own events, the things
15 they have observed. You can change their body type.

16 So on the question of does false evidence wreck
17 havoc? Does it lead people to confess? Does it lead
18 people to any -- to do any number of things that counter
19 their interest? There's 100 years of research on this.

20 Q Okay. So now, to follow up on that. You're telling
21 this judge right here that the Kassin and Keitchel?

22 A Correct.

23 Q Is an empirical study?

24 A Yes.

25 Q And that involves students?

1 A Yes.

2 Q Students who were given the task of entering data

3 using specialized computer software?

4 A I don't know about the specialized computer software.

5 Q Thank you.

6 A But yes.

7 Q I'm on it, though, right? This is it?

8 A Yes.

9 Q Okay.

10 A Yes.

11 Q They were specifically told if they hit the alternate

12 key, the program would crash. Eventually, the program did

13 crash, and the student was accused of hitting the

14 alternate key, even though the key was not struck. During

15 a subsequent interrogation, which included an accomplice

16 who claimed to have seen the student hit the alternate

17 key, 69 percent of the students signed a false confession?

18 A Correct.

19 Q And you're using that as a basis of knowledge for

20 false confessions in the criminal world, a classroom

21 study?

22 A Well, it's not --

23 Q You're saying this is an empirical study, for the

24 record?

25 A It's absolutely an empirical study. It's an

1 empirical study which was published in Psychological
2 Science, which has an 85 percent rejection rate.

3 Q Classroom students.

4 A Well, it's not classrooms. They're in a laboratory
5 situation.

6 Q Doctor, let's go specifically to the technique.
7 What's the technique?

8 A What technique?

9 Q That's what I'm asking you.

10 A The question --

11 Q In peer reviews of the technique, what's the
12 technique?

13 A I don't know what you're talking about.

14 Q That's why it's not reliable, Doctor. You can't even
15 tell me what technique.

16 MS. PRINGLE: Your Honor, that's not --

17 THE WITNESS: What are you talking about?

18 MS. PRINGLE: -- a question. It's Mr. Meadors
19 getting angry and being argumentative. It doesn't have
20 relevance. It's not a question.

21 BY MR. MEADORS

22 Q I'm not angry at all.

23 A What technique are you referring to? I know
24 thousands of techniques in the universe. What -- which
25 technique are you referring to?

1 Q The technique you're trying to show Your Honor you
2 used based on this science that's reliable. That's what
3 I'm asking. What's your technique?

4 A The technique in what, in the Kassin and Keitchel
5 (phonetic) study?

6 Q Doctor, you tell me.

7 A I'm sorry. I can't answer a question I don't
8 understand.

9 Q The technique that you, I guess, are going to rely on
10 in your testimony.

11 A You want me to ask the question? I don't know what
12 question you're asking.

13 Q What are you trying to get Your Honor to find
14 reliable based on this scientific -- what technique is
15 used to make -- that you say is based on reliable
16 scientific information?

17 A There is a body of literature that enables us to know
18 something about confessions and confession evidence,
19 police practices, interviews, interrogations, and the
20 results of all of that.

21 There are hundreds of studies that enable us to
22 identify risk factors. We are in a position to know what
23 happens in an interrogation, what training, advises in an
24 interrogation, what techniques tends to be used, which of
25 those techniques, if any, put innocent people at risk,

1 which do not.

2 Those are the studies I would talk about would be
3 restricted to talking not about whether or not some
4 absolute number of innocent people confess, because I
5 haven't got a clue what that absolute number is, and I
6 don't trust anybody who says they do.

7 Q Okay. And that's like a statistical.

8 A Nor --

9 Q You can't come up with like in a --

10 A Well, I can -- I can -- I can derive risk factor
11 estimates. I can tell you that in the presence of false
12 evidence, you're more likely to get a confession,
13 statistically more likely than in the absence of false
14 evidence.

15 But what I can't do is derive a precise estimate.
16 Nor would I, even if I could, but I usually can't, do what
17 a jury should do, which is to determine whether a specific
18 confession is true or false. That not would not my goal.

19 Q You never --

20 A My goal is not --

21 Q You never would say that, would you?

22 A One of the -- I would not say that.

23 Q That's what I meant.

24 A I'm not --

25 Q I remember you said that before.

1 A I mean, certainly, we can identify false confessions
2 as false in the way we talked about earlier.

3 Q Right.

4 A If the crime hadn't been committed, I have a pretty
5 good idea that was had false confession.

6 Q Sure.

7 A But not by -- by looking at the statement per say can
8 I do that. In fact, I've published studies showing that
9 when I show people, police officers, lay people,
10 confessions that are true confessions or false
11 confessions, and I know they're true or false because I
12 went into a prison, and I had prisoners tell me the
13 stories of why they were incarcerated, and I had them at
14 other times make something up that I knew they didn't do,
15 people can't tell the difference between the two sets of
16 statements, and I put myself into that category.

17 So it is not, and would not be my goal to, you know,
18 opine about the reliability of any particular confession.
19 Only --

20 Q And it --

21 A Only to talk about generic risk factors.

22 Q And just following up on that, and I didn't even
23 think about this until just now, but I think you said
24 before you wouldn't give an opinion on something that --
25 like a defendant said, unless it was corroborated, I read

1 in one of the transcripts last night. I mean, you
2 wouldn't even try to even consider that?

3 A I don't know exactly what you're referring to but...

4 Q Well, if the only evidence you had was just that a
5 defendant said something and nothing else, that wouldn't
6 come into your analysis. I read that in one of the
7 transcripts last night. I don't know if it was Cope or
8 the other one. Do you know what I'm talking about?

9 A Sure.

10 Q Okay.

11 A Sure.

12 Q Tell us, what does that mean?

13 A Well, you know, again, coming -- you have to
14 understand, I make decisions at two levels. The first
15 decision I make is whether to get involved in a case, but
16 once I make -- in order to know that, I want to know,
17 generally, what is the defendant's perspective on what
18 happened, what is the -- what are all the perspectives on
19 what happened.

20 Q So you have talked to Ms. Person?

21 A No, I have not.

22 Q Okay.

23 A I have not, because it would not be my goal -- and
24 there is no -- there would be no reason to, to come in
25 here and pretend to have an opinion on whether the

1 statement she signed is true or false, whether she is
2 innocent or guilty. That isn't my purpose.

3 My purpose would simply be to provide a jury with the
4 tools necessary for making that evaluation by talking in
5 generic terms about the science, because I think the
6 science is not something that the average person knows.
7 In fact, I'm fairly certain of that.

8 Q And you go back to that word "science". I'll agree
9 with you then we're talking about science. Specifically,
10 our courts -- that technique we just talked about, and I'm
11 still not clear on what it is, but what's the prior
12 application of that to the type of evidence involved in
13 this case?

14 A Prior application of what, I'm sorry?

15 Q The technique you used to the application of this
16 case.

17 A There -- there is no one technique. The literature
18 is based on a number of different methods and a number of
19 different studies.

20 The concept -- what I must be failing to get across
21 is the concept of converging validity. No single method,
22 no single study, you know, can produce a conclusion.

23 The conclusion has to follow from a body of studies
24 because every study has some limitations, and I would be
25 the first to acknowledge -- in fact, I acknowledge the

1 limitations of my own studies in the discussions of those
2 studies.

3 Every study has a limitation, and that's why you
4 can't rely on any single data point. You take a number of
5 data points collected by different researchers in
6 different ways, and that becomes the analysis. You can
7 statistically determine that there are risk factors on
8 that kind of analysis.

9 Q But not having any false confessions they won't. You
10 could never statistically come up with that?

11 A You know, I -- I -- I know of experts who have tried,
12 and I just -- they require -- it requires too much
13 extrapolation and too many assumptions.

14 Q I agree with you.

15 A We have missing cells. There's certain data points
16 we don't have, and I'm not willing to make an estimate.

17 Q I'm just going down the list, Doctor.

18 The quality control procedures used to ensure
19 reliability.

20 A Yes.

21 Q What are they?

22 A Again, when you submit an article for publication --
23 and again, it depends on the level of the journal, but
24 typically, you're going to get three or four reviews. An
25 editor takes the publication, sends it out to three or

1 four reviews.

2 Typically, the -- typically, because it's not always
3 the case, the author is blind, and typically, the
4 reviewers who write back to the author through the editor
5 are blind, don't sign their names.

6 What comes out of this is a set of reviews, mostly
7 critical, that discuss the positive and negative aspects
8 of the methodology.

9 The questions they ask, "Did you use a proper
10 sample?"

11 "Was the sample randomly assigned to condition,
12 perhaps as they should be?"

13 "Did you have the right controls?"

14 "Did you measure the right behaviors?"

15 And what so what you get out of that is a result that
16 comes from the reviewers to the editor in which the editor
17 makes a judgment, and that judgment is based on what the
18 editor considers to be the quality, or lack of quality, of
19 the -- and scientific merit of that article.

20 In fact, scientific merit is one of the check off
21 points that a reviewer is usually -- is usually asked to
22 acknowledge. What is the scientific merit of this study?

23 In the journals that I published in, again, the
24 rejection rate tends to be between 60, 80, 85 percent. So
25 the vast majority of papers are rejected because of a lack

1 of scientific merit in one way or another.

2 Q No rush. We have got plenty of time.

3 A I wouldn't -- I wouldn't -- it is not to say -- it is
4 a rigorous process.

5 It is the process that the National Science
6 Foundation uses to filter meritorious and non-meritorious
7 proposals for money. It's not perfect. Peer review is
8 not perfect, but it is the best method out there for
9 distinguishing science from everything else.

10 Q And I respect that on peer review. My question is
11 about quality controls, not period review. Actually, an
12 article is not -- and I'm not trying to be difficult, but
13 an article is not an empirical study. If you write an
14 article and send it out there. That's not a --

15 A Not necessarily. It may be. If the article that you
16 wrote about is about -- if you're writing about an
17 empirical study, it is.

18 Q Okay. What are the quality control procedures? I
19 mean, keep -- are you saying that's a quality control --

20 A Peer review is quality control.

21 Q All right.

22 A That's -- peer review is quality control. Now --

23 Q And that ensures reliability?

24 A That ensures the quality of that study. Now, to
25 ensure reliability, what -- that requires additional

1 studies. That's why I would never talk about a single
2 study.

3 In order to do that, if a study appears in press and
4 it is important enough, others will come in and try to
5 replicate it. They will often write to the author and
6 say, "Please send me the protocol. I want to know exactly
7 what you did so I can replicate that study." That's a
8 common practice in medicine and in psychology.

9 So they go ahead and they do that. If the study
10 replicates and gets published, that tells you you've got
11 some reliability.

12 If the study is replicated over and over and over
13 again, ultimately, somebody might actually conduct a
14 meta-analysis, which statistically compares various
15 studies. Now you have got metrics of reliability.

16 Q I agree with that, and that's why -- I mean, you even
17 have said yourself you won't take one case, so we really
18 don't have reliability in this field yet. Based on -- you
19 just said that. You said maybe one day we'll get to that
20 point.

21 A That's -- that's -- no. I didn't say that. Let's
22 take the Kassin and Keitchel (phonetic) study you seem
23 fond of.

24 Q No, sir. You brought that up. I didn't.

25 A Well, you were asking for something so there. I gave

1 it to you. That study was published in 1996. It has
2 since been replicated roughly a dozen times using a very
3 similar or identical method.

4 In addition, it has been replicated conceptually,
5 which means, you know what, we stopped using the computer
6 crash paradigm, and we went on to do something somewhat
7 different.

8 So in one study, for example, the lie about evidence
9 was to give people some kind of photo shop photograph to
10 show that that changes their sense of reality. In yet
11 another instance, my colleagues and I accused people of
12 cheating in a laboratory, and violating the university
13 honor code.

14 Q That's a study, though?

15 A That's a study.

16 Q All right.

17 A So what I'm saying is no single study makes a point,
18 but by the time you have got two, four, six, eight, 12
19 studies, and they all seem to point in the same direction,
20 we know we've got a risk factor on their hands.

21 Q Again, those -- you're choosing who is going to be in
22 this study?

23 A No. Absolutely not. You may be identifying your
24 population, but once you have your population, you are
25 randomly assigning them to either receive or not receive

1 your variable. That's -- that is the quality control in
2 science.

3 Q Talking about in your own's office. You said your
4 employer or whoever you -- the people you work with, the
5 last thing you were mentioning. You don't remember that?

6 A I don't know what you're referring to.

7 Q Isn't it basically true you've given a personal
8 opinion based on what you've read as a -- isn't that
9 really -- because in one of the cases in South Carolina
10 here, you didn't get admitted as an expert. You just got
11 admitted in your field, correct?

12 A I -- I don't recall.

13 Q Well, I'm pretty sure that happened in one of them,
14 and she said some states --

15 A I didn't get admitted as an expert. I testified as
16 an expert.

17 Q Well, I think they just offered you in social
18 psychology. I could be wrong. I didn't see -- and I've
19 got the transcript. I'll show it to you later or...

20 A Okay.

21 Q I'm pretty sure I'm right, but if I'm not, I'm not
22 trying to mislead you. You said some other states -- are
23 there other states you haven't been qualified?

24 A Yes.

25 Q How many?

1 A New Jersey. I think that's it.

2 Q New Jersey?

3 A Yes, and Mississippi.

4 Q And Mississippi?

5 A Yes.

6 Q Was that recently?

7 A Fairly recently.

8 Q How fairly is fairly?

9 A Two years ago.

10 Q And finally, I'm just going through these factors.
11 The consistency of the method with recognized scientific
12 laws and procedures.

13 A Yes, sir.

14 Q I need more than "yes". I mean, what is --

15 A The consistency of the methods? We use the same
16 methods. There is a protocol in science, which again,
17 peer review scrutinizes for this.

18 It is that you have assigned people to the conditions
19 of your study in the right way. You sampled correctly.
20 You've not disproportionately sampled one group into one
21 condition and another into another condition. You have
22 used the proper control groups.

23 You have used instructions that are appropriate. You
24 have held variables constant, except for your independent
25 variables, and you have measured behaviors that you want

1 to draw conclusions about.

2 Those are the metrics, and the only way I can --
3 other than to explain the ways of science is to say that
4 the three professional organizations that scrutinize the
5 science, both through their journals and through their
6 funding and through other metrics, like the writing of
7 Amicus briefs and White Papers all have agreed that this
8 is a body of literature that is worthy of general
9 acceptance.

10 Q But Mississippi didn't agree, and New Jersey didn't
11 agree?

12 A Correct. Actually, I don't recall the standard in --
13 I don't recall the standard.

14 Q But you're basically saying the peer review satisfies
15 the standards?

16 A No. I'm trying to explain -- I'm explaining both the
17 protocol.

18 Q Right.

19 A And I'm trying to explain that if you use those
20 protocols, your papers are accepted for publication, and
21 once a corpus of research studies are published in those
22 journals that do peer review, the field at large
23 acknowledges the field as a field that is generally
24 accepted.

25 So these are all different metrics. Again, I'm kind

1 of using converging evidence trying to show you in very
2 different ways how the field accepts these techniques.

3 Q Kind of a hybrid?

4 A Not a hybrid. It's a synthesis. It's an integration
5 of various sources of evidence. Again, I've got many
6 sources of evidence for the fact that these are the
7 protocols that are the design of science and psychology.

8 Q I just got a couple more questions. You would agree
9 that a classroom study with a computer is not the same
10 thing as an actual interview with a criminal.

11 A Of course not.

12 Q And if you answered this question a minute ago -- I
13 know we're both just starting to like each other, I think.
14 You might have -- you might have answered this a minute
15 ago. Is what you're doing really giving a personal
16 opinion?

17 You know yourself. I'm not disputing that at all.
18 I'm not trying to say you don't. And I mean -- but isn't
19 that, really, what you're basing it on?

20 Is this -- can you really tell the judge that this is
21 -- you're basing it on scientific, reliable information
22 that's got quality controls. You might one day, but do we
23 really have it now, and is this really your opinion,
24 because you are a smart man on this stuff?

25 A I -- I can't speak for another expert, but for

1 myself, I would say that I don't see myself coming in here
2 giving an opinion if you think the opinion is about a
3 specific case.

4 What I have opinions on, and these are opinions that
5 every -- just, you know, a vast majority of scholars and
6 scientists in my area would agree are opinions derived
7 from the data.

8 Yes, as a result of seeing the data points, as a
9 result of knowing about the dozens and hundreds of
10 studies, I have formed opinions. I have formed opinions
11 about what factors about a person, what factors about an
12 interrogation setting can put innocent people at risk to
13 confess. But that is an opinion based on the data, an
14 opinion that is widely shared. As to whether I would come
15 in and opine on a specific case, no, I wouldn't do that.

16 Q You would not do that?

17 A I would not do that.

18 Q Have you done that before?

19 A Being asked to render an opinion as to whether a
20 confession is true or false?

21 Q In a specific case. Have you opined on it or gone
22 over it?

23 A In the -- in the instances in which I have opined are
24 cases where D.N.A. comes in, in post conviction
25 proceedings where somebody has been convicted, and then

1 D.N.A. comes in and excludes them as having been, for
2 example, the rapist.

3 I'm asked to go back and indicate on opinion as to
4 what -- go back and review that confession now and tell us
5 what you think.

6 In that case, I am willing to draw the conclusion, if
7 I think it's -- it's meritorious that this confession
8 appeared to have no corroboration to it.

9 Q I was just fixing to ask you that, if that's what
10 your --

11 A Yeah. I still wouldn't say it's false. What I would
12 say, if this is all we've got, what else you got because
13 this doesn't corroborate? In the presence of D.N.A., that
14 would lead to a fairly obvious conclusion.

15 Those are the cases where I would, but coming in in a
16 trial situation, it is my very circumscribed goal to
17 provide a jury with the tools so that they understand what
18 is out there, not -- take those tools and apply them right
19 here on this case.

20 Q We may have misunderstood counsel. We thought she
21 was going to be specific, said yesterday she might get you
22 to do specific and might not, general. That's why I
23 was -- I was wondering.

24 So you would not come in -- you would -- you would
25 say, "I cannot be an expert to come in here and review

1 this case and give an opinion as to whether this statement
2 is false or not"?

3 A On that opinion?

4 Q Yes, sir.

5 A Whether it's false or not?

6 Q Yes, sir.

7 A I would not do that.

8 Q Let me ask you this just briefly: Are -- would your
9 testimony include the duration as a factor of just a
10 cover, generally?

11 A Yes. I mean, in talking about factors, you know, to
12 properly review the literature, that would be one of those
13 factors. Again, I would simply describe the research that
14 was done.

15 Q And does it matter to you in a case if -- well, like
16 this case, have you reviewed the stuff in this case?

17 A I have reviewed some stuff, yes.

18 Q If you're talking if there's like a three-and-a-half
19 hour window and the first -- somewhere in there in an
20 hour-and-a-half you're talking about something totally
21 different from this case, really has no relation, another
22 baby's death.

23 A Uh-huh.

24 Q That, in all fairness, should not be included in the
25 duration of the time of a statement concerning this case,

1 should it?

2 A Well, I'm not sure I agree with that, and I say that
3 for a very important reason, which is in order to -- for
4 time to become a risk factor, the only relevant aspect of
5 that time issue is the way in which it impacts the
6 subjective statement of the suspect.

7 If the suspect is in custody for a certain period of
8 time, whether they are being questioned about this
9 particular crime or something else, that suspect's
10 subjective state is what it is as a function of time.

11 Q I understand that. And as a psychologist, wouldn't
12 you like to know if there were other questions about other
13 crimes that are being asked, and they denied that but then
14 were asked about this crime and admitted to it, wouldn't
15 that go into your opinion about -- well, it was -- she is
16 saying false confession here but not here and not here.

17 A But I'm not -- but I'm not opining --

18 Q I understand that.

19 A -- on the effects of time in this case.

20 Q Oh, you're not?

21 A No.

22 Q You're not going to testify to time at all in this
23 case?

24 A No, but I think the jury should know what the time
25 parameters are in general.

1 Q And it would be --

2 A It's for the jury to apply those time parameters.

3 Q I agree with you, but isn't it also fair for the jury
4 to know there are different things going on about it. You
5 would want to know that.

6 A Well, as to what the jury knows or doesn't know about
7 that intertrial of time, that's not for me to communicate.

8 Q But out of fairness, you think they ought to know
9 that, do you not?

10 A Out of fairness?

11 Q To both sides.

12 A Again, the subjective statement --

13 MS. PRINGLE: Your Honor.

14 THE WITNESS: -- is suspect.

15 MS. PRINGLE: I would just object. I mean, I don't
16 think he's here to talk about the fairness of the State or
17 the defendant as to what the jury knows in terms of the
18 other infants.

19 MR. MEADORS: And your Honor, I don't know if you
20 wanted to let this in or not, but I was just inquiring
21 that issue, for time purposes, how much he was going -- if
22 he's going to comment on the length of time is a factor to
23 be considered, then with all due respect --

24 THE COURT: I think he answered your question. I
25 mean, you can -- you can certainly ask him different

1 question but -- and you can rephrase the question you
2 asked or a different type of question.

3 MR. MEADORS: I'll save it. Beg the Court's
4 indulgence.

5 (Pause).

6 Thank you. That's all I have.

7 THE COURT: Any redirect?

8 MR. MEADORS: I do have one more question. I
9 apologize. I didn't check with my boss. I apologize.

10 THE COURT: No problem.

11 BY MR. MEADORS

12 Q I understand you're not going to be specific about
13 this case, I think, but is one of the factors is going to
14 be that you're going to testify about that somebody wanted
15 to leave? If somebody wanted to leave, would that be one
16 of the things you're testifying about, potentially, that
17 somebody ought to consider?

18 A Not unless I'm asked, because there is no data on
19 that question.

20 Q That's what I was going to ask you. That's exactly
21 what I was going to ask you. So you wouldn't be
22 testifying about that?

23 A No. Not -- again, not unless asked a question about
24 a specific case, but no, that's not...

25 MR. MEADORS: Thank you.

REDIRECT EXAMINATION:

BY MS. PRINGLE

Q Just a couple of questions on the timelines since Mr. Meadors bright it up.

Dr. Kassin, you reviewed the Miranda waiver in this case that was signed on April 17th, which is the date of the confession that is most at issue in this case --

A Right.

Q -- and that was signed at 13:11, correct?

A Correct.

Q Is that your recollection, and you also reviewed the statement from April 17th, and in that statement, does it indicate that that statement began at 15:56 hours?

A Correct.

Q And ended at 16:48 hours?

A Correct.

Q And you -- you answered this to an extent, but if asked about the timeframe when it would be -- when, in your opinion, would the interrogation have begun, or what is the significance of sitting down at 1:11 and beginning a polygraph regardless of what the subject matter was?

A One of -- if I were to draw the timeline and count minutes in this case, 1:11 is the starting point and 16:48 is the ending point because from the subjective standpoint of the suspect, those are, you know,

1 three-and-a-half or so hours of questioning.

2 That's what's relevant, how much questioning has she
3 endured at that point, so to me, the timeline encompasses
4 three-and-a-half or so hours.

5 Q On this case?

6 A On this case.

7 MS. PRINGLE: That's all, Your Honor.

8 MR. MEADORS: Just to follow up on that real quickly.

9 RECROSS-EXAMINATION:

10 BY MR. MEADORS

11 Q Okay. So the 1:11 you're reporting to is on that, on
12 the advice of rights?

13 A Correct.

14 Q Okay. And -- so anything that happened in that
15 period of that duration, you would consider that period,
16 because she was being interrogated, that three-and-a-half
17 hours?

18 A She is in custody. I can't attest to it.

19 Q Well, actually, she wasn't to start with.

20 A 1:11.

21 Q She wasn't in custody.

22 A She signed her rights at 1:11. At that point, she is
23 there, and she is being questioned. Whether the
24 questioning is continuous, discontinuous, I am not privy.
25 I just know that the timeframe, and that would be for the

1 jury to determine how that time was filled and what
2 difference that makes, but timeframe encompassing this
3 statement, the taking of the statement, is
4 three-and-a-half hours, roughly.

5 Q And -- and if you were testifying specifically about
6 this case, you would say that. I understand you aren't,
7 but you would say it's that -- like you -- you'd say it
8 was three-and-a-half hours.

9 A I'd say it's three-and-a-half hours but I can't
10 account for --

11 Q I'm not trying to get you on that. I'm not. I'm
12 not. I promise. I just want to follow up now, your
13 testimony will be -- and I've read some of this stuff.
14 I'm going to read it again, but that -- that typically,
15 and I'm not sure exactly what you're going to testify to,
16 but generally time ranges of what you think are -- are --
17 would be susceptible or more like you ought to look at?

18 I mean, basically, don't you say the shorter the time
19 where the confession is, it's more likely to be true. I
20 know that's a generalization, but isn't that roughly true?

21 A As a general rule, I would actually state it in the
22 opposite way.

23 Q I'm sorry.

24 A That interrogations that went for very long periods
25 of time would be particularly likely to be --

1 Q Much better way of saying it, but you actually have a
2 study that shows that four hours is kind of a lynchpin,
3 too, correct? Lynchpin is not the wrong -- I'm not trying
4 to get you down.

5 A Yeah.

6 Q -- but you testified somewhere that's what you look
7 at.

8 A Four hours is -- the average interrogation is less
9 than that, and in most interrogations, according to
10 manuals, should be less than that. Four hours is a point
11 at which even the professionals are worried, so you start
12 to seeing advice about how to keep it under four hours.

13 Q And are you going to testify to that as a general --
14 is that what you think you're going to be testifying to
15 this afternoon, if the judge lets you?

16 A I would describe what is known about time. I would
17 describe what is known about time. Again, I -- I'm not
18 looking to push the jury in one direction or the other,
19 simply provide them with some of the parameters they can
20 make a more educated decision.

21 Q Which is what -- that would be one of your
22 parameters?

23 A Yes, time would be a parameter.

24 Q And so in that case, the difference between
25 two-and-a-half and three -- because you said the

1 confession is around two hours.

2 A Uh-huh.

3 Q Or you think are more likely to be true than false,
4 generally.

5 A That's a --

6 Q And I'm not --

7 A That's a stronger way to put it than I would.

8 Q That's fine. That's fine, but my point is the
9 smaller amount of time, the more likely you would say it's
10 not false. So there would be a difference, in your
11 opinion, between two-and-a-half and three-and-a-half
12 hours? Is that fair to say?

13 A No. I can't -- I can't even say that because the
14 literature doesn't allow us to parse time quite that
15 precisely. We know what the typical interrogation runs.
16 We know what the average seems to be. We know what sort
17 of the outer limits seem to be, and we know what the worst
18 case scenario seem to be.

19 Q But would your testimony be this is, you know, the
20 average? Four hours becomes more susceptible when it's
21 down to around two hours, that's more --

22 A There is no dividing line at which I'd say, "Start to
23 worry at this moment, at this point." There is not a
24 dividing line in that.

25 Q I'm just getting that. If I'm misreading, I got that

1 from some of transcripts last night. That's all. That's
2 all.

3 Thanks, doctor.

4 MS. PRINGLE: May I just ask him to clarify about the
5 in custody, because I think there may be an ambiguity left
6 from that question?

7 THE COURT: Yes.

8 REDIRECT EXAMINATION:

9 BY MS. PRINGLE

10 Q Just at 1:11, she was in the sheriff's department.
11 She was not under arrest, but when you say "in custody",
12 does that suffice that she was in the sheriff's department
13 at 1:11, had sign her Miranda form and was being
14 questioned?

15 A Well, I don't -- you know, I can't render a legal
16 judgment with regard to what constitutes custody.

17 The courts, over the years, have actually done some
18 of that on a case-by-case basis. She -- she had signed
19 her Miranda forms. She was there and subject to
20 questioning.

21 There are certain indications that she was in custody
22 at some point during that time, or at least not
23 indications from my standpoint, but the courts would have
24 said, for example, that if she takes a bathroom break and
25 is escorted to the bathroom, that that is an index of

1 custody. That happened, I believe, somewhere between
2 three and four o'clock, but no, it would not -- again, she
3 is there. She is subject to questioning.

4 Q Okay. So take the word "custody" out of it --

5 A Yes.

6 Q -- if she is there. Once the questioning begins,
7 that's a start point?

8 A Yes.

9 MS. PRINGLE: Thank you.

10 MR. MEADORS: Judge, could I inquire the -- Judge, it
11 may be -- and I've read some of his other stuff, and I
12 don't know what Your Honor is going to do, but you -- he
13 has mentioned polygraph, even in courts of this record,
14 just as examples where if you go to a polygraph and all
15 that, I didn't know, clear, that's where she was right
16 after this happened when she went to the bathroom.

17 She was being escorted, as she should have been,
18 because she just confessed to killing a child, but is he
19 planning on -- I don't know -- or going through these
20 generalizations, I guess one of them would be a polygraph
21 technique, and then they confessed after that? I don't
22 know. I'd probably object to that, if it was. I just
23 read some of your other stuff, and the Solicitor --

24 MS. PRINGLE: I think, actually, in that case, the
25 polygraph was in evidence. I don't intend to go into

1 polygraphs explicitly with him, if that clears that up.

2 I think that is a part of some of the bases for the
3 studies, and how they know some of the tactics. We can
4 just -- we can leave that completely out. I don't think
5 we have to go into that.

6 It may be better in this case if we're going to keep
7 his testimony generic not to go into that, but if they're
8 going to cross him on some of the lines that Mr. Meadors
9 was getting into, then I will go into specific risk
10 factors in her case, so -- but I will not go into the
11 polygraph. We'll stay with that.

12 MR. MEADORS: And will that then open up the other
13 two confessions she didn't confess to?

14 THE COURT: No.

15 MR. MEADORS: I'm just asking.

16 THE COURT: And, Dr. Kassin, I'm sure you probably
17 have not been informed as to prior rulings of this Court;
18 that polygraphs, any polygraphs that were taken in this
19 case certainly are not admissible, have not even been
20 disclosed to the jury and will not be disclosed to the
21 jury.

22 So to the extent that your testimony may relate to
23 those factors, I guess as a general factor, that certainly
24 could be admissible, but it is certainly -- to the extent
25 that your testimony may relate to what occurred in this

1 case is not a factor that can be considered by the jury.

2 THE WITNESS: I understand.

3 THE COURT: And I will leave it to the defense to
4 explain any other parameters that the Court has placed on
5 the entire testimony in this particular case.

6 I have a couple of questions myself.

7 EXAMINATION BY THE COURT:

8 BY THE COURT

9 Q Dr. Kassin, what I understand your testimony to be is
10 that in -- there seems to be some confusion about
11 scientific and nonscientific testimony or evidence. What
12 I gather is that social psychology is a science?

13 A Yes.

14 Q Psychology is a science, and sociology is a science?

15 A Yes.

16 Q Is that correct?

17 A Yes, yes.

18 Q With each of those types of sciences, whether it's
19 psychology or sociology, are there certain parameters and
20 principles that govern the collection of data and the
21 interpretation of data for each one of those fields of
22 practice?

23 A Yes. And actually, to become a member of that field,
24 in graduate school you would be required to one take one
25 or two of the courses on research methods. There are

1 textbooks on research methods. There are textbooks on
2 statistics.

3 You would be required to take one or two or three
4 courses on statistics. Research methods and statistics is
5 what we do. The content of what we study may vary from
6 one scholar to another, but what we have in common are the
7 research methods and the statistics which are available in
8 any number of textbooks.

9 Q And those methods formulate the foundation as to how
10 experiments and data and interpretations are done in that
11 particular field?

12 A Correct.

13 Q And that would be the same in the field of psychology
14 no matter what type of psychology would be studied or
15 interpreted?

16 A Correct.

17 Q In conjunction with that, then when you talk about
18 the studies that have been conducted, common to all of
19 those studies would be the same underlining method to
20 interpret the data and -- as it relates to the collection
21 of the data that's common to any type of study within the
22 field of psychology?

23 A Correct. Now, it's important to know that not every
24 study has to be conducted using the same methods, and some
25 methods enable you -- it depends on the conclusions you

1 want to draw.

2 Using some kinds of methods, you can draw causal
3 conclusions that this factor would be introduced, caused
4 him to change his behavior.

5 In other cases, you can demonstrate that there are
6 simply associations or correlations, but you cannot make
7 the causal statement. And in yet, other studies, like
8 those case studies, the individual case studies, you can
9 get some ideas, but you can never draw conclusions about
10 associations or correlations. So the methods that you
11 choose depend in part on the conclusions you're trying to
12 draw.

13 Q And as it relates to this particular science, the
14 social psychology relating to false confessions, what I
15 understand your testimony to be is that there is not one
16 particular type of study that would be used in order to
17 formulate conclusions related to false confessions.

18 A Correct.

19 Q And I also gather that -- that the body relating to
20 the science, and particularly as it relates to false
21 confessions, is derived from several different studies,
22 perhaps relating to different components of how false
23 confessions come to take place.

24 A Yes.

25 Q Is the science that relates to false confessions, is

1 the common theme -- what I hear your testimony is saying,
2 that there may be hundreds of studies that are conducted,
3 but that as a result of all of those studies collectively
4 within the field of social psychology, when you are
5 expecting false confessions, the studies seem to indicate
6 or have compiled a body from which we can say there are
7 certain factors that are present in those cases in which
8 false confessions are revealed and whether -- and -- and
9 part of that -- part of that comes from the study here
10 that -- that may deal with situations in which there's
11 D.N.A. and there's evidence of a false confession, or
12 there's self-reported instances of false confession. And
13 you look at those group of people who self-report --

14 A Right.

15 Q -- regardless of whether you believe what they say --

16 A Yes.

17 Q -- or at least in terms of self-reporting, these are
18 the factors who may be present among all of those
19 individuals who self-reported false confessions.

20 A Yes.

21 Q And whatever other study may exist, that there are
22 certain factors that are common to all of those that
23 provide the whole body of being able to determine what the
24 risk factors are and what -- what -- what criteria you
25 need to consider in determining whether or not there has

1 been a false confession.

2 A Yes. And these -- these lead to problemistic types
3 of conclusions, so based on a range of different studies
4 and different methodologies, it is possible to state that
5 certain techniques or certain factors might pose a risk to
6 the innocent person, and that risk means there is an
7 increased likelihood, as you would say in medicine, that
8 certain factors increase the likelihood of illness.

9 It doesn't mean, you know, that the smoker gets
10 cancer or that this person gave a false confession. It
11 simply means these are the factors to look for.

12 Q And in conjunction with that, the studies have -- the
13 studies have -- many studies have resulted in publications
14 that have gone through that peer review that you discussed
15 earlier.

16 A Correct, yes.

17 Q That would also be determining the methodology that
18 was used in that particular study, whether that was
19 appropriate, the controls that were used --

20 A Yes.

21 Q -- whether your statistical data was properly
22 calculated, and -- and so that's how there comes to be a
23 body of work from which you could then go out and
24 extrapolate or develop further those risk factors and
25 conclusions.

1 A Correct.

2 THE COURT: Thank you.

3 Anything further?

4 MR. MEADORS: Your Honor, could I make an argument?

5 THE COURT: Sure.

6 MR. MEADORS: Thank you, Your Honor, may it please
7 the Court. Judge --

8 THE COURT: Wait a minute, are you asking him
9 questions or are you --

10 MR. MEADORS: No, ma'am.

11 THE COURT: You may step down. Thank you.

12 THE BAILIFF: Watch your step for me, please.

13 THE COURT: What I'd like -- are you about to make
14 argument, Mr. Meadors?

15 MR. MEADORS: Yes, ma'am.

16 THE COURT: What I'll do is I'll hear from the
17 defense first --

18 MR. MEADORS: All right.

19 THE COURT: And then I'll hear from you since you're
20 in opposition to it.

21 MR. MEADORS: Sure.

22 MS. PRINGLE: Yes, ma'am.

23 I guess I would have three components to my argument:
24 One is I think there's an assumption, and I understand
25 that the scientific basis, as far as we know anyway, the

1 scientific admissibility, was not challenged in Cope and
2 Myers, just as far as we know.

3 But if you read those two cases, I think there is an
4 assumption that you can draw from those two cases alone
5 that not only is it admissible, but it should be permitted
6 to a great extent, and in those -- in those two cases, the
7 only thing that is being talked about is whether or not
8 that testimony should have been limited at all.

9 I think one of the cases actually looks at it as a
10 harmless error, even if it was error to limit it at all
11 because he was able to testify at length, go into so many
12 details, explain the process, explain the background, the
13 history, and the psychology and the science behind this.
14 So I think there is an assumption it's two cases. This
15 kind of testimony is admissible.

16 Secondly, I'm just not sure that I agree that White
17 requires an analysis of a social science within this
18 framework. I don't -- I don't -- I disagree.

19 THE COURT: It doesn't, I agree. It's not within
20 necessarily this framework, but certainly, what the case
21 law and what it says is, "Nonscientific expert testimony
22 must satisfy Rule 702, both in terms of expert
23 qualifications and reliability of the subject matter."

24 It then goes on to discuss Whaley, and in Whaley,
25 after they proceeded to analyze the matter of reliability

1 and held that any factual context presented, the trial
2 court abused its discretion by excluding the expert's
3 testimony.

4 It did go on -- goes on -- to say that, "The party
5 offering the expert must establish that the witness has
6 the necessary qualifications in terms of knowledge, skill,
7 experience, training or education."

8 And, of course, any defects or questions about those
9 qualification go to the weight to be given that testimony
10 and not to its in admissibility.

11 Then it says, "Turning to the reliability factor, a
12 trial court may ultimately take the same approach but only
13 after making a threshold determination for the purposes of
14 its admissibility.

15 "The foundational reliability requirement for expert
16 testimony does not limit itself to a one-size-fits-all
17 approach for the Council factors for scientific evidence
18 serves no useful analytical purpose when evaluating
19 nonscientific expert testimony."

20 It basically then went on to say that, "Yet, the
21 court, in the discharge of its gatekeeping role in
22 determining admissibility must initially answer the always
23 present threshold questions of qualifications and
24 reliability."

25 So what that tells me -- and then because White

1 involved dog tracking, it went on to establish the
2 standards for the gatekeeping rule for dog tracking
3 evidence.

4 What that tells me is that in this particular case, I
5 have to develop some type of factors for it that I would
6 consider for purposes of this particular case or for the
7 purposes of it not being social psychology testimony.

8 So I can -- I fully understand and realize that there
9 is not going to be a perfect fit within those, those Jones
10 factors, that have been enunciated.

11 MS. PRINGLE: That was all I was going to say. That
12 was completely it.

13 THE COURT: I see.

14 MS. PRINGLE: If we try to --

15 THE COURT: I won't be able to pigeonhole exactly
16 into one, two, three, four.

17 MS. PRINGLE: No social science would ever be
18 admissible if we ever had to. That's all I was going to
19 say.

20 I think that as far as establishing this as an area
21 that is reliable, this particular witness as a person who
22 is qualified, I don't think there is anyone who would be
23 more qualified than Dr. Saul Kassin. That is not just my
24 opinion. It is one that is shared widely, nationally.

25 I think the curriculum vitae and the qualifications

1 speak for themselves. He has testified extensively, and I
2 don't need to go through the scientific basis in
3 reliability. He has done that adequately.

4 This testimony should be admitted. If it's not
5 admitted based -- on the basis of what he has testified to
6 today, then it would never be admissible. He has met
7 whatever threshold, whatever those factors are that you
8 would have to come up with.

9 THE COURT: Yes, sir, Mr. Meadors.

10 MR. MEADORS: Thank you, Your Honor. First of all, I
11 think -- and I don't know of any hearing that has been
12 held like this yet for the State. That's why, I think, we
13 were compelled. The opinion actually says "must" to have
14 this hearing.

15 I would agree to an extent it was a little ambiguous.
16 I do agree with -- we have to maybe set a procedure, and
17 in this case, I think in this case we should follow the
18 Jones factors, because as Your Honor asked him a moment
19 ago, "Is this a science?" And he said yes.

20 So it actually puts it back into science, so it maybe
21 clears up in this case what prelims (phonetic) to use for
22 the Jones factors.

23 Judge, in one of his questions to you or maybe your
24 question to him, I apologize, about methodology, the
25 methodology you choose depends upon the conclusions you're

1 trying to draw. Well, that's not scientific or reliable.

2 And, Judge, just going straight down the factors,
3 I'll give him the first one: Publications, and peer
4 review. This is nothing personal. I actually like the
5 man.

6 Number one -- number one, he couldn't name the
7 technique, and I think the fact -- maybe what Ms. Pringle
8 was saying, because of this social science/science, I'm
9 not sure what it is, you might not ever be able to say
10 it's reliable based on that.

11 In 1997, that's what he said. He said since 1997,
12 that's been 12 years, but I haven't seen any other
13 studies. And I respectfully submit a study of students
14 with their computers is not an empirical study, not a
15 controlled study.

16 The other study he mentions is the D.N.A. study,
17 which he admitted those didn't even -- everybody in there
18 didn't even give statements, so that would, we argue,
19 would not be reliable, something reliable to base your
20 opinion on.

21 The other study was that he -- specific study he
22 mentioned was, I think, the Jones study. I'm sorry if I'm
23 wrong, 120 people. They actually looked for people they
24 knew gave false confessions. There wasn't even a crime
25 committed in a lot of them. That's not -- really has

1 nothing do with this case.

2 Certainly, we wouldn't -- I think that's why
3 Mississippi and New Jersey said it wasn't reliable. I
4 don't know, because you can't really come in here and talk
5 about it. So I'm not sure what the technique is.

6 Prior implication of the method to the type of
7 evidence involved in this case? Well, he specifically,
8 and for the record said, "I wouldn't do that and couldn't
9 do that." He said right here, "I can't do that."

10 So if you follow number one through four, because I
11 respectfully submit we have to because he has now said in
12 response to Your Honor's question, that that right there
13 says he can't testify as an expert in his field.

14 He admitted we can't do number two, and there was no
15 dispute about that. He said, "I would not, could not, am
16 not, going to apply that to this case" and could not, not
17 just wouldn't, couldn't."

18 The quality control procedures used to ensure
19 reliability, I don't know what they are. You go down and
20 talk to some police officers. Well, you go in a
21 classroom. You go talk to some prisoners, he cites as a
22 study, some confess, some don't.

23 I don't know what the quality control is in that
24 prison. We would submit that's not met, and the
25 consistency of the method with recognized scientific laws

1 and procedures. I don't think we ever got to that.

2 I don't think he answered that. I think he's trying
3 to answer two and three by just saying peer review covers
4 all of that. Well, respectfully, we think that's wrong.

5 Judge, I don't think if we'll make law in this case
6 but if that happens, and I'm not telling you what I want,
7 we are making law right now, if that's true. We're making
8 law, and it's -- it's new ground.

9 I guess we'd say that this is scientific. He has
10 admitted to it. We do need to go through the Jones
11 factors, and respectfully, the defense has not established
12 those; that this is -- the underlying basis for his
13 opinion is reliable. Thank you. We'd ask that he not be
14 allowed to testify on this subject.

15 Thank you, Your Honor.

16 THE COURT: Does the defense wish to be heard
17 further?

18 MS. PRINGLE: No, ma'am.

19 THE COURT: The first question I have to answer is
20 whether the evidence would assist the trier of fact.

21 In this particular case, in particular, the primary
22 question that the jury will have to determine is whether
23 the defendant engaged in conduct which ultimately caused
24 the death of Zachary Ulengchong.

25 In conjunction with that, there has been evidence

1 that has been presented that seems to make the evidence
2 turn on whether or not to believe the statements that she
3 provided to law enforcement officers about this particular
4 incident.

5 In conjunction with that, the defendant has placed a
6 -- placed evidence that indicates that she was in some
7 fashion coerced or that her statement was not voluntary in
8 nature.

9 In an effort to understand that testimony,
10 particularly in light of evidence that she acknowledged
11 that she understood her constitutional rights, that she
12 understood that she would waive those rights; that she
13 did, in fact, engage in that behavior, and that she was
14 voluntarily at the police station at the time that the
15 statements were made, it appears to be a body of science
16 that relates social psychology to false confessions.

17 I think that that information would assist the trier
18 of fact in being able to determine the questions that they
19 have to answer in this case; that is the voluntariness of
20 the statement and whether or not her statements were made
21 voluntarily, and whether or not they can be believed under
22 the circumstances. And so I find the evidence to be
23 presented by the witness would assist the trier of fact.

24 Secondly, I find that the expert is qualified. I
25 think that his education, and training, and research he

1 has done, and based upon all the information that's been
2 provided to me during this hearing, that I find that he is
3 qualified.

4 Certainly to the extent that there are any questions
5 about his qualifications, those would, in fact, pursuant
6 to the White case go to the weight to give this testimony
7 and the way to go forward on the evidence that he would
8 provide to the Court.

9 The third question that I have to answer is whether
10 the underlying science is reliable, and I understand that
11 there appears to be a difference between scientific and
12 nonscientific evidence.

13 Rule 702 does not make a distinction between that.
14 The reason I think that the Supreme Court stated in White
15 is that you have to do the 702 analysis because, in fact,
16 it encompasses not just scientific evidence. It covers
17 technical evidence and any other evidence that would be
18 specialized and require specialized knowledge.

19 There has been suggestion that I should apply the
20 factors that were specifically enumerated in Council and
21 in some small way reaffirmed in Jones.

22 Those factors relating to publications and peer
23 review of the technique, prior application of the method
24 to the type of evidence involved in a case, the quality
25 control procedures used to ensure reliability, and the

1 consistency of the method with recognized scientific laws
2 and procedures.

3 I note specifically that in those cases that have
4 applied those Council factors to scientific expert
5 testimony, they have involved a science that relates more
6 to a physical or a biological science than it does to a
7 social science.

8 I take particular note to the idea relating to dog
9 tracking evidence, as was discussed in White. And White
10 seemed to imply that -- that dog tracking evidence is not
11 a pure science, as someone defined that term, or a
12 biological science, but a science that is somewhat more
13 non-scientific in that there is not a -- as with blood,
14 serologicals, trace evidence, there is not a specific type
15 of science that can be applied to that particular field
16 that would result in the data, whether it's by chemical
17 analysis, whether it's by review under microscopic
18 analysis.

19 I think that that is the type of scientific evidence
20 to which the Jones and Council factors were discussing.
21 For social sciences and those sciences that are not
22 capable of specific and empirical analysis in terms of a
23 chemical basis or a microscopic basis or some other type
24 of physical science analysis, I think that what you have
25 to do is to look at the underlying science that is being

1 referred to.

2 In this particular case, we're talking about
3 Psychology. Psychology is a science. I don't think that
4 it's a science as is generally construed by most
5 individuals, particularly as it relates to the law, and
6 the requirement that they be very -- that those factors
7 that I described earlier would apply.

8 But certainly within the social sciences, there are
9 certain criteria that have to be followed in the analysis
10 and collection of data in studies that are conducted.
11 That comes from a well-recognized basis, because that
12 encompasses the field of psychology or sociology or
13 anthropology or any other type of social science that may
14 exist that there are certain recognized criteria in these
15 fields that formulate the basis for the science.

16 In conjunction with the data that would be applied in
17 this particular case, I think that certainly, part of
18 social science experiments involve starting with a
19 hypothesis, generating information and data either to
20 support or to refute a hypothesis.

21 And certainly to that extent, there is always some
22 idea that there could, in fact, be ways to manipulate and
23 control the information that is provided to -- to gather a
24 certain result.

25 And while that may appear to be the case on -- on the

1 face of things, when you require that the data has to be
2 collected within a particular manner and under guidelines
3 that control that particular social science, I think that
4 that is what, in fact, assures that there is some
5 continuity and that there is less of a bias or a
6 manipulation in the data to achieve the projected results.

7 To support that, I think that this -- as it relates
8 to false confessions, there is a wide body of studies that
9 have been conducted. There is a wide variety and body of
10 literature, including peer review publications.

11 There are textbooks associated with the study of the
12 false confessions. There are articles that have been
13 written in journals recognized by social scientists within
14 the field of psychology and forensic psychology that those
15 studies have been subjected to review by other social
16 scientists within the area to assure that the data was
17 collected in a reasonable manner; that the appropriate
18 controls were in place; that the statistical compilations
19 were correctly performed, and to be able to question and
20 study the results that were obtained throughout those
21 studies.

22 What I heard Dr. Kassin indicate, and why I find that
23 the science is reliable, is that through all of these
24 studies there have been -- and I don't remember the exact
25 term that was used, but there has been a collection of.

1 cases in which the various components of studies may be
2 replicated; that they -- that they may change certain
3 portions or controls or the standards which -- variables.

4 They may have certain variables that are different,
5 but despite those variables that over the course of
6 creating and conforming those studies, the results have
7 yielded the same information, and that that has, in fact,
8 led to a body of work that provides certain criteria in
9 standards and by lines for how to be able to interpret
10 those -- what they call, or what he calls, the risk
11 factors that are associated with those cases in which
12 false confessions are obtained.

13 I find that because of peer review, because of the
14 underlying science of psychology, and the number of
15 studies that have been done throughout the course of the
16 years, and again, the wide variety of analytical and
17 articles and textbooks and chapters that have been done in
18 this area, I find that it is a reliable science; and
19 therefore, it would be admissible in this particular case.

20 Turning to -- then to determine whether after coming
21 up on its admissibility I should conduct a 403 analysis,
22 that analysis requires that the probative value of that
23 science, of that information and that evidence, is
24 substantially outweighed by the prejudicial effect.

25 The prejudicial effect would include factors such as

1 the danger of unfair prejudice to the parties.

2 Particularly in this particular case, I'm looking towards
3 prejudice to the State, the confusion of issues,
4 misleading of the jury, consideration of undue delay,
5 waste of time, or needless presentation of cumulative
6 evidence.

7 I have considered all of those factors because I find
8 that the information would assist the trier of fact, and
9 that it is a central issue for the jury to determine.

10 I don't think that what I've heard of the science
11 would be unduly prejudicial, particularly in light of the
12 fact that at this particular point, there is not to be
13 testimony as to providing an opinion in this particular
14 case. Although, I think that probably could be done as a
15 general rule, because experts can give an opinion about
16 ultimate issues to be determined; that in this particular
17 case, there is not that.

18 I think that would avoid some of the issues that we
19 have all been concerned about. I don't find that it's
20 unduly prejudicial, and I would find that it would be
21 admissible in court in this particular case.

22 Are there any questions at this point?

23 MR. MEADORS: No, ma'am. Our next objection would be
24 that it's not relevant since he's not talking about
25 specific things in this case.

1 THE COURT: And I overrule that because I find it is
2 relevant, because it would assist the trier of fact as it
3 relates to issues they have to determine in this
4 particular case, and that is also what constitutes
5 relevance.

6 Anything further?

7 MS. PRINGLE: The only other additional issue would
8 be is I intend to stay generic with him; that that is what
9 their objection involved just now, but if they cross him
10 on the specifics of this case, then I will go back into
11 that on redirect, and we would have to talk about what the
12 timeframe is or how we navigate that, if necessary.

13 If they're not going to cross him on the specifics,
14 I'm not going to go into it but if they are, we'll have to
15 take that issue up.

16 MR. MEADORS: We think at a minimum, we ought to be
17 able to say something to him about a matter that occurred
18 in April of 2007 without, if that comes up, to explain
19 that other time period.

20 Just, I don't think that -- respectfully, to say it's
21 three-and-a-half hours just about this case, and he is
22 going to say this duration, which is clearly talking about
23 another kid that we've all agreed we can't talk about, I
24 just don't think that's fair. The documents are in
25 evidence, which is going to show the time. They're going

1 to argue it in closing.

2 THE COURT: I'm not sure I -- let me -- let me say
3 this. Repeat what you said earlier.

4 MS. PRINGLE: He's not -- he's not going to say
5 anything about this case. What he will do, and we had
6 initially planned to do, and is capable of doing, is not
7 say, "I think this is a false confession, but what he does
8 do sometimes, and could do, and is prepared to do, if I
9 asked him to, but I'm not, is he would identify the risk
10 factors that are present here.

11 Because of all of the problems with the timeframes
12 and the interrogation, the -- just going through the
13 materials that he reviewed -- he reviewed everything -- I
14 intent to not ask him specifically about three-and-a-half
15 hours or anything specifically about the specific
16 timeframe in this case.

17 He will --

18 THE COURT: Let --

19 MS. PRINGLE: I mean, everything he will have to --

20 THE COURT: Let me rephrase what I think you're
21 saying. What I think I hear you saying is that you will
22 ask him generally about false confessions and what are the
23 risk factors as it relates to false confessions, period.

24 MS. PRINGLE: Exactly.

25 THE COURT: He will testify to what those are.

1 MS. PRINGLE: Exactly.

2 THE COURT: But you will not ask him what risk
3 factors are present in this particular case.

4 MS. PRINGLE: Exactly, unless they cross him on this
5 case, and then I think that that time won't be an issue.
6 And in fact, generically, they can still cross-examine him
7 on, you know, length of interrogations, and that's to
8 their benefit.

9 THE COURT: And then you can argue what you want,
10 argue in closing.

11 MR. MEADORS: And if Your Honor listens, that's the
12 same thing that happened in this case. That's what he's
13 going to testify.

14 MS. PRINGLE: Not all of them.

15 MR. MEADORS: Well, a lot of them. Aren't -- isn't
16 that one of them? I want to make clear --

17 THE COURT: Well, I mean, they are what they are. If
18 he testifies generally as to what all the risk factors
19 are, then -- then you're not prejudiced because he's not
20 saying in this particular case I find this risk factor,
21 this risk factor, this risk factor.

22 If he says in false confessions generally, this is
23 what we find; this is what the studies have shown; it's
24 "A, B, C, D, E".

25 MR. MEADORS: But this evidence isn't what it is

1 because we talked about another case down there. We'll
2 get bootstrapped because he is going to include that as
3 the time they're working on this confession.

4 THE COURT: And I don't understand what you just said
5 Mr. Meadors.

6 MR. MEADORS: Okay.

7 THE COURT: I'm sorry.

8 MR. MEADORS: The three-and-a-half hour period, and
9 an hour-and-a-half of that was spent on Baby Walker --

10 THE COURT: And you can -- you can -- you can argue
11 in closing that not all of whatever time period, you know,
12 you -- I don't -- I don't believe that he's going to stand
13 up and get on the witness stand and say, "Her -- she came
14 into the department at 1-- you know -- 13, 15, and it was
15 16:49, or whatever time it was when she finished giving
16 her statement.

17 I don't think that that's what the testimony is going
18 to be, and I don't think that's what the defense is
19 proposing to elicit it from her --

20 MR. MEADORS: No, but he's going to --

21 THE COURT: From him.

22 MR. MEADORS: He's going to say it's about a
23 four-hour time period. She will argue in closing those
24 time periods.

25 THE COURT: Well, that's closing argument, and you

1 can argue in closing what you want to argue about how
2 it's -- it's not four hours; that, you know, she went to
3 the bathroom; they were walking up and down the hall; this
4 person came, and he stepped out. When they -- you know --

5 MR. MEADORS: Can we argue they were talking about
6 that another incident?

7 THE COURT: No.

8 MR. MEADORS: Without saying what it was?

9 THE COURT: And you know that's not allowed.

10 MR. MEADORS: I'm not going to say what --

11 THE COURT: I'm sorry?

12 MR. MEADORS: I'm not going to say what it is, but
13 just like in the statement you read. Can we read that
14 other statement, then, in our closing saying during this
15 time period, they were also taking about another matter
16 without saying what it is? Would you consider that for
17 closing? That's all.

18 THE COURT: I doubt very seriously I will, because
19 that was the subject of the discussion when Mr. Giese
20 asked the question of the witness before the officer got
21 him on the stand.

22 MR. MEADORS: Well, I guess could we revisit that
23 during closing. Okay.

24 THE COURT: We'll come back at 2:30.

25 (WHEREUPON, a lunch break was taken.)

1 THE COURT: Would you close that door question me,
2 please? Thank you.

3 Anything we need to take up before we bring the jury?

4 MS. McDUFFIE: Not from the State, Your Honor.

5 MR. STRICKLER: Only one thing, Your Honor. I have
6 noticed that Deputy Chief Wilson was in the courtroom at
7 that point. I'd assume that he will not be called in
8 reply.

9 MS. McDUFFIE: He will not, Your Honor.

10 MR. STRICKLER: Okay. Just checking. Nothing
11 further.

12 THE COURT: You may ask the jury to come in, please.

13 (WHEREUPON, the jury came into open court at
14 approximately 2:30 p.m.)

15 THE BAILIFF: The jury is seated, Your Honor.

16 THE COURT: Good afternoon, ladies and gentlemen.

17 THE JUROR: Good afternoon.

18 THE COURT: Is there any member of the jury panel
19 that has listened to, watched, read, any media reports or
20 had any conversations with anyone in reference to any of
21 the facts or issues that are to be determined in this
22 case? If so, raise your hand.

23 (There was no response.)

24 Thank you. At this time, ladies and gentlemen, I
25 believe we're ready to continue with the trial of this

1 matter.

2 You may call your next witness.

3 MS. PRINGLE: The defense calls Dr. Saul Kassin.

4 SAUL KASSIN, after being duly sworn,
5 testified as follows:

6 THE CLERK: Please have a seat. State your full name
7 for the record.

8 THE WITNESS: Saul Kassin, K-A-S-S-I-N.

9 DIRECT EXAMINATION:

10 BY MS. PRINGLE

11 Q Good afternoon, Dr. Kassin. Could I ask you to speak
12 up and into this microphone? Our jury may have trouble
13 hearing you.

14 Dr. Kassin, where are you from?

15 A John Jay College of Criminal Justice.

16 Q And where do you live?

17 A Massachusetts.

18 Q All right. Where is John Jay College?

19 A John Jay is in New York.

20 Q In New York City?

21 A In New York City.

22 Q And what is your -- what is your current position?
23 How are you employed?

24 A I'm a distinguished professor in psychology at the
25 John Jay College of Criminal Justice, and I'm also a part

1 time professor at Williams College in Massachusetts.

2 Q And I believe you said "distinguished professor".

3 What does that mean?

4 A The City University of New York has a number of
5 distinguished professorships that they allocate to its
6 university, John Jay being one of these colleges. So I'm
7 a distinguished professor.

8 Q And can you tell the jury about your educational
9 background?

10 A I have a bachelor of science degree from Brooklyn
11 College in psychology, a master's and P.h.D. in Psychology
12 at the University of Connecticut, and I've done
13 postdoctoral work at the University of Kansas and at
14 Stanford University.

15 Q And you completed your postdoctoral work in 1985,
16 '86.

17 A Yes.

18 Q Have you received any honors, awards, or grants as a
19 result of your -- in your field?

20 A I have.

21 Q And what are they? Tell the jury about some of
22 those.

23 A I received funding from the National Institute of
24 Child Development. I received funding from the MacArthur
25 Foundation. I received an award from the American

1 Psychological Association for my work on confessions, and
2 I received a United States Supreme Court judicial
3 fellowship and a postdoctoral fellowship at Stanford
4 University.

5 Q And that -- the American Psychological Association,
6 what award was that?

7 A It's a presidential citation.

8 Q And do you have any professional affiliations, and
9 will you explain to the jury what a professional
10 affiliation means?

11 A Psychology, it's a big discipline; and the American
12 Psychological Association is the largest professional
13 organization and the oldest. It represents roughly
14 155,000 psychologists around the world.

15 The Association for Psychological Science, or A.P.S.
16 is kind of an offshoot of A.P.A. It was developed 20
17 years ago by scientists in psychology.

18 A.P.A. represents both the mental health field and
19 the research community. The A.P.S. represents just the
20 scientific researchers, and then a third organization
21 that -- and I'm a fellow of both of those organizations;
22 and a third organization -- in fact, I was just president
23 of this past year -- is the American Psychology of Law
24 Society. It is a group that represents roughly 1,100 or
25 1,200 psychologists who are forensic psychologists in

1 their specialty.

2 Q And are you actually a fellow of those three
3 organizations?

4 A Yes.

5 Q And what does it mean to be a fellow?

6 A It's a distinguished status, to some degree.

7 Q And Dr. Kassin, in your work as a psychologist, have
8 you published any books?

9 A Yes.

10 Q And can you -- would it be fair to say you have
11 published about 12 books?

12 A Yes.

13 Q Or coauthored about 12 books?

14 A Yes.

15 Q And in particular, I want to ask you about a book you
16 published in 1993, Wrightsman and Kassin, Confessions in
17 the Courtroom. Do you recall that?

18 A Yes.

19 Q That is one of your published books?

20 A Yes, it is.

21 Q Have you also written some book chapters to be
22 inserted into books authored by others?

23 A Yes.

24 Q And if I were to say about 21 book chapters were
25 authored or coauthored, would that sound about right?

- 1 A About right.
- 2 Q And I want to ask you about some of those book
- 3 chapters specifically in the area of confessions. Okay?
- 4 I have in 2009, an article you authored in the Wiley
- 5 Encyclopedia of Forensic Science called Confessions,
- 6 Evidentiary Reliability.
- 7 A Correct.
- 8 Q Evidentiary Reliability of Confessions, correct?
- 9 A Yes.
- 10 Q And in 2008, you wrote another one on false
- 11 confessions published in the Encyclopedia of Psychology
- 12 and Law.
- 13 A Yes.
- 14 Q In 2008, Juries and Confession Evidence in
- 15 Encyclopedia of Psychology and Law?
- 16 A Yes.
- 17 Q And in 2007, Internalized False Confessions, Handbook
- 18 of Eyewitness Psychology published in 2007?
- 19 A Yes.
- 20 Q 2006, an article called Investigative Interviewing:
- 21 Rights, Research, Regulation --
- 22 A Yes.
- 23 Q -- published in 2006?
- 24 A Correct.
- 25 Q Cambridge University press, True or False -- an

1 article in 2004, an article titled True or False: I'd
2 Know a False Confession if I Saw One?

3 A Yes.

4 Q And to summarize, Dr. Kassin, nine of your 21 book
5 chapters have been written specifically on false
6 confessions and/or police interrogations; is that
7 accurate?

8 A That's accurate.

9 Q In addition, have you written any articles, and
10 specifically, I want to ask you about any articles you
11 have written recently?

12 A Yes. I've written a number of articles.

13 Q And can you tell the jury, you authored or coauthored
14 something called the White Paper, correct?

15 A Yes.

16 Q What is that?

17 A The White Paper -- the American -- I mentioned
18 American Psychology Law Society. That is the group that
19 represents forensic psychologists in the country.

20 The American Psychology Law Society had authorized,
21 in 2006, that I assemble a group of authors to write a
22 White Paper, which is a policy paper, on police
23 interrogations and confessions.

24 The result was we produced a paper called -- I
25 believe it's called Confession -- Police Induced

1 Confessions: Risk Factors, and Recommendations.

2 It is -- a White Paper is a policy paper. It's only
3 the second that this organization has ever authorized, and
4 the point is to attend to questions about risks and to
5 make recommendations for reform.

6 It is a paper that is -- well, it's a lot of work to
7 write, because in part, you assembled the group, you write
8 the paper. You send it out to review to a special science
9 advisory board.

10 I think -- we appeared at two open hearings and
11 conferences, posted it online for the membership to have
12 eight months, I believe, to make comments, and then it
13 went through a peer review at a journal, Law and Human
14 Behavior, which is a flagship journal in the field, and
15 then the executive committee of the organization
16 ultimately agreed to approve it.

17 So it's a fairly well vented paper that brings input
18 in from all directions in the field.

19 Q What does it mean to be a policy paper? What does it
20 mean?

21 A We were asked to write a policy paper on police
22 induced confessions, false confessions, and what -- what
23 recommendations we would have to minimizing their
24 occurrence.

25 Q Okay. To be issued by the American Psychological

1 Association? Sorry.

2 A Right.

3 Q And I want to direct your attention, I also have,
4 Dr. Kassin, that you have written, in total, 77 articles;
5 twenty-two -- approximately 22 of which relate to
6 confessions, false confessions, police interrogations, and
7 tactics. Does that sound accurate?

8 A That sounds right.

9 Q Out of 77 articles. I'm not going to ask you about
10 all 77.

11 A Thank you.

12 Q But I would like to ask you about another article
13 published in 2008 called the Psychology of Confessions,
14 and that was published -- do you recall that article?

15 A That's the title?

16 Q Yes.

17 A That's --

18 Q The Psychology of Confessions in 2008.

19 A Right. That was published in the Annual Review of
20 Law and Social Sciences.

21 Q And what is the Annual Review of Law and Social
22 Sciences, and what do you have to do in order to get an
23 article accepted by them?

24 A The articles are written by invitation when the field
25 has reached a certain level of maturity. There is the

1 annual review, and most disciplines have annual reviews.
2 We'll step up and ask an author to review that literature
3 as it currently stands. It's supposed to be an up-to-date
4 review of that literature, up-to-date conferencing.

5 Q Right. Additionally, I note in 2004, you coauthored
6 an article with Gisli Gudjonsson, the Psychology of
7 Confession Evidence: The Review of the Literature and
8 Issues --

9 A Yes.

10 Q -- is that correct? And that was published in the
11 Psychological Science and the Public Interest?

12 A Yes.

13 Q Dr. Kassin, how long have you been studying the issue
14 of false confessions?

15 A Twenty-five years or so.

16 Q All right. And you were first published in -- do you
17 know -- 1980?

18 A The first time I wrote about confessions was in 1980.

19 Q Okay. And you have been studying it. That was the
20 first actual publication?

21 A Yes.

22 Q Do you give presentations at professional
23 conferences?

24 A I do.

25 Q At -- what does that mean, professional conferences?

1 A I'll give presentations at psychology conferences,
2 and those are -- those are conferences that I've attended
3 over the course of my career.

4 In addition, I give talks, not at conferences per se,
5 but I get invitations a from judge's groups, bar
6 associations, the law schools, medical schools,
7 particularly forensic psychiatry programs, law enforcement
8 groups. I've given a couple of workshops, for example,
9 N.Y.P.D. the past couple of years. So there's a number of
10 those. It's -- essentially, the design was to communicate
11 the knowledge to practitioner groups, as well as other
12 psychiatrists.

13 Q And when you addressed N.Y.P.--- New York Police
14 Department, who -- who where you speaking to, addressing?

15 A Senior detectives. These were three, four-hour
16 workshops to the senior detectives that were arranged by
17 the training division.

18 Q I'm just going to ask you about a couple of the
19 schools that you've presented. You presented at Columbia
20 Law School?

21 A Yes.

22 Q Tufts University?

23 A Yes.

24 Q New York University?

25 A Yes.

1 Q Harvard?

2 A Yes.

3 Q Cornell?

4 A Yes.

5 Q Yale?

6 A Yes.

7 Q Stanford?

8 A Yes.

9 Q And you presented to judges, as well?

10 A Yes.

11 (Pause).

12 Q Dr. Kassin, what is a curriculum vitae?

13 A It's A resume.

14 Q And how --

15 A A fancy, academic word for resume.

16 Q All right. And how long is your resume?

17 A I'm not sure.

18 Q About 23 pages?

19 A That sounds about right.

20 Q Have you -- Dr. Kassin, have you been qualified --

21 oh, let me ask you this: You are a psychologist, correct?

22 A Yes.

23 Q What kind of psychologist?

24 A A social psychologist.

25 Q And how does that differ from any other kinds of

1 psychologist?

2 A A social psychologist is a -- as opposed to a
3 clinical psychologist, I think -- I've never seen
4 patients. I'm not a practitioner.

5 A social psychologist is a research psychologist, and
6 we -- the specific specialty area of social psychology is
7 the study of how people influence and are influenced by
8 each other.

9 So we study topics like persuasion, obedience to
10 authority, compliance, various forms of social influence
11 and how people can form impressions of each other.

12 Q I'm going to ask you about some courses that you've
13 actually taught as a professor. Introductory psychology?

14 A Yes.

15 Q Social psychology?

16 A Yes.

17 Q Psychology and the law?

18 A Yes.

19 Q Research methods?

20 A Yes.

21 Q Psychology of evidence?

22 A Yes.

23 Q Processes of adjudication?

24 A Yes.

25 Q Confession evidence?

1 A Yes.

2 Q Dr. Kassin, have you been qualified before as an
3 expert psychologist in state courts?

4 A Yes.

5 Q In federal court?

6 A Yes.

7 Q In military courts?

8 A Yes.

9 Q Have you been qualified before in South Carolina?

10 A Yes.

11 Q On how many occasions in South Carolina?

12 A I've testified at trial three times and in a
13 postconviction hearing, once.

14 Q Okay. And I have -- in South Carolina at trial in
15 2004?

16 A Yes.

17 Q 2001; in 1998?

18 A Yes.

19 Q Is that correct?

20 At this time, Your Honor, I would offer Dr. Kassin as
21 an expert in the area of social psychology in the field of
22 police interrogation practices and confessions.

23 THE COURT: Any voir dire?

24 MR. MEADORS: Yes, ma'am.

25 Good afternoon, Doctor.

1 THE WITNESS: Good afternoon.

2 MR. MEADORS: You were offered as an expert in
3 Mississippi, and New Jersey and not accepted, correct?

4 THE WITNESS: Yes.

5 MR. MEADORS: That's all. Thank you.

6 BY MS. PRINGLE

7 Q Dr. Kassin, was that because you were not qualified,
8 or because that evidence was not admitted?

9 A That evidence was not admitted.

10 Q Okay. Were you actually -- so that was not an issue
11 as to your qualification?

12 A No.

13 MS. PRINGLE: I'd offer him as an expert.

14 MR. MEADORS: Your Honor, subject to our objections
15 at the hearings on the -- well, our objections are
16 expressed in the record this morning.

17 THE COURT: And I don't believe there were any
18 objections to his qualifications. I find him qualified as
19 an expert in social psychology, subcategory being police
20 interrogations, and practices, and confessions.

21 MR. MEADORS: For the record, the objection was
22 knowledge but clearly to the subject matter being present.

23 THE COURT: That's correct.

24 Yes, ma'am.

25

1 BY MS. PRINGLE

2 Q Thank you.

3 Dr. Kassin, first of all, let me ask you: What is a
4 false confession?

5 A False confession is an admission of guilt, followed
6 typically by a narrative story detailing a crime that is
7 given by somebody who is innocent.

8 Q All right. And are there -- is there any way,
9 framework of categorizing or types of false confessions
10 that have been adopted in the literature?

11 A Yeah. It turn out there are a few types of false
12 confessions. If you go back through the pages through
13 history, you'd find -- and it's naturally described as --
14 there are three piles: There is one category of false
15 confessions that are known as voluntary false confessions.
16 A classic example is in 1932, Charles Lindbergh's baby was
17 kidnapped and two---

18 MR. MEADORS: Your Honor, I'm going to object to any
19 specific cases.

20 THE COURT: To the extent that it's illustrative of a
21 particular phase, I'll allow it.

22 BY MS. PRINGLE

23 Q Go ahead.

24 A So in a case like that, and you often see this in
25 high-profile cases, people come out of the woodwork and

1 volunteer confessions.

2 There are a number of explanations as to why that has
3 happened. In some cases, people have some pathological
4 intention for recognition, get their names in the
5 newspaper.

6 In some cases, people seemed to have been delusional,
7 and they may have believed that they committed some crime
8 that they were uninvolved in.

9 I think the most recent example of a good, voluntary
10 false confession was John Mark Karr when he stepped
11 forward to volunteer to the murder of Jon Benet Ramsey,
12 which ultimately the charges were dropped. He was
13 innocent.

14 So those are voluntary false confessions. There are
15 a number of reasons -- researchers have studied why does
16 it occur.

17 Sometimes the reasons are rational. Sometimes what
18 you find is that someone is protecting a loved one. It
19 might be a parent stepping forward to protect a child, or
20 a child stepping forward to protect a parent.

21 In other cases, it's really a questionable story
22 about someone who is just off a little bit. They want the
23 attention. They want the fame. They may feel
24 extraordinarily guilty for other things they have done in
25 life, and they have a need to punish themselves.

1 The explanations vary. These tend not to pose a
2 problem for the criminal justice system, so they tend to
3 not even count them.

4 Very often, police encounter people who volunteer
5 confessions, and they -- they manage to clear those
6 confessions by demanding that the person show guilty
7 knowledge: "What do you know about the crime?"

8 If the confessor knows things that only the
9 perpetrator could have known, you know you have got a good
10 confession, but if they can't do that, if they can't
11 produce those facts, then typically, that's a tip off that
12 you have got a false confession.

13 So that's one category. Again, it doesn't tend to
14 pose a problem because authorities tend to, I think,
15 ferret out.

16 The other two categories of false confessions both
17 come as a result of police interrogations. These are
18 cases where somebody initially denies a charge, then they
19 are interrogated.

20 Then as a result of the interrogation, they step
21 forward to confess. These are -- in these cases -- in all
22 cases I'm talking about are known proven innocent cases in
23 which you probably talk about, well, how do we know that?

24 There are two types of these police-induced false
25 confessions. One type has been called compliant false

1 confessions.

2 These are cases -- are these are actually the most
3 common of them. These are cases in which somebody is
4 simply so stressed or so broken down and looking for a way
5 out, and either they are being responsive to a fear of
6 punishment, a promise of reward, an implication of reward,
7 where they're stressed; they're tired.

8 Whatever it is, they agree to give a confession, but
9 privately, they know they didn't do anything wrong.
10 They're innocent. They know they're innocent, but they
11 confess because they just need to extricate themselves
12 from the situation.

13 In contrast to that are what are known as
14 "internalized false confessions". These are the toughest
15 for psychologists to understand, but they're -- it turns
16 out to be a number of these that have -- that have been
17 studied.

18 Internal false confessions are cases where, as a
19 result of certain highly suggestive police tactics, not
20 only does the person confess, but they actually come to
21 believe -- or get confused and believe that they have
22 committed this crime.

23 Now, the difference between the two is usually
24 discernible by what happens once the confession situation,
25 once the pressure has subsided.

1 In the compliant false confessions, typically what
2 happens is a person signs a confession. And at some point
3 later, they immediately retract it.

4 They say, "You know what, I was under pressure. I
5 couldn't see straight. I was confused. I needed to get
6 out of there, but I signed this confession."

7 The internalized false confessors actually are
8 confused. There are a number of cases like this,
9 involving often children but sometimes adults, in which
10 not only do they confess, but they proceed to believe they
11 have committed this crime.

12 There are a number of these on record, and the names,
13 and the dates, and the places change, but the script is
14 always about the same: A vulnerable suspect receives
15 false evidence.

16 They are led to believe that, for example, in some
17 cases that their hair was found in the victim's grasp or
18 that the victim's blood was found in their possessions,
19 and they get confused about reality. They wonder, "How
20 could that happen if I didn't do anything, and I don't
21 remember it?"

22 Ultimately, a conversation ensues about memory and
23 consciousness and how it's possible you may have done this and
24 not known it.

25 There are a number of cases like that that are kind

1 of hard to understand. There is an example in San Diego
2 of a kid named Michael Crowe, and he was charged --

3 MR. MEADORS: I'm going to object, Your Honor.

4 MS. PRINGLE: He's giving an example of internalized
5 false confession. He's explaining the categories of false
6 confessions.

7 MR. MEADORS: It's just not relevant also, Your
8 Honor, would be our objection.

9 THE COURT: I'll -- I'll allow it to be explained for
10 the purposes of illustration of the category.

11 THE WITNESS: Thank you.

12 The Michael Crowe case illustrates the prototypical
13 false confession. Crowe was brought in for questioning.
14 He was 14 years old when his 12-year-old sister was found
15 dead every night, having been stabbed in the bedroom.

16 He was brought in, isolated, questioned. The officer
17 told him a number of details that were not true. They
18 told him that her hair -- his hair was found in her gasp;
19 that her blood was found on his pillow and a number of
20 other details.

21 Eventually, he got confused and got convinced that he
22 woke up at some during the night, killed her, went back to
23 sleep and forgot the whole thing, and he ultimately
24 confessed.

25 He also implicated a friend who then confessed, and

1 then while the two of them were awaiting trial, a local
2 drifter was picked up with the sister's blood on his
3 clothing. This drifter was in the neighborhood at that
4 time with a history of violence, and so the charges
5 against the boys were dropped.

6 Those are the tougher ones to understand, so we have
7 the three types of false confessions: The voluntary,
8 compliant, and the internalized.

9 BY MS. PRINGLE

10 Q So voluntary one compliant to internalized --

11 A Yes.

12 Q -- and the third. That last example was
13 internalized?

14 A Yes.

15 Q I'm going to ask you how we know in a minute, but do
16 false confessions -- do false confessions actually happen?

17 A Yes.

18 Q Is it a real phenomenon?

19 A It's a phenomenon. It's a counter-intuitive, as I
20 know.

21 Q Okay. I'm going to ask you how we know in a minute,
22 but let me ask you first, do we have any idea how often it
23 happens?

24 A I have seen estimates, and honestly, I don't think it
25 is possible to do either one of these. I don't think

1 it's -- here is what we know about the prevalence of false
2 confessions.

3 And I don't think they amount to, you know, some
4 prevalence rate like the prevalence rate or incident rate
5 of some disease in the population.

6 We know that when you look at the Innocence
7 Project -- now, the Innocence Project is a very specific
8 single --

9 MR. MEADORS: Your Honor, I'm going to object. That
10 project, 25 percent or less, didn't even have written
11 statements in it, and he's now going into specific -- it
12 has no relevance to this. The folks in here, half -- more
13 than 80 percent of them didn't even give a statement.

14 MS. PRINGLE: It's the percentage of them that is
15 significance, 25 is 100 percent.

16 THE COURT: I'm -- I'm -- I'm going to sustain that
17 particular objection.

18 BY MS. PRINGLE

19 Q Do we have any way of knowing the rate at which this
20 happens?

21 A We know that in studies over the years, and this goes
22 back to the early 20th Century, of wrongful convictions,
23 in those studies -- in all of those studies when you
24 combine them, it's always between 14 and 25 percent of
25 wrongful convictions have false confessions and evidence.

1 Now, those are the studies of wrongful convictions.
2 Those are the tip of an iceberg, because what doesn't get
3 counted in those cases are cases like Michael Crowe who
4 was never charged. The charges were dropped. He was
5 never prosecuted.

6 His case, his story, doesn't become one of those
7 numbers. Also, not part of the numbers are cases in which
8 somebody confesses and then pleads guilty, and they're
9 essentially never heard from again. Also not part of the
10 numbers --

11 MR. MEADORS: Objection to that. That is -- there is
12 no way he can say that.

13 THE COURT: Overruled.

14 MR. MEADORS: Speculation, for the record.

15 BY MS. PRINGLE

16 Q Proceed, Dr. Kassin.

17 A And so there are a number of categories of confessors
18 where we know that there was a false confession, but we
19 don't count it in those wrongful convictions.

20 It's important to know that there are other ways to
21 try and determine whether or not false confessions occur
22 and with what frequency. Again, I don't think -- again, I
23 don't think we can ever come up with a number that says,
24 you know, 500 a year of these occur. I don't think it's
25 possible.

1 MR. MEADORS: And I'd object to relevance if he can't
2 come up with a number.

3 BY MS. PRINGLE

4 Q I can sum this up.

5 Doctor, is there any way to say exactly what the rate
6 at which this happens is?

7 A There are estimates that we have derived from police
8 officers and surveys, but no.

9 Q Okay. You testified a moment ago that we do know it
10 happens. How do we know that it happens? How does the
11 psychological, scientific community, know that this
12 happens?

13 A When somebody confesses, and they sign a confession
14 to a crime, there are generally four ways in which we turn
15 out that we know that confession turned out to be false.

16 In some of these cases, it turns out that a person
17 gives a confession, and then the thing they confess to
18 never happened.

19 So there is an example of a man in Texas who
20 confessed to murdering his girlfriend when she
21 disappeared, and then she showed up alive in Tucson,
22 Arizona; a pretty good indication that was a false
23 confession. So there are some cases that are of that
24 category.

25 A second category of a case: Somebody confesses to a

1 crime, and then it turns out it was physically impossible
2 for that person to have committed that crime.

3 There are different ways that can happen. In one
4 case, someone confessed to -- a 20-year-old man confessed
5 to murdering a classmate of his, and it turns out he was
6 in Brazil. We know he was in Brazil because he was at a
7 dentist, got a dental x-ray, and it was dated and timed
8 that it was his death.

9 MR. MEADORS: Objection. I don't -- he said -- I
10 could not hear where he said he was.

11 THE WITNESS: He was in Florida, but the -- he was in
12 Brazil, but the murder took place in Florida.

13 MR. MEADORS: All right.

14 THE WITNESS: There was a case in Chicago where two
15 boys confessed to the murder of an 11-year-old girl. It
16 turned out after they gave their confessions, it was
17 discovered that -- in autopsy that the girl had also been
18 raped and that there was semen.

19 The boys were seven and eight years old, and they
20 were incapable of producing semen. So it was physically
21 impossible for that confession to be true.

22 In a third category of cases, the actual perpetrator
23 is found. And the actual perpetrator is discovered, and
24 it turns out that perpetrator, and not the confessor, had
25 committed the crime.

1 A classic example, a recent example, in New York, a
2 very famous example, the Central Park jogger case. In
3 1989, five boys were convicted of confessing to the
4 Central Park jogger rape based on their confessions.

5 It turned out in 2002, from prison, another gentleman
6 stepped forward and said, "I was the Central Park jogger
7 rapist, and I acted alone."

8 When that District Attorney's office went back to
9 look at the evidence in that case, they discovered that
10 there was semen. It was D.N.A., and it matched this new
11 confessor. So the five boys were ultimately exonerated.
12 Their convictions were vacated.

13 Then the final category of having those, new
14 evidence, like D.N.A. comes in, somebody confesses to a
15 rape.

16 Bruce Gawdshawk (phonetic) in Philadelphia confessed
17 to two counts of rape. He was convicted and sentenced to
18 prison and put in prison, and ultimately, there was D.N.A.

19 When the time came that those D.N.A. tests could be
20 done, given the advances in technology, the State and the
21 defense lawyers sent the D.N.A. samples to their own labs.
22 Both labs came back with exactly the same conclusion.
23 Whoever committed one rape committed them both. It was
24 one person's sample. That person was not Bruce Gawdshawk.

25 So his confession, despite his confession, he was

1 D.N.A. exonerated. So those are the four ways of knowing
2 for sure that a confession is false.

3 Q Okay. And how -- do you ever -- do you ever review
4 confessions in -- over the last how many years have you
5 been doing this?

6 A Twenty-five years.

7 Q Twenty-five years. Have you reviewed actual
8 confessions?

9 A Yes.

10 Q And have you performed studies looking at the issue
11 of false confessions?

12 A Yes.

13 Q And have you actually looked at recordings of false
14 confessions?

15 A Yes.

16 Q Real recordings?

17 A Oh, many, yes.

18 Q Okay. And can you talk about the significance of a
19 recording?

20 A Sure. It's always been the case that confessions
21 would be recorded. There are cases that go back to the
22 1960s and '70s I'm familiar with where I've got actual
23 recordings of actual confessions.

24 But it didn't become particularly popular until the
25 early 1980s, and what would happen is a number of police

1 departments -- and in fact, I remember contacting the
2 District Attorney at Bronx, New York because he was
3 starting to videotape confessions in the 1980s because
4 they have such credibility in court.

5 The issue then was to videotape the confessions, and
6 a number of police and sheriff's departments all over the
7 country were videotaping those confessions.

8 Beginning several years later, a movement swept
9 through many states and many jurisdictions to require, or
10 to at least encourage, the videotaping of the full
11 interrogation.

12 Because when a judge, or jury, or consultant, or
13 lawyer is trying to evaluate the statement, it's
14 difficult, and sometimes impossible, to know what that
15 statement is, whether it's credible or not, without seeing
16 the process that gave rise to it.

17 So today in a number of states, it is required. In
18 many jurisdictions it's not required, but it's actually
19 voluntary.

20 There have been a number of surveys at police
21 departments in which they have voluntarily gone to
22 videotaping full interrogations, and they're
23 overwhelmingly happy with the process because they get to
24 see things in these tapes that they had missed the first
25 time around in the interrogation.

1 So there are two issues: One is the presence of a
2 videotaped confession, which is just the final statement.
3 The more recent movement is toward taping, and this could
4 be -- you know, tape recorder taping or videotaping, not
5 just the final statement, but the whole interview and
6 interrogation process that produced this statement.

7 Q All right. And have you actually viewed recordings
8 that -- of confessions that were later proved to be false?

9 A Yes.

10 Q And what is the significance of recording -- I guess
11 what I mean to ask you is what is the best evidence in
12 assessing the validity of a confession, and I'm going to
13 talk to you about that a little bit later --

14 MR. MEADORS: Objection. We didn't talk about this
15 earlier. None of this -- and he can't testify to that.

16 THE COURT: Counsel approach.

17 (WHEREUPON, a bench conference was held in the
18 presence but not within the hearing of the jury).

19 BY MS. PRINGLE

20 Q Dr. Kassin, backing up just a little bit to the issue
21 of how do we know that false confessions actually happen,
22 and you had explained one of the ways is, in fact, we --
23 expert psychologists, criminologists have used recordings,
24 correct?

25 A Yes.

1 Q Okay. And I want to ask you also what, if any,
2 effect of -- what is the Innocence Project, if you can
3 just summarize that quickly?

4 A The Innocence --

5 MR. MEADORS: I'm going to object to that. That has
6 no relevance to this case, respectfully.

7 THE COURT: I think you need to rephrase your
8 questions.

9 BY MS. PRINGLE

10 Q What effect, if any, have the D.N.A. exonerations,
11 that happened over recent years, had on your field?

12 A It has had a transformational effect. I say that
13 because -- and this includes myself: False confessions
14 are counter-intuitive.

15 And I think nobody had the sense that they were as
16 common or as frequent as what came through in the D.N.A.
17 case. In the D.N.A. cases, as we first discovered, the
18 first signal that came out loud and clear is that -- by
19 far and away, the most common reason for wrongful
20 conviction is eyewitness mistakes. Eyewitnesses make a
21 lot of mistakes.

22 Eighty percent of these wrongful convictions had
23 eyewitness errors. What nobody expected is that was 20 to
24 25 percent of those cases would contain false confessions.
25 We would have assumed that number would have been a lot

1 lower.

2 When you went back and looked at many of those cases,
3 what was discovered was in some of those --

4 MR. MEADORS: Your Honor, objection at this point.
5 He's going now into specific cases.

6 THE WITNESS: No, I'm not.

7 THE COURT: I'll allow him to finish answering the
8 particular question.

9 THE WITNESS: When -- when the collection of those
10 cases that identified a false confession are analyzed, and
11 what researchers have found is when you look at those
12 confessions, in the vast majority of them, more than
13 90 percent of them contain not only an admission of guilt,
14 but they contain accurate and often vivid details about
15 the crime, sometimes details that only the perpetrator
16 should have known.

17 So these were cases -- what has been discovered in
18 the Innocence Project is when you now know these people,
19 by D.N.A., were not the criminals, and yet, you have their
20 confessions, filled with details, and other
21 characteristics that make those confessions very credible,
22 that had a very jarring effect on the field.

23 BY MS. PRINGLE

24 Q Okay. So some false confessions contain accurate
25 details. Do some false confessions contain inaccurate

1 details?

2 A Yes. And that is the first metric. I mean, that's
3 what you would normally look for. There's -- a false
4 confession contains a description of the crime.

5 To the extent that -- the crime, as described, is off
6 is important ways, that would be a cause for concern. It
7 would certainly suggest some questions be raised about the
8 reliability of that confession.

9 Q All right. And do false confessions -- you said they
10 contain details. Do false confessions ever include, in
11 your experience, a motive?

12 A Yes. In fact, at a recent professional conference,
13 my colleagues and I presented an analysis of false
14 confessions in which we went back and did an analysis of
15 the content for false confessions.

16 What we found is that 80 percent of them contained
17 statements about a motives, that is: This is what I did,
18 and this is why I did it. So motive was always part of
19 the story line, and again, it become shocking to learn
20 that some of those cases in which there was not just,
21 "This is what I did and how and why" turned out, actually,
22 to be false.

23 Q What about expressions of remorse or apologies?

24 A Again, in the sample -- we looked at a sample of 20
25 of them, and in that -- in those 20, 40 percent contained

1 apologies or expressions of remorse.

2 Q All right. And have you actually, with respect to
3 the issue of details, you did a study on prisoner
4 confessions.

5 A Correct.

6 Q And can you tell the jury about that, and how that
7 relates to this?

8 A Sure. One of the -- what I've always been struck
9 with is I've -- I've been -- I've been looking at
10 confessions for years. I've seen hundreds of them on tape
11 or listened to them on tape.

12 I'll be honest: I've gotten to -- I got to realize
13 it's very, very difficult for me, just by listening to the
14 confession without knowing everything there is to know
15 about a case, to figure it out.

16 So I was curious, because I know that some experts
17 and some police officers have claimed that they would know
18 a false confession if they saw one.

19 Well, I wanted to test that. So my colleagues and I
20 went into a prison outside of Boston, and we recruited
21 some prisoners to take part in the study.

22 We videotaped the prisoners confessing to the crimes
23 for which they were incarcerated, and then we had those
24 same prisoners make up a confession on the spot to
25 something they didn't do.

1 So we knew which were which, and we had false
2 confessions and true confession. We went out and we
3 showed the tapes of the true confessions and false
4 confessions.

5 We showed them to laypeople. We showed them to
6 college students. We showed them to police detectives.
7 By and large, to make a long story short, people couldn't
8 tell the difference. People couldn't tell the difference
9 between true confessions and false confessions.

10 Now, part of the problem is we inherently believe
11 confessions. I will say, every time, every time, I hear a
12 confession for the first time, my impulse is to believe
13 it.

14 But that's part of it, but the other part is that the
15 confessions themselves have all of the Hallmarks of a
16 credible statement.

17 They contain the details, often accurate details.
18 They contain statements of motivation. They often contain
19 expressions of remorse and apologies, so it's very
20 compelling. It's hard for me to figure out how you can
21 figure it out, unless you pay attention to the rest of the
22 evidence in the case.

23 Q Okay. So to sum up what you just said in that study,
24 how do false confessions differ from true confessions in
25 terms of how they look, how they read, details,

1 expressions of remorse, apology, et cetera? How do they
2 differ? How does false differ from true, in that regard?

3 A It's not clear. Now, in order to answer the
4 actual --

5 (There was an equipment malfunction).

6 THE COURT REPORTER: I'm sorry, I need a moment.

7 (Pause).

8 Okay. Thank you.

9 (Pause).

10 MR. MEADORS: Your Honor, at this time respectfully,
11 we would object.

12 THE COURT: Do you need to approach?

13 MR. MEADORS: No, ma'am.

14 THE COURT: Okay.

15 MR. MEADORS: I'm just saying if he's saying it's not
16 clear, I don't know how he can testify to it.

17 THE COURT: And I think he was getting ready to
18 answer the question.

19 BY MS. PRINGLE

20 Q Can you explain why?

21 A Could you repeat the question, please?

22 Q Yeah. How do true confessions compare to false
23 confessions in terms of on their face?

24 A The reason I said that's not clear is that while we
25 have analyzed the content of false confessions and we have

1 looked at the content of true confessions and they look
2 similar, I'm personally not satisfied that we have two
3 otherwise comparable groups of confessions.

4 I think that question remains somewhat unanswered,
5 but what I do know, because we've done this research, is
6 that -- and this is one of the reasons why there is
7 increasingly, police departments around the country are
8 started to take full interrogations, is that although it's
9 hard to tell a confession just by watching the final
10 product, people become much more accurate judges of that
11 confession when they hear how it got to that point, when
12 they hear the process that produced it.

13 Where and how the details got there, where and how
14 the statement got there, and so it's clear that when
15 people have very access to the full process, they become
16 better, wiser judges of that confession.

17 Q Okay. What is the difference, if any, between -- we
18 hear the terms "interview" and "interrogation"
19 interchanged. What, if any, difference is there?

20 A Most interrogation schools, most trade annuals will
21 distinguish between these two processes. These are
22 sometimes words that are used interchangeably, but in
23 fact, within the profession, they refer to very different
24 processes.

25 Interrogation is really a two-step process. You get

1 into a preinterrogation interview, and it is designed for
2 credibility assessment purposes so that an interrogator or
3 prospective interrogator can size up the suspect,
4 determine if the suspect is lying or telling the truth,
5 and essentially make a judgment about whether this person
6 is a suspect and should be interrogated or is not a
7 suspect, is probably telling the truth and should be sent
8 home.

9 So the preinterrogation interview is a bit of a
10 screaming interview. No accusations are made. No -- no
11 -- it's not a high-conflict kind of interview. It's
12 mostly for information gathering purposes.

13 The interrogation steps into the second gear. If an
14 interrogation is conducted, it is because a judgment has
15 already been made that the suspect is our person. That
16 judgment may be right, or it may be wrong.

17 MR. MEADORS: Your Honor, I'm going to object to
18 that. It's speculation. In no way can he say what's in
19 the mind of all officers who are taking the statements.

20 MS. PRINGLE: I asked him what that's based on.

21 THE WITNESS: It is by definition --

22 MS. PRINGLE: Okay.

23 THE WITNESS: Oh, I'm sorry.

24 THE COURT: Provide a foundation.

25

1 BY MS. PRINGLE

2 Q What is that based on?

3 A Yes. Training manuals. Training manuals on how to
4 conduct interrogations will say that if you have made a
5 determination during the interview phase that this person
6 is probably guilty, you may then interrogate that person.

7 At that point, by definition, interrogation is a
8 process that a police officer starts with a suspect
9 already believed to be guilty, because if they believe
10 that person to be innocent, they don't bring them into
11 interrogation.

12 Now, the upside of that is it means not everybody
13 under suspicion gets interrogated. There's a screening
14 process. Some are interrogated. Some are sent home.

15 The downside is once the process begins, what it
16 means, by definition, is we already think we've got our
17 person. That's how interrogation begins, which is why the
18 opening round of an interrogation is an accusation.

19 Q Okay. And you talked about training manuals. Have
20 you actually reviewed training manuals?

21 A I've reviewed a dozen of them, and they're all
22 basically -- they're very similar.

23 Q All right. Now, to my next question, are there
24 common features in these training manuals that you have
25 reviewed? Have you reviewed them from different

1 geographical areas?

2 A Geography is not relevant. These are training
3 manuals that have been published over the years. These
4 are texts that are published.

5 They often form the basis of training and workshops
6 that travel the country, that law enforcement officers
7 take workshops. Sometimes loss-prevention managers who
8 work in the corporate world take workshops. Security
9 people take workshops. Even military intelligence
10 gathering officials sometimes will take these workshops.

11 So there are a number of manuals that essentially
12 reduce themselves to the same set of processes, so there
13 is a commonality across them.

14 The most popular is what's called the Reid Technique.
15 It's one of a variety. It's the most articulate and the
16 most commonly used, so if you understand the Reid
17 Technique, you probably understand most of those
18 interrogation manuals.

19 Q Okay. And in an interrogation setting, how, based on
20 your research, your review, all of these interrogations
21 that you have reviewed and the training manual, how does
22 the interrogation process proceed, and I'm taking about
23 from beginning to middle, to end? Can you explain that?

24 A Yeah. Interrogation is a multistep process. Now,
25 I've never actually seen an interrogation go literally

1 from steps one to nine in order in a perfect sequence, but
2 the elements are always in place.

3 The elements are these: Because essentially, they
4 reduce themselves to three processes: First, isolate the
5 suspect. You don't interrogate a suspect in his living
6 room or her living room or out in the street.

7 Interrogation, you bring into the police station.
8 The goal is to make the person somewhat uncomfortable,
9 remove all forms of social support so that this person is
10 in an environment that he or she wants to get out of it,
11 and there's a certain sense of urgency to remove
12 themselves from the situation.

13 So isolation is first. Make sure that -- it's
14 essentially low in comfort level, and, in fact, in the
15 Reid manual, they actually prescribe a certain blueprint
16 for an interrogation to make that happen.

17 Once the suspect is isolated, there are a number of
18 other processes. In general, those other processes fit
19 two -- two categories: One, is confrontation, accusation.

20 In the Reid Technique, as in most of the others,
21 interrogation begins with what is sometimes called a
22 positive confrontation or the direct confrontation.

23 It is the statement, "We know you did it, and we
24 don't want to hear any lies." That is followed by a
25 series of other steps.

1 In Reid, for example, in the Reid manual, those steps
2 include how to handle denials, how to overcome objections.
3 In fact, in the Reid Technique, once you have identified
4 your suspect and you accuse that suspect, if that suspect
5 begins to deny the charges, deny their involvement, the
6 interrogator is instructed to stop those denials in
7 mid-sentence, put your hand up, literally, to the
8 suspect's face, say, "We'll hear from you later," and not
9 allow that suspect to utter those denials or mount a
10 defense.

11 The suspect will often be called a "liar", not just
12 once but repeatedly. That process of confrontation, the
13 processes of confrontation, are designed to essentially
14 communicate to the suspect that your denials will not win
15 your freedom.

16 Denial won't work. "We think you're a liar. We want
17 to hear the truth." So that's the second step of stems,
18 and then the third set of steps, I generally have used the
19 term "minimization" to refer to that, but there are a
20 number of very discrete tactics at this point.

21 Once an interrogator gets the sense that this
22 isolated suspect is breaking down and starting to weaken,
23 the interrogator will start to make confession more
24 palatable.

25 Now, according to interrogation manuals, the goal of

1 an interrogation is to do two things: One, increase the
2 anxiety associated with denial. Make it anxiety provoking
3 and stressful to deny the charges; two, lessen the anxiety
4 associated with confession.

5 Well, one way to lessen the anxiety associated with
6 confessions is to provide minimizing remarks so the
7 interrogator at this stage of the game will say things to
8 a suspect like, "I think you did is normal. I don't think
9 you're a bad person. In fact, I think what you did
10 probably is not something you intended to do. Maybe it
11 was an accident. Maybe you were provoked, something that
12 happened on the spur of the moment."

13 There is some explanation that is designed to both
14 normalize and minimize, and that's one of the reasons that
15 particularly in compliant false confessions, there are so
16 many of those cases where when you look at the interviews
17 with those confessors afterwards and they're asked, "Well,
18 why did you confess to something you didn't do," their
19 answer is often, "Well, because I wanted to go home."

20 Now, you know, the common sense in me wants to smack
21 my head and say, "What made you think you were going to
22 confess to a crime and go home?" But when you understand
23 minimization, and there are studies that show this, when
24 you hear, "I don't think you're a bad person. I think
25 what you did maybe was just an accident. You were

1 provoked."

2 In fact, I've seen transcript where the -- where the
3 interrogator will say something like, "You know what, I
4 might have done the same thing in your situation."

5 You think to yourself, "Well, maybe what I did was
6 not so bad," and maybe they're not going to charge you.
7 So what happens with minimization is it leads people to
8 infer leniency.

9 They often think they're not going to get punished.
10 In the Central Park jogger case, five boys confessed.
11 Every one of them -- some of them were young enough to
12 have family members present. Every one of them, and their
13 family members, said afterwards, "I thought we were going
14 to go home now." Instead, they were under arrest. So
15 minimization is that third set of processes, and it is
16 designed to make confession easier.

17 Q Are there --

18 A However, this is no big deal.

19 Q Are there -- is -- is the providing of alternatives
20 and minimization a tactic with which you're familiar?

21 A Yeah. The culminating -- again, looking at the Reid
22 Technique in particular, the culminating event in
23 minimization is what's called the alternative question.

24 The Reid trained interrogators are specifically
25 trained to ask a question, such as, "So did you do this?"

1 Was it an accident, something you didn't intend to do?"

2 Or, "Did you intend to do it, and it was premeditated?"

3 The goal here is to present the suspect with two
4 guilty options: The one being the lesser evil, and with
5 the suspect who is, at this point, desperate to extricate
6 himself or herself from this situation, that lesser option
7 leaves him or her with the idea that maybe this isn't so
8 bad after all.

9 So essentially, what you find in the interrogation
10 room is what psychologists have found for more than 100
11 years in other settings. People try to maximize their
12 benefit, minimize their cost.

13 They try to gain rewards, avoid and punishment, and
14 people are very, very, very impressed by short-term
15 consequence.

16 If I have to get out of a bad situation now, I'll do
17 whatever it takes. As for whatever to me later, well,
18 I'll worry about that when I get there. People have that
19 tendency. Under stress, they have that tendency.

20 Q Just a couple more things. Is there -- in the
21 actual -- from interrogation to the end, to an actual
22 written statement, is there some chronology in there that
23 you can sum up and -- and explain how you get from
24 interrogation confrontation to an actual written statement
25 and what that usually looks like?

1 A Typically, what happens -- again, if you look at the
2 interrogation manuals, they will advise you on isolation,
3 confrontation, and minimization to get a person to finally
4 say, "Okay, okay. I did it."

5 But that admission of guilt isn't all that credible.
6 It's just an admission, and we all know that people can be
7 kind of bullied into capitulation at that point.

8 At that point, the goal of the interrogation is to
9 take that admission of guilt and blow into and embellish
10 it into a full narrative statement. A guilty person
11 should be able to tell you, "This isn't just what I did,
12 but this is how I did it. This is who I was with. This
13 is when I did it. This is why I did it," and that is the
14 full -- now, that's what's called the full confession.
15 It's not just an admission of guilt. It's an admission
16 plus the details.

17 Q Okay.

18 A And, again, a trained interrogator is to go from that
19 first break down of an admission into developing the full
20 narrative confession.

21 Q All right. I want to ask you about are there -- and
22 I don't want to go into this in a ton of detail, but are
23 there -- do you refer in some of your publications to the
24 literature to two pillars of modern interrogation?

25 A Yes.

1 Q And one of those you just explain, those are the
2 psychological interrogation techniques. You have gone
3 into that.

4 A Yes.

5 Q What is the other one?

6 A Well, there has to be that preinterrogation
7 interview. For years, interrogators have been trained on
8 how to do lie judgments, how -- like we all do on a
9 day-to-day, minute-to-minute basis, trying to figure out
10 if someone is lying to us or telling us the truth.

11 Research has always shown in social psychology for
12 years that people are bad lie detectors. They don't
13 realize what they had. They tend to be overconfident, but
14 we can't seem to make those judgments at high levels of
15 accuracy. However, trained interrogators are trained in
16 that first process at an interview, how to determine at an
17 interview, whether someone is lying or telling the truth.

18 So that use of behavior and demeanor cues to
19 determine if someone is lying, that is that first pillar.
20 That occurs in the preinterrogation interview.

21 Q And what does the research, the studies, indicate
22 about how good human beings are at -- at that?

23 A The research is clear. People are -- are poor lie
24 detectors, and this -- I should qualify that. People are
25 not poor lie detectors, necessarily, in judging, say,

1 people they know well, like a parent or a child or a
2 spouse, but in judging a stranger, somebody you don't
3 really know well, research shows, very controlled studies
4 show, people are bad lie detectors and are on top of it.
5 That same research shows that professionals who make those
6 judgments for a living aren't any better than the average
7 person; that training sometimes produces a modest
8 improvement, but not by much.

9 What those of us who are doing this research know, in
10 the process of trying to improve lie detector evidence,
11 and we're figuring out ways to improve performance, but
12 these are ways that are still in the laboratory that have
13 not actually made it into practice.

14 Q And you're talking about -- you said behavior and
15 demeanor as indicators.

16 A Yes. And if I might say, the problem with it is --
17 the problem with these cues very simple: People are
18 taught to judge when someone is lying by how anxious they
19 are.

20 We have this idea that when they lie, it makes you
21 anxious, and your anxiety leaks out in various behaviors.
22 When you're anxious, for example, you tend to look away.
23 You can't give somebody eye contact or you get fidgety, or
24 your posture starts to get rigid or very slouched.

25 It turns out, studies have shown, that those cues are

1 not predictive of deception. In fact, over the years,
2 dozens have studies have shown that whether or not someone
3 gives you direct eye contact or looks away has nothing to
4 do with whether they're lying.

5 A good liar will look -- and I saw this in the
6 prison: A good liar will look you right in the eye and
7 deliver, and then there are some people who are just
8 socially more modest and even when they're telling the
9 truth, they're anxious. They're looking away, so those
10 cues don't work.

11 Q All right. Doctor, I'm getting close to the end
12 here, but I want to ask you, you study this field in
13 particular, but you're also a social psychologist and
14 study psychology in some --

15 A Yes.

16 Q -- depth, as well?

17 A Yes.

18 Q And is it all -- everything that you have testified
19 to today, and again, I don't want to go into great detail
20 about this, but everything -- is it rooted in the basic
21 core principles of your field?

22 A Yes. It's basic psychology.

23 Q And why do you say that, if you can just...

24 A The principles are -- when I started to apply basic
25 principles of psychology to the study of confessions, the

1 science -- the scientists in psychology were not by any
2 means shocked, the idea that somebody might confess to
3 something they didn't do, as counter-intuitive as it
4 seems, is not shocking to a behaviorist, for example, who
5 studies how extensively people try to gain reward and
6 avoid punishment.

7 Reward and punishment is what goes on in the
8 interrogation room. People are seeking whatever rewards
9 they can get. If they're under stress, the reward is the
10 removal of that stress.

11 And as far as what we know about people as decision
12 makers, people are -- what -- decision making is often
13 called myopic. We are so focused on the here and now and
14 so focused on getting done what we need to get done now
15 that we just don't worry about future consequences,
16 particularly when you're stressed or when you're fatigued.

17 Q All right. Back to this: Specifically, in false
18 confessions -- well, interrogation, are there risk factors
19 present in psychological interrogation?

20 A Yes.

21 Q What are they? What -- are there categories?

22 A There are categories of risk factors. I think it's
23 useful to think in that way. Certainly, some people, some
24 individuals, more than others, are vulnerable to the
25 appeal issue.

1 Q What is this category?

2 A Dispositional risk factors.

3 Q Is this the first category?

4 A Yes.

5 Q Okay.

6 A I would like to think of myself, for example, because
7 of what I know as being relatively invulnerable to this
8 type of manipulation, but there are risk factors.

9 When you look at known false confession cases, you
10 find, for example, that kids are overly represented.
11 There are -- there is a disproportionate number of
12 teenagers, relative to teenagers and other contexts in
13 criminal justice.

14 So it suggests that teenagers are at risk more than
15 others in interrogation. The same is true for people, as
16 you can imagine, who are mentally retarded. People who
17 are mentally retarded -- research having nothing do with
18 confessions has long shown they are highly compliant, they
19 are highly subjective.

20 With people who are mentally retarded, if you ask a
21 question that requires a "yes" answer, even if the answer
22 requires an absurd answer, they will often say "yes" just
23 because it's -- they have a compliance tendency.

24 So it is clear that people who are limited
25 intellectually and people who are young because they are

1 immature and are focused on the moment tend to be at risk.

2 There are certain mental illnesses, as you can
3 imagine, that can make somebody at risk. If somebody, for
4 example, has a social anxiety disorder; someone, for
5 example, who shies away from confrontation and is very
6 uncomfortable with that kind of social confrontation, the
7 urgency to stop that confrontation, the urgency to stop a
8 process like that, may get to such a point that they
9 become vulnerable and confess.

10 If you get even more extreme in mental illness -- you
11 can imagine that somebody who maybe suggestible, might
12 actually be prone to believe this, and they might actually
13 be persuadable that they did something that they didn't
14 do.

15 So there are personality and mental health
16 differences, age differences, intellectual ability
17 differences and personality differences.

18 Research in this area has focused on two personality
19 characters: One is called a tendency towards compliance.
20 Some people just tend to be more socially approval
21 oriented and less confrontational than others.

22 They're more likely to say, "Yes, they hate
23 conflict." So they are more likely, when push comes to
24 shove, to capitulate.

25 A second characteristic of someone who is vulnerable

1 would be suggestibility. A person who is suggestible and
2 someone who is prone not to trust their own memory, so if
3 I try to manipulate their memory, if I give you false
4 information about something that happened to you
5 yesterday, if you're the kind of person who is
6 suggestible, you might actually come to believe it. So
7 those are the -- a range of characteristics that make
8 someone --

9 Q So the first is characteristics of the defendant?

10 A Yes.

11 Q And the second category relates to what?

12 A Relates to interrogation tactics.

13 Q All right. And what tactics create risk factors?

14 A The risk factors that are identifiable have to do
15 with time. The more time a person is subject to
16 interrogation, the more vulnerable they become to
17 capitulating.

18 The second is the presentation of false evidence,
19 which is that interrogation tactic that I talked about in
20 the Michael Crowe case.

21 When police interrogators lie about evidence or are
22 misleading in some way about evidence, when they suggest
23 that, "We have evidence of your guilt, whether you're
24 aware of it or not," that tends to bring innocent
25 people -- put them at risk.

1 Part of the reason is the reason is -- the reason
2 people confess and not just innocent people but criminals,
3 is they say they feel trapped by the weight of evidence.

4 When confessors are asked afterwards, "Why did you
5 confess?" They say, "They had all this evidence against
6 me."

7 Well, if innocent people think there is a lot of
8 evidence against them, they feel trapped by the weight of
9 the evidence. And so -- and so the presentation of false
10 evidence is a risk factor.

11 Then finally, certain types of minimization tactics.
12 You can imagine that just as you think you'd never confess
13 to a crime you didn't commit, if you're feeling trapped
14 and you're under stress, and now the implication of the
15 tactic is maybe what you did isn't so bad after all.

16 You start to engage in some kind of wishful thinking,
17 and what happens in these cases is people assume that
18 maybe they're not going to get punished. So that's what
19 makes confession easy.

20 That process, too, puts innocent people at risk, and
21 in fact, there are some in the field who believe that you
22 almost -- you almost don't find a single false confession.

23 I'm not quite willing to make it, because I haven't
24 seen the text of all of them, but it appears that
25 virtually every false confession known contains

1 minimization as a tactic.

2 Q And you had mentioned another condition that I don't
3 think you added, but is isolation one of those risk
4 factors?

5 A Yes.

6 Q That you talked about before?

7 A Yes.

8 Q All right. And then the third and final category of
9 risk factors?

10 A This is -- this is one that only recently have the
11 researchers discovered. That has to do, believe it or
12 not, with innocence.

13 We all, including myself, believe that being innocent
14 is a protection, and to a large extent, it is. The
15 problem is that innocent people have a belief. I think we
16 all have a belief in the world being a just place.

17 So what happens is innocent people -- when you look
18 at their behavior, innocent people are incredibly
19 cooperative. They waive their rights.

20 When you ask them why they didn't ask for a lawyer,
21 they say, "I don't need a lawyer. I didn't do anything
22 wrong. I have nothing to fear. I have nothing to hide."

23 They give themselves up. They bring themselves in.
24 They're highly cooperative. They're forthcoming during
25 interviews. There is research to suggest now, as well,

1 that innocent people put themselves at risk through a
2 number of interesting decisions.

3 There have been a number of D.N.A. confessors who,
4 when I interviewed them -- and I went ahead and conducted
5 some laboratory experiments to show this -- the reason
6 they say they confessed is they were tired. They had been
7 interrogated for a while. They were under stress, and
8 they got the sense that there was real evidence out there.

9 In a couple of these cases, Jeffery Deskovitz
10 (phonetic) being one, a guy named Tom Johnson being
11 another, what they said was, "I figured you know what,
12 I'll sign the confession now. They'll do their
13 investigation. They'll get the evidence. They'll see I
14 didn't do it."

15 Jeff Deskovitz was told, "We have D.N.A." Now, he
16 went away thinking, "Okay. Well, great. They'll do the
17 D.N.A. analysis. They'll see I didn't do it."

18 So in a very strange way, innocence, for innocent
19 people, the idea that there's information out there, like
20 D.N.A. or some other information, which might be a threat
21 and lead them to confess, actually -- the reason it
22 sometimes gets them to confess is because they see it as a
23 promise of future exoneration. "I've confessed now.
24 They'll do the investigation. They'll see that I didn't
25 do it, and then the confession won't matter."

1 So in a funny way, what we're starting to discover is
2 that innocent people who waive their rights to silence and
3 to an attorney, they waive their Miranda rights, at a
4 higher rate than criminals do.

5 It appears now that innocence, in some way, is a risk
6 factor. People are naive, and they believe in the justice
7 system.

8 Q I have only about two more questions of you.

9 I meant to cover this in the beginning: A
10 year-and-a-half, two years ago, did I contact you
11 regarding my work down here?

12 A Yes.

13 Q And did I, at that time, ask you to consult and
14 educate me --

15 A Yes.

16 Q -- in this area?

17 A Yes.

18 Q At some point, did I ask you to come down here and
19 testify --

20 A Yes.

21 Q -- to do the same for the jury?

22 A Yes.

23 Q And did you and I have a -- did you and I know each
24 other prior to this or have any kind of --

25 A No.

1 Q -- relationship --

2 A No.

3 Q -- other than profession? And Dr. Kassin, have I --
4 have we hired you?

5 A Yes.

6 Q And what is your hourly rate, sir? And how many
7 hours do you have in this case?

8 A My hourly rate is \$425 an hour, and I think I've put
9 in, up to today, probably 18, 19, 20 hours.

10 Q Okay. And finally, Dr. Kassin, is there an approach
11 for anyone, whether it be a social, psychologist,
12 criminologists, lay person, to assess the validity of a
13 confession? Is there a three-pronged approach?

14 A The approach -- because we know that people can't
15 just look or listen to a confession and right out of the
16 gate know if it's credible or not --

17 MR. MEADORS: Your Honor, objection. Can I approach?

18 (WHEREUPON, a bench conference was held in the
19 presence but not within the hearing of the jury)

20 BY MS. PRINGLE

21 Q What is the approach for assessing validity of a
22 confession?

23 A Here are the steps: First, you ask yourself the
24 question: Was this -- what do we know about the suspect
25 and the suspect's vulnerabilities and the situation that

1 suspect was in?

2 Q Okay. So -- sorry. You look at the person.

3 A Yes, look at a person.

4 Q Okay.

5 A And look at the situation that the person was put
6 into.

7 Q Conditions of the interrogation?

8 A Yes.

9 Q Okay.

10 A And based on that, you make some kind of a judgment
11 about whether or not the statement is mostly voluntary or
12 whether there were aspects of coercion attached.

13 As a general rule -- and this is not fixed, but as a
14 general rule, the more coercion there is, the more likely
15 they are to be taking a false statement.

16 I say it's not necessarily the rule, because I
17 described earlier sometimes people voluntarily confess
18 without coercion. So there are those cases.

19 As a general rule, the more coercion, the more likely
20 you are to have a false statement. So once you cleared
21 that hurdle, if you conclude that this was a mostly
22 voluntary statement, then the next question is, "Okay. Is
23 there -- in addition to the admission of guilt, is there a
24 detailed narrative, and if so, are the details accurate or
25 are they wrong?"

1 Because the perpetrator, a criminal, given the
2 details of a crime should give pretty much the correct
3 details.

4 Now, I don't believe that a confession should be held
5 to so high a standard that we would expect a perpetrator
6 to get every minute detail correctly, because I know from
7 my work in eyewitness identifications and testimony,
8 perpetrators are eyewitnesses. And eyewitnesses are not
9 perfect.

10 So you can't expect perfection in a statement either,
11 but for the most part, if there are glaring errors in a
12 confession, then that would suggest caution. That would
13 suggest there is a problem, perhaps, with the reliability
14 of that statement.

15 If there are not errors, in the statement is mostly
16 reliable, and here is the next step that often does not
17 get inserted into the process: You now have to ask the
18 question, "If the details are in there, and the details
19 are accurate; they fit the crime facts, where do the
20 details come from?"

21 This turns out to be a hugely important question,
22 because as I mentioned earlier, a recently published study
23 of 33 proven false confessions show that 32 of them
24 contain accurate details that only the perpetrator should
25 have known, details that were not supposedly in the public

1 demean.

2 So it is clear that just because there are details,
3 and just because the details are accurate doesn't
4 necessarily mean that the confession is good, but those
5 are the factors that -- that people should attend to, to
6 essentially compare the confession to the rest of the
7 evidence in the case, not take it at face value on its own
8 terms.

9 Q The last question is, you talked about if the details
10 are accurate, what if the details are not accurate?

11 A If the details are not accurate, then questions
12 should be raised about the reliability of the question.
13 It doesn't mean that the confession is false, but it means
14 that questions should be raised. The questions should be
15 scrutinized.

16 MS. PRINGLE: Dr. Kassin, I have no further
17 questions. If you could answer any that the prosecutor
18 might have.

19 THE COURT: Before we do that, let's take a brief
20 break.

21 Ladies and gentlemen, once again, I'm going to remind
22 you of the instructions, not to discuss it among
23 yourselves, as you've not heard all of the evidence.

24 It's inappropriate for you to do so at this time.
25 Let's take a break, and we'll come back and continue on.

1 (WHEREUPON, the jury left open court at approximately
2 3:40 p.m.)

3 THE COURT: Dr. Kassin, you may take a break. I'm
4 going to remind you that you should not discuss your
5 testimony during this break. You have not concluded it,
6 so it would be inappropriate for you to discuss it with
7 anyone at this time.

8 THE WITNESS: Okay.

9 THE COURT: Let's take a brief break, and we'll come
10 back.

11 (WHEREUPON, a short break was taken.)

12 THE COURT: Anything we need to take up before we
13 bring the jury in?

14 MS. McDUFFIE: Not from the State, Your Honor.

15 MR. STRICKLER: No, Your Honor.

16 THE COURT: You may ask the jury to come in, please.

17 (WHEREUPON, the jury came into open court at
18 approximately 3:50 p.m.)

19 THE BAILIFF: The jury is seated, Your Honor.

20 THE COURT: Mr. Meadors.

21 MR. MEADORS: Yes, ma'am.

22 CROSS-EXAMINATION:

23 BY MR. MEADORS

24 Q You've never, never, testified for the State in one
25 of these cases, have you?

1 A No.

2 Q And you got contacted about two-and-a-half years ago?

3 A I don't recall the exact date, about two years ago,
4 that's fine.

5 Q And 420 an hour?

6 A Yes.

7 Q 425, I'm sorry. And up to this time, how many hours?

8 A Probably about 20.

9 Q Twenty. And then you'll be paid for today?

10 A Yes, sir.

11 Q And how much will you get paid for today?

12 A Eight-hour limit, eight hours.

13 Q Eight-hour limit.

14 Thank you. That's all.

15 MS. PRINGLE: Just one.

16 REDIRECT EXAMINATION:

17 BY MS. PRINGLE

18 Q Have you consulted with prosecutors, U.S.

19 Attorneys --

20 A Yes.

21 Q -- in anticipation of testifying for them?

22 A Yes.

23 MS. PRINGLE: Nothing further.

24 I'd ask that he can be excused, Your Honor.

25 THE COURT: You may step down.

1 Any objection to him being excused?

2 MR. MEADORS: No.

3 THE COURT: Any additional witnesses for the defense?

4 MR. STRICKLER: Your Honor, the defense rests.

5 THE COURT: Rebuttal by the State?

6 MS. McDUFFIE: Yes, ma'am.

7 Your Honor, the State calls Gina Ulengchong.

8 THE COURT: I'll remind you that you are still under
9 oath, to tell the truth in this matter.

10 THE WITNESS: Yes, ma'am.

11 GINA ULENGCHONG - REBUTTAL, after
12 having been previously sworn, testified as follows:

13 DIRECT EXAMINATION:

14 BY MS. McDUFFIE

15 Q Gina, on December 2nd, 1998, did the defendant ever
16 tell you that Zachary was sick, and you should take him to
17 the doctor?

18 A No.

19 MS. McDUFFIE: No further questions, Your Honor.

20 MR. STRICKLER: No questions, Your Honor.

21 THE COURT: You may step down.

22 THE BAILIFF: Watch your step.

23 THE COURT: Any other witnesses?

24 MS. McDUFFIE: No, ma'am, Your Honor.

25 THE COURT: Ladies and gentlemen, at this time, we

1 have some brief matters of law which we need to take up
2 outside of your presence.

3 I'm going to ask that you retire to the jury room and
4 do not begin any discussions or deliberations. Even
5 though you have now, at this point, heard all of the
6 evidence that has to be presented, you still have not
7 heard my instructions to you on the law. So it would be
8 inappropriate for you to begin any discussions until
9 you've heard my charge to you.

10 I ask that you retire to the jury room, and we'll
11 bring your back as soon as possible. Thank you.

12 (WHEREUPON, the jury left open court at approximately
13 3:55 p.m.)

14 THE COURT: Are there any motions at this time?

15 MR. STRICKLER: Your Honor, may it please the Court.

16 I'm not sure whether I should have moved prior to the
17 reply testimony or not, but I am required to --

18 THE COURT: That's fine.

19 MR. STRICKLER: -- at this point in time renew my
20 previously stated motions for a directed verdict and a
21 mistrial that I made at the end of the State's case.

22 I don't have any additional bases to add to those
23 expressed to you at the end of the State's case, however.

24 THE COURT: And after the conclusion of all the
25 testimony in this case, I believe it's clearly a factual

1 issue that is to be determined by the jury as to the guilt
2 or innocence of the defendant in this case.

3 I think there is evidence that establishes the corpus
4 delicti, as I stated earlier. Having heard now from the
5 defense, I think that there's clearly some additional
6 factual issues for them to consider in making that
7 determination and that becomes an issue of credibility and
8 the issue of the weight to give that testimony. So I will
9 deny your motions at this point.

10 MR. STRICKLER: Thank you, Your Honor.

11 THE COURT: Okay. And the same with respect to the
12 mistrial.

13 MR. STRICKLER: Thank you.

14 Before moving on to -- before moving on to anything
15 else, there is still the outstanding issue raised --
16 actually, I think pretrial regarding --

17 THE COURT: The statement.

18 MR. STRICKLER: -- the physical statement itself.

19 THE COURT: I have considered that issue, and I will
20 allow the physical statement to go back. Although, it has
21 been read into court. It has been shown to the jury, not
22 once but twice. I think that it is an important document
23 because it contains on there the information relating to
24 the voluntariness of the statement.

25 In addition, I think that there's also a statement,

1 which is perhaps more contemporaneous with the events as
2 they occurred back in 1998, early 1999, in the letter that
3 she wrote to D.S.S. in response to the cite in a
4 deficiency.

5 I think that those two, those two statements, would
6 be available for the jury to consider. I don't think it
7 would be appropriate to send one without sending the
8 other, so I will allow the statement to go back into the
9 jury room.

10 MR. STRICKLER: Thank you, Your Honor.

11 That's all I have. I think we have charges that need
12 to be discussed.

13 THE COURT: Anything from the State?

14 MS. McDUFFIE: Yes, ma'am, Your Honor. In terms of
15 defense's request for involuntary to be charged, we would
16 refer Your Honor to McKnight vs. State cited at 378 S.C.
17 33, also 661 S.E. 2d 354, which says that involuntary
18 manslaughter is not a lesser-included of homicide by child
19 abuse.

20 THE COURT: Any response to that, Mr. Strickler?

21 MR. STRICKLER: Ms. Pringle has that.

22 MS. PRINGLE: Just that McKnight is pre-State vs.
23 gentry, and the crux of our argument was that Gentry has
24 changed that, if you will; that a charge or indictment is
25 no longer conferred subject matter jurisdiction on the

1 Court. Therefore, any charged that is supported by the
2 evidence presented at trial should be charged to the jury.

3 As far as I'm aware, that's never been raised, never
4 been ruled upon post-Gentry, but I think, clearly, if you
5 look at Ms. Person's statement in and of itself, it
6 certainly satisfies the elements of involuntary
7 manslaughter, an unlawful killing of another without
8 malice or criminal negligence.

9 If they were to believe her statement, strictly her
10 statement, then I think that the elements are met.

11 THE COURT: Any response to that?

12 MS. McDUFFIE: Your Honor, we disagree with
13 Ms. Pringle's characterization of Gentry. We believe that
14 McKnight is still the current law in South Carolina. This
15 is a 2008 case, and it is -- it is still, we believe, the
16 current state of law. We do not believe that involuntary
17 manslaughter is appropriate in this case.

18 THE COURT: Am I only required to charge the offense
19 that's been charged and the lesser-includeds, or am I
20 required to charge the law as it relates to any evidence
21 that supports any other charge?

22 MR. MEADORS: Would that go up to -- if we had a
23 strong armed robbery and armed robbery ended up being
24 shown, could we go up? I guess that would be the
25 question. I think they would object to that. So to

1 answer your question, then, I would think no.

2 Your Honor, beg the Court's indulgence.

3 (Pause).

4 THE COURT: Yes, sir.

5 MR. MEADORS: Then I guess under that theory, murder
6 could be charged here.

7 THE COURT: I think the general state of the law is
8 such that the Court is only required to charge the crime
9 that has been charged subject, of course, to any directed
10 verdict motions, and any charges that may be a
11 lesser-included -- lesser-included offense, if there is
12 evidence to support those charges.

13 So based upon McKnight vs. State, involuntary
14 manslaughter is not a lesser-included offense of homicide
15 by child abuse, and so I will not charge the involuntary
16 manslaughter.

17 As it relates to the charge, I will charge the jury
18 that they have to determine the facts based upon the
19 evidence. In order to do that, they have to judge the
20 credibility of the witnesses.

21 I will tell them how to view that credibility. I
22 will also charge them on the circumstantial evidence --
23 no. I will charge them on expert witnesses.

24 I will also charge them on circumstantial evidence.
25 I will charge them on the fact that there is a charge,

1 arrest, an indictment is not evidence. I will charge them
2 on the presumption of innocence.

3 I will charge them on -- on the Victor Nebraska --
4 vs. Nebraska reasonable doubt charge. I will charge them
5 on the statement of the defendant; that a statement is
6 alleged to have been made -- alleged to have been made by
7 the defendant and admitted into evidence in this case, and
8 while the Court has determined that it's admissible, that
9 they have the ultimate decision as to whether or not the
10 defendant made this statement.

11 If the defendant did make the statement, then they
12 have to determine whether the statement was made by the
13 defendant voluntary -- voluntarily of her own free will.
14 That means it was not caused by pressure, force, fear,
15 threats, coercion, intimidation, hope, promise of leniency
16 or reward of any kind.

17 In determining whether the statement was voluntary,
18 they have to consider the characteristics of the defendant
19 and the details of the questioning.

20 Some of the factors that they may consider are the
21 age of the defendant, the defendant's education or lack of
22 education, mental ability and capacity, I.Q. or
23 intelligence, background, environment, place and length of
24 detention, nature of the questioning, the advice or lack
25 thereof, and the advice or lack thereof to the defendant

1 of the constitutional rights, including but not limited to
2 the right to remain silent; that the statement could be
3 used against them in a court of law; the right to have a
4 lawyer present; could not afford a lawyer, one will be
5 appointed to them without cost. They could stop making a
6 statement at my time.

7 They must consider all of the surrounding
8 circumstances before giving any weight to the alleged
9 statement.

10 The State has the burden of proving beyond a
11 reasonable doubt that the statement was voluntarily. If
12 they find that it was, then they may give the statement
13 any further consideration that you consider to be proper.

14 If you decide -- and you must decide what weight to
15 give the statement. If you determine that the statement
16 was not the free and voluntary statement of the defendant,
17 then you should not consider the statement at all.

18 As to this particular case, the defendant has been
19 charged with homicide by child abuse. The state must
20 prove beyond a reasonable doubt that the defendant caused
21 the death of a child under the age of 11 while committing
22 child abuse or neglect.

23 Child abuse or neglect is the act or failure to act
24 which causes harm to the child's physical health or
25 welfare. Harm to the child's physical health or welfare

1 means that the defendant one: Inflicted or allowed to be
2 inflicted on the child physical injury; two, failure to
3 supply the child with adequate food, clothing, shelter, or
4 healthcare, and this failure caused physical injury or
5 condition which caused the death; or three, abandoned the
6 child, causing the child's death.

7 The State must prove beyond a reasonable doubt that
8 the death occurred under circumstances showing an extreme
9 indifference to human life. The State may also prove
10 homicide -- scratch that.

11 If you find that the State has failed to prove beyond
12 a reasonable doubt that the defendant committed homicide
13 by child abuse, then you may consider a lesser-included
14 offense of unlawful conduct towards a child.

15 The State must first prove beyond a reasonable doubt
16 that the defendant had charge or custody of the child, was
17 the parent or guardian of the child or was responsible for
18 the care and support of the child.

19 If the person responsible for the child's care
20 willfully includes a child's parent, guardian, or foster
21 parent, and the operator or employee of a caregiver of a
22 public or private residential home, institution, agency or
23 child day care facility, or has done -- who has assumed
24 the role and responsibility of a parent or guardian of a
25 child but does not necessarily have legal custody of the

1 child.

2 The State must also prove beyond a reasonable doubt
3 that the defendant placed the child at unreasonable risk
4 of harm affecting the child's life, physical or mental
5 health or safety or that the -- or unlawfully and
6 maliciously did, or cause to be done, any bodily harm to
7 the child so that the life or health of the child is
8 endangered or likely to be in danger. A child means a
9 person under the age of 18.

10 Their verdict has to be unanimous. It has to be the
11 verdict of all 12 of them. There are three possible
12 verdicts in this case, and I'll give them a verdict form
13 separate and apart from the indictment.

14 We, the jury, unanimously find the defendant guilty
15 of homicide by child abuse or guilty of unlawful conduct
16 towards a child or not guilty.

17 There is no significance in the order in which I post
18 them. I place one first. I place one second. They have
19 to make their decision based upon the evidence presented
20 in this case.

21 Anything further from the State?

22 MS. MCDUFFIE: No, ma'am, Your Honor.

23 THE COURT: Anything further from the defense?

24 (Pause).

25 Before I get to that, there is a portion in the

1 requested charge regarding the lack of a recording as a
2 factor for you to consider on the issue of the
3 voluntariness of the confession.

4 I did not -- I will not charge that. That's not the
5 current state of our law here in South Carolina. It's
6 certainly something that you can argue to the jury, but I
7 will not include it as a -- as a requirement of the law.

8 MR. STRICKLER: Thank you, Your Honor. That's the
9 only thing I was going to bring to the Court's attention.
10 I'll just note our exception that you're declining to give
11 that charge.

12 THE COURT: Anything further?

13 MS. McDUFFIE: No, ma'am, Your Honor.

14 THE COURT: Does the State plan on opening in full?

15 MR. MEADORS: We'd open on the law with giving
16 specific examples about it.

17 THE COURT: For planning purposes, do you know
18 approximately how long each -- the closings will take, and
19 that's on both sides?

20 MR. MEADORS: I think I'll be about 25 minutes,
21 maybe, and I don't know how long Mr. Strickler and
22 Ms. Pringle will be. The Solicitor, I'll let him answer
23 for himself, Your Honor.

24 MR. GIESE: May it please the Court.

25 THE COURT: Yes, sir.

1 MR. GIESE: I was thinking about two hours.

2 (Laughter).

3 Actually, I've never spoken that long if I had to, 30
4 minutes to 45 minutes.

5 THE COURT: You see I still have a sense of humor.

6 MR. GIESE: And so do I.

7 THE COURT: Mr. Strickler?

8 MR. STRICKLER: I don't have two hours to say about
9 anything or everything. Half-an-hour to 45 minutes, Your
10 Honor.

11 THE COURT: Okay.

12 MR. STRICKLER: I think Ms. Pringle does have one
13 thing she wants to --

14 THE COURT: Yes, ma'am.

15 MS. PRINGLE: Oh, I can definitely talk for two
16 hours.

17 THE COURT: I know you can.

18 MS. PRINGLE: But I won't be talking.

19 MR. STRICKLER: I can attest to that.

20 MS. PRINGLE: Your Honor, just we want to be sure
21 that we're all on the same page as far as arguing the time
22 line that has come up over and over again.

23 It is in evidence that she was Mirandized at 1:11.
24 The time the statement began, and the time the statement
25 ended, it's our position that we should be able to argue

1 that timeline.

2 MR. MEADORS: I told you she was going to ask to do
3 that, Judge --

4 MS. PRINGLE: No. That's --

5 MR. MEADORS: -- and that was my worry before.

6 THE COURT: I understand that, and I -- I think she
7 can argue what she thinks that timeline shows, and you can
8 argue what you believe that timeline shows with the
9 exception of talking about the other two statements.

10 MR. MEADORS: Does that mean I can say there was
11 another incident they were talking to her about during
12 that time?

13 THE COURT: I don't think so.

14 MR. MEADORS: What do I say about that other timeline
15 where we're talking about that other statement?

16 THE COURT: I don't think there is anything to be
17 said about that. I think you can -- I think there are a
18 lot of other ways you can explain that time period that do
19 not include talking about the other incidents.

20 MR. MEADORS: Do we have a few minutes to gather our
21 charge?

22 (WHEREUPON, a short break was taken.)

23 MR. MEADORS: Your Honor, I have one other board that
24 will be here in like 30 seconds.

25 THE COURT: While we're waiting, do you have any

1 objection?

2 MS. PRINGLE: I have no objection, Your Honor.

3 MS. McDUFFIE: No objection from the State, Your
4 Honor.

5 MR. STRICKLER: (Inaudible).

6 THE COURT REPORTER: I'm sorry, did you say you have
7 an objection or no objection?

8 MR. STRICKLER: I have no objection, Your Honor.

9 THE COURT: What about sending the indictment back
10 out? The only reason I didn't use the indictment as the
11 verdict form, because there was -- there was the
12 lesser-included. It normally, normally goes back.

13 So I know the State wants it to go back or doesn't --
14 or do you?

15 MS. McDUFFIE: We have no objection.

16 MR. STRICKLER: Could I take a look at that, Your
17 Honor?

18 (Pause)...

19 I don't have any objection. No objection, Your
20 Honor.

21 THE COURT: Did you want to look at it?

22 MR. STRICKLER: It's in evidence.

23 THE COURT: Yeah, it parrots the statute, and it
24 lists the code section.

25 (WHEREUPON, Court's Exhibits No. 3, 4 were marked for

1 identification only.)

2 THE COURT: Do you all have everything now in.

3 MR. MEADORS: Yes, ma'am.

4 THE COURT: Ask the jury to come in, please.

5 (WHEREUPON, the jury came into open court at
6 approximately 4:38 p.m.)

7 THE BAILIFF: The jury is seated, Your Honor.

8 THE COURT: Ladies and gentlemen, we have now reached
9 that part of the trial where you will hear the closing
10 arguments of the attorneys.

11 As I told you earlier this week, their closing
12 arguments are not evidence, but what they will do is they
13 will argue to you portions of evidence that you have heard
14 in an effort to try to sway you to find the facts in
15 accordance where their view of what happened. So I ask
16 that you listen very carefully to those closing arguments.

17 Oftentimes, they may raise questions that you'll want
18 to discuss among yourselves when it's time for you all to
19 begin your deliberations, or they may cause you to think
20 about the evidence in a different light.

21 So at this time, I ask that you listen carefully to
22 their closing arguments.

23 Mr. Meadors?

24 CLOSING STATEMENT:

25 MR. MEADORS: If it pleases, Your Honor, solicitor,

1 Ms. McDuffie, Mr. Strickler, Ms. Pringle, Madam Forelady,
2 ladies and gentlemen of the jury.

3 I was introduced. I want to introduce myself to you
4 now. I am John Meadors, the deputy solicitor of the fifth
5 judicial circuit. On behalf of the Solicitor, Joanna
6 McDuffie, Sergeant Isenhoward, Mr. Ross, Chief Wilson, and
7 the victim and family, I want to thank you all for being
8 here. Thank you for being here. Thank you for listening,
9 and thank you for your attentiveness in this case.

10 I'm going to be relatively short. I don't know how
11 y'all got here each day coming to court, whether it was
12 from Assembly to Blanding coming up this side of the
13 building, coming down Main Street, planning to come in the
14 front way.

15 I don't know where exactly you parked, but if you
16 came in the front, as you come up to the building, I don't
17 know if you saw it or not, but it's there subliminally.
18 Well, it's actually there, the scales of justice on the
19 gate. You may have seen it. You may not.

20 You kind of come into the courthouse, and if you get
21 to the elevator, some of you may have taken the stairs,
22 but if you go to the elevator, if you go to the left, it
23 says justice will direct our course with the scales.

24 It comes up and basically follows y'all to the jury
25 room and out here to this box every day. I say that

1 because it should, every day, direct your course. It
2 should during this trial, and it should as you go back to
3 deliberate the evidence, direct your course.

4 You are -- you are Lady Justice to an extent. I
5 mean, you decide what is justice in this case. She is
6 with her arms out and got a blindfold.

7 You took an oath, and you were asked to make a
8 decision about bias or prejudice. No matter who it is,
9 you'll listen to the facts. You'll be blind, but you
10 won't really be blind, but you'll listen, and you'll
11 decide the case, what's really credible, what's
12 believability.

13 You will have to drop that blindfold some, evaluate
14 some of the witnesses, watch them with your own eyes.
15 That's what you do. You didn't go to school to be a
16 juror. Mrs. McBride didn't have school, but you've been
17 in school your whole life, and what this case comes down
18 to in most cases is common sense.

19 Ladies and gentlemen, what we're doing now, as Her
20 Honor told you, is called closing arguments. It's a
21 terrible name for it because we can't -- y'all can't ask
22 us something. We can't ask you something, but it is a
23 time for us to tell you what we think the evidence is and
24 the reasonable inferences from that evidence.

25 I'm going to be relatively brief now. My part is on

1 the law, tell you'll what we think the law is, and give
2 you some examples out of the evidence of what the law is.

3 We think this shows you how this applies.

4 Mr. Strickler will get up on behalf of Ms. Person and tell
5 you what he believes the inferences are, and Solicitor
6 Giese will close for the State, since we have the burden
7 of proof and tell you his thoughts and feelings on this
8 case.

9 We all know what Her Honor has told you. The
10 defendant is charged with homicide by child abuse. What
11 I'm going to do now is go over the charges, go over our
12 burden, talk about the types of evidence, and then talk
13 about your role again, and specifically talk about the
14 voluntariness of the statement. Then I want to talk
15 about, toward the end, credibility and the believability
16 of the witness. Finally, I'm going to end with the
17 presumption of innocence.

18 I wish we could talk back and forth, but y'all know
19 what she is charged with, homicide by child abuse. Again,
20 Her Honor will charge you this at the end.

21 What is homicide by child abuse? Homicide by child
22 abuse -- a person is guilty of homicide by child abuse if
23 the person causes the death of a child under the age of
24 11. Well, we've proved that.

25 I'm going the tell you our burden in a minute.

1 Homicide by child abuse, if the person that causes the
2 death of a child under the age of 11 while committing
3 child abuse or neglect -- so then I think Her Honor is
4 going to charge you that child abuse or neglect means an
5 act -- is an act -- an act, an act, or omission by any
6 person which causes harm to the child's physical health or
7 welfare, putting your hand over the nose and mouth of a
8 12-month-old child. And the death occurs under
9 circumstances manifesting an extreme indifference to human
10 life.

11 This case may even be in the future an example of
12 what death occurring under circumstances manifesting an
13 extreme indifference to human life is: Putting your hand
14 over a helpless child.

15 Under our law and the law at the time this was
16 committed, the evidence potentially comes out, there may
17 or may not be other charges y'all could consider and
18 determine that y'all will be able to consider this charge.
19 It's a lesser-included charge of unlawful conduct towards
20 a child.

21 It's unlawful for a person who has charge or custody
22 of a child, or who is the parent or guardian of a child,
23 or who is responsible for the welfare of the child. So
24 those are the three categories. Obviously, she would fit
25 under charge or custody of a child: Number one, place the

1 child at unreasonable risk of harm affecting the child's
2 life, physical, or mental health, or safety, or do or
3 cause to be done unlawfully or maliciously any bodily harm
4 to the child so that the life or health of the child is in
5 danger or likely to be in danger. That's not what
6 happened in this case.

7 Well, this happened plus, and I guess the difference
8 between this and this is death. I mean, that's the
9 difference, so this is the charge, we submit the evidence
10 will show.

11 You have got a right to consider this. Lady Justice
12 can consider it. We'd ask that you not consider it long.
13 I don't think they'll argue it. I think their position is
14 that -- well, I don't even know if she said any of this.

15 I doubt they'll argue any of that, so if you find,
16 and you believe, that she put her hand over Zachary until
17 he quit or went limp, then that's what the charge is. You
18 can consider it, but we respectfully submit don't consider
19 it long.

20 This is kind of like we submitted an example of --
21 not that anybody else would do this, but if you went to
22 the mall and left your young child in the car for an hour
23 or so, and maybe pushed him and his little finger was
24 broken, that's what unlawful conduct toward a child is.
25 Zachary Uleungchong is dead.

1 What burden of proof do we have? It's the same
2 burden in this case as it is in every case in this
3 country.

4 Proof beyond a reasonable doubt: The law does not
5 require proof beyond all doubt. If that were the burden,
6 the system wouldn't exist.

7 Proof beyond a reasonable doubt is proof that leaves
8 you firmly convinced. There are very few things in this
9 world that we know with absolute certainty. Well, that's
10 true isn't it.

11 In criminal cases, the law does not require that we
12 overcome every possible doubt. You can't do that beyond
13 all doubt. It's beyond a reasonable doubt.

14 After you have considered all of this, listen to the
15 arguments, you'll go back, and if based on your
16 consideration of the evidence, you are firmly convinced
17 that the defendant is guilty of the crime charged, under
18 your oath, you must find her guilty.

19 If, on the other hand, you think there is a real
20 possibility that she is not guilty, you must give her the
21 benefit of the doubt and find her not guilty.

22 Over the course of my career, I've been trying to
23 explain it different ways. Some say hesitate to act. I
24 have come to realize that sometimes if you have questions,
25 they're just questions. Not all questions are reasonable

1 doubt.

2 We submit there's no reasonable doubt in this case,
3 ladies and gentlemen. Hold us to our burden, but we
4 submit that we have met our burden and beyond in this
5 case.

6 What are the different types of evidence? There is
7 direct evidence, which is evidence that a person gathers
8 with one of their senses. You see it, you hear it, smell
9 it, feel it, touch it, and you come in here on the witness
10 stands and tell y'all, "I heard this. I smelled it. I
11 touched it."

12 Like when the Chief came up here and said that Andrea
13 showed him how much pressure she put on Zachary. He felt
14 that and observed it and came here and told you about it.
15 That's direct evidence.

16 Circumstantial evidence is proof of a chain of facts
17 and circumstances. Proof of a chain of facts and
18 circumstances indicating the existence of another fact, of
19 a fact.

20 The law makes absolutely no distinction of what
21 weight you give to direct evidence or circumstantial
22 evidence, none whatsoever, nor is a greater degree of
23 certainty required of circumstantial evidence than direct
24 evidence.

25 Lady Justice, y'all weigh all the evidence, and after

1 weighing it, if you're not convinced of the guilt of the
2 defendant beyond a reasonable doubt, you must find her not
3 guilty. If, on the other hand, you are convinced of her
4 guilt beyond a reasonable doubt, then you must her guilty.

5 I believe Her Honor is going to charge -- well, I
6 know she is. Her Honor is going to charge you on the
7 voluntariness of the statement.

8 I guess that's kind of the theme here, isn't it? And
9 she is going to charge you based on listening to
10 Isenhoward, White, and Wilson and the defendant,
11 Ms. Person, that before a statement -- she has made an
12 initial finding it was admissible, but now the
13 voluntariness and freeness is up to y'all.

14 I ask you to think about it, and go back and look at
15 what the State has shown. On April 11th, she was read her
16 rights. She said she understood her rights. She signed
17 her rights.

18 I think that was a statement when she said, "I didn't
19 tell them about Baby Zachary because I didn't think it
20 would look good for me."

21 Is there any question she understood her rights? She
22 left out of there. I mean, she walked out, so the
23 question you'll have to decide on these statements, were
24 they freely and voluntarily given? She signed it. They
25 were, she said that.

1 The Solicitor is going to go over those statements in
2 his last part of the closing. Is there any question that
3 she voluntarily talked to them; that she signed it; that
4 she said, "I did it"?

5 "Was there any trouble with y'all communicating with
6 each other, Kevin, James, Chief?"

7 "No."

8 "Did she understand it?"

9 "Yes."

10 "Did she appear to understand you?"

11 "Yes, sir."

12 "Under the influence of alcohol, drugs, or any
13 intoxicants?"

14 "No."

15 "Were the responses timely? Answered the question
16 and answered it?"

17 "Yes."

18 "Subject appropriate?"

19 "Yes."

20 "Voluntarily, free?"

21 Look at the one statement on April 11th; look at the
22 statement on April 17th, the Advice of Rights on the 17th.
23 The Advice of Rights again under the statement. Again,
24 the Solicitor is going over this. The third time she has
25 read her rights. Two courses shy of graduating from

1 U.N.C. Is there any question she understood her rights?
2 She said she did, freely and voluntarily given.

3 She went over the form with Mr. White, personal
4 information. She understood. She was thinking,
5 background information. You must decide whether these
6 statements were freely and voluntarily given.

7 One indication, clearly, she signed it and said she
8 did it.

9 "Did you force her to?"

10 "No."

11 "Did you watch her sign it?"

12 "Yes."

13 "Did you go back over these statements with her?"

14 "Yes."

15 "Did she say, 'This is my statement?'"

16 "Yes."

17 "Is that her signature?"

18 "Yes".

19 "Is that her signature?"

20 "Yes."

21 Consider all those factors when evaluating the
22 freeness and voluntariness of the statements.

23 Your role -- we're here pretty much week in and week
24 out, month in and month out. Everybody here cares about
25 this. I think they do. It's the only thing I've ever

1 known. I hope it's all I ever do.

2 We're just part of a -- like a basketball team. I
3 heard a female judge from the lower part of the country
4 say, "We're like the supporting case."

5 Week in and we out, we have different players, and
6 y'all determine the outcome of the game. That's the way
7 this system is designed, except it's not a game.

8 This is an important day, the most important case in
9 this state in this county, important to the defendant,
10 important to the law enforcement and the family.

11 So how do you go about playing that, and what does
12 this case boil down to, like most every case does that's
13 ever tried?

14 I bet y'all know what's on this side. It's the
15 credibility and the believable of the witnesses, and
16 that's for y'all to decide. That's based on your common
17 sense, what you've learned in your everyday experiences
18 from watching these individuals on the stand, from
19 listening to the evidence.

20 What do you look at? You look at the demeanor of the
21 witness. Well, you saw the officers testify. These
22 officer's career, third level. Are they going to risk
23 their career to come here and lie, to frame somebody.

24 They don't even know the parties. Did you watch them
25 testify? Did you watch Kevin Isenhoward testify? Y'all

1 make the decision based on watching them testify.

2 Was the witness forthright or hesitant? Was it
3 consistent? Was testimony of a witness corroborated? Did
4 the witness have reason to be biased or prejudiced? Those
5 are the factors you consider.

6 Using your common sense, you'll saw everybody. With
7 all due respect, Ms. Person took the stand. Y'all have to
8 decide her credibility. Did it appear to be rehearsed?
9 Did it appear to be staged? Was it real?

10 I don't know what they're going to say? Were they
11 trying to reenact or kind of just following along with the
12 Solicitor? They're going to try to say that's what
13 happened down there. I don't know. I hope not.

14 She said -- what did they say, the question that was
15 asked? "Yes, I signed it, Solicitor. Yes, sir,
16 Solicitor. I made this statement."

17 Credible? These officers, that these officers, would
18 risk their career, go get a statement, and -- if they're
19 going to cheat, why would they put 15, 20 seconds? Why
20 wouldn't they put a minute or an hour or two?

21 You have got to decide who has the reason to be
22 biased or prejudice. With all due respect to Mr. Person,
23 Rodney Person, just trying to cover everybody, he took the
24 stand.

25 I know he cares about his wife. He says that day at

1 the sheriff's department he comes down, seen Isenhoward a
2 couple of times before, and Ms. Person said Isenhoward --
3 had been fine with him when she first talked to him.

4 Mr. Person comes down. He has seen him before and
5 not had a problem with Isenhoward. He comes downstairs
6 after Ms. Person has confessed to suffocating Zachary
7 Ulengchong, and he tells him you are under -- "Your wife
8 is under arrest for homicide by child abuse."

9 At that point, he says he tried to pull him over and
10 said, "Look, just give me about some emotional background.
11 It might help her down the road."

12 First time you ever heard that down here, first time.
13 Bias? Sure, sure. That's an example, never heard that
14 before, and does it make sense that right after --
15 wouldn't he do that before he told him he was under arrest
16 for something like that? Credibility? Believability?
17 You just have to evaluate it. I'm just putting those out
18 for your consideration.

19 And the Solicitor will talk about, I'm sure, about
20 Ms. Person and some of the things she added on the stand
21 that we had never seen before.

22 The doctors about cause of death. You know, I guess
23 through this last doctor, they're trying to say that -- I
24 don't know what they're trying to say, use some of these
25 factors. There's no evidence of it.

1 Who is using the tape recorder? Who is using a tape
2 recorder in this courtroom? You know what I first thought
3 with Dr. Collins? I liked her final conclusion, but why
4 not say how much are you making total? Now, why would
5 they not want you to know that?

6 Well, that's an example of prejudice or bias.
7 They're being paid. "How much are you being paid,
8 Doctor?"

9 "5,000."

10 I started to let it go. "So, well, are you getting
11 paid for today?"

12 "Five more thousand."

13 \$10,000, and I submit to you that's an attempt,
14 respectfully, to get y'all to consider that, to get y'all
15 to consider that, unlawful conduct.

16 Well, I do -- I do think that that wasn't there, the
17 suffocation, that might have gone anyway, which would
18 clearly be that charge. That's that extra five, but she
19 agreed with Armstrong, and then after reviewing
20 everything, she agreed with Nichols to the cause of death,
21 as a forensic pathologist has to consider everything; the
22 same conclusion Dr. Nichols did.

23 Two forensic pathologists came up with the same
24 conclusion, and she agreed with the first thing that
25 Dr. Armstrong said.

1 Dr. Smith treats live people, treats live people, and
2 at first it's not a reasonable doubt, ladies and
3 gentlemen. We'll submit that in '98, they came back and
4 said pneumonia. He says small; Dr. Collins says moderate.

5 He says, and Dr. Collins says, probably agree the
6 symptoms would be worse if you're two-and-a-half hours
7 from death. Nobody says they were worse. Nobody says
8 they were worse.

9 It would have been worse two-and-a-half hours from
10 their death. Credibility, believability. Dr. Smith, in
11 his 24 years, has never seen somebody with these type
12 symptoms and then die in two-and-a-half hours.

13 He said, "Doctor, worst-case scenario, how long would
14 it take someone?"

15 "Days".

16 The final witness here, credibility, believability, I
17 think we added up, close to \$12,000 he got paid, didn't
18 give an opinion. 10,000 gives you the same opinion as our
19 expert. 10,000 gives you the same opinion as our expert
20 on final cause of death. The last doctor that got up here
21 didn't even give you an opinion.

22 I think he was trying to say -- I think he was trying
23 to say well, that of this stuff, even y'all can't decide.
24 Well, yes, you can. Yes, you can. You can decide it on
25 the evidence, the corroboration.

1 And remember, do you remember old Dr. Armstrong up
2 here when he went back and looked at it? The only thing
3 to consider, the statement, is that the first thing? No,
4 it's a timeline. I looked back, and that makes sense,
5 that timeline. It's more consistent.

6 If you got pneumonia in you, moderate or mild, you're
7 going to have to put your hand over your face. That
8 explains this timeline. There's no way with these
9 symptoms, in my opinion, the baby could have died in that
10 short period of time.

11 Dr. Collins is trying to get you to say yes to get
12 you that other charge, we submit, but it was the timeline
13 that's important. That statement that you later give is
14 corroborated by the day care, corroborated by
15 circumstantial evidence.

16 Gina drops him off at 7:30. He's dead at ten.
17 Finally, I want to thank y'all again, and I'm hoping I
18 haven't taken too much of your time. But I'm going to end
19 with the presumption of innocence, presumption of
20 innocence.

21 I believe in the concept as much as anybody, and the
22 law says that Ms. Person is cloaked, cloaked with like a
23 coat, a blanket of innocence, and she stay cloaked with
24 that during the trial, now, and back in the jury room.

25 Then if you'll start looking over the evidence, as

1 you will, and you start seeing the evidence and discussing
2 it and seeing her statement was voluntary and she wasn't
3 coerced, she could have left with talking with White.

4 Once you take that robe off and you find that we meet
5 our burden, I'm going to ask you to do something symbolic.
6 I want you to take it, hang it on the wall as you're
7 talking about it, and then bring it back in here with your
8 guilty verdict. Bring it back in with a guilty verdict
9 and give that blanket to the real innocent. Wrap him up
10 in eternity with it. Give it to Zachary Ulengchong.
11 That's the innocent person here.

12 Thank you.

13 THE COURT: Mr. Strickler.

14 MR. STRICKLER: Thank you, Your Honor, may it please
15 the Court.

16 THE COURT: Yes, sir.

17 CLOSING STATEMENT:

18 MR. STRICKLER: On April 17th, 2007, Andrea Person
19 got in the car, drove to the Richland County Sheriff's
20 Department, met Investigator Isenhoward, was introduced to
21 Investigator or Lieutenant White, after a few denials,
22 admitted that she had suffocated Zachary Ulengchong on
23 December 2nd, 1998; admitted that she suffocated Zachary
24 Ulengchong -- the child she had cared for from the age of
25 six weeks old -- a child from the family that's closer to

1 her, no one disputes this, than anyone other than her own
2 family, a child of the family who kept children with her
3 for 11 years, including nine years after Zachary died.

4 I want to tell you something about that relationship.
5 She came in after a couple of, "No, I didn't do it. No."

6 "Okay, I did it." And they talked to her a little
7 while longer and reduced it to a statement, and that is
8 the State's case. The woman with the relationship like
9 that with the family is as close to her as anyone other
10 than her own family suffocated a child she cared for
11 virtually his entire life five days a week because he was
12 fussy. That's the State's case.

13 Does anyone sense the absurdity in that? We told you
14 at the beginning of the case, the slick defense lawyers
15 that we are, that the case is about a statement, whether
16 or not you should believe the statement.

17 We're at the end of the case now, and what's it
18 about? Whether or not you can believe the statement.
19 Ms. Pringle, not Ms. Fielding, but Ms. Pringle, cocounsel,
20 at the beginning of the case that if you ask 100 people on
21 the street, 100 out of 100 would be say, "Nope, I wouldn't
22 confess to something I wouldn't do. I just wouldn't do
23 it."

24 It's what the good Dr. Kassin called one of those
25 scientific counterintuitive. It goes against the grain of

1 what you think is right. Well, and wait until today, but
2 you got to hear from him about the fact that: One, it
3 happens.

4 I think we all know it happens; two, how it happens,
5 and we need to look into that in connection with the
6 evidence in this case. That's one of the few points in
7 time that I'm going to be in agreement with the
8 prosecution.

9 How do you figure it out? I told Ms. Pringle this, I
10 don't know, a month, month-and-a-half ago, by using your
11 common sense, by using your common sense. We'll talk
12 about why.

13 Saul Kassin agrees with that. We'll talk about how
14 you use your common sense to figure it out. Look at the
15 evidence and see what supports what.

16 What did Mr. Kassin say, Dr. Kassin say? Is there a
17 detailed narrative? Does it jibe with the facts? Well,
18 this is what's called a detailed narrative, okay. This
19 statement.

20 Does it jibe with the facts? And we're going to talk
21 about that in a moment. And if it doesn't, that's one of
22 the reasons, that's one of the things that should raise
23 questions in your mind as to the validity of the
24 statement.

25 Are there ways you can remove doubt that you might

1 have about the validity of the statement? Yep, we started
2 talking about that the first day of the case, and
3 Dr. Kassin talked about that today.

4 It's as easy as pressing the button on a tape
5 recorder. You want to know what's transpired. You want
6 to know what happened between Lieutenant White, Sergeant
7 Isenhoward, Deputy Chief Wilson, and Andrea Person right
8 here: Three senior members of the sheriff's department
9 and Andrea Person, who had never been arrested before in
10 her life, is her testimony.

11 She testified to that; that if she had so much as a
12 traffic ticket in her life, you would have heard about it.

13 So if you want to decide or figure out what went on
14 between Andrea Person and three senior members of the
15 sheriff's department and whether it was just, "No, no, no.
16 Okay. I did it. Let's talk for a while and do the
17 statement," or whether some of the things Saul Kassin
18 talked about went on, which leads to a statement you can't
19 trust, turn the button on, on a tape recorder. You even
20 talked about that.

21 Is the statement supported by evidence? No. Let's
22 look at some of these. Anywhere in this statement, and
23 you'll have this back in your jury room, you'll have the
24 statement back in your jury room. Anywhere in the
25 statement does it mention vomit or formula from the

1 child's mouth in the crib? The answer is no.

2 We know that 1998 that was a fact. You have a
3 picture of that fact right there. You have the testimony
4 of Mr. -- Ms. Fortson, the first person on the scene. I
5 called her the drama queen. Y'all can feel differently
6 about her. That's what I thought. The first person on
7 the scene, saw it, felt it, felt wet, talked about fluid
8 coming out of the child's mouth, one ounce, one-and-a-half
9 ounces, two ounces, whatever, definitely fluid.

10 You have Nam -- Nam Viravan with D.S.S. who was
11 brought in, who spoke with Andrea the day after,
12 December 3rd.

13 Among other things, she talked about Andrea talking
14 about fluid coming out of the mouth. You have
15 Ms. Fortson, again, with Andrea talking about when she did
16 C.P.R. before Ms. Fortson arrived. She did hear bubbling,
17 all right.

18 Nowhere in this is there anything about that. She
19 didn't find the child in a pool of vomit, what you want to
20 call formula, call it what you will, liquid, in his Pack N
21 Play, according this.

22 Now, one of things that Mr. Kassin talked about,
23 detailed narrative. All right. Does it jibe with the
24 facts, because people who did something know what they
25 did.

1 People who are complying -- false compliant
2 confession -- people who are complying come up with
3 whatever they want, whatever the police want them to say.
4 "I put my hand over his nose and mouth and held it there
5 for 15 to 20 seconds." Supported by the facts?
6 Absolutely not.

7 Uncontradicted, Dr. Collins from this stand. "Will
8 15 to 20 seconds of obstructed airway kill someone?"

9 "No. No way."

10 "How long would it usually take? Is there any kind
11 of consensus?"

12 "Two to three minutes."

13 What time was suggested to Andrea during the
14 conversations during what she says went on, 15 to 20
15 seconds? Officer -- I can't remember which officer she
16 said so, "Wasn't it more like two or three minutes?"
17 There's a reason they were saying, "Wasn't it more like
18 two or three minutes?" Because they know that confesses
19 to putting your hand over a mouth long enough to suffocate
20 someone.

21 "Is hand over mouth 15 to 20 seconds sufficient to
22 kill someone?"

23 "Absolutely not."

24 Detailed narrative jibe with reality? Absolutely
25 not. The kicker is she is providing them with information

1 to get out of the situation. She thinks she can go. She
2 just wants to go home. She thinks she can go home, which
3 is interestingly one of the things Dr. Kassin says is
4 common in people who falsely confess, that that's the
5 feeling they have. They just want to go home.

6 What's my out? How do I get out of this situation?
7 How do I end this short-term problem? I'll deal with the
8 long-term problems later?

9 And it's not making sense. It's not making sense is
10 what she says. Then she says, "Well, I had a
11 hysterectomy," and she describes, "Yes, yes. That's how
12 it is. That explains it, mood swings. This, that, and
13 the other."

14 Well, it's all well and good except for,
15 uncontradicted, her hysterectomy was August 19th, 1999,
16 nine months after the fact.

17 Why is she supplying that? Well, I want to go
18 through Dr. Kassin at the end and talk about some of the
19 things she -- that Andrea talked about and how they fit in
20 with what he has had to say, but let me -- did it come
21 down, as these three senior members of the sheriff's
22 department maintain it came down?

23 I have no doubt as to what they believe regarding
24 Andrea, all right. Their beliefs are not what matters
25 here today.

1 I also have no doubt that none of us would have any
2 doubt, I can sit down, about the entire issue in this
3 case, of what has been addressed, what went on, on
4 April 17th, 2007, okay.

5 And I knew they were going to do this: Doctors and
6 money. \$5,000 or \$10,000, as far as Dr. Collins goes.
7 I'll talk to Dr. Collins about that.

8 At \$12,000, I didn't do the math as far as Dr. Kassin
9 goes. We'll talk about Dr. Collins. I'm a college
10 graduate, all right. I graduated from a good college, but
11 I did not graduate magna cum laude, and I sure was not a
12 member of the Phi Beta Kappa national honor society, all
13 right.

14 I did a most abbreviated rendition of her 32-page
15 resume when I talked with her about her qualifications,
16 but they included a couple of significant positions
17 dealing with pediatrics.

18 The fact that she served as the medical examiner in
19 Charleston, and you had an opportunity to assess her
20 knowledge, her mastery of her subject in comparison with
21 the testimony you got from the State.

22 There's -- you know, charge a lot of money. That's a
23 lot of money. "How much is a horse worth?" my dad always
24 used to say.

25 "Well, whatever the market will bear."

1 Now, does that say she came in and testified falsely,
2 which is what they, I guess, want you to believe? If that
3 he would have done that, I would have gotten someone
4 willing to say, "It doesn't matter, even by the State. It
5 still doesn't."

6 You know, the only thing they did with her is set up
7 what's called a straw man. Mr. Meadors built it up. "Did
8 you see this about -- about the questioning? Were you
9 privy to these facts about the questioning?"

10 The beginning of my discussion with Dr. Collins, I
11 cleared all of that up. So he's, "You didn't hear. You
12 didn't get full details on the questions." Well, she --
13 she may not have because it doesn't matter, because the
14 premise is if you knew there was a confession, you'd call
15 it suffocation or a confession, okay. That was a given.

16 So let's take that out, because it's a question of
17 whether there's a confession or not is not for her to
18 decide. It is for each and every one of you to decide
19 ultimately.

20 So I wanted to focus her attention on what the
21 medicine says, on what pathology says so that you could
22 weigh her information with that supplied by people from
23 the State.

24 If we want to talk about money, here is the
25 difference, all right. Who did the State bring in?

1 Dr. Armstrong, and I'm going to talk in a little more
2 detail about various individual statements, but I'm just
3 trying to get an overview here.

4 Dr. Armstrong is not a forensic pathologist, as you
5 can assess for yourself, try to help you later. Joel
6 Collins, Dr. Joel Collins -- excuse me, not Joel Collins,
7 Clay Nichols, interestingly, a member of the Child
8 Fatality Review Committee.

9 Dr. Smith, a pediatrician, interestingly, a member of
10 the Child Fatality Review Committee who said in response
11 to a question to me: All it took was a phone call for you
12 to come in and testify, that's right, a phone call from
13 his friend John Meadors, a member of the Child Fatality
14 Review Committee.

15 You know, no one does this, I submit. Everybody in
16 this courtroom that works here gets paid, all right. I,
17 too, enjoy what I'm doing. I, too, have to make a living.
18 I get paid. I want you to get paid. I submit what you
19 need to be concerned about are people who volunteer,
20 because they have an agenda.

21 And Mr. Meadors did one other thing. I'm going to
22 get over it in a little bit. He sets up another straw man
23 as far as the slides, talked with Dr. Collins about it.
24 "How long have you had the slides?" This, that, and the
25 other, okay, the slides that she reviewed, got from the

1 State.

2 What's the response? "Y'all asked for them on
3 Thursday." Thursday of last week is how concerned they
4 were about revealing things for this case. "You asked for
5 them on Thursday, and they were in your hands on Friday."

6 Now, somehow that's a bad thing on our part. Jumping
7 to it and getting them the material they want, to them, in
8 less than 24 hours from Charleston to Lexington, all
9 right. That's another straw man.

10 All right. I'll submit to you there's another
11 explanation here, and everyone may have gotten it wrong.
12 I have been intrigued by this since I saw it.

13 I have been intrigued by -- I had to stop here for a
14 second. Sometimes you get wrapped up. I've been doing
15 this because this is my life, all right.

16 I'm intrigued from the moment we talk about this.
17 Zachary Ulengchong's never going to come back and that's
18 the end. There's nothing to say, or how wrapped up I
19 might get because of the attempt -- I don't mean to be
20 disrespectful here, but we have to focus on why we are
21 here today. So --

22 THE COURT: Mr. Strickler --

23 MR. STRICKLER: Yes.

24 THE COURT: -- I'm sorry to interrupt you. Just make
25 sure that you keep your voice up so the court reporter can

1 hear you.

2 MR. STRICKLER: Yes, ma'am, thank you.

3 THE COURT: Thank you.

4 MR. STRICKLER: So when I say I'm intrigued, as an
5 attorney on this case, this formula makes me wonder.

6 Mandy Fortson talking about compressions and formula
7 continuing come out of the mouth and nose makes me wonder.
8 There's no question there was pneumonia present.

9 Could the child also have asphyxiated on vomiting of
10 formula? I'm going to talk with you about Dr. Armstrong,
11 because that should have been found at autopsy, but let's
12 just say did Dr. Armstrong weigh Zachary Ulenchong for
13 the autopsy? No.

14 Did Zachary -- did Dr. Armstrong, not a forensic
15 pathologist, calculate the length, height of Zachary
16 Ulenchong? No. Per Dr. Collins, should you do that? Is
17 that standard procedure? Yeah.

18 Dr. Armstrong even indicated, and I'm sure you're
19 tired of seeing me waive this around, he indicated --
20 well, grudgingly admitted some knowledge of Spitz and
21 Fisher, which Dr. Collins indicates -- you can assess
22 whether she knew what she was talking about there, every
23 forensic pathologist has this. It's "The book", all
24 right.

25 So how thorough was Dr. Armstrong? I mean, the lungs

1 worked on compression. Fluid comes out, okay. First
2 through the efforts of Andrea, then through the efforts of
3 Ms. Fortson, then through the efforts of E.M.S. personnel
4 who arrived. Then you combine that with a doctor that
5 doesn't look very hard at what he's doing, maybe whatever
6 you're looking for just shows asphyxia from regurgitated
7 formula -- actually not formula, milk. I think there's
8 another explanation.

9 All right. Quickly, and I won't take too much of
10 your time. I want to run through the witnesses and what
11 they have to say.

12 Gina Ulangchong, the first thing she didn't say is
13 everything Andrea said about the nature of our
14 relationship is wrong, okay. She didn't say that.

15 She could have gotten up today and replied, said
16 "That's all wrong." She didn't say that.

17 Someone told Andrea that the cause of death was
18 pneumonia and a collapsed lung. Do you remember I asked
19 Mr. Isenhoward about it. I asked Ms. Viravan about it who
20 spoke with Andrea.

21 Ms. Viravan spoke with Andrea on December 3rd, the
22 day after the death. The final autopsy was not rendered
23 until February 4th, okay, and when Ms. Viravan spoke with
24 Andrea, she said in speaking with the coroner, the
25 Ulangchong's, that was her understanding of the cause of

1 death.

2 And yes, if we're back to considering pneumonia as a
3 cause of death, yes. Gina says November 23rd, do you
4 remember whether Zachary was treated for the cut to his
5 forehead, notation made on the sheet? I talked with
6 Dr. Collins about it, and Gina Ulungchong admitted that
7 Zack was taken, kind of bad at that point in time, for
8 congestion, which is what Dr. Collins says is more
9 perfectly consistent with the onset of the infection
10 leading to pneumonia.

11 The three officers that you heard from, if we're to
12 understand it, there were a couple of denials, denials on
13 Andrea's part, that she caved in while she is still
14 talking with Lieutenant White, told the same story again
15 in Lieutenant White's office to Sergeant Isenhoward, then
16 Investigator Isenhoward. Now it's Sergeant Isenhoward,
17 went over, reaffirmed her story with Deputy Chief Wilson,
18 and then went back into Sergeant Isenhoward's office and
19 went and told the same story yet again; that nothing went
20 on in that period of time to go ahead and help rebuild
21 this story; that none of the things she said happened
22 happened.

23 If they got the same story at 16:48, when this
24 statement was signed at 4:48 in the afternoon, as was
25 given far earlier in the day, whatever time it was when

1 she first gave it to Lieutenant White, what are they doing
2 for rest of that time?

3 If there's no need for encouragement, why don't you
4 just troop right out on Lieutenant White, sit down and
5 type up the statement? We're done, you know.

6 There is a department policy -- this is Deputy Chief
7 Wilson: "There is a department policy that we do not
8 videotape or audiotape statements. It's department
9 policy."

10 You could say it's department policy because we
11 couldn't do it in every case. You could say it's
12 department policy because tape recorders are too expensive
13 for the sheriff's department, or you could say it's
14 department policy for any one of a number of lame excuses.

15 It's department policy because that way the
16 prosecution can say just what they've said today. These
17 guys come in and put their careers on the line, so put
18 them against her.

19 Well, I'm going to put them against her. I want you
20 to turn on the button on a tape recorder. He's got a
21 computer in his office. Slap a microphone on it, tape it
22 straight to the hard drive.

23 I mean, we're not talking major expense here, and we
24 are talking about as serious a crime as one can imagine in
25 the State of South Carolina, but you know, it's convenient

1 to not do that because then there's no record of what goes
2 on with Saul Kassin.

3 Quickly, Deputy Coroner McFarland, he confirms that
4 Zachary was found in a pool of vomit or liquid, confirms
5 the house was in good order and then reflected nowhere in
6 his notes, nowhere in his report, he gratuitously slams in
7 that Andrea's house was dirty. The house was dirty.

8 Well, I apologize to the Ulengchong's. It's a slam
9 to Andrea. It's a slam to them. Caring parents, caring
10 enough, who thought enough of the place to keep their
11 children there for 11 years. "I wouldn't keep my children
12 there."

13 Mandy Fortson, I want to talk about, just revisit for
14 just a moment. She testified that Andrea told her that
15 her -- Gina -- about two weeks earlier Gina told Andrea
16 that Zachary had pneumonia. I talked about the fluid from
17 the mouth, all right, and we get into the medical experts.
18 I brought some of these up. I'll do it a little more.

19 Dr. Armstrong, does he have a reason to change his
20 opinion? Sure. He sees a statement now. As a
21 pathologist, he sees a statement, sees a confession,
22 that's it. That's the cause of death. I'm going to
23 correct it now.

24 Then he comes up a series of reasons that he claims.
25 The reason is the statement. He comes up a series of

1 reasons: Pneumonia was the cause of death in 1998. Now,
2 he terms it a mild case of pneumonia.

3 Well, it was mild enough in 1998, and was he still
4 the doctor then? Was he still the pathologist then? He
5 still reviews stuff.

6 In fact, he recently looked at it. It was mild
7 enough then to say it killed him. That was his opinion in
8 '98. Is his testimony believable? No. It was both
9 deceptive and misdirected.

10 He, on several occasions, referred to nonspecific
11 findings. Do you remember that? Specifically -- not
12 specifically. Early swelling of the brain was one of the
13 findings in '98, and alveolar hemorrhaging -- alveoli, the
14 sacs in the lung, was the finding in '98.

15 Now, at that point in time, nothing to do with
16 asphyxiation, doesn't relate it to pneumonia. Those are
17 nonspecific findings.

18 I asked Dr. Collins, "What's a nonspecific finding?"

19 "Just what it says. It's doesn't signify anything.
20 It's found so common, in so many different things, that it
21 means nothing."

22 Well, except Dr. Armstrong when he says nonspecific
23 finding, I mean, you find it in drowning and suffocation.
24 So I asked him, "Doctor, do you find it in anything else?"

25 And you talk about credibility. Did you see Kim

1 Collins, here, here, here, here? You know, there's 1,000
2 here, here, here, here? Yeah, it's nonspecific. It
3 doesn't mean anything.

4 So is he forthright? Is he believable? Is he being
5 straight with you? No. He's running something by you
6 trying to infer that these couple of findings that mean
7 nothing actually might relate to suffocation and
8 asphyxiation.

9 He didn't culture for bacteria in the case, and
10 everyone agreed, you know, bacteria can -- is toxic, and
11 it can end up being highly toxic. And how toxic it is can
12 affect how dramatically it impacts the system which
13 pneumonia is the possible cause of death.

14 We don't know, because he didn't do it. That's
15 indicative of the thoroughness of the autopsy he
16 conducted.

17 It doesn't matter how big it is or he is. Doesn't --
18 there's no indication that he checked the mouth of the
19 kid, Zachary, almost 13 months old. Does the child have
20 teeth by then? Yeah.

21 Everyone agreed, even Dr. Collins, you often see no
22 signs in suffocation, but when you see signs, what can you
23 see, among other things, injuries to the inside of the
24 mouth from the teeth when the mouth is being held shut.

25 There's no indication you can check that, so you

1 should consider how much of an expert he is. And I've
2 got -- I've got a suggestion, which is not much.

3 I'm not even going any further than the fingernails
4 and the glans penis that he noted and supplied as a reason
5 for suffocation. Dr. Collins responded to that.

6 If any of you think there's any reason to give any
7 credibility to what Dr. Armstrong said in regard to
8 cyanosis in either of those areas, I submit there's no
9 basis for that. Never seen anywhere in the literature,
10 anywhere, anyhow at all from the one that does pediatrics.

11 I was going to go through this book over here, but
12 I'm going to try to speed it up and won't take very long
13 because they talk -- well, no, I am going to go over it.
14 I'm sorry.

15 Let's talk about the timeline. We'll give you the
16 timeline. I've heard it a couple of times before. "The
17 observer is impressed with the striking discrepancy
18 between the classical textbook description of the clinical
19 manifestations demonstrated by the patient with grave
20 pneumonia that the observer is impressed."

21 Despite what you think, here comes something
22 counterintuitive: The classic manifestation is
23 demonstrated; that is to say shock, frustration, marked,
24 dyspnea, and the like. And the observer is impressed
25 with -- these are the classical manifestations, you know,

1 that you would see over time, you know, according to the
2 State's witnesses. And the fact that many persons with
3 extensive pneumonia are able to be up and about and to
4 carry on in some fashion up to the moment of collapse and
5 death from the standard text on medicolegal investigation
6 of death.

7 Dr. Nichols -- let's see what Dr. Nichols did. I
8 took the time to go through it with him. Yep, Zachary was
9 sick February 2nd, temperature of 102, went to the
10 emergency room, followed up on February 3rd.

11 On April 28th, he went to emergency care, fever, loss
12 of appetite, temperature of 101, assessment, diagnosis,
13 pneumonia, April 28th.

14 The 29th, back there, child doing better.
15 Presumptive pneumonia is resolved. Pneumonia in April of
16 '98, another sick visit April 30th. However, the
17 reactions to the Augmentin they have him on for pneumonia,
18 Augmentin, all right.

19 One medication he was on used to treat bacterial
20 infections. Z-Pack, Zilopack, medication used to treat
21 bacterial infections; Dimetapp, over-the-counter, for
22 congestion preliminary to infections.

23 Okay. July, cough, runny nose; August, that's when
24 he got the Z-Pack, October, again fever of 101.3, and we
25 know that November 23, he was treated for that cut and was

1 on Dimetapp.

2 You know, kids get sick. That's my understanding.
3 Day care kids gets sick more than they do elsewhere,
4 that's right.

5 He got pneumonia. He got it more than once because
6 he had it when he died. Whatever these people say, they
7 didn't say -- none of them could say well, he didn't have
8 pneumonia. They just downplayed pneumonia.

9 Not enough pneumonia? Kim Collins says it is. Kim
10 Collins knows what she is talking about. Kids -- assess
11 this, please: From Dr. Nichols, kids don't fight when
12 they're suffocated, little things.

13 Kim Collins. Did you hear her testimony? Did you
14 see her testimony? Do you know she is telling the truth
15 when she testified to that? "I've seen a video from the
16 Nanny Cam. That poor little thing fights as hard as
17 anyone can. It's not a gentle suffocation." That's the
18 expertise that you have on behalf of Clay Nichols.

19 Nichols does say, right, go around and around a
20 little bit, same thing with him that I did with Kim
21 Collins. If you take the statements out, get rid of them,
22 what do you have, just left with the medicine.

23 Oh, he still couldn't go -- couldn't go --
24 undetermined. All right. Well, that -- fine. I'll take
25 that. That means the whole issue in this case is whether

1 or not this is true.

2 And lastly, as far as assessing the credibility of
3 the witnesses, Clay Nichols, completely unrelated case.
4 Maybe it wasn't clear enough about it, completely
5 unrelated case, a shooting case years ago, does the
6 autopsy, you know, notes the presence of a gallbladder in
7 the victim when the gallbladder had been surgically
8 removed about four years earlier, keen eye, keen attention
9 to detail.

10 Yeah, I paid some money for an expert. He has
11 volunteers. They got volunteers. Dr. Smith very shortly,
12 all it took was a phone call to get him down here, didn't
13 feel particularly comfortable saying what he said.

14 There's no basis, according Dr. Collins, and I submit
15 to you, you learn enough about pneumonia, you know that
16 you have the diagnose it with the slides.

17 There's no basis from reading a couple of sentencing
18 from a typed report in diagnosing mild pneumonia, a small
19 amount -- excuse me, a small amount of pneumonia.

20 All right. That's it for the State's case. I mean,
21 it breaks down to -- to an autopsy in 1998 and a report in
22 '99. Some witnesses at that point in time said pneumonia
23 with some fluid that still is, without meaning to be
24 disrespectful, intriguing to me because I can't explain
25 it, and no one has explained it to the -- satisfactorily

1 to me. No one has explained why that doesn't kill a
2 child.

3 You have got that much stuff coming out of your nose
4 and mouth, not breathing. You heard gurgling sound like
5 blowing bubbles in a milk carton, a glass.

6 All right. You heard -- well, the Solicitor has
7 already talked about Rodney Person coming down, and
8 Mr. Isenhoward went to follow up on him about the mood
9 swings, this, that, and the other because that's their
10 full story, the hysterectomy, that it never happened prior
11 to the death. That's their full narrative that they want
12 to flesh out.

13 Andrea, there she was, never arrested before, mother
14 of two beautiful children, voluntarily came down there,
15 wanted to help, completely unprepared for what happened,
16 an innocent in the sense where you remember Rodney says
17 she'd kind of naive, gullible, an innocent in the sense of
18 bringing in -- from Mr. Kassin, actually, and she walks
19 into a three-detective buzz-saw team that we submit
20 employed a lot of techniques, Saul Kassin talked about, to
21 generate the statement. We can't prove it because we
22 don't have a video, and we don't have an audio, and that
23 ain't our fault.

24 And Mr. Meadors said, "You've heard things from the
25 stand you've never heard before." Well, I guarantee you

1 she did not go to the police and tell the police then when
2 I was here before, all of this stuff happened, and that's
3 why the statement came down, because the last time she
4 went down to the police, she got arrested. She got
5 charged with homicide by child abuse.

6 Ms. Viravan, I've already covered. Dr. Collins, I
7 think I've covered. Dr. Kassin, I've taken notes. I
8 haven't talked with -- Ms. Pringle dealt with him. I'm
9 done talking. I know I've said it times before, but I'm
10 just furiously taking notes.

11 We have here what's called a compliant false
12 confession. Testimony from -- think about the testimony
13 of Andrea, looking for a way out. One of the things he
14 says we can comment in that situation, an expression
15 that's even used in that situation: "I want to go home."

16 What do you need to look for in evaluating? Are the
17 details off in this detailed statement? Yes. The
18 statement in there about motive? Yes. "The baby is
19 crying, so I killed him. Baby Ulengchong, who I cared for
20 since I was six weeks ago, whose siblings I cared for,
21 whose mother was my personal banker, who I had that kind
22 of relation with, I murdered that child because he was
23 crying." That's the motive?

24 Expressions of remorse, that's one of the things you
25 look for. That's this letter. After you get them all

1 jacked up, after you get that, this is part of the
2 process.

3 Remember what happened with this letter. Did it ever
4 get to Pete and Gina Ulengchong? Taken, shown to Gina.
5 Did she get to keep it? No. Why? Because the police
6 solicited it be written to be used as evidence right here
7 today. That's why.

8 Now, what did Mr. Kassin say? It's easier -- we're
9 all suckers. We're all not very good in determining
10 whether someone is telling the truth or whether someone is
11 lying. That may be counterintuitive, too, but it's
12 proven.

13 Can anyone here believe Saul Kassin didn't know what
14 he was talking about? All right. We're not very good at
15 doing it. We're better at doing it, better at assessing
16 it when the entire -- not just the statement, but the
17 entire process was reported, so we can evaluate how things
18 are going; that the process used, whatever procedure is
19 used, whatever technique is used, basically involves an
20 individual, okay, and the family did so, confronting the
21 individual, minimizing the situation, supplying
22 explanations, hysterectomy, to excuse the behavior while
23 still admitting guilt. That's called minimization, all
24 right. It's a classic technique.

25 Provide alternatives, "Couldn't this have happened?

1 Couldn't this have happened? Couldn't this have happened?
2 That's what happens in the period of time after the few
3 no's, and then she says, "Yes, I did it," according to the
4 statement.

5 What's really happening in -- happening in that
6 period of time, is she is being suggested, intimidated as
7 she talked about by Lieutenant White, further suggested
8 taken around, shut it off to someone else, good cop, bad
9 cop, worked that routine, and then you get the full
10 confession, and you need to consider it.

11 Was she vulnerable when she gave it? Yes. Is the
12 narrative accurate? Absolutely not.

13 All right. I'm not going to get to talk with you
14 anymore. I don't know that there would be any problems
15 with that on your part, but I'm not going to. Mr. Giese
16 will get up and address you now. I'll sit down and shut
17 up.

18 On April 17th, 2007, Andrea Person, she's never been
19 in trouble before in her life, is the mother of two
20 beautiful children, two beautiful, intelligent children, a
21 caring mother, voluntarily got in her car, drove down to
22 the Richland County Sheriff's Department, walked in after
23 minimal opposition on her part, confessed to killing
24 Zachary Ulengchong on December 2nd, 1998.

25 Zachary Ulengchong, the child she had cared for since

1 he was six weeks old, five days a week, 12 hours a day,
2 been in day care 12 hours a day, all right, a child of
3 people that she was closer to than anyone else in her
4 family, other than her family.

5 "Because he was whining", that's the State's case.
6 The law says that you all have no friends to reward nor
7 enemies to punish, you sitting as jurors.

8 You don't owe anyone anything. You need to be
9 concerned with what the evidence proves in relation to the
10 law as Judge Lee will charge you, no friends to reward nor
11 enemies to punish.

12 You need to be concerned with what is proven and what
13 is proven beyond a reasonable doubt. There is no medical
14 evidence. Consider the testimony. There is no medical
15 evidence to support the contention that Andrea Person
16 killed Zachary Ulenchong on December 2nd, 1998.

17 I've come up with one other explanation other than
18 pneumonia that still is running around in my mind, but
19 there's none supported. You consider the testimony of
20 those witnesses. There's none to support that's how it
21 happened.

22 There is no other evidence around to support that
23 this is how it happened. In fact, there's lots of
24 evidence around to completely debunk this is how it
25 happened. It didn't happen this way. It's not maybe it

1 didn't happen this way. It did not happen this way.

2 Fifteen, 20 seconds won't kill someone, period,
3 undisputed. Take your hand off someone's mouth. Then
4 take a deep gasp, which Dr. Collins said. This is not
5 rocket science. This is just common sense, but it happens
6 to be the testimony of a medical expert.

7 What happens then? Deep breath. She said, "The
8 baby, they are wailing at that point in time," all right.
9 If it's a deep breath, what's the person doing?
10 Breathing. If the person is breathing, what are they?
11 They're not dead.

12 It didn't happen the way it is down in there. It
13 didn't happen at all.

14 Now, I'm not going to go through -- I'm not going to
15 go through all of the law that Mr. Meadors went through.
16 I'd submit that if you buy this, okay, then this is not a
17 confession of homicide by child abuse, because according
18 to this, the child was still breathing. Something
19 happened afterwards.

20 According to this, her actions did not demonstrate an
21 extreme indifference to human life. That's one of the
22 requirements in homicide by child abuse.

23 She doesn't say, "I held him down until he" --
24 killed, you know, for minutes, and minutes, and minutes.
25 No. She said this -- if you believe this, you should --

1 in this, she says 15 to 20 seconds, took it off, took a
2 deep breath, put him down, later came back, and he died.
3 That's not an extreme indifference. That's hardly
4 abominable behavior. It's horrible behavior. It's not an
5 extreme indifference to human life.

6 If you should believe that somehow this happened in
7 the face of all the stuff that clearly shows it didn't,
8 then that's that lesser charge Mr. Meadors is talking
9 about. It's not just leaving the kid in the car.

10 It's the lesser charge, but if you aren't convinced
11 that she did that, and I just tried to outline for you a
12 few reasons you shouldn't be convinced, then she is not
13 guilty.

14 The tragedy of December 2nd, 1998, Andrea has been
15 living with the consequences of a the tragedy on
16 April 17th, 2007 for the last two-and-a-half years. The
17 State is asking that you all sign off on it.

18 You don't have any friends to reward or enemies to
19 punish. You need discuss the case with each other. You
20 need to listen to your fellow jurors, and then you need to
21 vote, vote yourself with confidence and vote with what has
22 been proven to you beyond a reasonable doubt.

23 You owe it to the other jurors to talk with them, and
24 you owe it to the other jurors to this system to vote for
25 yourself as to what you feel has been proven beyond a

1 reasonable doubt.

2 Proof beyond a reasonable doubt is the highest
3 standard known to the courts of this state. You get a
4 car, you know, you sue someone for millions and millions
5 of dollars. It's proved by a preponderance of the
6 evidence. It's a little bit more evidence than you find
7 for that side.

8 There's a middle ground of evidence. Middle ground
9 of evidence -- this is interesting -- middle ground of
10 evidence is called evidence that is clear and convincing.
11 That sounds pretty strong. Clear and convincing evidence.

12 That's not the highest. The highest proof required
13 in this state, in this country, is proof beyond a
14 reasonable doubt. Proof that once said is -- leaves you
15 firmly convinced. Another way of saying it is proof that
16 dispels any doubt you can give a reason for. That's Saul
17 Kassin's testimony of false confessions.

18 Now, this being a piece of fiction, I believe is the
19 material Ms. Pringle used, is the doubt, doubt, doubt.
20 It's nothing but doubt.

21 Y'all, I appreciate you bearing with me. I submit to
22 you if you do your duty, if you hold the State to its
23 burden that you've sworn to do, that's your oath: "I will
24 well and truly true, and true deliverance make, to the
25 State of South Carolina and the defendant, whom I shall

1 have in my charge, and true deliverance make." That's the
2 oath you took.

3 You have Andrea Person in your charge. I submit if
4 you're true to your oath, if you don't think you have
5 friends or enemies what you need to the deal with, if you
6 review the evidence and apply the law, you'll return a
7 verdict that speaks the truth that Ms. Pringle talked with
8 you at the beginning about, the verdict that speaks the
9 truth. That verdict is not guilty.

10 Thank you very much.

11 THE COURT: Ladies and gentlemen I'm going to ask
12 that you stand up for just a moment. Take a stretch
13 break.

14 (Pause).

15 Yes, sir. Mr. Giese.

16 MR. GIESE: May it please the Court, Your Honor.

17 CLOSING STATEMENT:

18 MR. GIESE: Madam forelady, ladies and gentlemen of
19 the jury, I agree with my colleague, Mr. Meadors, in that
20 I want to thank you for the time that you've given us.

21 I know it's been a long week. It's been a tough
22 week, but I assure you that your service is very important
23 to our society and our community, and I appreciate that.

24 You know, I sat there for the last four days or five
25 days, whatever it was, and I listened, I listened to the

1 testimony. I listened to the lawyers, listened to the
2 arguments just like y'all have.

3 You know, it struck me today, it struck me just a
4 little while ago, especially during Mr. Strickler's
5 closing argument, the defense has done everything in their
6 power these last several days to run, to run, to run, and
7 they are running for a reason.

8 They have run for days, for days, away from these
9 statements that their client made, and they have run for a
10 reason. And that reason is, ladies and gentlemen, those
11 statements that she made in this case concerning that
12 young, innocent 12 month old are damning. They convict
13 her, the State submits, of homicide by child abuse, and
14 they have done everything in their power to run from it.

15 A prime example, how about this: This is the
16 grandest -- and I wrote it down, "the grandest conspiracy
17 that we've ever seen here."

18 It's a conspiracy not only of the Richland County
19 Sheriff's Department and their investigators, three to be
20 exact, who forced this lady to make the statement as they
21 say, but it's a conspiracy of the sheriff's department and
22 a new conspirator that we just mentioned today for the
23 first time. That's the Fatality Review Board with
24 S.L.E.D.

25 The Fatality Review Board is now involved in this

1 grand conspiracy, as Mr. Strickler wants you to say,
2 because Mr. Meadors is on that Fatality Review Board, and
3 two of the witnesses that came up here and testified on
4 their own time are with the Fatality Review Board.

5 Somehow, the Fatality Review Board and the sheriff's
6 department -- and yes, ladies and gentlemen, they get to
7 use my office, and maybe have gotten together to frame
8 Andrea Person because, ladies and gentlemen, to come back
9 "not guilty", the State submits, you will have to believe
10 that it is the grandest conspiracy in the history of
11 Richland County because that's the only way the State
12 submits you can come back with not guilty, the only way.

13 He said something else. He talked about asphyxiation
14 on vomit. Who testified that there was vomit in this
15 young man's lungs, or in his trachea, or anywhere in his
16 body? No one, no one.

17 It is, as Mr. Strickler has said, a fantasy. It is
18 Mr. Strickler trying to get you to look at something else
19 that wasn't even testified to. There's no vomit, a
20 pathologist looked. There's no vomit. Even their own
21 Dr. Collins said there was no vomit. Yet, Mr. Strickler
22 is now arguing, "Oh, he could have asphyxiated on vomit."

23 You know, I sat here today, just like y'all did, and
24 I was -- I was just watching as Dr. Kassin from, I don't
25 remember where, I think Boston or Massachusetts, flew down

1 here and came up and testified as to issues involving
2 confessions.

3 We all sat through that for about an hour,
4 hour-and-15 minutes, Dr. Kassin testified up here. And,
5 you know, I was listening, but do you know what really
6 struck me?

7 Dr. Kassin has been involved with this case for two
8 and one-half years. Ms. Pringle asked him that, and he
9 said, "I've been involved two-and-a-half years." Yet, for
10 two-and-a-half years and \$12,000, he doesn't have an
11 opinion about this case?

12 He doesn't testify about whether this is a false
13 confession or not? Two-and-a-half years in the case. You
14 are an expert in confessions, and you don't give an expert
15 opinion in this case?

16 But he said something else that was even more
17 interesting, something else that I hope, I hope clicked in
18 your minds, and it was a quote that he said when he was
19 describing what -- you know, I don't remember. One of the
20 types. He said there's some people that confess who just
21 want to go home.

22 I heard that, and I said, "Where have I heard that
23 before? Where have I heard that before?" I heard it from
24 Ms. Persons when she testified, remember? She testified,
25 "I just wanted to go home."

1 Well, now, ladies and gentlemen, do you think that's
2 coincidence? Do you think that after being involved in
3 the case for two-and-a-half years and saying, "I just
4 wanted to go home," and Dr. Kassin says, "Some people just
5 want to go home," do you think that's coincidence? No,
6 ladies and gentlemen, it's not.

7 The State submits she knew what he was going to
8 testify to, and she said the magic words. And that goes
9 to credibility, doesn't it? Doesn't that go to
10 credibility?

11 Just like, for the first time we've heard in two
12 years, that she told the victims' mother, "You need to
13 take this child to the doctor." Well, that's the first
14 time we've heard that, and there's a reason for that, too,
15 ladies and gentlemen. It's because you can't believe
16 anything she says.

17 That is -- she makes that up to make herself not look
18 as bad. That's what you're dealing with. That's what
19 you're dealing with. You're dealing with someone who is
20 trying to save herself.

21 Now, let's talk about the defendant for just a
22 second. I want everyone to remember on April 17th, 2007,
23 the defendant, Ms. Persons, could have left at any time up
24 until her statement saying she killed Zachary Ulangchong
25 or put her hand over his mouth and nose.

1 Do you know what's so interesting about that? And
2 Mr. Meadors, he touched on it, but what's so interesting
3 about it is that lo and behold, she had been down there
4 six days before, been read the same Advice of Rights,
5 signed them, said she understood them; at some point on
6 the 11th, got up and left, got up and left.

7 Now, she comes back down on the 17th. Back down,
8 does the exact same Advice of Rights. You'll have these
9 back there with you. You'll see her signature on them.
10 You'll read what they read to her.

11 And yet, now she claims she didn't think she could
12 leave at some point; that she was scared; that they
13 threatened her; that they beat on the table; that one of
14 the officers, Lieutenant White, ran his hands through his
15 hair. Well, first off, he's bald, but he ran it through
16 his hair and then slammed his hands down on the desk.

17 I asked her, "Well, you clearly could have left at
18 that time, couldn't you?" What was her answer. "Yeah, I
19 could have."

20 So how fearful was she at that point? How scared,
21 intimidated was she? How coerced was she at that point?
22 Because she could have left at any time.

23 And look, I remember Dr. Kassin saying you have to
24 look at the -- you have to look at the person involved who
25 makes the statement.

1 You have to look and see the intelligence level, the
2 education level of the person who makes the statement.
3 Then he went from children to handicapped people to people
4 with mental illness saying, you know, these people have a
5 lower susceptibility to be led, but you know something?
6 We don't have a handicapped person. We don't have a child
7 in this case. We don't have a mentally ill person in this
8 case.

9 We have a smart, as you could see, educated at U.N.C.
10 Chapel Hill person who majored in psychology. She got
11 within two classes of graduating from U.N.C. Chapel Hill
12 in psychology, and yet, they want you to believe that she
13 somehow was coerced into this? She was somehow tricked
14 into this? They used some kind of technique to get her to
15 say something that she didn't mean?

16 This is an adult. This is an educated adult, college
17 educated, and they're saying, "Oh, well she got tricked
18 into it. She got intimidated into it. They made her stay
19 it. They suggested these things to her."

20 Ladies and gentlemen, the State submits you don't
21 usually get smart, educated U.N.C. Chapel Hill,
22 majored-in-psychology defendants.

23 The State submits on the level of intelligence, she
24 is as high as you get. Yet, they want you to believe that
25 she was somehow tricked into this, fooled. Her will was

1 overborn.

2 A person who knows her rights, knows she can leave,
3 and just for whatever reason, they trick her. They want
4 you to believe she confessed to something she didn't do,
5 and, you know something, it's not once. It's not where
6 she says it to Lieutenant White, and Lieutenant White
7 hears it and then goes out and gets somebody else in
8 there, and she looks at them. She looks at the new person
9 that comes in, said, "I knew I said it, but I didn't mean
10 it."

11 She says it a second time, a third time, a fourth
12 time, and a fifth time, five times. This woman has been
13 deceived, and she admits it five times? Five different
14 times with three different people, and writes a letter?

15 They want you to believe that it's false all five
16 times. As I said before, she had left on 11:07, and she
17 had her right read to her.

18 Remember, ladies and gentlemen, we're talking about
19 five times. The State's case very briefly, Gina
20 Ulengchong, 7:30 to 7:40, she dropped little Zachary off,
21 no symptoms. He was laughing and fine.

22 10:30, she gets a call to go to the hospital. We
23 know E.M.S. was called at ten. We know that from 7:40 to
24 ten o'clock, young Zachary was killed.

25 And here is the key: We had to put her back up,

1 because this is the first time anyone had ever heard,
2 anyone had ever heard, that the defendant had claimed that
3 she had told Gina Ulengchong, who is here today again, to
4 take the child to the doctor. That's the first time
5 anyone has heard that.

6 So we had to put her back up to say whether or not
7 that happened, and ladies and gentlemen, it didn't because
8 there were no symptoms. He was laughing and fine.

9 She kissed him goodbye, and it was the final kiss.
10 10:05, Mandy Fortson arrives. That's incorrect. It
11 should be 10:05 is the call. She gets there. She gets --
12 she sees him on the ground. She comes inside. She sees
13 him on the ground to the left. She goes over there.

14 When she gets to him, she tries to get him some
15 C.P.R., and a little bit of formula comes outs of her --
16 comes out of his mouth. It's not this gushing formula or
17 this gushing vomit, this gushing whatever that
18 Mr. Strickler has been talking about claiming she said.
19 Listen to her testimony. "A little bit of formula came
20 out;" that there was a bottle in the crib, approximately
21 eight ounces were left in it, mostly full, liquid in the
22 crib.

23 Didn't say vomit, Mr. Strickler. And it is soaked
24 in. And look, you can see it. It had soaked in. By the
25 time this picture was taken, it had soaked in, and that's

1 a deputy coroner getting there that day, who has to go to
2 the scene that day. It had soaked in, and there's no
3 vomit there. Take a close look.

4 And here's -- here's -- here's the part that they
5 can't get around: The skin was cold. He was dead. Well,
6 now, ladies and gentlemen, the skin was cold because he
7 heat leaves the body when you die.

8 She was concerned about the length of time he had
9 been dead. It's common sense, ladies and gentlemen. Dead
10 body, a period of time, cold, common sense. We all know
11 that. We don't need an expert to fly in here and tell us
12 that.

13 And you know, the really frightening part, and I
14 wrote this down because I was listening, Ms. Fortson said
15 that Ms. Persons -- now, this is -- you've got to
16 understand, this is within minutes, this is within two
17 hours-and-a-half of the child being dropped off with her,
18 she is not concerned about the baby. She is concerned.
19 She says, "What is going to happen to me?" Do you
20 remember that?

21 Oh, but it's -- it's -- it's a person that's so
22 concerned about that child. Oh, she is so worried about
23 this child and this friend of theirs who she has loved
24 since the beginning of time. "What is going to happen to
25 me?"

1 Well, that's not the end, because Deputy Coroner
2 McFarland comes. The defendant makes a statement at that
3 time, and this is what she tells him. Nine a.m., fed two
4 bottles of formula.

5 Actually, I think it was one formula, one juice. She
6 comes back, and 30 minutes later, the child is blue.
7 Well, ladies and gentlemen, you're talking to the first
8 law enforcement, I guess, officer, the coroner. Deputy
9 coroner comes to your house, and you say nothing, nothing
10 about the child being ill that day.

11 This -- remember now, this same person who makes this
12 statement, Ms. Persons, make the statement to Deputy
13 Coroner McFarland that morning, that day; that 30 minutes
14 later the child was blue and does not mention anything
15 about the child being ill.

16 Why is that important? Well, it's important because
17 she claims she told Gina Ulengchong that she needed to
18 take the child to the doctor. Yet, after the child dies
19 and a couple hours later, she mentions nothing to the
20 coroner's office, nothing.

21 And that's because that child, the State submits,
22 wasn't showing any symptoms, and if he was, they weren't
23 bad enough for her to notice it.

24 Jump forward. This is December 2nd, 1998. Leap
25 forward, leap forward. April 2007, the defendant comes

1 down on the 11th, read her rights, leaves.

2 The 17th, she comes back voluntarily, drives herself
3 down there, comes in. The first investigator she talks to
4 is Lieutenant White, the guy who ran his hands through his
5 hair, she said.

6 She tells Lieutenant White after he says -- and this
7 is the interesting thing. Lieutenant White says, "I told
8 her that there were some discrepancies that we needed to
9 talk about," and they talked.

10 And sure enough, at some point, Ms. Person says, and
11 wrote it down, "Baby Zachary would not quit crying. I
12 held my hand over his mouth and nose. Zachary became
13 motionless and quiet. I panicked. I panicked." I bet
14 she did.

15 "I put him down in the crib. Fifteen minutes later,
16 he was lifeless. I falsely reported how Zachary died. I
17 was afraid" she would go to jail.

18 Now, ladies and gentlemen, the defense wants you to
19 believe that Lieutenant White made her make this
20 statement; that he somehow got her to say all these things
21 and confess to doing something she did not do, college
22 educated adult.

23 And you know, that's just her first statement that
24 day, first statement that day, because he takes her after
25 that statement. He goes out -- actually, I'm sorry. He

1 goes out, and he gets Sergeant Isenhoward, who is in the
2 courtroom today and who testified. And Sergeant
3 Isenhoward, even though she denies this happened, came
4 into the room, kneeled down and asked her, "Tell us what
5 happened."

6 She repeats just about what she said to White,
7 statement number two. This person who has been coerced
8 and overborned will has just now said the same thing to
9 two separate officers who were there, Isenhoward and
10 White.

11 They want you to believe that this Lieutenant White,
12 with all the years of experience he has in the sheriff's
13 department, beat down on the table, ran his hands through
14 her -- his hair and made her confess. Same as to White,
15 and then she added, "I have been lying to everyone ever
16 since."

17 Ladies and gentlemen, the State submits to let her go
18 in this case, you have to believe that Isenhoward and
19 White are either not telling the truth about her saying
20 this, or that they somehow coerced her into making this
21 statement up. No, ladies and gentlemen, not Richland
22 County. The State submits that doesn't happen here.

23 Isenhoward listens to the statement, remembers her
24 saying, "I have been lying to everyone ever since," and
25 takes her to go see his boss, Chief Wilson, who is in the

1 courtroom today also.

2 All the years of experience that Chief Wilson has,
3 the State submits, is on the line right now, today.
4 Because, ladies and gentlemen, if you believe Ms. Persons,
5 then you believe that Chief Wilson, the third-ranking
6 person in the sheriff's department with 20 -- 30 years of
7 law enforcement experience stuck his fist out in a
8 threatening manner and intimidated Andrea Person because
9 that's what she said he did.

10 She was so intimidated and so scared and so upset
11 that she continued to confess. Chief Wilson, it was a
12 free-flowing statement. Quote, "I am relieved to finally
13 tell someone about it."

14 And use your common sense, ladies and gentlemen,
15 because that's what we ask you to do. Mr. Meadors told
16 you. "I am relieved to finally tell someone about it."

17 We've all had experiences, and that's what we're
18 asking you to remember, of telling people things. And
19 after you tell them, you do feel better. You feel
20 relieved. You feel better. She admitted to putting a
21 hand over the mouth and nose. "Zachary then got quiet."

22 Now, Mr. Strickler has made a point, or attempted to
23 make a point, about 15 to 20 seconds is not long enough to
24 suffocate a child.

25 Well, ladies and gentlemen, I watched Mr. Kassin

1 testify, and I've listened to Mr. Strickler and
2 Ms. Pringle talk and question law enforcement.

3 And, you know, something that's interesting, they
4 asked each investigator, Wilson, Isenhoward, everybody,
5 "What technique did you use? You used a technique, didn't
6 you? You used the Reid Technique."

7 I don't remember the names of the techniques they
8 claimed. What did each one of them say? Each one of them
9 said, "No, I didn't. It was pretty free flowing. We
10 didn't use any technique on her. We didn't lie to her.
11 We didn't tell her we had fingerprints anywhere," as they
12 were talking about. "We didn't do any of that. We didn't
13 do anything. She confessed."

14 Do you know who used the technique, a technique? Do
15 you know who used it? She did. She did. The State
16 submits it's a technique called a Gentle Art of Confessing
17 Error, a Gentle Art of Confessing Error.

18 It's a technique that people use, defendants,
19 everybody, sometimes uses them. It's where you will admit
20 doing something but not tell the whole story hoping that
21 they'll believe the little story.

22 The little story in this case is that she only held
23 her hand on him 15 to 20 seconds on little Zachary.
24 That's the story. That's the Gentle Art of Confessing
25 Error.

1 She confesses the 15 to 20 seconds, so you'll take
2 the big gulp, which is, "I held onto him until Zachary got
3 quiet. I held onto him", as she told earlier, "until
4 Zachary got limp." That's not 15 to 20 seconds, ladies
5 and gentlemen, and she said it.

6 Amount of pressure? Firm handshake? Of course,
7 there again, it's because -- it's because Chief Wilson
8 threatened her by sticking his hand out in front of her
9 face and scaring her. She grasped his hand. Would you
10 believe that? Would you believe that officer did that?
11 He threatened her, 30 years?

12 And the hysterectomy, the famous hysterectomy. Well,
13 let me ask you this: How do we first know about the
14 hysterectomy at that time? They knew because she told
15 them. She told them about the hysterectomy. How would
16 they know if she did not tell them?

17 She is searching to explain why she put her hand over
18 the mouth and nose of that innocent 12 month old. Her
19 words, not theirs. Before I get to the statements, and
20 I'll be very brief on the statements, I promise, because
21 you're going to have them back there, well, the written
22 statements.

23 Dr. Armstrong: A mild case of pneumonia, blue
24 fingernails and penis, statements, cause of death,
25 suffocation.

1 In the end, this forensic pathologist, after being
2 given the statements, looking back at the case, comes back
3 and says suffocation, and remember that word,
4 "suffocation", because the State submits it's used again.
5 It's used by Dr. Nichols, who is the medical examiner for
6 Richland County. He does these every day. He looks at
7 these things every day, and he says it's a small or medium
8 amount of pneumonia. I believe small.

9 So he takes the insufficient -- he believes it's
10 pneumonia. It's an insufficient amount to cause death, so
11 he looks at that. He looks at the amount of pneumonia in
12 the body.

13 He looks at the timeline. When I say timeline, he
14 looks at the drop off at 7:30 to 7:45, and the child is
15 dead at ten. And says in the statements, also, and says
16 the cause of death, once again, is suffocation,
17 suffocation.

18 That's two experts. And, you know, I put this -- I
19 put -- I put this one (indicating) in the State's case,
20 this witness. We didn't call her.

21 Dr. Collins, who after all the testimony, and all the
22 questions by the defense, and everything that they've
23 looked at, her final answer was what? Suffocation.

24 She said -- she was asked, "When you look at the
25 timeline, when you look at the statements, when you look

1 at the slides, when you look at the prior autopsy, what do
2 you conclude?"

3 "It wasn't vomit. He didn't die of asphyxiation from
4 that. He died from suffocation."

5 Where is the dispute, ladies and gentlemen? Where is
6 the dispute?

7 Finally, Dr. Smith. Now, Dr. Smith is part of this
8 cabal, this conspiracy of law enforcement and the -- I
9 don't even think I wrote it down again. I forgot the name
10 of it.

11 (Pause).

12 Fatality Review Board. He's part of this conspiracy
13 to frame the defendant. He's an expert pediatrician,
14 spent 24 years. He looked at it, said it's a small amount
15 of pneumonia, and that the child lacked symptoms of it.

16 And he also said this: That it would be days, days,
17 not hours, not two hours, not two-and-a-half hours, but
18 days before the child would have reached that point of
19 death.

20 He treats the living. He treats symptoms. He sees
21 it every day. He knows when someone needs to go to the
22 hospital. He knows when someone needs a Z-Pack. He
23 knows.

24 If the person was dead within two-and-a-half hours of
25 his or her death from pneumonia, he would be -- or he or

1 she would be obviously extremely ill. And who else said
2 that? Their own expert. Dr. Collins said the exact same
3 thing.

4 And guess what, ladies and gentlemen? There were no
5 symptoms, because that child doesn't dying of pneumonia.
6 That child was crying, and that child was crying loud
7 enough to wake the other six children or five children
8 that were in their cribs asleep. And she didn't want
9 that, and she shut him up, and she went too far.

10 The statements, you have seen them. You'll have them
11 back there with you. Just a couple points of it. Look at
12 this narrative. Look at the question. On that day, look
13 at the narrative.

14 Each statement that is here, each statement that is
15 written, each oral statement the defendant has admitted to
16 saying or writing.

17 There is no issue as to whether or not she confessed
18 five times, no issue. "He was still crying very loudly.
19 He was whining, and I didn't want the other children to
20 wake up. I put my hand over his nose, and held it there
21 for 15 to 20 seconds. Zachary got quiet."

22 Mr. Strickler wants you to believe that those are the
23 sheriff's department's words. The State submits if the
24 sheriff's department is making this up, and there is this
25 grand conspiracy, they're going to say it's longer than 15

1 to 20 seconds. They're going to make it up. It's going
2 to be minutes.

3 The reason it says 15 to 20 seconds is because it's
4 her words, not theirs. "Zachary got quiet." That's
5 different from the other statements where she says
6 motionless and limp.

7 She put him down in the crib. She went and cleaned
8 up the house, straightened up the kitchen and living room.
9 That took about 15 to 20 minutes.

10 "I got worried because he had been crying all day,
11 and now he wasn't crying anymore." Well, earlier she said
12 "he fell asleep, I thought."

13 Ladies and gentlemen, we know that's not true because
14 she goes back to check on him. We know that child was
15 dead when she put him back down in that crib.

16 "Did you use force or pressure when you held your
17 hand over Zachary's nose and mouth?"

18 Answer: In her words, as she said from that stand,
19 "I guess that I put a little pressure behind it," her
20 words.

21 "Do you feel as if your actions on 12/2/98, led to
22 Zachary's death?"

23 And what else do you need than that question? What
24 else? This is an educated, college-educated person, says,
25 "Yes. I should have chosen a different way to handle him.

1 I should not have put my hand over his face. It was not
2 my intent to kill him."

3 She did.

4 "I just wanted him to go to sleep. I am so sorry."

5 And, you know, ladies and gentlemen, it's not like
6 she is up there yesterday or the day before, yesterday,
7 saying, "Oh, no. I never said that. They just made me
8 say it. No. I never said that, didn't come out of my
9 mouth. I didn't sign this. That's not me."

10 She said, "Yeah, I said it. I told them. I told
11 them. I should have chosen a different way to handle it.
12 I shouldn't have put my hand over his face. I'm so
13 sorry." I helped kill him. She admitted to it on the
14 stand.

15 "Have you ever told anyone else about this before
16 today?"

17 "No, sir, not to this extent. I told some of my
18 other clients about the death but not my involvement."

19 Question: "Do you have anything else to add to this
20 statement?"

21 "I cannot convey how sorry I am. I should have taken
22 a step back. If I could change things, I would. I'm
23 tired of holding on to this. It feels good to say it to
24 someone. I know this is going to change things in my life
25 with my friends, but it's the right thing to do. I was

1 wrong for what I did. I want to ask for forgiveness and
2 move on in my life."

3 And I asked her, "Were those your words?"

4 "Yeah. They were my words."

5 And finally, and, please, when you go back there,
6 take a good look at State's Exhibit No. 8, please. Take a
7 good look at it. I want each of you to look at it.

8 The State submits look how free flowing it is. Look
9 how it's not a stop and interpreted. It's like -- it's
10 like what was described earlier: Free-flowing statement.

11 There is no stops and then starts again. It's a
12 free-flowing written statement to Pete and Gina Ulengchong
13 in her own words, her own handwriting.

14 Ladies and gentlemen, the State submits, it does not
15 get any better than this. As confusions go, look at this.
16 It's startling.

17 And she apologies, and her heart is sick and
18 whatever. And then in her own handwriting, she writes, "I
19 didn't want to hurt him but I did." This woman, who is as
20 they want you to believe, this innocent woman, just said,
21 "I didn't want to hurt him" wrote it and "I did. I should
22 have stopped and walked away. I -- I should have stopped
23 and walked away. What I did was wrong, and I am so sorry.
24 I thought he fell asleep in my arms. God help me. I'm
25 sorry. Please forgive me. Please forgive me. I'm sorry

1 so sorry."

2 You know, ladies and gentlemen, I really am not sure,
3 the State submits, what else there could be in this case.
4 "I should have walked away. I should have stopped."

5 She is right. She should have walked away, and she
6 should have stopped. But she didn't, and because she
7 didn't, she caused that child's death. She caused his
8 death.

9 The State submits, it's -- it's as obvious as that,
10 five statements, five confessions, three different people.
11 She writes a handwritten letter.

12 You know, when I get to this point -- and I'm just
13 about done -- but when I get to this point in the trial,
14 I've been doing it as long as Mr. Strickler, years, but
15 I'm always stunned by the power that a jury has, you 12.

16 It's an awesome power. It's a power of the right and
17 wrong. It's a power over the law, facts, case. That's an
18 awesome power. It's an awesome responsibility, but the
19 power that you don't have as jurors, you don't have, is to
20 bring Zachary Ulengchong back to his parents.

21 Zachary Ulengchong today would be 12 years old: His
22 parents never had the opportunity to watch him grow, to
23 watch him live, to share in his successes, to share in his
24 failures, to be there for him, and they never will.

25 But the power that you do have today, right now, is

1 to give them justice and give that innocent 12-month-old
2 Zachary Ulengchong some kind of justice.

3 Ladies and gentlemen, justice in this case is not
4 releasing Ms. Person after she made five statements, five
5 confessions, after she put her hand over that child's
6 mouth and nose and went limp.

7 Justice, in this case, is a conviction against
8 Ms. Persons of homicide by child abuse. The State submits
9 that's what the evidence shows, and that's what you're
10 here for today. The State asks for that.

11 Thank you.

12 THE BAILIFF: If you need to leave the courtroom, you
13 need to leave at this time, ladies and gentlemen. Once
14 the door is locked, you can't get out.

15 THE COURT: Ladies and gentlemen, at this time, I'm
16 going to ask that we take a restroom break and ask that
17 you retire to the jury room at this point but not to begin
18 to discuss this matter.

19 You still have not heard my instructions to you on
20 the law. It would be inappropriate for you to begin any
21 discussions at this time.

22 I will also tell you that based upon the time, I will
23 have the clerk come in and inquire as to whether or not
24 you wish to order a meal for the evening. It will take a
25 little bit of time for that meal to arrive.

1 The sooner you get the order in, the better off we'll
2 be. So -- and I'll ask her to come in while we're taking
3 this short break. Let's take a very brief restroom break
4 and come back.

5 (WHEREUPON, the jury left open court at approximately
6 6:48 p.m.)

7 THE COURT: Let's take a brief break and we'll come
8 back.

9 (WHEREUPON, a short break was taken.)

10 THE COURT: You need the make sure your telephones
11 are turned off, not on silent, not on vibrate, turned off.

12 You can ask the jury to come in, please.

13 (WHEREUPON, the jury came into open court at
14 approximately 7:03 p.m.)

15 THE BAILIFF: The jury is seated, Your Honor.

16 JURY CHARGE:

17 THE COURT: During this trial, ladies and gentlemen,
18 you and I have certain duties to perform. As the trial
19 judge, it's my responsibility to preside over the trial of
20 this case and to rule upon or pass upon the admissibility
21 of evidence that's been presented throughout the course of
22 this trial, and you are to consider only the competent
23 evidence which is before you.

24 To any evidence to which there was an objection
25 sustained or you were instructed to disregard, you must

1 not speculate as to what that evidence might have been or
2 the reasons for the objection.

3 Again, you should consider all of the testimony and
4 evidence, along with the exhibits that have been made a
5 part of the record in this case.

6 Now, I have the additional duty to instruct you on
7 the law that applies in this case, and as the trial judge,
8 I am the sole judge of the law that applies.

9 If you have any preconceived ideas as to what the law
10 is, what you want the law to be, or your interpretation of
11 the law, you must set all of that aside, for under your
12 oath as jurors, you are sworn to accept the law as I
13 charge it to you.

14 Now, if, by chance, I make some error in my charge,
15 then there is another court and another time that can
16 correct those errors of law, but for purposes of this
17 trial right now this moment, you must accept the law as I
18 charge it to you as being the correct statement of the
19 law.

20 Now, in every case tried before a jury, you, the
21 jurors, become the sole and exclusive judges of the facts
22 of this case. No one can tell you what the facts of this
23 case are, and if I've done anything throughout the course
24 of this trial that has given you any impression that I'm
25 commenting on the facts or telling you what facts to find

1 or giving an opinion about the facts, I ask that you set
2 that aside, as well.

3 I assure you, I don't have any opinion about the
4 facts of this case. That's not my job here. That's not
5 my duty, not my responsibility. That's your job, your
6 duty, your responsibility as jurors to determine the facts
7 of this case.

8 In order to do that, you have to analyze and to
9 evaluate the evidence and determine what evidence
10 convinces you of its truth.

11 In order to do that, you have to assess the
12 credibility or believability of the witnesses who have
13 testified. In determining the credibility or
14 believability of the witnesses, you may consider the
15 following factors: What was the manner and appearance of
16 the witness who testified? Was he or she hesitant or
17 straightforward in answering the questions? Was the
18 witness's testimony consistent or inconsistent? How did
19 the witness come to know the facts that he or she
20 testified to, or what was his or her ability to know these
21 facts?

22 Is there a reason that a witness would want to give
23 testimony that would help or hurt one side or the other?
24 In other words, was the witness's testimony biased or
25 prejudice in some manner? And was the testimony of a

1 witness strengthened or weakened by other testimony or
2 other evidence?

3 Now, ladies and gentlemen, in determining the
4 credibility of the witnesses, you may believe one witness
5 against several witnesses or you may believe several
6 witnesses against one witness.

7 You may believe a portion of a witness's testimony
8 and disregard other portions of that same witness's
9 testimony, and if you have a good and sufficient reason
10 for doing so, you may accept a witness's testimony in its
11 entirety or you may reject it in its entirety.

12 These factors you should not exercise arbitrarily,
13 but if in your good judgment, there's reason for you to
14 consider these factors, then you should do so.

15 Your objective, ladies and gentlemen, is to seek the
16 truth, and whether it comes from a witness or witnesses
17 for the State or witness or witnesses for the defense, you
18 do not determine the truthfulness of the testimony or the
19 evidence by counting the number of witnesses who testified
20 for one side or the other. The truth is not determined by
21 counseling witnesses.

22 What the law simply requires is that when you
23 exercise your mental processes in coming up with what you
24 consider to be truthful evidence, you should use your good
25 common sense. Use your sense of logic and reasoning. Use

1 your experiences in life.

2 You then apply these attributes to the evidence and
3 determine what you, the jury, consider to be truthful
4 evidence. And then to those true statements of fact as
5 determined by you, you apply the law as I will charge it
6 to you, and you will be able to arrive at your verdict.

7 Your verdict should not be based upon sympathy,
8 passion, or prejudice. By your verdict, you have no
9 friends to reward, and you have no enemies to punish.
10 Your verdict should simply speak the truth.

11 Now, under our Rules of Evidence, ordinarily
12 witnesses are not allowed to testify as to opinions or
13 conclusions.

14 An exception exists for those that we call expert
15 witnesses. Those are witnesses who, because of their
16 education or training, they profess to be an expert in
17 some science or art or some calling, and they can state an
18 opinion on matters in which they profess to be an expert,
19 and they can give reasons for their opinion.

20 Their opinion must be stated to a reasonable degree
21 of professional certainty. You should consider any and
22 every expert opinion that has been given in this case and
23 give it the weight that you think that it deserves.

24 If you should find that a witness -- the expert's
25 testimony is not based upon sufficient education or

1 training, or if the witness's testimony or opinion is
2 outweighed by other evidence or other testimony, then you
3 are not required to follow it.

4 An expert's testimony is to be given no greater
5 weight than that of any other witness simply because that
6 person professes to be an expert, and you are not required
7 to accept an expert's opinion even though it may be
8 uncontradicted.

9 Now, ladies and gentlemen, there are two types of
10 evidence that are generally presented during the course of
11 the trial: One is direct evidence, and the other is
12 circumstantial evidence.

13 Direct evidence is testimony of a person who claims
14 to have actual knowledge of a fact, such as an eyewitness.
15 It is evidence that immediately establishes the main fact
16 that's to be proven.

17 Circumstantial evidence is proof of a chain of facts
18 and circumstances that indicates the existence of a fact.
19 It is evidence that immediately establishes collateral
20 facts from which the main fact may be inferred.
21 Circumstantial evidence is based upon inference and not
22 based upon personal knowledge or observation.

23 Now, the law makes no distinction between the weight
24 or value that's to be given direct evidence or
25 circumstantial evidence, nor is a greater degree of

1 certainty required of circumstantial evidence than of
2 direct evidence.

3 You should weigh all of the evidence that has been
4 presented in this case, and after weighing all of that
5 evidence, if you are not convinced of the guilt of the
6 defendant beyond a reasonable doubt, then you find the
7 defendant not guilty.

8 Now, ladies and gentlemen, I instruct you, once
9 again, the fact that the defendant was arrested in this
10 case and charged and indicted is not evidence in this case
11 and cannot be considered by you as evidence of guilt in
12 this particular case, nor does it create any presumption
13 or inference of guilt.

14 This document which constitutes the indictment is
15 simply the document by which the charge has been
16 presented, and which we are able to come here and to have
17 a trial on these issues.

18 Now, to this indictment, ladies and gentlemen, the
19 defendant has pleaded not guilty, and that plea casts the
20 burden on the State to prove that the defendant is guilty
21 of this crime that she has been charged with. Because a
22 person who is charged with a crime in South Carolina, or
23 in the United States, is never required to prove that they
24 are innocent.

25 Now, ladies and gentlemen, it's a very important and

1 cardinal rule of law and rule of evidence that the
2 defendant in a criminal trial, no matter how serious the
3 charge against that person may be, is always presumed to
4 be innocent of that particular crime for which he is
5 indicted unless and until that guilt has been proven by
6 evidence that satisfies you of that proof beyond a
7 reasonable doubt.

8 Now, that presumption of innocence does not end here
9 when I finish charging you, and you go into the jury room.
10 It continues from the time that the defendant first makes
11 an appearance here in court throughout the entire trial
12 and throughout your deliberations until you reach a
13 verdict of guilt that's based upon evidence that satisfies
14 you of that guilt beyond a reasonable doubt.

15 Now, our supreme court has said that the presumption
16 of innocence is like a robe of righteousness that's placed
17 about the shoulders of the defendant, and it casts that
18 defendant among the class, that class being the innocent,
19 until that presumptive robe of righteousness is stripped
20 from that defendant by evidence that satisfies you of that
21 guilt beyond a reasonable doubt.

22 Now, ladies and gentlemen, I cannot impress upon you
23 that the presumption of innocence is not a mere legal
24 theory. It's just not some nice, legal phrase. It's a
25 very important and substantial right to which every person

1 is entitled, and every defendant is entitled, until you,
2 the jury, are satisfied from the evidence that the
3 defendant is guilty beyond a reasonable doubt.

4 Now, so what is reasonable doubt? Now, the
5 Government has the burden of proving each and every
6 element of the offense that's been charged beyond a
7 reasonable doubt.

8 Now, some of you may have sat as jurors in a civil
9 case in which you were told that it was only required to
10 be proven that a fact was more likely true than not true.
11 Well, in criminal cases, the Government's burden is more
12 powerful than that. It must be beyond a reasonable doubt.

13 Proof beyond a reasonable doubt is proof that leaves
14 you firmly convinced of the defendant's guilt. Now, there
15 are very few things that we know in this world that are
16 without absolute certainty, and the law does not require
17 proof that overcomes every possible doubt in a criminal
18 case, but if, based upon your considerations of the
19 evidence, you are firmly convinced that the defendant is
20 guilty of the crime with which he has been charged, then
21 you must find her guilty.

22 If, on the other hand, you think that there is a real
23 possibility that she is not guilty, then you must give her
24 the benefit of that doubt and find her not guilty.

25 In this case, ladies and gentlemen, a statement

1 alleged to have been made by the defendant has been
2 admitted into evidence in this case, and while the Court
3 has determined that the statement is admissible, I
4 instruct you that you have the ultimate decision of
5 whether or not the defendant made the statement.

6 If the defendant did make the statement, then you
7 must determine whether the statement was made by the
8 defendant voluntarily and of her own free will. This
9 means that the statement was not caused by pressure,
10 force, fear, coercion, threat, intimidation, or any hope
11 or promise of any leniency or reward of any kind.

12 In determining whether the statement was voluntary,
13 you should consider both the characteristics of the
14 defendant and the details of the questioning.

15 Some of the factors that you must consider are the
16 age of the defendant, the defendant's education or lack of
17 education, the defendant's mental ability or capacity, the
18 defendant's I.Q. or intelligence, the defendant's
19 background and environment, the place and length of
20 detention, the nature of the questioning, and the advice
21 or lack thereof to the defendant of her constitutional
22 rights.

23 Those rights include, but are not limited to, the
24 right to remain silent; that any statement could be used
25 against her in a court of law; the right to have a lawyer

1 present; that if she could not afford a lawyer, a lawyer
2 would be appointed to represent her without any cost, and
3 that she could stop making a statement at any time.

4 You must carefully consider all of the surrounding
5 circumstances before you give any weight to the alleged
6 statement.

7 The State has the burden of proving beyond a
8 reasonable doubt that the alleged statement was voluntary.
9 If you determine that it was, then you may give the
10 statement any further consideration that you deem to be
11 proper. You must decide what weight, if any, should be
12 given to the alleged statement.

13 If you determine that the alleged statement was not
14 free and voluntary, a free and voluntary statement of the
15 defendant, then you should not consider the statement at
16 all.

17 The defendant in this case, ladies and gentlemen, has
18 been charged with homicide by child abuse. The State must
19 prove beyond a reasonable doubt that the defendant caused
20 the death of a child under the age of 11 while committing
21 child abuse or neglect. Child abuse or neglect is an act
22 or failure to act which causes harm to the child's
23 physical health or welfare.

24 Harm to the child's physical health or welfare means
25 that the defendant either inflicted or allowed to be

1 inflicted on the child physical injury, failed to supply
2 the child with adequate food, clothing, shelter, or
3 healthcare, and this failure caused a physical injury or
4 condition which caused death, or the -- abandoning the
5 child causing the child's death.

6 The State must also prove beyond a reasonable doubt
7 that the death occurred under circumstances showing an
8 extreme indifference to human life.

9 Ladies and gentlemen, if after considering all of
10 this evidence, you determine that the State has failed to
11 prove beyond a reasonable doubt that the defendant
12 committed homicide by child abuse, you may consider
13 whether the State has proven beyond a reasonable doubt the
14 lesser-included offense of unlawful conduct towards a
15 child.

16 The State must prove beyond a reasonable doubt that
17 the defendant had charge or custody of the child, was the
18 parent or guardian of the child, or was responsible for
19 the care and support of the child.

20 A person who is responsible for the a child's welfare
21 includes: The child's parent, guardian, or foster parent,
22 an operator, employee, or caregiver of public or private
23 residential home, institution, agency, or child day care
24 center facility, or an adult who has assumed the role or
25 responsibility of a parent or guardian for the child but

1 does not necessarily have legal custody of the child.

2 The State must also prove beyond a reasonable doubt
3 that the defendant placed the child at unreasonable risk
4 of harm that affects the child's life, physical, or mental
5 health or safety, or unlawfully and maliciously cause to
6 be done any bodily harm to the child so that the life or
7 health of the child is in danger or likely to be in
8 danger. A child under this provision, these provisions,
9 means that the person is under the age of 18.

10 Ladies and gentlemen, when you have considered all of
11 the evidence in this case and you have made your decision
12 and determined the facts of this case, then you will apply
13 the law as I have charged it to you, and then you will be
14 able to arrive at your verdict.

15 Your verdict must be unanimous. It must be the
16 verdict of all 12 of you. In this case, there are three
17 possible verdicts. When you have arrived at your verdict,
18 it will be time for your foreperson to complete the
19 verdict form, and I will go over the form with you.

20 This form says, "We, the jury, unanimously find the
21 defendant -- there's a space, guilty of homicide by child
22 abuse, or guilty of unlawful conduct towards a child, or
23 not guilty."

24 There's no significance to the order in which I
25 placed them on this page. I have to put one first. I

1 have to put one second, but again, your thought process
2 should be to consider whether or not the State has proven
3 by a greater weight or a preponderance of the evidence
4 that the defendant made a statement and whether or not
5 that statement was made freely and voluntarily.

6 After you have made that decision, then you can
7 determine whether the State has proven by a -- beyond a
8 reasonable doubt whether the defendant committed the
9 offense of homicide by child abuse.

10 If you find that the State has proven that, then you
11 would check here, the first line, and then you would sign
12 your name, Madam Foreperson, and then put today's date.

13 If you find, however, that the State has failed to
14 prove beyond a reasonable doubt that the defendant was
15 guilty of homicide by child abuse, then you may consider
16 whether the State has proven beyond a reasonable doubt
17 that the defendant is guilty of the offense of unlawful
18 conduct towards a child. If you find that the State has
19 met that burden, then you would check that, and again, you
20 would sign the paper.

21 If, however, you find that the State has failed to
22 prove beyond a reasonable doubt that the State has -- that
23 the defendant has committed the offense of unlawful
24 conduct towards a child, then your verdict in that case
25 would be not guilty, and you would check that particular

1 box.

2 As I stated, ladies and gentlemen, your verdict must
3 be unanimous. It must be the verdict of all 12 of you.

4 During the course of this trial, you have been
5 allowed to take notes. You should remember that some
6 jurors may be better note takers than others, but your
7 juror notes should not be given any greater weight than
8 the independent recollection of any other juror.

9 The recollections of individual jurors should be
10 considered just as reliable as notes taken by other
11 jurors.

12 Those notes are to be used by you only to refresh
13 your own memory and recollection of the things that you
14 heard, what you heard and saw during the course of this
15 trial. And as I stated, they are to be given no greater
16 weight than what somebody -- someone may recall from their
17 memory who did not take notes.

18 Ladies and gentlemen, as I stated, you have been
19 sworn as fair and impartial jurors to determine the facts
20 of this case based upon the evidence that's been presented
21 to you throughout the course of this trial.

22 When you have determined the facts and you have
23 applied the law as I charged it to you, then again, no one
24 can complain about your verdict, and you would have fully
25 discharged your duty and your responsibility as jurors in

1 this particular case.

2 Again, ladies and gentlemen, your verdicts should not
3 be based upon sympathy, passion, or prejudice. Your
4 verdict should simply speak the truth.

5 At this time, ladies and gentlemen, I'm going to ask
6 that you retire to the jury room. I ask that you not
7 begin your deliberations just yet.

8 The law requires that I consult with the attorneys to
9 see if I have omitted anything from my charge. If I have
10 not omitted anything, then the indictment, the verdict
11 form, and the exhibits will be sent to you, and you may
12 begin your deliberations at that point.

13 Madam Foreperson, if throughout the course of the
14 deliberations, there are any questions that arise and you
15 would like to have us try to answer those, if you will
16 write the question on a sheet of paper, sign your name,
17 knock on the door, give it to the bailiff, and we'll try
18 to answer it.

19 If, however, you have no questions, and once you have
20 reached a verdict, and you have completed the verdict
21 form, then knock on the door at that time and tell us that
22 you have received a verdict, and we will receive you back
23 into court to receive your verdict.

24 Now, Mr. Dyer and Mr. O'Neal, as the alternates, your
25 role has also been extremely important throughout the

1 course of this trial.

2 If one of your fellow jurors had been unable to
3 complete service, then you could step into that person's
4 Hughes. When the jury goes back, I ask that you wait
5 outside in the hallway in the back. Do not go into the
6 jury room, and I'll come back and excuse you in a few
7 moments.

8 At that time, ladies and gentlemen, I'll ask that you
9 retire to the jury room and await further instructions
10 before you begin deliberations.

11 Let me tell you that dinner has been ordered. When
12 it arrives, what will happen is the bailiffs will knock on
13 the door. They'll ask that you stop deliberating.
14 They'll bring in dinner, and once they leave, then you can
15 resume your deliberations and eat while you deliberate.
16 So I ask that you retire and await further instructions.

17 Thank you.
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1 (WHEREUPON, the jury left open court at approximately
2 7:25 p.m.)

3 THE COURT: Are there any exceptions to the charge by
4 the State?

5 MS. McDUFFIE: No, ma'am, Your Honor.

6 THE COURT: By the defense?

7 MR. STRICKLER: Your Honor, only to note, please, my
8 exception to Your Honor's failure to charge the requested
9 language regarding recordings of statements contained. I
10 believe that was our Request to Charge No. 1. I'd have to
11 renew that objection at this point in time.

12 THE COURT: And I've noted for the record, and I have
13 made that a Court's Exhibit, the Request to Charge a
14 Court's Exhibit, for the record.

15 MR. STRICKLER: And that co-counsel also notes that I
16 should renew my objections to Your Honor's failure to
17 charge involuntary manslaughter as it pertains to that.

18 Thank you, Your Honor. That's all.

19 THE COURT: And it's noted, as well.

20 Please come and look at all the exhibits and please
21 look again at the verdict form and the indictment to make
22 sure that they are in proper form.

23 (Pause).

24 THE COURT: There were ten exhibits for the State?

25 THE COURT REPORTER: There were, but number six was

1 I.D. only.

2 THE COURT: Okay.

3 They are acceptable?

4 MS. McDUFFIE: Yes, ma'am, Your Honor.

5 THE COURT: Mr. Dye, at this time they have reviewed
6 the exhibits and the verdict form, and the indictment.
7 You may take them back to the jury.

8 THE BAILIFF: Yes, ma'am.

9 THE COURT: And tell them to begin their
10 deliberations.

11 Ladies and gentlemen, we'll stand in recess until we
12 hear from the jury. As far as the attorneys are
13 concerned, if they need to leave, I need a number, how to
14 reach you, where you can be reached.

15 Ms. Person, you need to stay in the vicinity of the
16 courthouse.

17 Anybody else who leaves the courthouse may not get
18 back in, just so that you are aware of that.

19 (WHEREUPON, the jury began their deliberations at
20 7:28 p.m.)

21 THE COURT: Ladies and gentlemen, it's my
22 understanding that the jury has reached a verdict. I will
23 bring in the jury.

24 I will tell you that you see the number of deputies
25 standing around the courtroom. I do not want any show of

1 emotion, any outbursts, any gasps, any sighs. Any display
2 of any emotion that causes any type of disruption, they
3 have all been instructed they will remove the offender
4 from the courtroom.

5 If you feel that you cannot sit and listen to the
6 verdict and not show emotion, then I would suggest and
7 encourage you to leave at this particular time.

8 Is there anything we need to take up before we bring
9 the jury in?

10 MS. McDUFFIE: Nothing from the State, Your Honor.

11 MR. STRICKLER: No, Your Honor.

12 THE COURT: You may ask the jury to come in, please.

13 (WHEREUPON, the jury returned to open court with the
14 verdict at 9:11 p.m.)

15 THE BAILIFF: The jury is seated, Your Honor.

16 THE COURT: Madam Foreperson, I understand that you
17 have reached a verdict; is that correct?

18 THE FOREMAN: We have, Your Honor.

19 THE COURT: If you would please pass it to the
20 bailiff.

21 (Pause).

22 Madam clerk, if you would publish the verdict.

23 THE CLERK: Indictment number 2007-GS-40-3510, the
24 State of South Carolina vs. Andrea Person. This is an
25 time for homicide by child abuse. We, the jury,

1 unanimously find the defendant guilty of homicide by child
2 abuse. This is signed Foreperson Nicole Summers-Summons,
3 November 20th, 2009.

4 Madam foreperson, is this your verdict and the
5 verdict of the entire jury?

6 THE FORELADY: Yes.

7 THE COURT: Do the parties wish to poll the jurors?

8 MR. STRICKLER: The defense requests polling, Your
9 Honor.

10 THE COURT: Ladies and gentlemen, the clerk will call
11 your name. She will ask you two questions. Those
12 questions are: "Was this your verdict, and is it still
13 your verdict?" I ask that you answer according to your
14 conscience.

15 Yes, ma'am.

16 THE CLERK: Nicole Summers-Simmons, was this your
17 verdict?

18 JUROR: Yes.

19 THE CLERK: Is it still your verdict?

20 JUROR: Yes.

21 THE CLERK: Michael Bailes, was this your verdict?

22 JUROR: Yes.

23 THE CLERK: Is it still your verdict?

24 JUROR: Yes.

25 THE CLERK: Nola Burnette, was this your verdict?

1 JUROR: Yes.
2 THE CLERK: Is it still your verdict?
3 JUROR: Yes.
4 THE CLERK: John Harper, was this your verdict?
5 JUROR: Yes.
6 THE CLERK: Is it still your verdict?
7 JUROR: Yes.
8 THE CLERK: Kathy Littrell, was this your verdict?
9 JUROR: Yes.
10 THE CLERK: Is it still your verdict?
11 JUROR: Yes.
12 THE CLERK: Yvonne Tang, was this your verdict?
13 JUROR: Yes.
14 THE CLERK: Is it still your verdict?
15 JUROR: Yes.
16 THE CLERK: Robert Heath, was this your verdict?
17 JUROR: Yes.
18 THE CLERK: Is it still your verdict?
19 JUROR: Yes.
20 THE CLERK: Kenneth Hadley, was this your verdict?
21 JUROR: Yes.
22 THE CLERK: Is it still your verdict?
23 JUROR: Yes.
24 THE CLERK: Ricquel Burgess, was this your verdict?
25 JUROR: Yes.

1 THE CLERK: Is it still your verdict?

2 JUROR: Yes.

3 THE CLERK: Margaret Longshore, was this your
4 verdict?

5 JUROR: Yes.

6 THE CLERK: Is it still your verdict?

7 JUROR: Yes.

8 THE CLERK: John Tucker, was this your verdict?

9 JUROR: Yes.

10 THE CLERK: Is it still your verdict?

11 JUROR: Yes.

12 THE CLERK: Stephanie Nichols, was this your verdict?

13 JUROR: Yes.

14 THE CLERK: Is it still your verdict?

15 JUROR: Yes.

16 THE CLERK: The jury has been polled, Your Honor.

17 THE COURT: Ladies and gentlemen, I'm not concerned
18 with the verdict that you reached so much as I am
19 concerned by the process by which you reached your
20 verdict.

21 You listened to the evidence as it was presented
22 throughout the course of this trial. You also have
23 listened to my instructions to you as to the law.

24 You determined your view of the evidence and
25 determined the facts of this case, and you applied the law

1 as I charged it to you.

2 Having done so, then no one can explain a about the
3 verdict that you have reached, and you have fully
4 discharge your duty and responsibility as jurors in this
5 case.

6 On behalf of State and the county, I'd like to thank
7 you very much for your service in this matter. I ask that
8 you -- you are, of course, free to go.

9 Some of you have requested to be escorted to your
10 cars. If you wish to be escorted, I ask that you return
11 back to the jury room.

12 If you need any return-to-work forms so that you can
13 take back to your employers, if you'll also go back to the
14 jury room, then the clerk will come in and take care and
15 provide you with these forms.

16 Thank you very much for your service, and I ask that
17 you return the plastic portion of your badge to the
18 bailiff on your way out. You are free to keep the white
19 part as your souvenir from service this week, and I'm sure
20 Ms. McBride will be sending you your checks in the mail.

21 Thank you very much.

22 (WHEREUPON, the jury left open court at approximately
23 9:16 p.m.)

24 Are there any posttrial motions at this time?

25 MR. STRICKLER: May it please the Court, Your Honor.

1 THE COURT: Yes, sir.

2 MR. STRICKLER: At this point in time, I'd move for a
3 new trial in this matter referencing back on the
4 previously stated motions for a directed verdict and
5 mistrial expressed in the State's case and the end of the
6 trial, the complete presentation of evidence.

7 I'd also move for a new trial based upon the fact
8 that with all due with respect to the jury in this case,
9 deliberations took slightly in excess of an
10 hour-and-a-half.

11 Given the nature of the issues presented to the jury,
12 the evidence in this case, I would submit with that being
13 the case, is insufficient time devoted to considering the
14 verdict in this matter.

15 THE COURT: I will deny the motion for a new trial
16 based upon the grounds cited in the directed verdict
17 motion, as I indicated.

18 I thought there was sufficient evidence to be able to
19 send the issues to the jury. Certainly, there were
20 factual issues that they had to determine. It became a
21 question of credibility of the witnesses, as well as
22 whether or not the statement was voluntarily and freely
23 made. They have made that determination based upon their
24 view of the facts, and I'll deny your motion on that
25 basis.

1 MR. STRICKLER: Thank you very much, Your Honor.

2 THE COURT: I believe as soon as the clerk comes
3 back, we're ready for sentencing.

4 MR. MEADORS: Yes, ma'am. If you'll beg the Court's
5 indulgence.

6 THE COURT: Yes, sir.

7 (Whereupon, a spectator was removed from the
8 courtroom).

9 (Pause).

10 THE COURT: Are the State and the defense ready at
11 this point?

12 MR. STRICKLER: Yes, ma'am.

13 MR. MEADORS: Yes, ma'am.

14 THE COURT: Mr. Meadors.

15 MR. MEADORS: If it pleases, Your Honor. I have
16 spoken to Pete and Gina Uleungchong. They requested I
17 speak to you briefly.

18 They wanted to thank the jury for the verdict. The
19 facts kind of speak for themselves. The only other thing
20 they wanted me to add was that, obviously, they loved
21 Zachary, miss him, wish he was still here, but he will
22 always be with them. God bless them and everybody.

23 Thank you, Judge.

24 THE COURT: Ms. Person, do you understand that the
25 jury has returned a verdict of guilty on this particular

1 charge, and that the possible term of imprisonment is not
2 less than 20 years up to life in prisonment? Do you
3 understand that?

4 THE DEFENDANT: Yes, ma'am.

5 THE COURT: And you understand that -- I believe that
6 your attorneys may have explained to you that it is
7 considered to be a most serious offense, which means that
8 it carries a strike.

9 If you were subsequently convicted of other charges
10 that carry a strike, at some particular point, the State
11 can seek that any sentence imposed, or a conviction, would
12 carry a life without the possibility of parole sentence.
13 Do you understand that?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: Mr. Strickler?

16 Ms. Pringle?

17 MR. STRICKLER: Thank you, Your Honor, may it please
18 the Court.

19 I, too, will be brief in this regard. I've known
20 Andrea for -- since shortly after her arrest. I take no
21 issue with the jury verdict. I'm not going to argue with
22 that.

23 She has been consistent with what she has had to say
24 to me for two-and-a-half years. You have heard about her,
25 heard about her family, about her background. I don't

1 think I can add to that.

2 She has been a pleasure to have as a client. I think
3 she sincerely misses Zachary herself, and I'd ask the
4 court to exercise whatever leniency you can in this regard
5 and hear from Ms. Pringle, if she would like to address
6 the Court, and Andre herself, and if her husband, Rodney,
7 would like to address the Court, I'd like to have him have
8 the opportunity to.

9 (Mr. Person indicates in the negative).

10 He says no.

11 THE COURT: Ms. Pringle?

12 MS. PRINGLE: Your Honor, all that I can add, I --
13 you had many opportunities to observe Andrea and obviously
14 sat through this entire trial.

15 The one thing that I'd like to add is that she is a
16 very, very loved member of her family. She has two
17 wonderful, beautiful, bright, outstanding children who
18 adore her and are going to miss her terribly, a husband
19 who loves her, and you seen her family has been here every
20 day this week.

21 I just wanted to add that her children are among the
22 strongest, most outstanding individuals I've ever met for
23 a 16 and 17 year old, and I think that speaks to her
24 character. I think that is one thing that may not have
25 come out in this trial, but I have come to know them and

1 come to know Rodney. I would also ask for leniency.

2 (Pause).

3 THE COURT: Ms. Person?

4 THE DEFENDANT: I -- I just want my -- my friends to
5 know, and my girl and my boy, I love them even to this
6 day. I am sorry that we all had to go through this, and I
7 want peace for them all and that's all.

8 THE COURT: Thank you.

9 MR. STRICKLER: Thank you, Your Honor.

10 THE COURT: I have presided throughout the course of
11 this trial and heard all of the evidence that was
12 presented. In addition, I have presided over many of the
13 pretrial issues that were discussed in the case.

14 What I will say is that Ms. Person's demeanor and
15 conduct has remain the same throughout all of my
16 experiences in presiding over various matters.

17 She has always appeared in the same manner and had
18 the same demeanor throughout all of those court
19 appearances.

20 This was my first opportunity this week -- it was my
21 first opportunity to meet the Ulungchong's. I'd heard
22 often about their child, Zachary, but had not had the
23 opportunity to see them or to hear from them until this
24 trial occurred.

25 I think I speak for everyone in saying that this was

1 truly a tragedy that occurred. In terms of what actually
2 happened and whether -- I would submit that no one really
3 knows but Ms. Person.

4 I think that the State presented the evidence that it
5 had. The defense presented the evidence that it had as to
6 what occurred on that particular day, but ultimately --
7 and the jury made a decision as to the credibility of
8 those versions of events.

9 Certainly, the 12 of them, in their collective
10 wisdom, have come up with a decision, but it still remains
11 that no one actually knows what happened except for
12 Ms. Person.

13 I understand, and my heart goes out to the
14 Ulengchong's, over the loss of their child. And as we
15 were reminded during the closing arguments, it's been 12
16 years, but it will continue to follow them for the rest of
17 their lives. Their siblings, their other children, will
18 miss a singling that they didn't have to grow up with
19 them.

20 To Ms. Person's family, you all will now experience a
21 loss that will be very deep for you. I know that over the
22 past few years, you have begun to experience some of that
23 loss through the charges that were made. And, of course,
24 beginning today, you will longer be able to have the care
25 and comfort of your family and loved one.

1 The hard part of my job is trying to balance all of
2 the issues and all of the equities in this case. It is a
3 difficult decision, and one that I do not take lightly.

4 I tried to think all week of what I would say in the
5 event that the jury returned a verdict as it did today. I
6 don't believe that I still have the words to -- to -- to
7 be appropriate and to say what I think or what I really
8 feel would capture what the families feel.

9 This was truly a tragedy. I do not believe that the
10 maximum sentence of life imprisonment would be appropriate
11 in this particular situation, and I understand that the
12 minimum is 20 years.

13 And based upon my consideration of all the evidence
14 and the information that's been provided to me over the
15 course of my involvement with this particular case, I find
16 that the appropriate sentence would be to sentence Andrea
17 Person to the Department of Corrections for a period of 22
18 years.

19 Good luck to you, ma'am.

20 MR. STRICKLER: Thank you, Your Honor.

21 MR. MEADORS: Thank you.

22 (Whereupon, the proceedings were concluded.)

23

24

25

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

VS.

Richland
Andrea PersonRECEIVED
IN THE COURT OF GENERAL SESSIONS
RICHLAND COUNTY
DETENTION CENTERINDICTMENT/CASE#: 2007 -GS- 40 - 3570

2009 NOV 23 AM 8:55

1556834

AKA:

Race: BlackSex: Female

Age: _____

DOB: _____

SS#: _____

Address: _____

City, State, Zip: _____

DL# _____

SID# _____

Date of Offense: 12-1-98S.C. Code #: 16-3-95 (A)(1)(B)(1)CDR Code #: 2356

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS TO: Homicide By Child AbuseIn violation of 16-3-95 (A)(1)(B)(1) of the S.C. Code of Laws, bearing CDR Code # 2356☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☒ §17-25-46
(OSC w/minor 1st or Lowd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State. (Defendant Initial)ATTEST: Jonna McDuffie 11043

Solicitor

SC Bar # _____

Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 22 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____, plus costs and assessments as applicable; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.☐ The Defendant is to be placed on Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.SPECIAL CONDITIONS:
☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____

_____ days/hours Public Service Employment

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine:

\$14-1-206 (Assessment 107.5%)	\$ _____
\$14-1-211(A)(1) (Conv. Surcharge)	\$100 \$ _____
\$14-1-211(A)(2) (DUI Surcharge)	\$100 \$ _____
\$56-5-2995 (DUI Assessment)	\$12 \$ _____
\$56-1-288 (DUI Breath Test)	\$500 \$ _____
\$35-13 (Public Def/Prob)	\$25 \$ _____
\$73-3, 1B TP (Law Enforce. Funding)	\$25 \$ _____
\$33-7, 1B TP (Drug Court Surcharge)	\$100 \$ _____
\$50-21-114(BUI Breath Test Fee)	\$50 \$ _____
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea \$ _____
3% to County (if paid in installments)	\$ _____
\$90.11 TP (SOCJA Surcharge)	\$5 \$ _____
TOTAL	\$ _____

Court Reporter: Jeanette McRideClerk of Court/ Deputy Clerk: AdyObtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol Testing ☐

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ Beginning _____ paid to Public Defender Fund

Other: _____

\$25 \$ _____

☐ Appointed PD or appointed other counsel, \$35.13 TP☐ Requires \$500 be paid to Clerk during probation.PRESIDING JUDGE: Ch. Street LeeJudge Code: 2118Sentence Date: November 20, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Alison Renee Lee, Circuit Court Judge

THE STATE,

Respondent,

vs.

ANDREA PERSON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial judge properly denied Appellant's motion for a directed verdict because there was sufficient evidence presented establishing the required elements of the corpus delicti of homicide by child abuse independent of Appellant's statements to law enforcement.

II.

The trial judge properly denied Appellant's motion for a mistrial based on a question and answer from trial because the law enforcement officer's vague response was not prejudicial, did not reference any other pending charges or prior bad acts committed by Appellant, was consistent with testimony already presented, and was not further explored by the State during trial.

STATEMENT OF THE CASE

In April of 2007, Appellant Andrea Person was arrested following an investigation into the death of an infant. In May of 2007, the Richland County grand jury indicted Appellant for homicide by child abuse. On November 16, 2009, a jury trial was commenced in the Richland County court of general sessions with the Honorable Alison Renee Lee, circuit court judge, presiding. At the conclusion of trial, the jury convicted Appellant as indicted. The trial judge sentenced Appellant to a term of incarceration of twenty-two years. Subsequently, Appellant timely filed a notice of appeal.

STATEMENT OF FACTS

On November 17, 1997, Gina Ulengchong ("Gina") gave birth to a baby boy, Zachary U. ("Victim"). (R. p. 15). Gina remained at home with Victim for approximately six weeks and then enrolled him in Appellant Andrea Person's home day care. (R. p. 16). Appellant took care of Victim at her home during the day on Mondays through Fridays. (R. p. 17). Typically, Gina dropped Victim off with Appellant at approximately 7:30 a.m. and picked him up by 6:00 p.m. (R. pp. 17-18).

In April of 1998, Victim was diagnosed with a slight case of pneumonia and received antibiotics as treatment. (R. p. 18). However, the treating physician took x-rays of Victim's chest after the diagnosis, and no signs of pneumonia were present in Victim's lungs. (R. pp. 292-293). Victim was sick for approximately one week, responded to the treatment, and got better. (R. p. 19). He never had any trouble breathing while ill. (R. p. 19). In October of 1998, Gina took Victim to the doctor to seek treatment for a stuffy nose. (R. pp. 19-20). Victim was again given antibiotics and recovered from his illness. (R. p. 20). His symptoms did not return. (R. p. 20).

On the evening of December 1, 1998, Victim appeared fine and slept through the night. (R. p. 21). On the following morning, Gina dropped Victim off at Appellant's day care around 7:30 a.m. to 7:45 a.m. (R. p. 22). Victim was not ill at the time, was laughing, seemed fine, and did not have a stuffy nose or fever.¹ (R. p. 22).

Later that morning, Mandy Fortson, a certified emergency medical technician and volunteer with the Sandhill Fire Department, was dispatched to Appellant's home in response to a report of an infant male not breathing. (R. pp. 40-41; p. 43; p. 45). She

¹ During trial, Appellant testified on cross-examination she told Gina that Victim needed to be taken to the doctor at the time he was dropped off. (R. p. 364). However, in rebuttal, Gina testified Appellant never told her Victim was sick and needed to be taken to the doctor when she dropped him off at Appellant's day care on the morning of his death. (R. p. 1168)

arrived on the scene within two to four minutes and entered the residence. (R. p. 45; p. 47). Upon entry, Fortson observed Appellant, who appeared nervous and tearful, pacing back and forth while using the phone. (R. p. 47; p. 51). Victim was lying on his back on the middle of Appellant's living room floor. (R. p. 48; p. 50).

Fortson asked Appellant about Victim's medical history and condition, and Appellant informed her Victim had pneumonia two weeks earlier but was off his medication and was better as far as Appellant was aware. (R. pp. 52-53). Appellant told Fortson she fed Victim before his nap, laid him down in a collapsible crib, found him unresponsive twenty to forty minutes later, and attempted to revive him. (R. pp. 53-54; p. 57). Fortson observed a small trickle of formula coming out of the corner of Victim's mouth. (R. p. 53). She then began to perform C.P.R. on Victim, and one and a half to two ounces of milk came out of Victim's mouth and nose. (R. p. 55). Victim's skin was cold when Fortson began compressions.² (R. p. 64). Subsequently, paramedic Andrew Stewart arrived on the scene and assisted Fortson in the resuscitation efforts. (R. p. 58). Together, Stewart and Fortson performed C.P.R. on Victim for eight to ten minutes prior to the ambulance's arrival. (R. pp. 60-61). Once the ambulance arrived, Victim was rapidly transported from the scene. (R. p. 61).

Fortson remained at the day care for several hours to provide assistance to Appellant. (R. pp. 62-63; p. 70). She attempted to get in touch with Victim's parents and advise them of the situation. (R. p. 63). She also examined Victim's crib and found a bottle containing eight to ten ounces of formula that was "ice cold." (R. pp. 67-68). The crib had a large pool of liquid on the mattress at the bottom, and the liquid was already

² Fortson believed Victim's skin was colder than it should have been based on the time frame reported by Appellant, and she concluded Victim was deceased at the time she began performing resuscitation efforts. (R. pp. 64-65).

soaked in and absorbed into the mattress. (R. pp. 67-68). Additionally, Fortson spoke with Appellant, who repeatedly expressed concern for herself and what was going to happen. (R. pp. 68-69). However, Appellant never inquired about Victim's condition. (R. p. 69).

Meanwhile, while at work, Gina received word to call her babysitter around 10:30 a.m. (R. p. 23). She quickly called Appellant's home, and a paramedic answered the phone and told her Victim had been taken to the hospital. (R. p. 23). Gina went to the hospital and left a message for her husband. (R. p. 23). Her husband joined her at the hospital, and they were informed Victim had died. (R. pp. 24-25).

Later that day, Deputy Coroner Eric McFarland spoke with both Gina and Appellant and went to Appellant's residence in response to Victim's death. (R. pp. 78-79; p. 80). Appellant informed McFarland she put Victim in his crib and found him blue in color when she checked on him approximately thirty minutes later. (R. p. 83). McFarland asked Appellant if Victim had been ill, and Appellant did not report anything significant. (R. pp. 83-84). McFarland then relayed the information he collected to a pathologist, and an autopsy was conducted. (R. pp. 84-85).

Dr. William Armstrong, a pathologist and expert in forensic pathology, performed the autopsy of Victim on December 2, 1998. (R. pp. 216-218). During his examination, Dr. Armstrong discovered no signs of external injuries but found that Victim had a mild case of pneumonia. (R. pp. 220-221). Tissue samples were collected for analysis. (R. p. 85). Additionally, Dr. Armstrong noted Victim had swelling of the brain, acute hemorrhagic edema in his lungs, and blue fingernails and extremities. (R. p. 222; p. 223; pp. 228-229). Based on the autopsy results, Dr. Armstrong concluded Victim died from pneumonia based on the lack of any other specific findings. (R. p. 223). However, he

1

did not have Victim's medical records or a specific time line of the day of Victim's death at the time he made his initial findings. (R. p. 224). Subsequently, the preliminary report prepared by the Coroner's Office left the cause and manner of Victim's death open for continuing investigation. (R. p. 86; p. 91). However, the coroner signed a certificate of death for Victim on February 22, 1999, which listed the cause of death as lobular pneumonia and the manner of death as natural. (R. p. 91).

Several years later, on April 2, 2007, Sergeant Kevin Isenhoward, an investigator with the Richland County Sheriff's Office, responded to Appellant's home day care to investigate an incident involving a child. (R. pp. 129-130). Through his investigation into the incident, Sergeant Isenhoward learned about the death of Victim in 1998. (R. p. 130). However, Appellant failed to reveal anything about Victim's death when Sergeant Isenhoward spoke with her that day. (R. p. 130).

On April 10, 2007, Sergeant Isenhoward spoke with Victim's mother about Victim's health before he died. (R. pp. 130-131). He then contacted Appellant and spoke with her the next day at the sheriff's department. (R. p. 131). During their meeting, Appellant was advised of her rights, signed a waiver of rights form, voluntarily agreed to speak with the officer, and informed him she did not reveal Victim's death during their April 2 encounter because she did not want to look bad. (R. p. 132). She then left the sheriff's department after their meeting. (R. p. 132).

Subsequently, Sergeant Isenhoward arranged another meeting with Appellant, and she voluntarily returned to the sheriff's department around 1:00 p.m. on April 17, 2007. (R. p. 132). Sergeant Isenhoward met Appellant in the lobby and noticed her appearance and personal hygiene had gradually deteriorated with each of their meetings. (R. pp. 133-134). He then took her to an interview room to meet with Lieutenant James White, with

the interview beginning at approximately 1:05 p.m. (R. p. 97; p. 132). At the outset, Lieutenant White informed Appellant of her rights, and she again signed a waiver of rights form. (R. p. 97; p. 100; p. 102). They progressed with the interview, and Appellant initially denied injuring Victim. (R. p. 111; p. 123). However, Lieutenant White advised Appellant he did not believe she was being truthful with her statements about Victim's death. (R. p. 111). Appellant then confessed to placing her hand over Victim's face and mouth for approximately fifteen seconds after she could not get Victim to stop crying. (R. p. 112). Appellant stated Victim became motionless and quiet so she returned him to his crib. (R. p. 113). Appellant indicated she panicked, left Victim in the crib, and returned fifteen minutes later to find Victim lifeless. (R. p. 113). Appellant informed the officer she then called emergency services and falsely reported how Victim died. (R. p. 114). She expressed remorse and stated she was untruthful because she was afraid she would go to jail. (R. p. 113; p. 114).

Following her statements, Lieutenant White contacted Sergeant Isenhoward and informed him Appellant admitted to suffocating Victim. (R. p. 115; pp. 134-135). Sergeant Isenhoward entered the interview room, knelt beside Appellant, and asked her what happened. (R. p. 135). With Lieutenant White present in the room, Appellant repeated her statements to Sergeant Isenhoward. (R. p. 115; pp. 135-136). Appellant stated she placed her hand over Victim's mouth for fifteen to twenty seconds until he went limp, left him for fifteen minutes, discovered him lifeless, called 911, and repeatedly lied to everyone about his death from that point forward. (R. p. 115; pp. 135-136). She said she did it because Victim was fussy, irritable, and crying. (R. p. 136).

Afterwards, Appellant used the bathroom and drank some water. (R. p. 137).

Sergeant Isenhoward then brought Appellant to Deputy Chief David Wilson's office, and

she again revealed the circumstances of Victim's death. (R. p. 137; p. 139; p. 196). Appellant told the officers Victim was fussy when he arrived and would not take a pacifier. (R. p. 140; p. 197). She indicated he was uncooperative and she was afraid he was going to wake the other children. (R. p. 140). Appellant stated she held Victim, and, when he continued to cry, she put her hand over his nose and mouth for fifteen to twenty seconds until he stopped crying in order to quiet him. (R. p. 140; pp. 197-199). Chief Wilson asked Appellant to demonstrate how much pressure she applied to Victim's face, and Appellant demonstrated a firm grip on Chief Wilson's hand. (R. p. 140; p. 199). Appellant stated Victim then gasped for air, stopped crying, and she put him in his crib. (R. p. 140; p. 199). She informed the officers she later discovered he was lifeless and gave a false report of his death to the 911 operator. (R. pp. 140-141). Appellant indicated she had a hysterectomy around the time of Victim's death and believed it might have been affecting her behavior. (R. p. 145; p. 200).

Next, Sergeant Isenhoward took Appellant to his cubicle in order to take a written statement from her. (R. p. 145). Sergeant Isenhoward recorded Appellant's written statement at 3:56 p.m after informing her of her rights. (R. p. 148; p. 151). In the statement, Appellant admitted the following about Victim's death:

On that day [Victim]'s mother dropped him off at my house at [my address]. He arrived there at around 8am. He was sick with a cold and was very fussy. I fed him when he arrived that morning and laid him down for a nap. I got him up at around 9:00-9:30 am and changed his diaper. I fed him his second bottle at around 10am. He was still fussy and I couldn't pacify him. He was sick and full of cold. I went on about dealing with all of the other children and he was crying the whole time. It was naptime and I still couldn't pacify him. I picked him up and held him in my arms. I tried to pacify him and rock him to sleep. He was not responding to it. He was still crying very loudly. He was whining and I didn't want the other children to wake up. I put my hand over his nose and mouth and held it there for 15-20 seconds. [Victim] got quiet. When I took my hand off he took a deep breath and it appeared to me that he fell

asleep. He wasn't moving and I carried him into the daycare room. I put him in his crib. I went and cleaned up the house and straightened up the kitchen and living room. That took about 15-20 minutes. I got worried because he had been crying all day and now he wasn't crying anymore. I went into the daycare room and checked on [Victim]. I picked him up and he wasn't breathing. I immediately tried to give him mouth-to-mouth resuscitation. He wasn't responding to it. I called 911. A short while after that the ambulance arrived and took him to the hospital.

(R. pp. 154-155; pp. 529-531). Appellant indicated she felt her actions were responsible for Victim's death, stating: "Yes. I should have chosen a different way to handle him. I should not have put my hand over his face. It was not my intent to kill him. I just wanted him to go to sleep. I am so sorry." (R. pp. 159-160; pp. 529-531). Appellant concluded the statement by stating:

I cannot convey how sorry I am. I should have taken a step back. If I could change things I would. I'm tired of holding on to this. It feels good to say it to someone. I know this is going to change things in my life with my friends but it is the right thing to do. I was wrong for what I did. I want to ask for forgiveness and move on in my life.

(R. p. 161; pp. 529-531). After the statement was prepared, Appellant reviewed each page and signed it multiple times. (R. pp. 161-164). In addition to Sergeant Isenhoward, Chief Wilson witnessed Appellant sign the statement. (R. pp. 156-157).

After making the statement, Appellant alerted Sergeant Isenhoward she wanted to apologize to Victim's parents. (R. pp. 164-165). He offered her a blank piece of paper to write a letter to Victim's family, and Appellant wrote an apology. (R. pp. 165-166). In the apology letter, Appellant stated: "Please forgive me and know it was not my intention to cause you such loss. I didn't want to hurt him. But I did. I should have stopped & walked away. What I did was wrong and I'm so sorry." (R. p. 167; p. 532).

Subsequently, Appellant was arrested and indicted for homicide by child abuse. (R. pp. 522-523). After a renewed investigation into Victim's death, the final coroner's

report was amended on April 18, 2008, to reflect a cause of death of cardiac arrest due to asphyxiation due to hand over mouth, and the manner of death was ruled a homicide. (R. p. 85). Appellant then proceeded to trial.

During trial, Victim's mother and Fortson testified about their experiences on the day of Victim's death. (R. pp. 21-22; pp. 48-53). Additionally, the investigating officers testified about the circumstances surrounding Appellant's statements to law enforcement. (R. p. 96; pp. 135-136; p. 197). The officers confirmed no threats, force, coercion, or interrogation techniques were employed to elicit Appellant's statements. (R. p. 104; p. 112; p. 126; p. 142; p. 189; p. 210; pp. 214-215). They further testified Appellant was cooperative, remorseful, relieved, and volunteering of her statements. (R. pp. 126-127; p. 141; p. 190; pp. 211-212; p. 215). The officers denied suggesting any details or information to Appellant during the interviews.³ (R. p. 126; pp. 179-180; p. 189; p. 198).

During Chief Wilson's testimony, the following exchange occurred while the solicitor was questioning the witness:

[Solicitor]: Once she had made that statement, the written statement, did you have any contact with her that day?

[Witness]: I did.

[Solicitor]: And not on this case –

[Witness]: No.

[Solicitor]: Not on any matter –

³ Later during trial, Appellant disputed the officers' testimony and claimed the officers were aggressive, accusatory, forceful, threatening, and unwilling to accept her initial denial of responsibility. (R. pp. 336-337; p. 347). She testified the officers suggested scenarios about how Victim could have been killed before she eventually began to go along with their stories out of desperation to go home. (R. pp. 339-340; p. 345; p. 350). She attributed the inculpatory portions of her statements and apology letter to the officers and stated they were lying about the circumstances of the interview. (R. pp. 353-354; pp. 389-390). However, she admitted she was fully aware of her rights and knew she did not have to sign any statements and was allowed to leave at any time during the interview. (R. p. 349; pp. 368-369; p. 378). She offered no explanation as to why she did not leave the interview while armed with this knowledge. (R. p. 370).

[Witness]: No.

[Solicitor]: -- concerning this event?

[Witness]: No, sir.

[Defense Counsel]: Objection, Your Honor. I have a matter of law to take up.

[Trial Judge]: Yes, sir. You can approach.

(R. p. 205). The trial judge then conducted a bench conference with counsel, noted an objection for the record, and allowed questioning to continue. (R. p. 206). Following the bench conference, the solicitor did not ask any additional questions regarding the objected-to line of questioning. (R. p. 206).

Subsequently, outside the presence of the jury, the trial judge acknowledged Appellant made a mistrial motion based on an allegedly improper question asked to Chief Wilson. (R. pp. 247-248). Appellant asserted the reference to law enforcement contact with Appellant related to another matter or charge "raised the speculum of additional charges" and warranted the grant of a mistrial. (R. p. 248). The trial judge noted earlier testimony established Appellant had been contacted by officers in another matter. (R. p. 249). The trial judge concluded that "[w]hile . . . it probably would have been best for the question and the answer not to have been given," Appellant had not been prejudiced. (R. p. 249). The trial judge then prohibited any further discussion of the matter during trial and denied Appellant's motion for a mistrial. (R. p. 249).

In addition to the officers' testimony, the State presented testimony from several medical experts. (R. p. 216; p. 251; p. 277). First, Dr. Armstrong testified about his findings during his autopsy of Victim. (R. p. 218). Dr. Armstrong opined the cause of Victim's death was suffocation. (R. pp. 225-226). He testified it would have been

unusual for Victim's mild case of pneumonia to be fatal. (R. p. 226). He noted the reported time line of Victim being well and then deceased within two and a half hours was too rapid of a time period for Victim to have died of pneumonia. (R. p. 227). He further noted his findings of brain swelling, blue coloration in Victim's fingernails and extremities, and redness in the lungs were consistent indicators of strangulation. (R. p. 223; pp. 227-229). When questioned about the lack of external signs of strangulation, he testified placing one's hand over a child victim's nose and mouth would hardly ever leave detectible marks. (R. p. 246). Based on his review of all available information, Dr. Armstrong concluded Victim was suffocated, and he testified he would have had this opinion in December of 1998 if all the available information would have been available at that time. (R. pp. 225-226; p. 229).

Dr. Clay Nichols, the chief medical examiner for Richland County and an expert in forensic pathology, testified he reviewed all the available information regarding Victim's death, including the autopsy report, the emergency room report, Appellant's statements, Victim's medical records, information from law enforcement, and tissue samples from Victim's lungs. (R. pp. 251-252; pp. 253-254). Based on his analysis, Dr. Nichols testified Victim died of asphyxiation due to suffocation. (R. p. 254). He opined Victim's mild case of pneumonia was insufficient to cause death. (R. pp. 254-255). He testified Victim's fine health two and a half hours prior to his death and the reported timeframe of his death were inconsistent with a death caused by pneumonia. (R. pp. 255-256). He noted Appellant's admission of responsibility for Victim's death was consistent with his findings. (R. p. 275). Additionally, he noted it was quite common to find no marks present on the body of a suffocated child. (R. p. 257).

Finally, Dr. Gratin Smith, a pediatrician and an expert in the field of pediatrics, testified about his review of the records and information related to Victim's death. (R. pp. 277-278). Dr. Smith testified he found a small amount of pneumonia present in Victim's lungs, with the signs of pneumonia confined to only a portion of one of Victim's lungs. (R. p. 281). He stated an infant dying of pneumonia typically would exhibit obvious symptoms of fast breathing, increased exertion to expand the lungs, fatigue, and a struggle to breathe. (R. p. 282). Dr. Smith testified the obvious signs of critical illness and respiratory failure would have been noticeable several hours before the child's death, with a death from pneumonia taking days. (R. pp. 282-283). Based on his analysis and review, Dr. Smith concluded Victim did not die of pneumonia. (R. pp. 283-284).

Subsequently, the State rested, and Appellant moved for a directed verdict. (R. p. 295). Appellant asserted the State failed to prove the corpus delicti of the charged offense independent of her confession. (R. p. 296). However, Appellant conceded it is proper for forensic pathologists to consider statements given in a case when determining cause of death. (R. p. 300). After hearing argument from counsel, the trial judge determined there was sufficient evidence establishing the corpus delicti of the offense. (R. p. 303). Therefore, after viewing the evidence in a light most favorable to the State, the trial judge denied Appellant's motion. (R. pp. 304-305). Appellant then renewed her motion for a mistrial, and the trial judge again denied the motion after finding Appellant was not prejudiced. (R. pp. 305-306).

Subsequently, in Appellant's defense, Dr. Kim Collins, the former chief medical examiner of Charleston County and an expert in forensic pathology, testified she reviewed all of the available information regarding Victim's death. (R. pp. 395-397; 399-400). After conducting her review of the information, including Appellant's statements,

Dr. Collins stated she had a theory about the cause of Victim's death. (R. p. 402). However, excluding Appellant's statements and only considering the information available in 1998, Dr. Collins testified she would have concurred in the original finding of pneumonia as the cause of death. (R. p. 400; p. 402). She opined Victim's pneumonia, which she characterized as moderate, was significant enough to be the cause of death. (R. pp. 402-403; p. 412; pp. 415-416). Therefore, Dr. Collins testified there was not a sufficient basis in the autopsy information alone to change the diagnosis to one of asphyxiation. (R. p. 428). However, Dr. Collins conceded she had changed her opinion regarding a cause of death in the past after receiving additional information, and she acknowledged a forensic pathologist cannot exclude statements when determining the cause of death. (R. p. 435). Dr. Collins further acknowledged there were no signs of a serious case of pneumonia in the autopsy information. (R. p. 435). However, based solely on the autopsy findings, she testified she believed the cause of death to be pneumonia. (R. p. 446). However, based on her review of all the available information, Dr. Collins opined the cause of Victim's death was asphyxiation due to smothering. (R. pp. 446-447).

At the conclusion of the evidentiary phase of trial, Appellant renewed her motion for a directed verdict, and the motion was again denied. (R. pp. 517-518). At the conclusion of trial, the jury convicted Appellant of homicide by child abuse. (R. pp. 519-520). The trial judge then sentenced Appellant to a term of imprisonment of twenty-two years. (R. p. 521).

ARGUMENT

I.

The trial judge properly denied Appellant's motion for a directed verdict because there was sufficient evidence presented establishing the required elements of the corpus delicti of homicide by child abuse independent of Appellant's statements to law enforcement.

Appellant argues the trial judge should have granted her motion for a directed verdict because the only evidence of the corpus delicti of homicide by child abuse was her allegedly "false" confession. Appellant asserts there was no independent corroborating evidence of the crime. To the contrary, the testimony of the victim's mother, an emergency medical technician, and a variety of medical experts established the victim died as a result of criminal agency as opposed to natural causes. This testimony sufficiently independently corroborated Appellant's statements to law enforcement to establish their trustworthiness. Based on the presentation of corroborating evidence establishing the elements of the corpus delicti of the charged offense, the trial judge properly denied Appellant's directed verdict motion. Appellant's conviction should be affirmed.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). On appeal from the denial of a directed verdict, the appellate court must view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-594, 606 S.E.2d 475, 478 (2004).

When presented with a motion for a directed verdict, the trial judge is concerned with the existence or non-existence of evidence, not its weight. State v. Long, 325 S.C. 59, 62, 480 S.E.2d 62, 63 (1997). The trial judge should deny the directed verdict and submit the case to the jury if there is any substantial evidence reasonably tending to prove the guilt of the accused or from which guilt may be fairly or logically deduced. State v. Robinson, 310 S.C. 535, 538, 426 S.E.2d 317, 319 (1992).

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). The appellate court may only reverse the trial judge's denial of a motion for a directed verdict if there is no evidence supporting the trial judge's ruling. State v. Gaster, 349 S.C. 545, 555, 564 S.E.2d 87, 92 (2002). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (citing State v. Fogle, 256 S.C. 149, 153, 181 S.E.2d 483, 484 (1971)).

In a criminal case, the prosecution must present some proof of the corpus delicti of the charged offense before the case can be submitted to the jury. State v. McCombs, 335 S.C. 123, 126, 515 S.E.2d 547, 548 (Ct. App. 1999). "A conviction cannot be had on the extra-judicial confessions of the defendant unless corroborated by proof aliunde of the corpus delicti." State v. Williams, 321 S.C. 381, 384, 468 S.E.2d 656, 657 (1996). "This rule with regard to the proof of the *corpus delicti*, apart from the mere confession of the accused, proceeds upon the theory that the general fact, without which there could be no guilt in the accused or in anyone else, must be established before anyone could be convicted of the alleged criminal act which caused it; for otherwise, the accused might be

convicted when there was no criminal agency involved.” State v. Thomas, 222 S.C. 484, 486-487, 73 S.E.2d 722, 723 (1952) (italics in original).

The proof of the corpus delicti must come from a source other than the defendant’s out-of-court statements. State v. Saltz, 346 S.C. 114, 137, 551 S.E.2d 240, 253 (2001). However, the evidence required to overcome a directed verdict on this basis may be sufficient even where the evidence is circumstantial or presumptive if it is the best evidence obtainable. McCombs, 335 S.C. at 126, 515 S.E.2d at 548. “[T]he corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant’s extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred.” State v. Osborne, 335 S.C. 172, 180, 516 S.E.2d 201, 205 (1999). “If the statement is independently corroborated, then the combination of the statement and the State’s remaining evidence may be considered by the trial court to determine if there is any evidence tending to establish the *corpus delicti*.” State v. Russell, 345 S.C. 128, 132-133, 546 S.E.2d 202, 205 (Ct. App. 2001) (italics in original).

If there is any evidence presented tending to establish the corpus delicti of the charged offense, it is the trial judge’s duty to pass that question on to the jury. State v. Dodd, 354 S.C. 13, 18, 579 S.E.2d 331, 334 (Ct. App. 2003). “ ‘When there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury.’ ” Thomas, 222 S.C. at 487, 73 S.E.2d at 723-724 (quoting State v. Brown, 205 S.C. 514, 520, 32 S.E.2d 825, 827 (1945)). “[The appellate court is] not here to determine the sufficiency of the evidence to justify the jury’s verdict . . . ; but [the

appellate court is] concerned only with the question as to the sufficiency of that evidence to require the trial Judge to submit the issue of criminal agency to the jury." State v. Edwards, 173 S.C. 161, 165, 178 S.E. 277, 278 (1934).

In a case involving a homicide, the corpus delicti of the offense generally consists of two elements: (1) the death of a human being; and (2) the criminal act of another causing the death. Brown v. State, 307 S.C. 465, 467, 415 S.E.2d 811, 812 (1992). Like other offenses, the corpus delicti of a homicide may be established by circumstantial evidence when it is the best evidence obtainable. Saltz, 346 S.C. at 137, 551 S.E.2d at 252. Furthermore, circumstantial evidence may be sufficient to establish the corpus delicti even if the cause of death cannot be determined. Brown, 307 S.C. at 467-468, 415 S.E.2d at 812; see, e.g., State v. Owens, 293 S.C. 161, 168, 359 S.E.2d 275, 278 (1987) (finding sufficient circumstantial evidence of the corpus delicti of murder independent of Owens' inculpatory statements where the victim's body was never discovered but the victim's personal habits and relationships established his sudden disappearance was most likely not a voluntary act).

In the case sub judice, there was sufficient evidence presented establishing the corpus delicti of the charged offense of homicide by child abuse. Before the case could be submitted to the jury, the solicitor was required to offer evidence showing: (1) Victim, who was under the age of eleven, was deceased; and (2) a criminal act resulted in Victim's death. See S.C. Code Ann. § 16-3-85(A) (defining the required elements of the offense of homicide by child abuse). The testimony of Victim's mother, the emergency medical technician, and the experts for both the State and the defense sufficiently established these required elements.

Initially, the testimony clearly established Victim died while in Appellant's sole care at her home day care. Thus, the only issue on appeal is whether sufficient evidence was presented to establish criminal agency was involved in Victim's death. Our courts have recognized the difficulty frequently inherent in proving criminal agency was involved in a crime. See State v. Blocker, 205 S.C. 303, 306-307, 31 S.E.2d 908, 910 (1944) (recognizing it is exceedingly difficult to establish criminal agency involved in an arson case because the crime rarely occurs in the presence of an eyewitness and often requires negative proof of the absence of an accidental cause of the fire as opposed to direct proof of a non-accidental cause); Edwards, 173 S.C. at 165, 175 S.E. at 278 (finding proof of criminal agency is, as usual, difficult in arson cases and often requires proof by circumstantial evidence of a negative character); see also Thomas, 222 S.C. at 492, 73 S.E.2d at 726 ("It is sometimes difficult, where the criminal agency of another is sought to be proved by circumstantial evidence, but on a motion for direction of a verdict of not guilty, the evidence must be viewed in a light most favorable to the State's case."). Based on the difficulty inherent in establishing criminal agency in certain circumstances, our courts have recognized the question of whether or not sufficient evidence was presented to show criminal agency should be viewed broadly and the ultimate decision in the case should be left for the jury to decide where any evidence of criminal agency is available. See Edwards, 173 S.C. at 167, 175 S.E. at 279 ("Our attention has been called to cases from jurisdictions other than ours, wherein the appellate Courts held there was not sufficient evidence as to the criminal agency to require a submission of that issue to the jury. . . . In our consideration of the cited cases, we have had to keep in mind that the rule in this State, as to leaving an issue of this character to the jury, is a very broad one." (emphasis added)).

Just as our courts have recognized under other circumstances, while there is little difficulty inherent in proving a victim has died in a homicide by child abuse case, direct evidence establishing a child has been killed by smothering is difficult to obtain.⁴ See, e.g., State v. Reed, 676 A.2d 479, 480 (Me. 1996) (“[A] child can be smothered, and this may, or may not, show up in the autopsy.”). Therefore, absent an eyewitness to the crime, it is generally necessary to view other circumstantial evidence related to the child victim’s death to determine if criminal agency was involved. In Appellant’s case, the testimony of the various witnesses sufficiently corroborated Appellant’s statements to law enforcement indicating she asphyxiated Victim.

Viewing the evidence presented during trial, the testimony of Gina, the victim’s mother, established Victim was healthy and normal the night before his death and when he was dropped off at Appellant’s day care approximately two hours before his reported death. Furthermore, Gina reported that Victim had no trouble breathing even when he was being treated for pneumonia months before his death. Fortson testified Appellant stated Victim had recovered from his illness and was fine as far as Appellant was aware. Fortson further testified Victim’s body was colder than it should have been based on the information she received from Appellant. Finally, Fortson’s testimony established Appellant expressed concerns for herself and her future as opposed to concerns about Victim’s well-being shortly after Victim was taken away in the ambulance.

In addition to this testimony, multiple medical experts offered opinions about Victim’s death. Dr. Armstrong opined the cause of death was suffocation after he reviewed all available information in the case. He noted his original determination of

⁴ Notably, Appellant’s pathology expert, Dr. Collins, testified: “[T]he only way you can diagnose smothering is by confession.” (R. p. 436). Furthermore, Dr. Armstrong and Dr. Nichols testified a child victim could be suffocated without leaving any marks on the child’s body. (R. p. 246; p. 257).

pneumonia as the cause of death was based on the lack of any other specific findings. However, Dr. Armstrong testified he observed multiple indicators of strangulation, including swelling in Victim's brain, acute hemorrhagic edema in Victim's lungs, and blue coloration in Victim's fingernails and extremities, when he renewed his investigation into the case. See, e.g., Id. at 481 ("[The examiner] explained that a child who dies of smothering may also show signs of lividity (blue face) or cyanosis (blue color in the lips and fingernails and the overall skin tone)."). He determined the short time period between Victim being healthy when dropped off and deceased just a few hours later was too quick for Victim to have died of pneumonia. Based on his analysis of these indicators along with Appellant's statement, he determined the cause of death was suffocation.

Additionally, Dr. Nichols and Dr. Smith each testified Victim did not die of pneumonia based on the minimal degree of pneumonia present in his lungs at the time of his death. Dr. Nichols opined the cause of death was asphyxiation due to suffocation, and he testified Appellant's statements were consistent with his review of Victim's body and the lack of significant signs of pneumonia. Dr. Smith testified Victim would have been exhibiting obvious signs of critical illness and respiratory failure if he had been dying of pneumonia when dropped off at the day care, and he stated those symptoms would have been visible for hours. Notably, Victim's mother testified these signs of critical illness that would have and should have been easily detectable were not present in Victim less than three hours before his death.

Finally, Appellant's own expert, Dr. Collins, determined the cause of Victim's death was asphyxiation due to smothering. She opined there was no basis to change the cause of death to asphyxiation when considering only the autopsy reports, but she

testified a forensic pathology cannot exclude all available information, including a suspect's statements, when determining the cause of death. When Dr. Collins considered all of the information a pathologist was required to consider, she concluded Victim's death was a homicide.

The State was only required to provide sufficient independent evidence to corroborate Appellant's statements to a degree the jury could reasonably believe the crime of homicide by child abuse had occurred. Compare with Dodd, 354 S.C. at 17-18, 579 S.E.2d at 333-334 ("Once Dodd confessed to having a gun during the commission of his robbery, the State only needed to present sufficient independent evidence to corroborate those statements so that a jury could reasonably believe an armed robbery occurred. Here, Dodd's confession to having a gun was corroborated by his threat to the clerk that he would kill her if she did not do as he told her. Although his threat, unaccompanied by any representation of a deadly weapon, would not *independently* be sufficient to establish the element of a deadly weapon, the threat *is* sufficient to corroborate Dodd's confession to being armed." (citations omitted) (*italics in original*)). Viewing all the trial evidence in a light most favorable to the State, there was sufficient evidence presented establishing a jury question as to whether Victim died as a result of criminal agency. See Saltz, 346 S.C. at 138, 551 S.E.2d at 253 ("Considering the evidence in the light most favorable to the State, we conclude that the trial court properly denied appellant's motion for a directed verdict. There is more than adequate circumstantial evidence to prove Joseph did not die a natural death."). Victim died in Appellant's sole care after being healthy just a few hours earlier, and multiple experts determined Victim did not die as a result of natural causes. While the experts' determination of the cause of death as asphyxiation by smothering was at least partially

based on Appellant's statements, evidence of other indicators of an unnatural death independent of those statements was presented during trial. Together, this testimony and evidence corroborated Appellant's statements and satisfied the concerns of the corroboration rule by ensuring the criminal act referenced in Appellant's statements actually occurred. See Blocker, 205 S.C. at 310, 31 S.E.2d at 911 (finding sufficient evidence of criminal agency based on the totality of the circumstances even though the individual facts viewed separately might not have been sufficient to establish the corpus delicti of the offense).

Taking the independent evidence in conjunction with Appellant's statements, the totality of the evidence allowed for a reasonable inference Appellant was guilty of homicide by child abuse. See Osborne, 335 S.C. at 180, 516 S.E.2d at 205 ("Applying this rule to the facts at hand, we find the State provided sufficient independent evidence to support the trustworthiness of Respondent's statements to police. We further find this independent evidence, taken together with the statements, allowed a reasonable inference that the crime . . . was committed."). The evidence presented was sufficient to establish the corpus delicti of the offense and required the submission of the case to the jury.

Appellant's statements were sufficiently independently corroborated, and the solicitor presented evidence establishing each element of the corpus delicti of the offense. The testimony and evidence sufficiently established a jury question as to whether Victim's death was the result of criminal agency or of natural causes. See Reed, 676 A.2d at 482 ("Those facts, objectively viewed, are sufficient to establish a substantial belief that the infant died as a result of criminal agency. The existence of other explanations for the circumstances surrounding [the victim]'s death does not preclude such a finding."). A holding to the contrary would make it virtually impossible to

successfully prosecute a criminal defendant suspected of suffocating an infant victim due to the inherent difficulty in distinguishing between natural and unnatural deaths in child victims. Based on the presentation of the evidence corroborating Appellant's statements in this case, the trial judge was required to submit the case for jury resolution. As there was not a complete failure of the evidence and the corpus delicti of homicide by child abuse was established with independent corroboration, the trial judge properly denied the directed verdict motion; and her ruling was supported by the evidence. Appellant's conviction should be affirmed.

II.

The trial judge properly denied Appellant's motion for a mistrial based on a question and answer from trial because the law enforcement officer's vague response was not prejudicial, did not reference any other pending charges or prior bad acts committed by Appellant, was consistent with testimony already presented, and was not further explored by the State during trial.

Appellant contends the trial judge should have granted her mistrial motion after a question by the solicitor allegedly raised the implication of other pending charges. Appellant maintains the question, coupled with other testimony indicating officers had initially talked to Appellant about another incident, prejudicially raised the specter of other cases against her. The trial judge properly denied the mistrial motion. The challenged portion of the testimony vaguely indicated the officer had further contact with Appellant not in relation to the trial charge after she made her incriminating statements. The testimony did not specifically reference any other prior bad acts or pending charges and, at most, merely indicated the officer spoke with Appellant in relation to some other matter. Furthermore, the testimony was extremely vague and was consistent with earlier testimony indicating the officers initially came into contact with Appellant while investigating another matter, and the State did not present any evidence related to prior bad acts, additional charges, or the other matter during trial. Even if the challenged testimony was improper, it was not sufficiently prejudicial to warrant the extreme measure of the grant of a mistrial. The trial judge did not abuse her discretion. Appellant's conviction should be affirmed.

The grant or denial of a mistrial lies within the sound discretion of the trial court, and the ruling will not be disturbed on appeal absent an abuse of discretion or an error of law. State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627-628 (2000). A mistrial should not be granted unless absolutely necessary, and instead, all other methods to cure any

possible prejudice should be exhausted before granting the motion. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). "The granting of a motion for mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). The burden is on the moving party to establish both error and prejudice. State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989). In determining whether to grant a mistrial, the court should determine whether or not the mistrial is dictated by manifest necessity or the ends of public justice. State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002); see State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) ("The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment.").

Our appellate courts favor the exercise of the wide discretion of the trial judge in determining the merits of a motion for mistrial. State v. Howard, 296 S.C. 481, 483, 374 S.E.2d 284, 285 (1988). The trial judge should weigh the following factors when considering such a motion: (1) the character of the testimony, (2) the circumstances under which it was offered, (3) the nature of the case, (4) other testimony presented at trial, and (5) any other relevant matters. State v. Thompson, 276 S.C. 616, 621, 281 S.E.2d 216, 219 (1981). "A mistrial should not be ordered in every case in which incompetent evidence is received." State v. Patterson, 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct. App. 1999).

In State v. Council, Council argued he was entitled to a mistrial based on the introduction of testimony concerning a prior fingerprint card. Id., 335 S.C. at 11, 515

S.E.2d at 513. An officer testified he took prints from Council after his arrest and compared those to prints in the S.L.E.D. records. Id. at 11-12, 515 S.E.2d at 513. Council moved for a mistrial, contending the testimony implied he had a prior record by indicating he had been previously fingerprinted. Id. at 12, 515 S.E.2d at 513. The trial judge refused to grant a mistrial and declined to issue a curative instruction in order to avoid drawing the jury's attention to the issue. Id. The Supreme Court affirmed the denial of the motion for mistrial, finding the reference was too vague to be prejudicial and it was questionable whether the jury understood the implications of the testimony. Id. at 13, 515 S.E.2d at 514.

In State v. Thompson, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003), Thompson moved for a mistrial after an officer testifying for the State indicated he knew Thompson had warrants at the time officers approached his home. Thompson contended this testimony was improper evidence of prior bad acts, but the trial judge denied the motion. Id. The Court of Appeals affirmed, finding the reference to prior criminal acts was too vague and not sufficiently prejudicial to justify a mistrial. Id. at 561, 575 S.E.2d at 82. The Court held: "[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes." Id.

The Supreme Court and the Court of Appeals, in both Council and Thompson, have affirmed the denial of mistrials based on the vagueness of references to prior bad conduct or criminal records. Additionally, other cases decided by our courts support these holdings. See State v. George, 323 S.C. 496, 511, 476 S.E.2d 903, 912 (1996) ("Appellant's possible drug dealing was merely suggested and **no testimony was presented concerning such behavior**. We conclude that the judge's instruction to

disregard statements suggesting Appellant's involvement with drugs sufficiently cured any alleged error." (emphasis added)); State v. Singleton, 284 S.C. 388, 392, 326 S.E.2d 153, 156 (1985), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding arresting officer's vague references to prior crimes in the jury's presence did not warrant the granting of a mistrial); State v. Robinson, 238 S.C. 140, 150-151, 119 S.E.2d 671, 676 (1961), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (finding testimony by a witness that Robinson told him he was on the way to the "probation office" did not create an inference that Robinson had been convicted of another crime); State v. Wiley, 387 S.C. 490, 496, 692 S.E.2d 560, 563 (Ct. App. 2010) ("[W]e believe the State's comment regarding Wiley's warrant was merely a vague reference to his prior criminal record that did not justify granting his motion for mistrial. Furthermore, even if the jury inferred that Wiley committed another crime from the State's opening statement, we believe Wiley was not prejudiced because the State never attempted to prove Wiley was convicted of some other crime. Therefore, we conclude the State's opening statement regarding Wiley's unrelated outstanding warrant was not sufficiently prejudicial to warrant a mistrial." (citations omitted)).

In the case at bar, the challenged question and response during Chief Wilson's testimony merely established the officer had further contact with Appellant not related to the case for which she was on trial. The references were extremely vague, contained no details about any other crimes or bad acts, and did implicate Appellant in any crimes. The officer's response certainly did not suggest Appellant had been formally charged or convicted of any other crimes. Furthermore, after the isolated comments were made,

there was no further reference to any additional law enforcement contact with Appellant on any matter.

Appellant asserts the reference was prejudicial because it raised a clear implication of other charges against her. However, that implication was far from clear in this case, especially in light of the fact earlier testimony established law enforcement officers initially came into contact with Appellant after investigating another incident with a child in her day care. Critically, no details about the other incident were presented, with nothing suggesting Appellant was not a witness or victim in the other investigation. Thus, the remarks about law enforcement contact were entirely consistent with testimony already presented establishing the officers were in contact with Appellant in relation to another unrelated incident. The isolated reference was simply too vague to be prejudicial to Appellant and did not implicate her in any other wrongdoing.

Based on the circumstances of the challenged portion of the testimony, the trial judge properly declined to employ the extreme measure of declaring a mistrial. The question and response were extremely vague and were not damaging or prejudicial. The isolated remarks were consistent with the earlier testimony and were not further explored at any point during trial. Appellant has failed to establish the manifest necessity required to show an abuse of discretion by the trial judge.⁵ See State v. Brown, 389 S.C. 84, 94, 697 S.E.2d 622, 627 (Ct. App. 2010) (“A manifest necessity must exist for the trial court to discharge the jury and declare a mistrial.”). The motion for mistrial was properly denied, and the trial was not rendered unfair. See State v. Greene, 255 S.C. 548, 558, 180

⁵ In order to establish the allegedly prejudicial character of the challenged question and answer, Appellant has referred to the deaths of two other children enrolled in her day care. (App. Br. p. 11). However, tellingly, Appellant cited to two pre-trial hearing transcripts to establish the details of those crimes because neither death was ever referenced, either directly or indirectly, during trial in the jury’s presence. (App. Br. p. 11).

S.E.2d 179, 184 (1971) (“[The appellant] was not entitled to a perfect trial, only a fair one.”). Appellant’s conviction should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

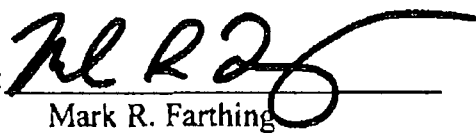
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April 11, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Alison Renee Lee, Circuit Court Judge

THE STATE,

Respondent,

vs.

ANDREA PERSON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

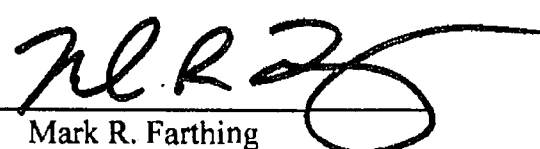
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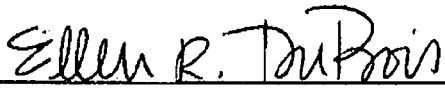
Appellant.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 11th day of April, 2011.


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STATE OF SOUTH CAROLINA

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THE STATE,

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APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying appellant's motion for a directed verdict when the only evidence against appellant was her statement to police which was not proven by evidence aliunde the confession?
2. Did the trial court err in denying appellant's motion for a mistrial after Officer David Wilson testified that he did have other contact with appellant that day but not on this case which raised the specter of the other charges related to the deaths of two other babies in her care?

STATEMENT OF THE CASE

On May 23, 2007, the Richland County Grand Jury indicted Andrea Person on the charge of homicide by child abuse. On November 16 – 20, 2009, appellant proceeded to trial before the Honorable Alison Renee Lee and a jury on Indictment 2007-GS-40-3510 which alleged that Andrea Person caused the death of Z. Ulenchong, a child under the age of eleven, on December 2, 1998, by homicide by child abuse. November 16, 2009 R. 9, ll. 1 – 22. She was represented by Douglas Strickler and Fielding Pringle. The state was represented by Solicitor Warren B. Giese, Deputy Solicitor John P. Meadors, and Assistant Solicitor Johanna McDuffie. The jury returned a verdict of guilty as indicted. Judge Lee sentenced Person to twenty-two years incarceration. Person's attorneys filed a notice of appeal. This appeal follows.

ARGUMENT

I.

The trial court erred in denying appellant's motion for a directed verdict when the only evidence against appellant was her statement to police which was not proven by evidence aliunde the confession?

Andrea Person operated a day care from her home and was fully licensed by DSS to do so. R. 450, ll. 13 – 25; R. 451, ll. 1 – 25; R. 452, ll. 2- 25; R. 453, ll. 1 – 12. Andrea testified that on December 2, 1998, she was keeping Z. Ulengchong, the twelve month old son of Andrea's close friends, Gina and Pete Ulengchong. R. 313, ll. 1 – 25; R. 315, ll. 1 – 25; R. 316, ll. 1 – 25. On this day, the baby was crying and fussy that morning after she had given him his milk bottle. She fed him a juice bottle and rocked him. Then she placed him in the Pack N Play for his morning nap while the other children were napping. R. 317, ll. 1 – 25; R. 318, ll. 18 – 25; R. 319, ll. 1 – 25; R. 320, ll. 1 – 25; R. 322, ll. 1 – 14.

She did some things around the home, and then returned to check on minor. He found him lying in a pool of fluid in his Pack N Play not breathing. She began CPR and called 911. R. 322, ll. 15 – 25; R. 323, ll. 1 – 25; R. 324, ll. 1 – 23.

Many Fortson explained that she was the first EMT person to respond to the 911 call from Andrea on December 2, 1998 for minor. R. 38, ll. 19 – 25; R. 40, ll. 19 – 25; R. 43, ll. 1 – 25; R. 45, ll. 1 – 20. When she arrived at Andrea's house, she found minor lying on the living room floor. She said that Andrea was extremely upset and pacing the floor. R. 48, ll. 8 – 14; R. 51, ll. 1 – 13. Andrea told her she had given the baby his bottles and out him down for a nap and then found him not breathing in his pack N Play. R. 53, ll. 1 – 25. Ms. Fortson found a large pool of liquid in the Pack N Play. R. 67, ll. 1 – 25.

Dr. William Armstrong was the forensic pathologist who performed the autopsy on minor in 1998. He listed the cause of death as pneumonia. R. 223, ll. 17 – 23.

On April 2, 2007, Sergeant Kevin Isenhoward visited the home of Andrea Person to investigate an incident at the day care involving another child. Through that investigation, he learned of the death of minor. R. 127, ll. 15 – 25; R. 128, ll. 20 – 25; R. 129, ll. 6 – 21. On April 11, 2007, Andrea went to the Sheriff's Office to meet with Sergeant Isenhoward. Sergeant Isenhoward asked her about the death of minor and why she had not told them earlier. Her alleged reply was that she did not want to look bad. R. 131, ll. 1 – 25; R. 132, ll. 1 – 9.

On April 17, 2007, Andrea went to the Sheriff's Office again at Sergeant Isenhoward's request. R. 132, ll. 10 – 25. After talking with her, he sent her to talk with Lieutenant (Lt.) James White.¹ During the interview with Lt. White, Andrea allegedly confessed to him that she placed her hand over the baby's face and mouth for approximately fifteen seconds because she could not get him to stop crying. R. 111, ll. 19 – 25; R. 112, ll. 1 – 25.

Lt. White then took Andrea back to talk to Sergeant Isenhoward. R. 134, ll. 15 – 24. Andrea then allegedly confessed to him that she had put her hand over minor's face and mouth because he would not stop crying. The officers obtained a written statement to that effect. R. 135, ll. 1 – 25; R. 136, ll. 1 – 25; R. 148, ll. 1 – 25; R. 151, ll. 1 – 25; State's Exhibit 9, R. 529.

¹ Lt. White administered a polygraph to appellant which both parties agreed would not be discussed at trial. Oct. 30, 2009 Tr. 37, ll. 13 – 24; Tr. 4, ll. 11 – 19.

Dr. Armstrong testified that after learning of Andrea's statement, he changed his opinion on the cause of death for minor from pneumonia to suffocation. R. 224, ll. 1 – 25; R. 225, ll. 1 – 25; R. 226, ll. 1 – 17.

Dr. Clay Nichols, forensic pathologist, testified that he did not perform the autopsy on minor in 1998. However, in April 2007, Coroner Watts asked him to review the autopsy performed by Dr. Armstrong on minor in 1998. He reviewed the autopsy, Andrea's statements, and the medical records of minor. His opinion as to the cause of death of minor was asphyxiation due to suffocation. He said the degree of pneumonia was insufficient to cause death. R. 253, ll. 1 – 25; R. 254, ll. 1 – 20; R. 255, ll. 1 – 2.

Dr. Kim Collins, a forensic pathologist, was called by the defense as a witness. R. 394, ll. 11 – 25; R. 395, ll. 1 – 25; R. 396, ll. 1 – 25; R. 397, ll. 1 – 7. She testified that the autopsy in 1998 of minor indicated the amount of pneumonia was moderate, not minimal. R. 415, ll. 3 – 25; R. 416, ll. 1-8; R. 424, ll. 1 – 9. She said the spleen was prominent indicating infection. R. 402, ll. 1 – 25; R. 403, ll. 1 – 25. However, no cultures were done at the time of the autopsy so there was no way to know what caused the pneumonia – if it were viral or caused by bacteria. There were some very toxic bacteria that caused pneumonia. R. 416, ll. 1 – 25; R. 417, ll. 1 – 25; R. 418, ll. 1 – 25; R. 419, ll. 1 – 25. Dr. Collins disagreed that the degree of pneumonia was insufficient to cause death because the pneumonia was widespread in the lungs of minor. R. 420, ll. 17 – 25; R. 421, ll. 1 – 5.

Andrea's testimony was that she went to talk to the investigators in April 2007 because she wanted to help. R. 333, ll. 1 – 11. She told the investigators that she did not hurt minor because she loved him like he was her own son. She told them this "over and over." However, Lt. White would not accept her answer as he told her she must have done

something because "this does not make sense." R. 335, ll. 1 – 25; R. 336, ll. 1 – 25; R. 337, ll. 1 – 18.

At some point, Lt. White became aggressive towards her and accusatory. R. 337, ll. 19 – 25. She felt scared and confused. Lt. White then told her of a friend who could not make his child stop crying so he put his hand over the child's face and mouth. R. 339, ll. 1 – 25. She admitted that it could have happened that way. Then she started going along with the story so she could help give closure to the family. Andrea just wanted to go home. R. 340, ll. 1 – 25; R. 341, ll. 1 – 12.

When she talked to Sergeant Isenhoward again, she told him that she did not hurt minor. She told him that she felt that the officers wanted her to make up something to tell them. R. 343, ll. 1 – 25; R. 344, ll. 1 – 7. She felt Rapped, scared, confused, and just wanted to go. R. 347, ll. 1 – 20.

Defense counsel called as a witness, Dr. Saul Kassin, who was qualified as an expert in social psychology in the field of police interrogations practice and confessions who testified about false confessions. R. 812 – 873.

Andrea told the jury that she did not place her hand over minor's face and mouth and that she did not suffocate him. R. 352, ll. 19 – 25; R. 353, ll. 1.

At the close of the state's case, defense counsel made a motion for a directed verdict based on the "law that a conviction cannot be had on the extra judicial confession of the defendant unless it is corroborated by proof aliunde from another source of the "corpus delicti." R. 295, ll. 15 – 25; R. 296, ll. 1 – 25; R. 297, ll. 1 – 25; R. 298, ll. 1 – 25; R. 299, ll. 1 – 22. Counsel argued that the evidence the state used to corroborate Andrea's statement was the pathologists' opinion which was based on Andrea's statement. R. 300, ll. 1 – 25; R.

301, ll. 1 – 8. The judge denied the directed verdict motion. R. 302, ll. 14 – 25; R. 304, ll. 1 – 25; R. 305, ll. 1 – 11.

After the jury verdict, defense counsel moved for a new trial based on his previously stated directed verdict motion. The judge denied the motion. Nov. 2009 R. 983, ll. 1 – 25.

The South Carolina Supreme Court held in State v. Williams, 321 S.C. 381, 468 S.E.2d 656 (1996); citing State v. Blocker, 205 S.C. 303, 31 S.E.2d 908 (1944), that a conviction cannot be had on extra-judicial confessions of a defendant unless corroborated by proof aliunde of corpus delicti. Proof of corpus delicti is not a prerequisite to admission of an extra-judicial confession of a defendant; if, however, corpus delicti is not proven and sole evidence of guilt is the confession, a directed verdict in favor of the defendant is required.. State v. Williams, *supra*.

The “corroboration rule” requires that extra-judicial confessions of a defendant be corroborated by proof aliunde of the corpus delicti. State v. Osborne, 335 S.C. 172, 175, 516 S.E.2d 201, 202 (1999). The corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant’s extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred. State v. Dodd, 354 S.C. 13, 579 S.E.2d 331 (Ct. App. 2003); citing State v. Osborne, *supra*.

The directed verdict should have been granted because the only evidence of homicide by child abuse with minor was Andrea’s false confession. The incident was nine years old and had not been questioned. The autopsy at the time of the baby’s death said pneumonia was the cause of death. When the pathologist changed his opinion, it was based on Andrea’s statement. There was no independent corroborating evidence for homicide by child abuse.

ARGUMENT

II.

The trial court erred in denying appellant's motion for a mistrial after Officer David Wilson testified that he did have other contact with appellant that day but not on this case which raised the specter of the other charges related to the deaths of two other babies in her care.

Andrea Person was charged with three counts of homicide by child abuse when three children died while in her home operated day care over a nine-year period. R. 2, ll. 1 – 6. The children were Z. Ulenchong, twelve months old, who died on December 2, 1998; E. Brown, four months old, who died January 9, 2001; and M. Walker, two months old, who died April 2, 2007. All three allegedly died from suffocation. The state was going to proceed on the three counts in one trial. R. 4, ll. 5 – 25; R. 5, ll. 1 – 25; R. 6, ll. 1 – 20; R. 2, ll. 1 – 6. The judge granted appellant's motion to sever the trials. R. 8, ll. 1 – 25; R. 9, ll. 1 – 25; R. 10, ll. 1 – 4. On November 16, 2009, the state proceeded to trial on the case of Z. Ulenchong.

David Wilson, the Deputy Chief over investigations in the forensics lab of the Sheriff's Department, testified that Sergeant Isenhoward brought Andrea to talk to him on April 17, 2007. Deputy Chief Wilson talked with her R. 193, ll. 4 – 20; R. 195, ll. 15 – 25; R. 196, ll. 1 – 25; R. 197, ll. 1 – 23. Solicitor Giese questioned him on direct testimony as follows:

Q. Once she had made that statement, the written statement, did you have any contact with her that day?

A. I did.

Q. And not on this case---

A. No.

Q. Not on any matter----

A. No.

Q. ---concerning this event?

A. No, sir.

Mr. Strickler: Objection, Your Honor. I have a matter of law to take up.

R. 205, ll. 14 – 24.

At that point a bench conference was held. The judge stated on the record that there was an objection and she would have to take up the matter. Cross-examination then proceeded. R. 206, ll. 1 – 14.

Later, the judge said she needed to put that matter on the record. Defense counsel argued that Solicitor Giese's questions to Chief Wilson that he had other contact with Andrea that day but not on this case "raised the specter of additional charges. R. 247, ll. 12 – 25; R. 248, ll. 1 – 25.

The judge stated that it was possible that they did raise a specter, but there was already some discussion that Andrea had been contacted about another matter although there was no discussion as to what the other contact concerned. R. 249, ll. 1 – 7. The judge then ruled:

While I agree that it probably would have been best for the question and the answer not to have been given, I don't think it's prejudicial at this particular point. And I'm sure it won't be discussed further, either through testimony or in closing arguments.

R. 249, ll. 8 – 13.

Defense counsel renewed his motion for a mistrial at the close of the state's case and again after the verdict which the judge denied each time. R. 305, ll. 11 – 25; R. 306, ll. 1 – 16; R. 517, ll. 14 – 25; R. 518, ll. 1 – 10.

The decision to grant a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Ferguson, 376 S.C. 615, 658 S.E.2d 101 (Ct. App. 2008) citing State v. Edwards, 373 S.C. 230, 236, 644 S.E.2d 66, 69 (Ct. App. 2007). A mistrial should be granted only when absolutely necessary. State v. Culbreath, 377 S.C. 326, 659 S.E.2d 268 (Ct. App. 2008). It is only in cases of abuse of discretion which result in prejudice that appellate court will intervene and grant a new trial. Id. A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial. State v. Wilson, 2010WL 3219324 (Ct. App. 2010).

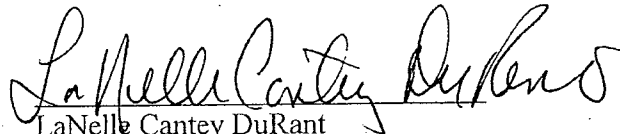
The questions raised by Solicitor Giese were prejudicial to Andrea because it was clear that the implication was there were other charges against her. This, taken along with Sergeant Isenhoward's testimony that he had gone to Andrea's home initially to discuss an incident with another child, raised the specter of other cases against Andrea. It was sufficient to plant the idea in the minds of the jurors which was prejudicial to Andrea.

Evidence of a person's character is not admissible to prove action in conformity with on a certain occasion. State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923). Where there is serious doubt as to the admissibility of evidence, that doubt should always be resolved in defendant's favor. Id. The mistrial should have been granted.

CONCLUSION

Based on the above, the conviction and sentence of the trial court should be reversed, and the case remanded for a new trial.

Respectfully submitted,

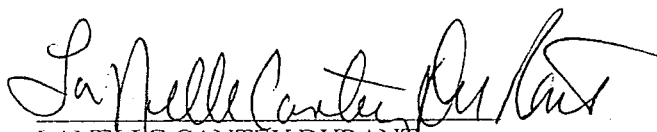

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of May, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."


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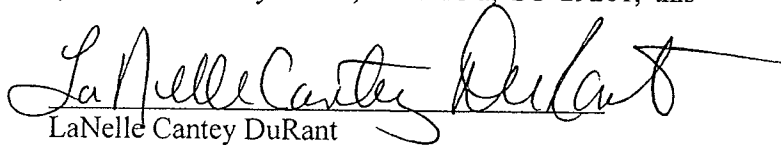
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ANDREA PERSON,

APPELLANT

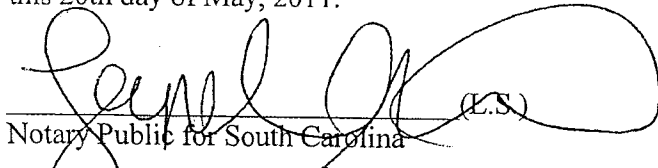
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Mark Farthing, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 20th day of May, 2011.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 20th day of May, 2011.


(L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.



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MAR 05 2012

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OFFICE

The South Carolina Court of Appeals

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March 5, 2012

REMITTITUR

The Honorable Jeanette W. McBride
1701 Main Street, Room 205
PO Box 2766
Columbia, SC 29202

Re: The State v. Person, Andrea
2007-GS-40-03510

Dear Mrs. McBride:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

V. Claire Allen (JA)

V. Claire Allen
Deputy Clerk of Court

VCA/tf

cc: Appellate Defender LaNelle C. DuRant
Assistant Attorney General Mark R. Farthing

PER CURIAM: Andrea Person appeals her conviction for homicide by child abuse, arguing the trial court erred in denying her (1) motion for a directed verdict and (2) motion for a mistrial following an officer's testimony about additional contact with Person. We affirm.¹

1. We hold the trial court properly denied Person's motion for a directed verdict.

"When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). "When reviewing a denial of a directed verdict, [an appellate court] views the evidence and all reasonable inferences in the light most favorable to the [S]tate." Id. "A person is guilty of homicide by child abuse if the person . . . causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to the human life." S.C. Code Ann. 16-3-85(A)(1) (2003). When applied to a particular offense, corpus delicti means that the specific crime has actually been committed. State v. Dodd, 354 S.C. 13, 17, 579 S.E.2d 331, 333 (Ct. App. 2003). "[A] conviction cannot be had on the extra-judicial confessions of a defendant unless they are corroborated by proof aliunde of the corpus delicti." State v. Osborne, 335 S.C. 172, 175, 516 S.E.2d 201, 202 (1999) (footnotes omitted).

Sufficient independent evidence corroborated Person's statement that the twelve-and-a-half-month-old boy (Victim) in her care died as a result of her actions. See id. at 180, 516 S.E.2d at 205 ("[T]he corroboration rule is satisfied if the State provides sufficient independent evidence which serves to corroborate the defendant's extra-judicial statements and, together with such statements, permits a reasonable belief that the crime occurred."). The evidence established Victim was in Person's sole custody at the time of his death. Victim's mother testified Victim did not exhibit any signs of illness at the time she dropped Victim off at Person's house. Expert witnesses affirmed

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

Victim died within an interval of time too short for the pneumonia found in his lungs to have been the cause of his death. The expert witnesses contended the minimal or small amount of pneumonia found in Victim's lungs was insufficient to cause death, with an additional consideration being the lack of pneumonia symptoms. Physical evidence found at the time of Victim's autopsy was consistent with a cause of death of asphyxia by suffocation. Viewing the evidence and all reasonable inferences in the light most favorable to the State, sufficient evidence proved Victim did not die a natural death. See State v. Saltz, 346 S.C. 114, 138, 551 S.E.2d 240, 253 (2001) (holding the trial court properly denied Saltz's motion for a directed verdict when circumstantial evidence existed to prove the victim did not die a natural death, notwithstanding Saltz's argument that the facts were equally consistent with death by accident or sudden illness). Therefore, the trial court properly submitted the case to the jury. See Osborne, 335 S.C. at 180, 516 S.E.2d at 205 ("If there is any evidence tending to establish the corpus delicti, then it is the trial court's duty to pass that question on to the jury.").

2. We hold the trial court properly denied Person's motion for a mistrial because the officer's testimony was not prejudicial to Person. "The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." State v. Wilson, 389 S.C. 579, 585, 698 S.E.2d 862, 865 (Ct. App. 2010) (citation and internal quotation marks omitted). "A mistrial should only be granted when absolutely necessary, and a defendant must show both error and prejudice in order to be entitled to a mistrial." Id. at 585-86, 698 S.E.2d at 865. "The power of the trial court to declare a mistrial should be used with the greatest caution under urgent circumstances and for very plain and obvious reasons stated on the record by the trial court." State v. Wiley, 387 S.C. 490, 495, 692 S.E.2d 560, 563 (Ct. App. 2010).

The officer confirmed he had further contact with Person on the day she gave the written statement but not for any matter concerning Victim's death. The State did not introduce any evidence regarding the reason for the additional contact, and no bad acts or other charges were referenced during the trial. Even if the jury inferred she committed another bad act from the officer's statement, Person was not prejudiced because the State never

attempted to prove she committed another bad act. See Wiley, 387 S.C. at 496, 692 S.E.2d at 563 (finding not prejudicial the State's mention of Wiley's unrelated outstanding warrant during opening statements, "even if the jury inferred that Wiley committed another crime . . . because the State never attempted to prove Wiley was convicted of some other crime"). Therefore, the trial court did not abuse its discretion in denying Person's motion for a mistrial.

AFFIRMED.

HUFF, PIEPER, and LOCKEMY, JJ., concur.

STATE OF SOUTH CAROLINA

County of Richland

In the Court of Common Pleas

Andrea Person 338104
Full name and prison number (if any) of Applicant,

vs.

State of South Carolina
Name of Respondent.

APPLICATION FOR
POST-CONVICTION RELIEF

2012 JUN 19 PM 3:46
JENNIFER W. MCBRIDE
C.C.P. & G.S.
FILED
RICHLAND COUNTY

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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention Leath Cor Inst, 2809 Airport Rd,
Greenwood SC 29649
2. Name and location of Court which imposed sentence Richland County Judicial
Center - Columbia, SC 29202
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
(a) 07-65-40-3510
(b) _____
(c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
(a) Nov 16-20, 2009 - 22 yrs.
(b) _____
(c) _____

5. Check whether a finding of guilty was made

- (a) after a plea of guilty _____
- (b) after a plea of not guilty ~~1~~ _____
- (c) after a plea of nolo contendere _____

6. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

- i. S. C. Appellate Court
- ii. _____
- iii. _____

(b) the result in each such Court to which you appealed:

- i. Denied
- ii. _____
- iii. _____

(c) the date of each such result:

- i. Feb. 2012
- ii. _____
- iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. Not available
- ii. _____
- iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

- (a) _____
- (b) _____
- (c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Govt failed to meet burden of proof
- (b) Prosecutorial Misconduct (see annexed PCRA)
- (c) Ineffective Assn. of Counsel

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

- (a) See annexed PCRA
- (b) _____
- (c) _____

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? Yes
- (d) any other petitions, motions or applications in this or any other Court?
Yes

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

- i. _____
ii. _____
iii. _____
- (b) the proceedings in which each ground was raised:
i. _____
ii. _____
iii. _____
15. If any ground set forth in (9) 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) _____
(b) _____
(c) _____
16. 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? _____
17. If you answered "yes" to one or more parts of (16), list:
(a) the name and address of each attorney who represented you
i. Douglas Strickler - Public Defender - Arraignment
ii. Fielding Pringle - Public Defender - Trial
iii. Lanell Durant - Appeal
(b) the proceedings at which each such attorney represented you:
i. Arraignment & Trial
ii. Arraignment & Trial
iii. Appeal
18. State clearly the relief you seek in filing this application.
Vacation of order of conviction
19. Are you now under sentence from any other court that you have not challenged?
No

County of Richland

Andréa Person, 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.

Andréa Person

SWORN to and subscribed before me this

13

day of

June 2012
John B. Wimsley
 Notary Public

My Commission Expires:

04-14-2015

RICHLAND COUNTY
 FILED
 2012 JUN 19 PM 3:46
 JEANNETTE W. MCBRIDE
 C.C.P. & G.S.

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF**

I, Andréa Person, 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 therefor.

Andréa Person
 Applicant

SWORN or affirmed to and subscribed before me this

13

day of

June 2012

John B. Wimsley
 Notary Public

My Commission Expires

04-14-2015

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

GENERAL SESSIONS
07-GS-40-3510

STATE OF SOUTH CAROLINA

against

ANDREA PERSON, Defendant

APPLICATION FOR POST-CONVICTION RELIEF

This is an application for post-conviction relief under the South Carolina Code of Laws, Title 17, Chapter 27, for relief from judgment of conviction for homicide by child abuse (S.C.C. 16-3-85) following a jury trial on November 16-20, 2009 where she was found guilty and sentenced to imprisonment for twenty-two (22) years. This application is made because the defendant believes that she was convicted in violation of the Constitution of the United States and the laws of this state, and that she is not guilty and has been subjected to a fundamental miscarriage of justice and her conviction was based on an unreasonable determination of facts in light of the evidence presented in the state court proceeding (See: *Humphries v. Ozmint*, 397 F.3d 206, 4th Cir. 2005) and in furtherance thereof she says:

1, While she was conducting a day care service, a child, Zachary Ulengchong (D.O.B. November 13, 1997) died on December 02, 1998. An autopsy continued for a number of years (about eleven) and the Doctor William Armstrong, M.D. finally determined, after consultation with Dr (Clay) Nichols and the Solicitor's Office just prior to November 19, 2009, that the child had died of suffocation". Prior to that there was an "un-adjusted" cause of death, probably of pneumonia and bronchitis which the doctor did not particularly testify to, but made reference to "mild pneumonia, with notable heaviness to the lungs (N.T. p. 347) which he described as "acute hemorrhagic edema." Also the brain was described as showing "early swelling of the brain" (p. 346) in which "the convolutions kind of flattened out." (later described as "acute cerebral edema" [p. 351]) The witness described that these conditions can be caused by head trauma, drugs, restriction of oxygen, drowning, strangulation, mountain climbing, (What about pneumonia? That's a form of drowning.) The Solicitor asks: "Could that be consistent with suffocation? A. It is now." [p. 352] ("It is now"? Now, but not before? That's right he just now talked with Dr.

Nichols.) The original "un-augusted" diagnosis was that the child had pneumonia. "mild", as the cause of death. (p. 354) The child was also reported to have anoxia which manifested in blue fingernails, and a blue tip of his penis. Curiously resuscitative efforts did not reportedly restore a non-blue to these tissues. The doctor did not do a culture on the lung tissue or the blood of the infant, (p. 355) but testified that "some bacteria are extremely toxic" and that a mild case of pneumonia could be still extremely toxic. (p. 356)

2, The initial findings were that there was also acute and chronic bronchitis, chronic meaning long-term. (p. 360-61) Did the child have chronic pneumonia? The Coroner, Eric McFarland testified that the death certificate identified the cause of death as "lobular pneumonia; manner of death is natural." (p. 195)

3, The child's mother Gina Ulengchong testified that the child had pneumonia in April. (p. 110, 113) He was sick with a "cold" about Oct 31, and was given antibiotics by his primary care physician. On November 23, 1998, the child fell off the bed and cut his head. The cut was serious, and was taped to close because stitches were medically inappropriate for the infant. At that time he was taking Dimetapp for congestion. (p. 130) He died December 2, 1998 with pneumonia and chronic bronchitis, also acute cerebral edema, which the doctor testified could be caused by head trauma. What we have is a child that exhibited early pneumonia, later congestion, and confirmed chronic bronchitis. The child was notably sick with respiratory symptoms for most, if not all of his life, hence, "chronic bronchitis".

THE DEFENDANT WAS COERCED INTO MAKING A FALSE STATEMENT.

4, On April 17, 2007, she was invited to come to police headquarters, the Richland County Sheriff's department where she was met by Lieutenant James White, reportedly around 1:05 (P.M.) where she was given all sorts of forms waiving her rights to sign, prior to interrogation. According to Officer White, she almost immediately, in Officer White's words: She basically confessed to placing her hand over his face and mouth and She admitted to placing -- she told me that she placed her hand over his face and mouth for approximately 15 seconds because she could not get him to quit crying....those were hers" (her words). (p. 231) Actually, they were Officer White's rendition of her words. In Officer White's words: "She stated that Zachary became motionless and quiet." Officer White continues: "Panicked, put him in the crib, came back in 15 minutes and he was lifeless." [Nobody talks like that.] "These were her words." Mandy Fortson E.M.T. testified that when she arrived "Zachary's skin, temperature

nap. I got him up around nine or 9:30 a.m. and changed his diaper.

I fed him a second bottle around ten a.m. He was still fussy, and I couldn't pacify him. He was sick and full of cold.

I went on about dealing with all the children, and he was crying the whole time. It was naptime, and I still couldn't pacify him.

I picked him up and held him in my arms. I tried to pacify him to rock him to sleep. He was not responding to it. He was still crying very loudly. He was wining, and I didn't want the other children to wake up.

I put my hand over his nose and mouth and held it there for 15 or 20 seconds. Zachary got quiet. When I took my hand off, he took a deep breath and appeared -- and appeared to me that he fell asleep." (Exact statement that Officer Isenhoward took from the defendant and is recorded in the notes of testimony at p. 273:15 to p. 274:7) **The defendant did not say that the child went limp.** And the officer is recording her exact words. She never said the child died. She never said anything except that the child became quiet and appeared to fall asleep.

9, The defendant testified. "Q. Did you suffocate Zachary Ulengchong? A. No, ma'am. Q. Did you hold your hands over his nose and mouth until he stopped breathing? A. No, I didn't." In the statement that the investigator recorded, the defendant states that she put him down and he took a deep breath. She clearly, by the officer's testimony did not stop the child from breathing, and if she did place her hand over the child's mouth, did so only for 15-20 seconds, which did not stop the child from breathing, according to the officer's direct recording of her exact words. She said that the child took a deep breath.

10, The defense called Saul Kassin, PhD. Who was qualified as an expert in social psychology, subcategory being police interrogations, and practices, and confessions. (p. 825) He was not permitted to offer his personal opinion in this particular case. (p. 805) Dr. Kassin described a certain type of person who was vulnerable to make a false confession which he described as having a "social anxiety disorder; someone for example who shies away from confrontation and is very uncomfortable with that kind of social confrontation, the urgency to stop a process like that (Reid type of interrogation which consists of repeated accusations and police lies), the urgency to stop that confrontation, the urgency to stop a process like that, may get to the point that they become vulnerable and confess." (p. 862) "The more time a person is subject to interrogation, the more vulnerable they become to capitulating. (p. 863:15-17)

11, During the defendant's cross-examination, the witness was interrogated by Warren

defendant to "admit" that Zachary was "lifeless", when in fact what she had said was that Zachary "wasn't breathing." If she had believed, and or made the statement that he was lifeless, why would she attempt artificial respiration?

14. The Solicitor continued: "(Did) you tell them that you placed your hand over Zachary Ulenchong's nose and mouth and held it there until he went *limp*, correct? A. Yes, sir." (p. 574) Referring to paragraph 8, the statement recorded verbatim by the officer was that "Zachary got quiet.... He appeared to fall asleep." During the interrogation conducted at trial, the Solicitor coerced the defendant to "confess" that the child went *limp* when in fact the statement recorded by the investigator indicated that the child got quiet, but during the solicitor's interrogation, she was coerced to confess that she had said "limp" when the statement recorded by the officer established that she in fact said "quiet."

15. Solicitor Giese, to be absolutely certain that he coerced the defendant into making a new confession markedly different from her police taken statement refers to the police taken statement and asks her to confirm whether this was the statement: "When I took my hand off, he took a deep breath and appeared to me that he fell asleep. Your words? A. Yes, sir." (p. 580:3-5)

16. Solicitor Giese continued: "So correct me if I'm wrong, but this whole confession, these whole statements, everything in here you say where it talks about you putting the hand over his face, him going limp, all of that is a creation of law enforcement? A. Yes, sir." (p. 589:20-25) How do we know that it's true? We know that's true because the Solicitor, in the courtroom exerted a coercive interrogation on the defendant and got the defendant to admit to things that the police investigator had not even imagined. The Solicitor got the defendant to make a new confession that contradicted the supposed "confession" that she made and which was recorded verbatim by the police investigator. The Solicitor proved that the defendant would make almost any kind of confession if even a minimal amount of coercion were applied. The Solicitor confirmed the testimony and opinion of Saul Kassin, PhD. that some persons under pressure become compliant and make false confessions. The Solicitor proved that the defendant would make a false confession if subjected to coercion, and not even much coercion at that.

EVEN IF THE COERCED STATEMENT ATTRIBUTED TO THE DEFENDANT WERE ACCURATE, AND NOT A POLICE CREATION, SHE ADMITTED NO CULPABLE LETHAL ACT, THE CORPUS DELICTI.

17. According to the police, the defendant made a statement that she placed her hand over the mouth and nose of the child for 15 to 20 seconds. Kimberly Collins, M.D. testified as an expert in forensic pathology for the defendant. On direct examination, she was asked: "Will obstructing breathing for 15 to 20 seconds kill someone? A. No. Q. Are you relatively confident in making that statement? A. Yes, You'd need much more, a longer duration of hypoxia or not -- inability to breathe than 15 to 20 seconds. Q. What's the literature usually speak about, two to three minutes? A. Yes.... Defense counsel continues: "Q. And if they take a deep breath, have they been suffocated? A. No. Q. Successfully suffocated? A. No." (p. 628-629) This fact is un-contradicted by government witnesses.

18. In concluding cross-examination John Meadors, Deputy Solicitor asks Dr. Collins: "Q. Do you have a reasonable -- do you have an opinion to a reasonable degree of medical certainty on the cause of death of Zachary Ulenchong? (intervening clarification) A. But when you're given the same findings, but you're given a *statement that a person claims they put their hand over a child and smothered them*, then it would change the cause of death to asphyxia due to smothering. (There is no such fact in evidence that any person claimed that they put their hand over a child and *smothered* them. In fact, this physician just testified that a breathing restriction of 15 to 20 seconds would not kill the person) your opinion today of the cause of death of Zachary Ulenchong on 12/02/1988 is that he was smothered? A. Yes. Q. Asphyxiated? A. Yes. (p. 652-653)

MOTION: SINCE THE WITNESS CONTRADICTED HER OWN TESTIMONY, AND WAS ASKED TO AND DID MAKE AN EXPERT STATEMENT THAT THE CHILD DIED AS A RESULT OF CIRCUMSTANCES CONSTITUTING A FACT NOT IN EVIDENCE, (THAT THE CHILD WAS "SMOTHERED") DEFENDANT MOVES THIS COURT TO STRIKE THE ANSWER CITED IN PARAGRAPH 18, AND DECLARE A MISTRIAL AS THE ERROR PREJUDICED THE DEFENDANT.

19. Dr. Clay Nichols, M.D. was accepted by the court as an expert in forensic pathology. Dr. Nichols did not have any part in the autopsy of Zachary Ulenchong from December, 1998. (p. 399) Dr. Nichols testified that he reviewed the autopsy, the emergency room sheet, medical records of the child and statements that have been submitted to you that were made by the defendant in this case. (A. "Yes, I have.; p. 399:18) Mr. Meadors asked: "Q. Based on your review of the autopsy and the other documents that you have been provided, either through law

enforcement or our office, do you have an opinion to a reasonable degree of medical certainty the cause of death of Zachary Uengchong? A. Yes, I do. Q. And what is that opinion? A. Zachary Uengchong died as a result of asphyxiation due to suffocation." (p. 400:12-20) Referring to paragraph 18, Dr. Kimberly Collins, forensic pathologist in uncontroverted testimony unequivocally stated that "obstructing breathing for 15 to 20 seconds" will not kill someone. And further, the fact in evidence that the child took a deep breath indicated that the child was not suffocated. It is apparent then, that Dr. Nichols formed his opinion, not based on facts in evidence, but on facts not in evidence.

20, "On August 13th. This court granted (defense) motion in opposition to joinder. The State filed motion to reconsider. And on August 28th. (sic) At the motion to reconsider (defense) was provided with an affidavit as the court is aware that was signed by Dr. Clay Nichols, an affidavit not a report -- not a medical report, but an affidavit stating that it was his opinion to a reasonable degree of medical certainty that Ms. Person had suffocated Elijah Brown because she had three children die in her care and that is a statistic -- statistically improbable." (Transcript, Hearing November 19, 2008, p. 6:6-15) Dr. Nichols testified by affidavit that he formed his opinion as to the cause of death of the child, or children, not based on the facts in evidence, but based on his own "calculation" that pertained to some calculation of the statistics of the case that he had undertaken, and never testified at the trial that his calculation of his statistical analysis played a role, if not being the sole determinant of his opinion that the Uengchong child died as a result of suffocation. As such, Dr. Nichols has made a determination based on facts not in evidence and this is impermissible, and prejudiced the defendant.

21, At the Brady Motion Hearing, November 19, 2008, counsel discussed the basis of the expected testimony of Dr. Clay Nichols. The court held: "YOU OBVIOUSLY HAD CONVERSTATIONS WITH HIM (DR. NICHOLS) ABOUT THE CAUSE OF DEATH. AND YOU CAN CERTAINLY DISCUSS AND DISCLOSE WHAT INFORMATION YOU TOLD HIM RELATING TO CAUSE OF DEATH; WHETHER IF YOU PROVIDED HIM DOCUMENTS, THEN YOU NEED TO PROVIDE THOSE DOCUMENTS. IF YOU HAVE ALREADY DONE THAT, THEN YOU NEED TO IDENTIFY WHAT THOSE DOCUMENTS WERE. IF IT WAS THE INVESTIGATOR FILE, THEN THAT NEEDS TO BE STATED AND WHAT DOCUMENT SPECIFFICALLY. IF IT WAS INFORMATION FROM INVESTIGATOR ISENHOWARD, IF IT WAS BASED UPON STATEMENTS THAT WERE MADE BY THE DEFENDANT, WHATEVER INFORMATION WAS PROVIDED TO HIM

THAT CAUSED HIM FOR HIM TO CONSIDER IN DETERMINING THE CAUSE OF DEATH WAS SUDDEN INFANT DEATH SYNDROME OR SOME OTHER CAUSE OF DEATH, THEN THAT INFORMATION NEEDS TO BE DISCLOSED.

TO THE EXTENT THAT IT'S WITHIN HIS OWN THOUGHT PROCESSES, THEN AT THAT PARTICULAR POINT, THEY CAN GATHER THAT INFORMATION FROM DR. NICHOLS AS TO HIS THOUGHT PROCESSES.

BUT IN ORDER TO DETERMINE HOW HE CAME ABOUT AND HOW HIS DECISION MAY HAVE BEEN INFLUENCED BY MATERIAL THAT WOULD HAVE BEEN PROVIDED TO HIM, THEY ARE ENTITLED TO KNOW WHAT THAT INFORMATION IS." (Hearing November 19, 2008, p. 15:3-24)

"I AM GOING TO ORDER THAT IT BE PRODUCED WITHIN 20 DAYS."

MR. ROSS: YES, MA'AM. (November 19, 2008, p. 17:11-13)

That information was not produced, in violation of the court's order.

MOTION: DEFENDANT MOVES TO STRIKE FROM THE RECORD THE TESTIMONY OF DR. CLAY NICHOLS BECAUSE HE FORMED HIS EXPERT OPINION REGARDING THE CAUSE OF DEATH OF THE CHILD BASED ON FACTS NOT IN EVIDENCE, AND BECAUSE OF THE GOVERNMENT'S FAILURE TO COMPLY WITH THE COURT'S ORDER TO PROVIDE THE BASIS FOR DR. NICHOLS' OPINION, THEREBY DENYING THE DEFENDANT THE CONSTITUTIONALLY PROTECTED RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

22, Dr. William Armstrong, M.D. was accepted by the court as an expert in forensic pathology. Dr. Armstrong had performed the autopsy on Zachary Uengchong on December 2, 1998. Mr. Meadors asked Dr. Armstrong: "Q. Now, what were your findings in December of 1998, as to the cause of death, in 1998, as to the cause of death of Zachary Uengchong. A. Well --" (p. 346:3-6) (discussion and responses regarding a finding of "swelling of the brain, heaviness to the lungs and acute hemorrhagic edema of the lungs) ...Pneumonia".... (p. 347:19)

23, Mr. Meadors asked Dr. Armstrong: "Q. Have you had an occasion to look at and/or discuss statements made by this defendant regarding what she said she did to the body of Zachary

Ulengchong? A. Yes, I did. Q. Have you conferred with Dr. Nichols? A. Yes. Q. Have you talked with us at the Solicitor's Office? (Hypothetical question: Did Dr. Nichols tell you of his statistical analysis that revealed that the child was suffocated? Hypothetical answer: "Yes, I was very impressed with that theory and I altered my opinion of the cause of death of the child because I too accepted that it was statistically improbable that the child died of pneumonia, even though it was a fact not in evidence.")

24, Mr. Meadors asks of Dr. Armstrong: "Q. Will you tell the ladies and gentlemen of this jury on November 19th, 2009, what is your opinion, to a reasonable degree of medical certainty, of the cause of death of Zachary Ulengchong? A. Well, I have adjusted my opinion on that, now I feel that it is due to suffocation." (p. 349-50) Upon cross-examination, Douglas Strickler for the defendant asks: "Q. You listed some reasons for your changing your opinion in this particular matter. The truth be told, the reason you changed your opinion in this matter is one in nature: That the statement from Andrea Person relating to the death of Zachary Ulengchong, correct? A. That's a strong point."

25, Considering that the defendant did not admit (assuming *arguendo* that she did freely admit anything, as opposed to having been coerced to make that statement that she covered the child's nose and mouth) to a culpable lethal act, only a breathing restriction of 15 to 20 seconds, Dr. Armstrong's "adjusted" opinion could not have considered the defendant's precise statement "a strong point" (not a compelling rational) but he had to have considered facts not in evidence in adjusting his opinion, and never disclosed the real reason he adjusted his opinion. Resultantly, the medical doctor relied on facts not in evidence because the defendant did not admit to a lethal culpable act, and did so in violation of the defendant's right to confrontation.

MOTION: DEFENDANT MOVES TO STRIKE FROM THE RECORD THE TESTIMONY OF DR. WILLIAM ARMSTRONG BECAUSE HIS CONCLUSIONS REGARDING THE CAUSE OF DEATH WERE BASED ON FACTS NOT IN EVIDENCE AND RESULTANTLY DENIED THE DEFENDANT HER CONSTITUTIONALLY PROTECTED RIGHT TO CONFRONTATION AS DESCRIBED IN THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

26, "An expert who has no personal knowledge on which to base his opinion can render opinion testimony only in response to a hypothetical question. *State v. King*, 158 S.C. 251, 155 S.E. 409 (1930) The hypothetical question must be based upon facts shown by the evidence;

opinions based upon facts not in evidence must be disregarded. *Sumner v. Pruitt*, 211 S.C. 65, 314 S.E. (2d) 150 (Cr. App.) [*Logan v. Gatti, M.D.*, 289 S.C. 546, 548, 347 S.E.2d 506, 507] "Hypothetical questions -- Assumption of facts in putting a question may be regarded as a test of whether a witness is being examined as an expert. The expert, properly so called, is asked what would be his judgment upon all or any prescribed part of the facts, as to which evidence has been lawfully received, or which has been admitted, assuming that they are assumed to enable the witness to give an intelligent opinion. The witness having no facts in mind as the result of observation, it is in this way alone that a proper basis for a reasonable judgment can be furnished and the witness cannot add to the hypothetical question facts within his own knowledge and not in evidence. The requirement that the question should be in hypothetical form, stating fact of which there is some evidence in the case, continues throughout the examination of the expert. Different hypotheses may be submitted to the witness for different parties, provided the facts embraced in each hypothesis have some support in the evidence." *Ellis v. Kansas City Life Ins Co.*, 187 S.C. 334, 197 S.E. 398, 400; (*State v. King*, 222 S.C. 108, 115; 71 S.E.2d 793, 796) The probative value of expert testimony, based upon hypothetical facts, stands or falls upon which it is predicated. *McCarty v. Kendall Co.* 238 S.C. 193, 120 S.E.2d 869. Here the hypothetical question which was the basis of the doctor's testimony lacked anything like a complete or accurate hypothesis supported by proof. ... An expert witness is not allowed to base his opinion upon the opinion of another. *Hines v. Pacific Mills*, 214 S.C. 125, 51 S.E.2d 383; *Ellis v. Kansas City Life Ins Co.* supra. (*Glenn v. Mills*, 242 S.C. 535, 541, 131 S.E.2d 696, 698) Each doctor in rendering an opinion as to the cause of death relied upon facts not in evidence. The facts in evidence did not support the answer given in turn by each doctor, consequently the opinions of each doctor regarding the cause of death were inadmissible and should be stricken from the record. It should be noted that the very words of the defendant's statement are in contention since the government coerced the defendant to make an alternative statement in court more prejudicial than the statement recorded by the police. And further, the admissions, whether police induced or not, of a breathing restriction of 15-20 seconds, does not support a hypothetical question containing the assumption that the child was "smothered", and therefore cannot support an expert opinion that the child was asphyxiated by the defendant.

27, The episode(s) described above is a clear product of prosecutorial misconduct. Defense counsel, despite being aware of the need for a factual basis for the opinions of the medical doctors in pronouncing a "cause of death" failed to object at this stage of the trial and the

defendant was thereby prejudiced in violation of The Strickland standard.

MOTION FOR DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

28. At the close of the government's case, defendant made a motion for directed verdict. The court denied this motion and stated: "The child was not exhibiting any signs of illness at that time that it was dropped off; ...there was a small amount of pneumonia." (p. 457:4-9) The record shows that the child had chronic bronchitis and was sick for most of his life, and that a small amount of pneumonia can kill. (See paragraphs 1-3, supra) It was an abuse of discretion for the court to have ignored the evidence that the child was sick and that the pneumonia suffered by the child could not kill him. The defendant, according to the police-coerced statement stated that the child was in acute distress and the statement indicates that the hand over the mouth was an attempt to minimize the child's symptoms. Further, the court was fully aware that Dr. Nichols based his opinion that the child was killed by child abuse based, not on the medical evidence in the case, but by his own calculations of statistical probability. Dr. Nichols was never qualified as a statistician. He never provided the basis for his calculations, and the court should consider that he, on a personal level invented a reason to contend a manipulated "expert" opinion that justified his personal bias, but which was not probative. And further, Dr. Nichols clearly influenced the other "experts" to alter their diagnoses to conform to his amateurish feelings about the case, as Dr. Armstrong indicated regarding the "cause of death" he initially found then "adjusted" to suit Dr. Nichol's statistical analysis. If there were a case to be made for statistical analysis, it should have been made before the jury, not in some back room with the government prosecutors egging Dr. Nichols on to promote the "statistical improbable" theory of his. The court clearly severed the trial from the other cases used by Dr. Nichols in his analysis because such would be prejudicial. The government made a mockery of the order to sever when it snuck the "statistical analysis" in with Dr. Nichols using this theory to influence the other doctors which of necessity required an introduction of the three suspicious deaths to make his analysis complete. The court should have recognized that the government failed to meet the corpus delicti of the charge and should have granted the motion to dismiss, and failing to do so constituted an abuse of discretion or error of law.

GOVERNMENT ATTORNEY, PERSISTENTLY USED THE WORD "LIMP" TO CONVEY THE IMPRESSION THAT THE CHILD WAS DEAD AND THAT THE DEFENDANT KNOWINGLY CAUSED THE DEATH OF THE CHILD.

29, Referring to paragraphs: 8,9, and 1.1, supra, the defendant stated and was recorded by police saying that the child got "quiet". She did not say "limp". When the government attorney interrogated the defendant she stated that the child went "limp" but this as explained was the result of the defendant being coerced in the courtroom, as there was no recording of her ever having said that before the police. It appears that the use of the word "limp" was invented by the government for the purpose of prejudicing the defendant and making it appear that she knew the child had been killed; when in fact she stated that the child took a breath, which is clearly not "limp."

30, When questioning Officer Eisenhower, Mr. Meadors asked "Q. That she covered the child's mouth and placed him in the crib and he went limp?" (p. 255:17-18) Those were not her words. We have her words recorded by the police. Officer Eisenhower later quotes the defendant: "Zachary got quiet." (p. 274:5) "He fell asleep." (p. 274:7) He did not go "limp" except as the solicitor's invention.

31, Upon cross examination, Officer Eisenhower testifies: "She is saying...he fell limp." (p. 302:12-14)

32, Officer Wilson testified: "She said that when she removed her hand, that he took a deep breath and was still. Q And was what? A. And was still. She thought he was asleep at that point." (p. 323:21-24)

33, Mr. Meadors asks Dr. Armstrong: "...she had put her hand over the mouth...until the body went limp? Did you have that information? A. No I did not." (p. 348:10-14) Mr. Meadors asks Dr. Armstrong: "Would it be consistent with your opinion, 'I put my hand over his mouth, and he went lump (sic) A. That's very significant." (p. 369: 19-22) The Doctor thinks it very significant that the child went "limp." Since she did not say that, that translates into "prejudice."

34, Mr. Meadors questions Dr. Nichols: "Dr. Nichols, you do have her statement that she put her hand over his mouth, and he went limp, right? A. I believe that was a misstatement that I read? (p. 421:2-6)

35, The government invented the word "limp" to prejudice the defendant who actually said that the child became quiet or still, as in falling asleep, not "limp" which wrongly leads the jury to

erroneously believe that the defendant knew or intended the child. This is prosecutorial misconduct to introduce facts not in evidence to the defendant's prejudice. Defense counsel did not object to any of these mischaracterizations, ineffectively.

DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE.

36, The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. (U.S. Const. Amend. VI, *Strickland v. Washington*, 466 U.S. 668; *Lomax v. State*, 379, S.C. 93, 665 S.E.2d 164) The United States Supreme Court has announced a two-prong test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. (*Strickland* at 687, *Cherry v. State*, 300 S.C. 114, 386 S.E.2d 624) Defense counsel provided a witness, Dr. Kimberly Collins, M.D. (paragraphs 17-18) who testified affirmatively to the government's theory of the death of the child while being asked an improper hypothetical question, not objected to by defense counsel. Counsel was ineffective for failing to investigate contradictory medical evidence and expert's opinions ruling out natural causes of death. (*McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354) Furthermore, counsel's failure to file and perfect an appeal as requested by the defendant results in the functional equivalent of having no representation at all under *Austin (v. State)*, 305 S.C. 453, 409 S.E.2d 395, 1991 S.C. LEXIS 195, citing: *Anders v. Calif.*, 386 U.S. 738) resulting in the tolling of any statutes of limitation regarding the timeliness of appeals. (*Pelzer v. State*, 378 S.C. 516, 662 S.E.2d 618, 2008 S.C. App. LEXIS 95)

37, This court is further referred to the matter of *The State v. Celeste Durant*, County of Hoary, South Carolina, 2007-CP-26-7409. This case involved the death of a 20 month old child from a fractured skull. Dr. Clay Nichols testified that the child could not have sustained a fractured skull that resulted in her death from a short fall. (N.T. p. 621-622) Dr. Nichols' testimony was contrary to the scientific nature of head injuries in children, and particularly in contradiction to the known scientific basis for head injury and death from short falls that are documented. Dr. Nichols' testimony was blatantly false and prejudicial to the defendant. Thus we have a pattern of false testimony proffered by this medical doctor to support the government's case(s) when it is scientifically incorrect to do so. Dr. Nichols is not a witness who can be trusted to offer honest unbiased testimony based on science. The attorney General should investigate the testimony of Dr. Nichols in these two cases, and expand the investigation into other cases where Dr. Nichols offered unscientific prejudicial testimony.

JUDGMENT OF CONVICTION SHOULD BE VACATED.

38. The appellate court will reverse the PCR judge's decision when it is controlled by an error of law. (Suber v. State, 371 S.C. 554, 558; 640 S.E.2d 884, 886; McMillan v. State, S.C.S.C. Opinion 26688, filed July 20, 2009) Given the abuse of discretion of the trial court in the admission of evidence, resulting in prejudice to the defendant, the conviction should be reversed. (State v. Martucci, 380 S.C. 232, 247, 669 S.E.2d 598, 606)

WHEREFORE, for the aforestated reasons, this court should vacate its judgment of conviction and order a new trial, and such other and further relief as is just and proper.
Affirmed as true under penalty of perjury

Andrea Person, 338104
Leath Correctional Institution, M2-104
2809 Airport Road
Greenwood, S.C. 29649

Dated: 5/9/12

AP:mmm

Andrea Person

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
)

PERSON Andrea -
00338104,

) 2012CP4004265
)
)
)

) Applicant,
)
)

) v.
)

) RETURN
)
)

) State of South Carolina,
)
)

) Respondent.
)
)

_____)
The Respondent, making its Return to the application for post conviction relief (PCR) filed June 19, 2012, would respectfully show this Court:¹

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. The Applicant was true bill indicted at the May 2007 term of the Richland Grand Jury for Homicide by Child Abuse (2007-GS-40-3510).² She was represented by Fielding Pringle, Esquire, on the charge(s). Applicant proceeded to jury trial before The Honorable Alison Renee Lee. On November 20, 2009, Applicant was found guilty as indicted and sentenced to twenty-two (22) years imprisonment.

¹<http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2012CP4004265&CourtType=G&CaseType=Civil&CourtAgency=40002>

² <https://sword.doc.state.sc.us/scdc-public/inmateDetails.do?id=+00338104>

Direct Appeal

A Notice of Appeal was filed and an appeal perfected. After briefing from both sides, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Person, 2012-UP-068 (filed February 8, 2012). The Remittitur was issued March 5, 2012.

The current application for post conviction relief (PCR) was filed June 19, 2012.

II.

Attached herewith and incorporated herein are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the trial transcript, and the Applicant's applicable direct appeal files.³ The Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations and/or to provide a more detailed procedural history.

III.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following:

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Govt failed to meet burden of proof
- (b) Prosecutorial Misconduct (see annexed PCRA)
- (c) Ineffective Assn. of Counsel

³ The Respondent will utilize the Record on Appeal if the direct appeal was an Anders appeal.

This is an application for post-conviction relief under the South Carolina Code of Laws, Title 17, Chapter 27, for relief from judgment of conviction for homicide by child abuse (S.C.C. 16-3-85) following a jury trial on November 16-20, 2009 where she was found guilty and sentenced to imprisonment for twenty-two (22) years. This application is made because the defendant believes that she was convicted in violation of the Constitution of the United States and the laws of this state, and that she is not guilty and has been subjected to a fundamental miscarriage of justice and her conviction was based on an unreasonable determination of facts in light of the evidence presented in the state court proceeding (See: *Humphries v. Ozmint*, 397 F.3d

THE DEFENDANT WAS COERCED INTO MAKING A FALSE STATEMENT.

EVEN IF THE COERCED STATEMENT ATTRIBUTED TO THE DEFENDANT WERE ACCURATE, AND NOT A POLICE CREATION, SHE ADMITTED NO CULPABLE LETHAL ACT, THE CORPUS DELICTI.

MOTION FOR DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

DEFENSE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE.

36, The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. (U.S. Const. Amend. VI, *Strickland v. Washington*, 466 U.S. 668; *Lomax v. State*, 379, S.C. 93, 665 S.E.2d 164) The United States Supreme Court has announced a two-prong test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. (*Strickland* at 687, *Cherry v. State*, 300 S.C. 114, 386 S.E.2d 624) Defense counsel provided a witness, Dr. Kimberly Collins, M.D. (paragraphs 17-18) who testified affirmatively to the government's theory of the death of the child while being asked an improper hypothetical question, not objected to by defense counsel. Counsel was ineffective for failing to investigate contradictory medical evidence and expert's opinions ruling out natural causes of death (*McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354) Furthermore, counsel's failure to file and perfect an appeal as requested by the defendant results in the functional equivalent of having no representation at all under *Austin (v. State)*, 305 S.C. 453, 409 S.E.2d 395, 1991 S.C. LEXIS 195, citing: *Anders v. Calif.* 386 U.S. 738) resulting in the tolling of any statutes of limitation regarding the timeliness of appeals. (*Pelzer v. State*, 378 S.C. 516, 662 S.E.2d 618, 2008 S.C. App. LEXIS 95)

IV.

Regarding Applicant's assertions of actual innocence, improperly coerced statement, and failure to grant the motion for directed verdict, Respondent respectfully submits these allegations are without merit as they are either not a cognizable ground for post-conviction relief or are an issue that should have been raised on direct appeal. First, Applicant's claim of actual innocence is not a cognizable grounds for post-conviction relief. PCR is not a proper avenue to challenge the sufficiency of the evidence supporting a jury's conviction. *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1974).

PERSON Andrea - State's Return - (2012CP4004265)

Page 4 of 8

Further, the admission of an improperly coerced statement and failure to grant a motion for directed verdict are direct appeal issues procedurally barred from being brought forth herein by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for direct appeal and a PCR application cannot assert any issues that could have been raised at trial or on direct appeal. Id.; see also Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

Therefore, aside from a claim of ineffective assistance of trial counsel, the claims set forth in the application are without merit and improperly brought in this action.. Accordingly, Respondent requests they be summarily dismissed.

V.

However, regarding Applicant's assertion of ineffective assistance of trial counsel, the Respondent contends trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 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, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. **The Respondent requests an evidentiary hearing to fully resolve this issue.** See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

VI.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied. The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held. The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Alexis K. Lindsay, Esquire regarding when the hearing should be set.⁴

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney
General

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July 3, 2012

⁴ The current PCR Roster for the 5th Circuit is available at <http://www.scag.gov/criminal-litigation/postconvictionrelief>
PERSON Andrea - State's Return - (2012CP4004265)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

2012CP4004265

CERTIFICATE OF SERVICE

Respondent.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the a letter in the above-captioned matter on the following person(s) by routing the same to the United States mail, postage prepaid:

Alexis K. Lindsay, Post Office Box 11449 , Columbia, SC 29211

DATED July 9, 2012.


Jean R. Indriago
Legal Assistant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
Andrea Person #338104,	)	Civil Action No. 2012-CP-40-4268
	)	
Applicant,	)	
	)	
vs.	)	AMENDED APPLICATION FOR
	)	POST-CONVICTION RELIEF
State of South Carolina,	)	
	)	
Respondent.	)	

The Applicant Andrea Person ("Applicant") by and through her undersigned counsel would amend her Application for Post-Conviction Relief filed on June 29, 2012, by adding the following specific allegations to her original allegation of ineffective assistance of counsel:

1. Ineffective assistance of trial counsel at a critical stage of the case, the pre-trial *Jackson v. Denno* hearing, including the failure to properly prepare for the hearing, the failure to call witnesses or offer testimony at the hearing, the failure to effectively cross-examine the State's witnesses, the failure to make any sort of argument to the judge regarding the voluntariness of the statement, and failing to advise Applicant on the importance and implications of the hearing or her right to testify at it.
2. Ineffective assistance of trial counsel for calling Dr. Kimberly Collins as an expert witness and/or for failing to properly prepare the witness.

I. Introduction

In 2007, a baby died in the daycare Applicant ran out of her home. Shortly after the death, law enforcement began investigating two other child deaths that took place in Applicant's daycare, both of which had previously been deemed the result of natural causes. At 12:50 PM on April 17, 2007, Applicant voluntarily went to the Richland County Sheriff's Department with

intentions of offering any information she could about the most recent baby's death. Instead, Applicant was given an extensive polygraph examination on all 3 deaths, including that of 13-month old Zachary Ulengchong, who died almost 10 years earlier in December 1998 and whose death certificate listed "pneumonia" as the cause of death. Applicant was told erroneously that she failed the test regarding Zachary. The subsequent lengthy interrogation by law enforcement totaling over 7 hours eventually led to a statement by Applicant that, in an effort to calm Zachary, she held her hand over his mouth for 15-20 seconds, after which he took a deep breath and went to sleep. Shortly after, Applicant found Zachary dead in his crib.

The prosecution's case against the Applicant for the death of Zachary Ulengchong was built entirely on that one ambiguous statement by the Applicant. There are two ways that the death of a baby can be determined to be a smothering: physical evidence or a confession. In this case, there was a statement which was deemed a confession¹, which the Applicant has always maintained was false, coupled with a complete lack of physical evidence. Therefore, even a minimally effective effort by the Applicant's trial counsel should have required a focus on preventing the admission of the confession, so that the jury would never even be allowed to consider that evidence. Instead, the jury heard the evidence but, for a variety of factors which will be discussed below, heard only a watered-down version of Applicant's interrogation. Trial counsel was constitutionally ineffective in their effort to prevent the statement from being admitted into evidence, and the Applicant was severely prejudiced as a result.

¹ Dr. Kimberly Collins, forensic expert for the defense, testified that restricting oxygen for 15-20 seconds would be insufficient to cause death. Trial transcript at 628, *State v. Person*, 07-GS-40-3510. Dr. William Armstrong, the medical examiner who performed the autopsy on Zachary, testified that 15-20 seconds was a very short amount of time. *Id.* at 366.

Applicant was further prejudiced by the ineffective use of Kimberly Collins, M.D. as a witness for the defense. Dr. Collins' testimony served only to bolster the prosecution's case and confirm the conclusion reached by the State's expert.

II. Post-Conviction Relief Standard

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354 (2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984)).

III. Counsel rendered ineffective assistance regarding the admissibility of the confession

Pursuant to the United States Supreme Court's decision in *Jackson v. Denno*, a criminal defendant is entitled to a hearing outside the presence of the jury to determine the voluntariness of statements made by the defendant. *State v. Miller*, 375 S.C. 370, 382, 652 S.E.2d 444 (Ct. App. 2007). "The test of admissibility of a statement is voluntariness." *State v. Childs*, 299 S.C. 471, 475, 385 S.E.2d 839, 842 (1989). The burden is on the state to prove by a preponderance of the evidence that the statement was voluntary *and* taken in compliance with *Miranda*. *State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692 (1986). If the judge grants the motion, the confession is never admitted into evidence at trial, and the jury never hears about it.

"The trial judge must determine if under the **totality of the circumstances** a statement was knowingly, intelligibly, and voluntarily made." *Miller*, 375 S.C. at 382 (emphasis added). "It is now axiomatic ... that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary [statement], without regard for the truth or falsity of the [statement]...even though there is ample evidence aside from the

[statement] to support the conviction.” *Id.* at 380 (citing *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964)).

In some cases, where there may be corroborating eye witness testimony, video evidence, or DNA evidence, such a hearing may not be critical. In the Applicant’s case, however, the confession was the whole case. There was no physical evidence of the Applicant’s guilt. Without the confession, the prosecution would likely not have had enough evidence to move forward with the defendant’s trial as it was the foundation upon which all other evidence was built.

At the *Jackson v. Denno* hearing, the judge denied the motion, but the transcript, record, and evidence presented show an inadequate and ineffective effort by trial counsel. Trial counsel’s cross-examination of the State’s witnesses was cursory and unproductive. He failed to put up a single witness to counter the State’s version of events. Further, before the judge made her ruling, trial counsel waived his right to even make an argument. This lack of preparation resulted in a crucial lost opportunity to have the confession deemed involuntary. Trial counsel had an opportunity to present the judge with the defense’s version of the “totality of the circumstances” but failed to offer any facts to counter the State’s version.

Several South Carolina cases have “recognized appropriate factors that may be considered [by the judge] in a totality of the circumstances analysis: background; experience; conduct of the accused; age; maturity; physical condition and mental health; length of custody or detention; police misrepresentations; ... direct or indirect promises, however slight; lack of education or low intelligence; repeated and prolonged nature of the questioning; exertion of improper influence.” *State v. Moses*, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010). See also *State v. Simmons*, 384 S.C. 145, 163-64, 682 S.E.2d 19 (Ct. App. 2009) (coercion, hunger, promise of leniency); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S.Ct. 2041 (1973)

(length of detention, repeated and prolonged nature of questioning, deprivation of food or sleep); *State v. Parker*, 381 S.C. 68, 85-93, 671 S.E.2d 619 (Ct. App. 2008) (physical and mental state of defendant, misrepresentations of evidence by police, coercion). "This list of factors is not an exclusive list. Moreover, no single factor is dispositive and each case requires careful scrutiny of all surrounding circumstances." *Moses* at 514 (internal citations omitted).

By not calling any witnesses at the *Jackson v. Denno* hearing, trial counsel was ineffective in providing the judge any evidence related to the above-listed factors. The only testimony the judge had in front of her to consider in making her ruling was offered by the law enforcement witnesses testifying for the prosecution. Therefore, trial counsel had an uphill battle at trial to try to poke holes in the prosecution's evidence regarding the confession and create reasonable doubt in the minds of the jurors, all while trying not to open the door to evidence the jury was not allowed to hear, including the critical facts surrounding a polygraph examination of the Applicant. This battle could have been avoided if all evidence concerning the confession and why it was involuntary was thoroughly raised at the *Jackson v. Denno*. The evidence and testimony which should have been raised at the *Jackson v. Denno* will be discussed below.

A. Evidence that could be raised at the *Jackson v. Denno* hearing ONLY and was not

i. Severance

On August 14, 2008, the trial judge granted the defense's motion for three separate trials for each baby. At first glance, this appears to be a positive ruling for the defense because it meant that the jury would not be prejudiced by the other two deaths. However, it also meant that at trial, the defense was unable to offer testimony as to the true duration of Applicant's 7.5 hour interrogation because it did not want to open the door for the prosecution to the other two babies.

Instead, the interrogation timeframe was limited to the roughly 3 hours that law enforcement estimated they spent questioning Applicant specifically about Zachary.

One of the most critical factors that led to the Applicant's false confession was the length of time she was interrogated and the manner in which the investigators kept reminding the defendant that there were three dead babies and demanding that she provide an explanation. Although the prosecution's law enforcement witnesses testified to the full length of the interrogation at the *Jackson v. Denno*, defense counsel did not offer any witnesses who could testify to the effects or risk factors of such a long interrogation. Then at trial, the testimony defense counsel elicited from the Applicant and the false confessions expert was severely weakened by the shortened time frame they were able to discuss without opening the door to the other deaths. At a pre-trial hearing, outside the presence of the jury, defense counsel and experts would have been able to offer testimony and evidence of the effects of such a long and confusing interrogation about multiple deaths.

ii. Polygraph

"Generally, the results of polygraph examinations are inadmissible because the reliability of the polygraph is questionable." *State v. Wright*, 322 S.C. 253, 255, 471 S.E.2d 700 (1996) (citing *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982)). In this case, the use of a polygraph was a very important piece of the story of the Applicant's confession because the examiner misrepresented her results and eventually used that misrepresentation to induce the Applicant to agree with a story that did not happen. It was such important and relevant evidence that trial counsel even suggested to the trial judge that she would not be opposed to evidence related to the polygraph coming in at trial. Trial transcript at 137, *State v. Person*, 07-GS-40-

3510. However, the trial judge would not even entertain the suggestion, which is not surprising given the law on polygraph evidence. *Id.* at 138.

Because trial counsel knew that testimony related to the polygraph would not be admissible at trial, they should have used that testimony where it would have made a difference: at the *Jackson v. Denno* outside the presence of the jury. At that hearing, Dr. Kassin, the false confessions expert discussed below, could have testified how polygraphs are a powerful tool used by law enforcement to elicit confessions. The Applicant could then have testified as to how the polygraph examiner misrepresented to her that she failed the questions related to Zachary Ulenchong and how that affected her state of mind. Many lay people, including the Applicant, are unaware that police frequently lie to suspects. Police misrepresentations are a factor for the judge to consider when determining the voluntariness of a statement. See *State v. Parker*, 381 S.C. 68, 85-93, 671 S.E.2d 619 (Ct. App. 2008); *State v. Moses*, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010).

Instead, this evidence was never presented at all and was effectively lost. Failure to present this testimony was ineffective assistance by trial counsel and caused severe prejudice to the Applicant.

B. Dr. Saul Kassin

Dr. Saul Kassin, who was the defense's false confessions expert at trial and will testify at the PCR hearing, should have been called to testify at the *Jackson v. Denno* hearing. The failure to call him was ineffective assistance by trial counsel. Dr. Kassin is one of the world's leading experts on the topic of false confessions and has written numerous books, articles, and other publications on the subject. His testimony should have been powerful and served to inform the listener about a topic with which most people are not familiar. However, because of the existence

of evidence, discussed above, which the jury could not hear, Dr. Kassin was forced to walk very fine lines when he testified at trial for fear of opening the door to the other two babies.

At a pre-trial hearing outside the presence of the jury, however, Dr. Kassin could have given much more effective and helpful testimony. First, he could have testified about the use of polygraphs as a prop by law enforcement to set the stage for an interview. He could also have testified to the effect their use can have on suspects, especially when a suspect is falsely told that he or she failed the polygraph exam. Second, Dr. Kassin could have testified as to the effects or risks associated with interrogations lasting as long as the Applicant's interrogation and the effects of such lengthy questioning about three different incidents spanning ten years. Additionally, much of Dr. Kassin's research focuses on personality traits or individual factors which may increase the likelihood that a certain person would be more prone to giving a false confession. Had trial counsel had the Applicant evaluated by a clinical psychologist, Dr. Kassin would have been able to testify on those issues.

Overall, Dr. Kassin could have testified to the potential risk factors that are often present in false confession cases to make the judge, who must use a totality of the circumstances test as discussed above, a much more informed and critical viewer of this confession. See *State v. Moses*, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010).

At a minimum, trial counsel should have consulted with Dr. Kassin prior to the *Jackson v. Denno* to be much better prepared for the cross examination of the law enforcement witnesses. For instance, Dr. Kassin has done research on the effects of "forensic bias" and how knowledge by law enforcement that a total of three babies had died in the Applicant's daycare could affect their ability to accurately score a polygraph and conduct an unbiased interview. Instead, the cross examination by trial counsel was rote and ineffective.

Had the judge determined at the *Jackson v. Denno* that the Applicant's confession was not a voluntary statement, as stated above, the prosecution would have been left with no physical evidence. Other than the Defendant, Dr. Kassin was the only witness on the defense's witness list whose testimony could influence the judge's ruling on whether the confession was made voluntarily. Therefore, Dr. Kassin's presence at the *Jackson v. Denno* was crucial, and trial counsel's failure to call him was ineffective and prejudicial to the Applicant.

C. Applicant

Trial counsel was also ineffective for not calling the Applicant as a witness at the *Jackson v. Denno* hearing. The Applicant was the **only** other person present during her seven (7) hour non-recorded interrogation. Therefore, she was the **only** person who could directly dispute the testimony of the law enforcement officers.

Further, the Applicant was the only person who could testify to the presence of the risk factors that Dr. Kassin would have testified about. For example, the Applicant was the only person who could testify to how she is a diabetic and at the time of her interrogation, she had not eaten since the night before or taken her diabetes medications. She could have testified to the effects on her body when she has not eaten or taken her medicine, especially when she does not eat the entire day and is in an extremely stressful situation for over 7 hours. She could have testified to the stress she was under as she went to the sheriff's department that day, including the grief she felt for the baby who died and his family. The Applicant was also under tremendous stress because of her family's financial situation, as she would no longer be able to operate a day care and provide an income. Also, her husband was in the process of taking a paternity test to see if he was the father of the Applicant's former best friend's teenage son.

As to the actual interrogation, the Applicant could have testified to how the officers told her they would be questioning her about the most recent baby's death and surprised her with questions relating to the other deaths, creating a confusing shell game. She could have testified to how they used the polygraph to intimidate her, told her she failed the test, and showed her the results only briefly before snatching the paper away. She could have testified to how they told her that if she did not give them a better story, they would have to dig up Zachary Ulengchong's body, which had been buried for ten years. Much of this testimony could not be used at trial because of the limitations on the evidence the jury could hear, discussed more fully above. However, at the *Jackson v. Denno*, the Applicant could have fully testified as to all of the relevant factors that played into her confession. Additionally, her testimony would have made Dr. Kassin's testimony more relevant and useful.

"Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1995). There is no valid strategic reason why they did not call the Applicant. Well before the *Jackson v. Denno* hearing, which was held just a few weeks before trial, counsel had already determined that the Applicant would testify at trial as she was the only witness to the events leading up to Zachary's death. Therefore, the only plausible reason to not have her testify at the *Jackson v. Denno* would be to avoid giving the prosecution an earlier opportunity to question her about her guilt or innocence. However, this risk does not actually exist if a defendant can testify at a *Jackson v. Denno* without jeopardy to or waiver of her right to remain silent. *Lufkins v. Solem*, 716 F.2d 532 (8th Cir. 1983).

IV. Counsel's deficient performance regarding the *Jackson v. Denno* prejudiced the Applicant

A review of the transcript from Applicant's *Jackson v. Denno* hearing shows a complete lack of effort by trial counsel. Therefore, prejudice should be presumed. "[W]hen counsel is denied at a critical stage of a defendant's trial, prejudice will be presumed." *McKnight v. State*, 320 S.C. 356, 465 S.E.2d 352 (1995). This hearing was a critical opportunity to have the confession deemed involuntary and completely cripple the prosecution's case. Instead of calling relevant witnesses and eliciting relevant testimony to aid the judge in her evaluation of the totality of the circumstances, defense counsel barely put up a fight on cross examination and waived the right to make an argument.

Even if prejudice is not presumed, it is present here because the "trial record does not show that '[the] other evidence of guilt presented at trial ... was substantial to a degree that would negate any possibility of actual prejudice resulting from the admission of [the] inculpatory statement.'" *Lufkins* at 541 (citing *Wainwright v. Sykes*, 433 U.S. 72, 91, 97 S.Ct. 2497 (1977)). If the confession had been deemed inadmissible, none of the State's other evidence could have come in because it was all dependent on the confession. The only reason the medical examiner changed the cause of death on the autopsy was because he considered the untested, unproven, and non-sensical "confession." Prejudice is clear in this case because the confession was the ONLY evidence of guilt. The *Jackson v. Denno* was an opportunity to keep that one piece of evidence out, and trial counsel failed to pursue it.

V. Counsel rendered ineffective assistance regarding the use of Dr. Collins and caused prejudice to the Applicant

At the time of Zachary Ulengchong's death in 1998, Dr. William Armstrong, the medical examiner who performed the autopsy concluded that Zachary had died of pneumonia. However,

during the prosecution's case-in-chief, Dr. Armstrong and Dr. Clay Nichols, a forensic pathologist, both testified that they believed Zachary was suffocated. They also both testified that in reaching their conclusion, they had considered the statement by Andrea Person that she held her hand over Zachary's face for 15-20 seconds. Trial transcript at 365 and 411-12, State v. Person, 07-GS-40-3510.

Based on that testimony, it was, therefore, critical that the defense call an expert witness who would testify that pneumonia was the proper cause of death. Defense counsel called Dr. Kimberly Collins as an expert in forensic pathology. She was paid a total of \$10,000 for her time and testimony. On direct examination, Dr. Collins testified that pneumonia was the appropriate cause of death and that restricting oxygen for 15-20 seconds would be insufficient to cause death. *Id.* at 628. However, on cross examination, she testified that if she considered the Applicant's statement, she would conclude that Zachary was smothered. *Id.* at 652.

Calling an expert witness whose ultimate conclusion is consistent with the State's experts was ineffective assistance by trial counsel. They should have known exactly what Dr. Collins would say on direct and cross, and there is no reason why they would not have discovered through proper preparation that Dr. Collins would testify the way she did. The South Carolina Supreme Court has previously held that calling an expert witness whose testimony only bolsters the State's case was ineffective assistance and prejudiced the defendant. *McKnight v. State*, 378 S.C. 33, 661 S.E.2d 354 (2008). Because Dr. Collins ultimately reached the same conclusion as the State, she should not have been called as an expert witness.

Further, not only does Dr. Collins' testimony support the State's case, it is self-contradictory on its face. On the one hand, she testified that the act to which the Applicant "confessed" would not cause death because 15-20 seconds was not long enough to do so. On the

other hand, she testified that if she considered the Applicant's statement, the baby must have been smothered. Those two views are irreconcilable, and proper preparation by trial counsel would have revealed Dr. Collins' inadequacy as an expert witness for the defense in this case. If trial counsel could not find a forensic pathologist to testify that the baby died of pneumonia, it would have been more effective and less prejudicial to just not call one at all. Choosing to call an expert who mimics the State's position can never be a strategic decision, and it caused prejudice to the Applicant.

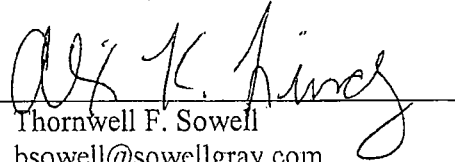
VI. Conclusion

For the reasons stated above, the Applicant is entitled to have her sentence vacated pursuant to S.C. Code Ann. § 17-27-20. She received ineffective assistance of her trial counsel at a critical stage of her case, the pre-trial *Jackson v. Denno* hearing. She was prejudiced by this failure because that was a completely missed opportunity to argue against the admissibility of the one piece of evidence upon which the State's entire case was built. Trial counsel also rendered ineffective assistance when it called Dr. Kimberly Collins as an expert witness. The Applicant was prejudiced by this because Dr. Collins' ultimate conclusion was the same as the experts testifying for the State, thereby bolstering the prosecution's case.

[Signature page follows]

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CERTIFICATE OF SERVICE

I, the undersigned Legal Assistant, of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., attorneys for Applicant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

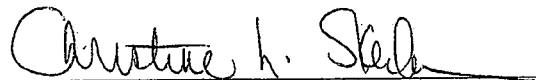
Pleadings:

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Christine L. Skalamera

September 25, 2013

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF RICHLAND
4 2012-CP-40-04268
5

6 Andrea Person

7 vs.

8 State of South Carolina
9
10

11 Columbia, South Carolina

12 October 2, 2013

13 Before the Honorable James R. Barber, III
14

15 APPEARANCES

16 For the State: Harrigan, Whitmire

17 For the Applicant: Lindsay, Sowell
18

19 Reported by: Elizabeth Harris (edited by Mike Watkins)

20 Official Court Reporter
21
22
23
24
25

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1 THE COURT: All right.

2 MS. HARRIGAN: May it please the Court?

3 THE COURT: Yes, ma'am.

4 MS. HARRIGAN: This is the matter of Andrea Person
5 versus the State of South Carolina, docket number
6 2012-CP-40-4268. Ms. Person was indicted during the
7 May 2007 term of the Richland County grand jury for homicide
8 by child abuse, she was represented Douglas Strickler and
9 Fielding Pringle. On November 16th through 20th, 2009
10 Ms. Person proceeded to a jury trial before the Honorable
11 Allison Lee where she was convicted as indicted. Judge Lee
12 sentenced Ms. Person to 22 years imprisonment. Notice of
13 appeal was filed and perfected, the South Carolina Court of
14 Appeals affirmed applicant's conviction and sentence. The
15 remittitur was sent on March 5th of 2012, thereafter on
16 June 19th of 2012 applicant filed a timely application for
17 post conviction relief. On September 25, 2013, applicant
18 through her counsel, Alexis Lindsay, filed an amended
19 application alleging the following: Ineffective assistance
20 of trial counsel at the Jackson v. Denno hearing including
21 the failure to properly prepare for the hearing, failure to
22 call witnesses who would offer testimony at the hearing,
23 failure to effectively cross examine the State's witnesses,
24 failure to make any sort of an argument to the Judge
25 regarding the voluntariness of Ms. Person's statement, and

1 failing to advise applicant on the importance and
2 implications of the hearing or her right to testify at it.
3 And the second allegation is ineffective assistance of trial
4 counsel for calling Dr. Kimberly Collins as an expert
5 witness and/or for failing to properly prepare her as a
6 witness. At this time I will turn it over to Ms. Lindsay.

7 THE COURT: All right. Ms. Lindsay?

8 MS. HARRIGAN: Yes, Your Honor. At this time we would
9 call Dr. Saul Kassin.

10 THE COURT: Ms. Person, if you will come over here and
11 have a seat next to your counsel.

12 The witness, SAUL KASSIN, was first duly sworn
13 and testified as follows, on:

14 DIRECT EXAMINATION

15 BY MS. LINDSAY:

16 THE COURT: State your full name for the record.

17 THE WITNESS: Saul Kassin, S-a-u-l, K-a-s-s-i-n.

18 Q. Okay. Dr. Kassin, if you would, tell us where you live
19 and where you were employed?

20 A. I live in Williamstown, Massachusetts. I am employed
21 part-time at Williams College and full-time at John Jay
22 College of Criminal Justice.

23 Q. Could you scoot that microphone over? Okay, great. and
24 What is your job there?

25 A. Distinguished Professor of Psychology.

TESTIMONY OF SAUL KASSIN

1 Q. Okay. What exactly does Distinguished Professor mean?

2 A. I'm a full professor who has a special appointment at
3 the City University of New York, it's for a few professors
4 based on a record of distinction and career.

5 Q. Could you tell me about your educational background?

6 A. I had a Bachelor of Science Degree at Brooklyn College
7 at City University of New York. A Masters and a Ph.D in
8 Social Psychology at the University of Connecticut. And
9 then I had post-doctoral research fellowships at Stanford
10 University, University of Kansas and the U.S. Supreme Court.

11 Q. And exactly what kind of psychologist are you?

12 A. I'm a social psychologist.

13 Q. And so you spend a lot of time researching?

14 A. Yes.

15 Q. And a large portion of your work focuses on confessions
16 and various aspects of confessions?

17 A. Yes.

18 Q. Such as false confessions in police interrogations?

19 A. Correct.

20 Q. And how long have you focused on these topics in your
21 work?

22 A. Approximately 25 years.

23 Q. And I'm not going to go through all of these, but you
24 have -- is it fair to say that you've authored and
25 coauthored numerous books, somewhere between and ten and 15?

TESTIMONY OF SAUL KASSIN

1 A. Yes.

2 Q. And you've written numerous book chapters, more than
3 20?

4 A. Yes.

5 Q. And you've written numerous articles, more than 25?

6 A. Yes.

7 Q. And is it also true that you coauthored a white paper
8 on this topic of false confession?

9 A. Yes.

10 Q. Could you tell me a little bit about the white paper
11 process?

12 A. Psychology has two major organization, the American
13 Psychological Association, which is the original -- first
14 organization of psychology, founded in New York in the 20th
15 century which has 155,000 members. The other is the
16 Associations for Psychological Science. APA, the larger
17 organization, has a number of divisions, one is the division
18 of psychology and law. The psychology and law division
19 several years ago the executive committee and scientific
20 review paper committee approved the writing of a white paper
21 and named me as its first author. I assembled a crew of
22 others, we then wrote a paper entitled police induced
23 confessions, risk factors and recommendations. That paper
24 was then sent to a number of outside reviewers. It was
25 reviewed by an executive committee. It was then posted

TESTIMONY OF SAUL KASSIN

1 online for the membership to comment on. We then appeared
2 and presented basically a summary of that paper at two
3 annual hearing -- two annual conferences, at which point it
4 was approved and submitted to Law and Human Behavior, which
5 is a flagship journal of the field. It then received three
6 or four editorial consultant reviews as well as the editor's
7 decision to accept its publication. And as a result of this
8 process, which took some three or four years to completion,
9 it became a white paper. It's the second in the history of
10 the organization.

11 Q. Okay. And so the white paper, in addition to the other
12 equal qualifications you mentioned, many of these focus on
13 false confessions.

14 A. Yes.

15 Q. In the field of false confessions, is it fair to say
16 that it's a developed field?

17 A. At this point it's a very well developed field.

18 Q. And how do we know that?

19 A. Well, there are a number of metrics. Simply look at
20 the number of research articles that are published, research
21 grants that are funded say from an actual science foundation
22 of the National Institute of Justice, there are numbers of
23 books on the subject, large numbers of book chapters on the
24 subject. One, I think, comprehensive review book is written
25 in 2013 by Gisli Gudjonsson, he has more than 1,000

TESTIMONY OF SAUL KASSIN

1 references in his bibliography and research papers, and
2 these are articles that have survived the peer review
3 process. And so there's a body of research, and that body
4 of research has been approved in the white paper. The
5 American Psychological Association has relied on that body
6 of research in submitting five or six amicus groups to
7 various state supreme courts, and the association for
8 Psychological Science which is a group of 20,000
9 psychological scientists specializing in the science of
10 human behavior as opposed to the mental health practice.
11 Have invited a paper that Gisli Gudjonsson and I coauthored
12 for a special collection of journal of their organization.
13 So the main organizations show a good deal of consensus.

14 Q. Okay. Do you frequently present at conferences and in
15 front of certain professional groups related to these
16 topics?

17 A. Yes, ma'am.

18 Q. Law schools, judges conferences, law enforcement
19 groups?

20 A. Yes.

21 Q. Do you teach a number of classes related to the
22 psychology professions?

23 A. I do.

24 Q. Have you previously been qualified as an expert
25 psychologists in various state courts?

TESTIMONY OF SAUL KASSIN

1 A. Yes.

2 Q. Federal course?

3 A. Yes.

4 Q. Military courts?

5 A. Yes.

6 Q. And how many times have you testified in South
7 Carolina?

8 A. I have testified at three trials and I believe one post
9 conviction hearing.

10 Q. Including the trial that is at issue in this PCR?

11 A. Actually -- I'm sorry, four trials and a post
12 conviction hearing.

13 MS. LINDSAY: At this time, Your Honor, I would offer
14 Dr. Kassin as an expert in the area of Social Psychology in
15 the fields of false confessions and police interrogation
16 practices.

17 MR. WHITMIRE: Your Honor, may I have the opportunity
18 for some voir dire? Walk Whitmire on behalf of the
19 respondent.

20 THE COURT: You may.

21 VOIR DIRE EXAMINATION

22 BY MR. WHITMIRE:

23 Q. Welcome to South Carolina again, Dr. Kassin.

24 A. Thank you.

25 Q. You testified in the trial of State vs. Wesley Max

TESTIMONY OF SAUL KASSIN

1 Myers, is that correct, in Charleston?

2 A. Yes.

3 Q. You testified in the trial of State versus Billy Wayne
4 Cope in Rock Hill; is that correct?

5 A. Yes.

6 Q. And pardon my redundancy, Dr. Kassin, but every time
7 that you've testified in South Carolina you've been asked to
8 explain what has changed in the reliability of your
9 methodology since you authored the Social Psychology of
10 False Confession Compliance Internalization and
11 Collaboration in 1997 where you commented that false
12 confession theorists could be qualified to testify
13 predominantly; is that correct?

14 A. No. You're citing a different article.

15 Q. It's your 1997 article. It's the one where you say we
16 do not -- we can't at this time be qualified; is that
17 correct?

18 A. That's not what I said. The context of the remark was
19 that there are areas of our research in which more research
20 is needed and that we're not qualified. It doesn't mean
21 that we don't know anything. But yes, in 1997 the state of
22 this field was far less mature than it is now.

23 Q. And your methodology has been criticized because it has
24 not been supported by sufficient empirical data testing to
25 reveal a potential known rate of error; is that correct?

TESTIMONY OF SAUL KASSIN

- 1 A. No, that's not correct.
- 2 Q. So it has nothing been criticized by Paul Cassell?
- 3 A. Paul Cassell is a critic of the field in general, he is
4 a law professor. He has not criticized my methods to my
5 knowledge in part because we can calculate error rates, we
6 do calculate error rates. We do statistical analysis that
7 tell us what the error rates are.
- 8 Q. David Perez is another law professor that criticizes
9 this, correct, and the admissibility of false confession?
- 10 A. I'm sorry, who?
- 11 Q. David Perez, another law professor has criticized this,
12 correct? Are you familiar with that?
- 13 A. No.
- 14 Q. Michael Welner, M.D., of the forensic panel has
15 criticized your findings, is that correct? Are you familiar
16 with this?
- 17 A. I'm not, but I know of Michael Welner, yes.
- 18 Q. And the National Association of Police Organizations,
19 and it's in Dickerson versus United States have particular
20 criticized your findings. Are you aware of that?
- 21 A. They citing my findings in Dickerson?
- 22 Q. Yes.
- 23 A. I did not know.
- 24 Q. And New Jersey Appellate Court, too; is that correct?
- 25 A. New Jersey Appellate Court did not -- they overturned a

TESTIMONY OF SAUL KASSIN

1 Judge's decision so allow me to testify, I don't recall what
2 the criticism was.

3 Q. In State v. Wesley Max Myers you testified there's no
4 generally accepted theory within the scientific community as
5 to the rate of the frequency of the false confessions, do
6 you recall that?

7 A. Correct.

8 Q. And you testified on numerous occasions it's impossible
9 to do an empirical study because you cannot obtain a
10 randomized repetitive sample; is that correct?

11 A. An empirical study of what? It depends on the
12 empirical study of what.

13 Q. Of interrogations and confessions.

14 A. No. We can do empirical studies and we can demonstrate
15 that you produce greater numbers of false confessions under
16 some circumstances than others, we can do that and
17 statistically analyze the results and then meta-analyze
18 numbers of statistical studies and come up with error rates.
19 So it depends on what specific question it is you're talking
20 about.

21 Q. Within a community of a city for instance, let's say
22 the number of interrogations, the number of elicited
23 confessions, have you actually analyzed a random sample or
24 have you cherry-picked cases ad hoc case studies.

25 A. It depends on the question you want to answer. If the

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1 question you're asking is what percentage of all
2 interrogations of innocent people result in false
3 confessions, that is a question to my knowledge nobody has
4 answered or could answer. But that's the circumscribed
5 question I would say that about.

6 Q. And I believe in State v. Billy Wayne Cope a few years
7 in Rock Hill you criticized Paul Cassell's research when he
8 found that to be --

9 THE COURT: Slowdown on your question a little bit so I
10 can understand it.

11 MR. WHITMIRE: I apologize, Your Honor.

12 Q. You criticized his research where he found between 1987
13 and 1997, he guesstimated that there were some 23 million
14 interrogations and confessions. Do you recall that?

15 A. I don't recall it. But again, Paul Cassell is a law
16 professor, not a scientist and I don't recall the actual
17 statistics you're referring to. And I am generally
18 reluctant to accept -- I don't make estimates of the
19 prevalence rate of false confessions and I don't accept
20 other's estimates because it requires too much extrapolation
21 and too much assumptions.

22 Q. Can you further elaborate on that?

23 A. Yeah. We have no idea what number of interrogations
24 are conducted in the first place, in part because we don't
25 know always what constitutes an interrogation. Sometimes

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1 police will bring in a suspect and conduct a
2 pre-interrogation interview, it's not clear that that
3 qualifies as an interrogation. In addition, one of the
4 problems with studying false confessions in these contexts
5 is it's often not clear when a confession was false.
6 Because there are, for example the Innocence Project
7 database which shows that out of 312 DNA exonerated
8 individuals, and that's a database we can count on because
9 they were DNA exonerated cases where actual innocence was
10 demonstrated, we know that 30 percent of those cases now
11 contain false confessions in evidence. We know that when I
12 have surveyed police to ask them to estimate what percentage
13 of the time that you think -- and I did this with 671 U.S.
14 and Canadian police detectives, and the question that my
15 colleagues and I asked was what percentage of the time in
16 your experience that an innocent person is interrogated do
17 you think they confess, and their estimate was five percent.
18 Now, I suppose a loose non-scientist could take five
19 percent, count out the number of interrogations conducted in
20 a year and extrapolate and suggest that that's the number of
21 false confessions, I don't think that's a reasonable way to
22 do that. And that's what I mean by extrapolating.

23 Q. Dr. Kassin, what I'm interested in is have you actually
24 taken let's say relative samples such as the City of
25 Columbia, looked at all of the interrogations over a given

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1 period of time, confessions that were elicited and then came
2 up with a result?

3 A. To answer what question?

4 Q. To answer the question of what is a false confession.
5 Is it a false confession? Are there certain --

6 A. Well, I can tell you what a false confession is. A
7 false confession is a case that has been identified in the
8 literature among scholars in false confessions by one of
9 four methods. One, somebody had given --

10 Q. Dr. Kassin --

11 A. You asked me the question.

12 THE COURT: You've got to let him answer, Mr. Whitmire.

13 A. When you look at the literature in terms of identifying
14 false confessions, there are four case to do that. In some
15 of the ways it turns out that a confession that was given
16 was given to a crime that ultimately turned out had never
17 been committed, the victim, for example, was found. In some
18 larger number of cases it turns out that the confession was
19 to a crime that turned out to be physically impossible. So
20 for example, when two suspects were apprehended and
21 confessed in Chicago to the murder of an 11 year old girl,
22 they confessed to knocking her off her bike and killing her,
23 and then it turned out that the autopsy result after the
24 fact showed that, in fact, the girl had been raped and there
25 was semen and the suspects were seven and eight years old

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1 and could not produce semen. So that turned out to be a
2 confession that was impossible. Then there are cases, like
3 the DNA categories of cases, where despite confession
4 overwhelming contradictory evidence often in the form of DNA
5 is presented, sometimes in the form of the actual
6 perpetrator being apprehended. And so it's that category of
7 case, those four categories of cases, where we know for a
8 fact that a confession taken was a false confession.

9 Q. Dr. Kassin, but in State v. Cope, didn't you testify
10 there's no scientific way to validate a false confession?

11 A. No. I couldn't have possibly have said that.

12 MR. WHITMIRE: Beg the Court's indulgence.

13 (Break in proceedings.)

14 MR. WHITMIRE: May I approach, Your Honor?

15 THE COURT: You may.

16 Q. On page 121 to refresh your recollection.

17 A. I'm not sure -- page 121, what you are asking me to
18 read?

19 Q. When Solicitor Brackett cross examined you.

20 A. Yes.

21 Q. "How you can scientifically say that this is a false
22 confession?"

23 A. That's not on this page.

24 Q. Well, it's the scope of the testimony. Well --

25 A. Excuse me, what you're referring to is not on this

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1 page.

2 Q. Dr. Kassin -- we'll move on. You've referred to DNA
3 and the Innocence Project several times, but the presence or
4 absence of DNA in itself only creates an inference of
5 potential culpability or results in a culpability, would you
6 agree with that?

7 A. Please elaborate.

8 Q. The presence or absence of DNA -- for instance, the
9 Chicago case that you referenced in this -- well,
10 Ms. Person's trial on page 836 where third party semen
11 exonerated the boys of the crime. It legally exonerated
12 them but it scientifically only proves that third party
13 semen was present in the victim's body. You can't -- do you
14 understand what I'm saying or asking you?

15 A. No. A seven year old boy confessed to a murder that
16 turned out to also contain a rape, and the boy could not
17 have raped the girl so I'm not sure I understand. Are you
18 saying that's not a proven false confession in your mind?

19 Q. No, I'm interested in your methodology. You're not a
20 forensic DNA analyst, are you?

21 A. No.

22 Q. Do you have any training in the investigation of crime?

23 A. In actually doing it?

24 Q. Yes.

25 A. No. Actually I send my students off to be trained, my

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1 graduate students are trained.

2 Q. And I believe one of the first metrics of your analysis
3 is to determine if there is any potential details that are
4 at odds between statement and the facts of the offense; is
5 that correct?

6 A. That's only a metric if an individual is interested in
7 trying to determine the credibility of a particular
8 confession. The research I do is not designed to isolate on
9 particular cases whether a confession is true or false. The
10 goal of my research, and my methods are designed to do this,
11 is to establish general principles which would inform us as
12 to what kinds of people and under what kinds of
13 circumstances false confessions are more or less likely to
14 happen. So I'm dealing in probabilities, not in trying to
15 analyze specific cases.

16 Q. But when you make a finding that a confession is not
17 supported by the facts of the offense, your opinion
18 essentially is no more valid than a lay witness concerning
19 the evidence itself; is that correct? Would you concede
20 that?

21 A. Please restate the question.

22 Q. When you're making a finding that the facts of an
23 offense are at odds with the confession given by a
24 particular defendant in a case, your actual opinion as to
25 the forensic evidence is no greater than a lay witness. You

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1 don't have any sort of specialized training in forensics, do
2 you?

3 A. No. I have specialized training in Social Psychology
4 and I have analyzed hundreds of confession cases. Now,
5 the --

6 Q. But what I'm really interested in when you're analyzing
7 these hundreds of confessions cases, do you consult with the
8 investigators who investigated the case in the initial
9 stages? Do you consult with third party experts who can
10 verify that this is, in fact, evidence for this reason?

11 A. Typically if you're asking what I do as an expert in
12 specific cases is I read police reports, I look at
13 transcripts and if there are recording of interrogations I
14 read those. I take a look at the confession, and yes, I do
15 compare the confession, the facts in that confession to the
16 facts of the case. I look most importantly at who the
17 suspect is and the circumstances under which that suspect
18 was interrogated and the tactics that were used. And all of
19 this is done not with an eye toward establishing an opinion
20 as to whether a particular confession is true or false
21 because that's the jury's job to do, my goal is to simply
22 educate a jury as to what the are the risk factors to watch
23 for. What kinds of people are particularly vulnerable what
24 kinds of interrogation tactics in situations put people in
25 general at risk.

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1 Q. But you understand that the big issue that many other
2 experts have had with your research and those of your
3 colleagues is that when you make these broad conclusions at
4 trial, you reference the Chicago case, you reference the
5 Jonbenet Ramsey case, you're not explaining how that DNA
6 exonerated somebody, scientifically exonerated somebody,
7 getting to the inevitable conclusion that it proves a false
8 confession having that case.

9 A. It's not my goal to explain a particular confession.
10 And just to scale back a bit, those critics you are
11 referring to are not my colleagues. They are not social
12 psychologists, they are not members of the scientific
13 community, and they stand outside of the area. So I can
14 tell you that the scientific community in which I'm a
15 member, they will argue forcefully that the research is well
16 conducted, that the research is reliable, that it has
17 survived the rigorous process of peer review and it has done
18 so at various levels, and that there is a general consensus
19 in the community, both The American Psychological
20 Association and the American Psychology and Law will attest
21 to that.

22 Q. Your methodology is not being criticized for your
23 actual findings or psychological expertise, it's been
24 criticized because you have not been able to establish a
25 rate of error, potential rate of error that can be

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1 potentially objectively analyzed.

2 A. It's not my goal to establish a single error, it can't
3 be done, and I resist any effort on the part of alleged
4 experts to attach a number. You know, the temptation is we
5 want to be like epidemiologists, they want to tell you, for
6 example, in epidemiology what is the prevalence of lung
7 cancer in a particular population like Columbia, South
8 Carolina. We can't do that and I don't think we should even
9 try to do that. What we can do is note that false
10 confessions occur, there have been numbers of proven
11 instances, and that certain factors are more associated with
12 those false confessions than others. And the research that
13 I do in particular is designed to test causal hypothesis
14 about the relationship between certain tactics and certain
15 types of confessions.

16 Q. Without knowing potentially the number of
17 interrogations that occur, the number of false confessions
18 that could possibly have occurred, you're essentially --
19 it's just a case study, ad hoc case study; is that correct?

20 A. No, I don't do case studies. What I do are
21 experiments. I do laboratory experiments, I do field
22 experiments. I demonstrate, for example, that it is very
23 difficult for the average person or even a professional to
24 tell the difference between a true confession and false, and
25 the way I do that is not by speculation and not by case

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1 study. I went into a prison in Boston, I had prisoners
2 confess their crimes to me and I taped them. And then I had
3 those same prisoners by my instruction confess to crimes
4 that they did not commit, make it up, and I taped it. And I
5 showed those tapes to police officers, I showed them to lay
6 people and people cannot accurately distinguish true and
7 false confessions. So on your earlier question about can we
8 tell whether a confession is true or false, that's exactly
9 my point, by looking at it, by listening at it, you can't
10 tell. You have to know something about the context of that
11 confession.

12 Q. But hasn't your particular research been criticized
13 within your community because you're not looking at a
14 suspect charged with a potential serious heinous crime in
15 the interrogation -- in the set of the interrogation itself,
16 you're looking at college students?

17 A. My research has not been criticized in my scientific
18 community as far as I know.

19 Q. So, Dr. Kassin, you're not aware that Dr. Leo, one of
20 your colleagues, has criticized your research because of its
21 inability to translate to a criminal suspect in the setting
22 of an interrogation?

23 A. It depends -- no, I'm not aware of that.

24 Q. And Dr. Kassin, I'm referring to Richard A. Leo, Police
25 Interrogation, American Justice, 199 in 2008. You're not

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1 aware of this at all? That it has been criticized because
2 you're conducting experiments on college students where
3 potentially the consequences of internalized coherent
4 confession as you have stated are minimal, you're not
5 looking at serious prison time, you're unable to replicate
6 an actual scenario of the interrogation of a criminal
7 suspect?

8 A. Of course it's not possible to replicate the stress
9 ethically with human subjects of an actual criminal
10 investigation. But I would argue that there are states in
11 many of these studies that many of the studies involve
12 getting our participants to confess to cheating, and that
13 cheating is defined as a violation of university's academic
14 honor code and the stress level is about as high as we are
15 permitted ethically to create, and yet in those studies we
16 still produce false confessions. And so no, I would
17 disagree, and there's not a single methodology. I think
18 that the elegance and maturity of the science is that there
19 are numerous methods. Richard Leo is a colleague of mine,
20 he is a coauthor on the white paper whose findings that I
21 will be representing in this testimony, he is a coauthor on
22 that white paper. He does a different type of research, he
23 does observational studies. He observes live and videotaped
24 interrogations. He does case studies both individual case
25 studies and aggregated over numbers of case studies. I do

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1 laboratory and field experiments. This is field built on a
2 convergence of a whole lot of methods and a whole lot of
3 people doing different types of things, and yet we are all
4 producing in different ways and in different methods the
5 same basic signals about what the risk factors are and
6 that's why whether Richard Leo is critical of a particular
7 experiment of mine or not, he is fully on board with the
8 basic conclusions of the white paper because he is an author
9 on that white paper.

10 Q. Isn't it correct at Ms. Person's trial you testified
11 that the phenomenon of false confessions, the research
12 behind it you're just hitting the tip of the iceberg?

13 A. What I mean by hitting the tip of the iceberg is that
14 for every false confession that has been discovered there is
15 some large unknown number of false confession cases that
16 have not been discovered. But as far as the research goes,
17 we have reached a level of maturity since my disclaimer in
18 1997 in an article written in 1996, so that's 17 years ago,
19 and in part because of the DNA exoneration cases and in part
20 because of what we now know about wrongful convictions, that
21 literature has exploded. There are hundreds and hundreds of
22 studies all over the world on false confessions.

23 Q. But today in the last 25 years since -- well, the heart
24 of research began I believe in the mid to late eighties and
25 you pioneered this, you and your colleagues have not

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1 conducted a study of a local police department, have you,
2 over a time period?

3 A. Meaning what?

4 Q. Looking at every single interrogation that --

5 A. For what purpose? To answer what question?

6 THE COURT: You don't get to ask the lawyer questions,
7 you answer the questions.

8 Q. And it's not that you're methodology or your findings
9 have been criticized, academically it's that in a court of
10 law your findings have been criticized because there's not
11 sufficient empirical data presented by you to establish a
12 known rate of error to objectively be tested, that's the
13 major concern. If you're just hitting the tip of the
14 iceberg, Dr. Kassin, and you've had 30 years, shouldn't you
15 have had the opportunity to have a random sample on a
16 survey?

17 A. You're using the term tip of iceberg incorrectly. I
18 describe the number of known false confessions as the tip of
19 the iceberg, I do not describe the state of the research as
20 the tip of the iceberg. And as far as whether it is useful
21 or not, my research was cited recently by the U.S. Supreme
22 Court and it has been cited by several state appellate
23 courts. This research is not in question. The fact that
24 false confessions occur is not in question. The fact that
25 search types of people are more vulnerable than others is

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1 not in question. The fact that certain techniques put
2 innocent people at risk is not in question. And none of --
3 no one in the field --

4 Q. But the fact of your admissibility in a court of law
5 still is in question; is that correct?

6 A. Admissibility in court of law is not a statement about
7 the state of the science, it's a statement about the state
8 of law.

9 Q. Dr. Kassin, I'm not disputing your findings, your
10 studies, I'm disputing your admissibility in a court of law.
11 It is still in dispute, am I correct?

12 A. I can't address the law. Yes. Sometimes I have not
13 been admitted as an expert.

14 Q. Tenth Circuit Court of Appeals; is that correct?

15 A. Excuse me?

16 Q. In the Tenth Circuit Court of Appeals you and your
17 colleagues have not been allowed to testify because of
18 concerns regarding the liability of your findings; is that
19 correct?

20 A. Tell me what the case we're talking about.

21 Q. State v. Adams, Tenth Circuit.

22 A. I was not involved in that case.

23 Q. It's not that you're involved, it's the body of
24 research that you and your colleagues have produced and the
25 inability to this point to conduct an empirical study that

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1 involves seeing an area over a period of time, the
2 interrogations that took place, the confessions that were
3 elicited and then analyzing it, it's all been ad hoc case
4 studies.

5 A. You, know there was an investigation several years ago
6 in Suffolk County, New York, where it turned out that in a
7 certain period of years there was a 94 percent confession
8 rate and the National Law Journal went ahead and did an
9 expose in which they found lower confession rates in other
10 jurisdictions. That's all well and good and it may suggest
11 something about certain precincts being more susceptible
12 than others. But if what you're asking is that narrow
13 question can I tell you what the false confession rate is in
14 Columbia, South Carolina, the answer is no, I cannot.

15 Q. Have you even attempted to research the history, or
16 lack thereof, of false confessions elicited by correctional
17 psychiatrists? Have you looked -- have you actually taken
18 the steps to do this besides just saying that it's just
19 impossible to do?

20 A. No. My focus has been on interrogation, police induced
21 confessions taken in the interrogation room.

22 Q. And this is the last question I'll ask you on this.
23 Wouldn't it be helpful to conduct a study where you actually
24 analyzed video/audio confessions over a period of time and
25 then see where the results take you without being

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1 conclusion-based to start your research?

2 A. To learn what?

3 Q. To learn potential frequency, to have an empirical data
4 base of which you can be objectively analyzed for record of
5 error. If you just get up there and testify this is a false
6 confession --

7 A. Currently we are analyzing a series of roughly 1,000
8 case files from precincts across the United States, 500 or
9 so of which contain confessions, we are actually conducting
10 a content analysis of that now, it's, I think, an
11 interesting question. There is always interesting
12 questions, I've got hundreds of things I would like to do
13 that I haven't yet. So if you're asking have we done
14 everything, the answer is no.

15 MR. WHITMIRE: Beg the Court's indulgence.

16 (Break in proceedings.)

17 Q. Dr. Kassin, are you aware of Dr. Michael Welner of the
18 forensic panel has challenged your findings and then stated,
19 "Embellishment does not serve justice, it takes away from
20 the credibility of a legitimate concern." Are you aware of
21 his research?

22 A. He doesn't do research. But I'm aware of the testimony
23 he has given, yeah.

24 Q. Is this a fair assessment?

25 A. The Forensic Panel is his own newsletter it's -- yes.

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1 I know that he has written negatively of me.

2 Q. But he -- didn't the New Jersey Appellate Court cite he
3 and his findings in the opinion in which that you were not
4 admissible -- your testimony was not admissible?

5 A. Yes.

6 Q. And he has also presented on panels throughout the
7 country; is that correct?

8 A. I can't answer for what he has done.

9 Q. What I'm asking is are -- his statement, "Embellishment
10 does not serve justice, it takes away from credibility of
11 legitimate concern," is that a fair assessment?

12 A. No, he's not a scientist. The work I do is published
13 in scientific journals, it goes through a peer review
14 process, we do statistics, we use control groups and
15 comparison groups. And Michael Welner is a forensic
16 psychiatrist, he has a medical degree, he's not trained in
17 research. And so yes, I understand that there are political
18 and ideological forces outside of my field that are
19 critical. But within the field where we are -- really what
20 we're trying to do is establish general principles and not
21 necessarily involve ourselves in the ideology of it, no,
22 he's not in the position to even evaluate the field itself.

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

24 (Break in proceedings.)

25 Q. Do you recall that in State v. Cope you testified you

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1 said, "Coherent internalized false confession is an
2 interesting case, because what happens in private they, the
3 suspect, defendant, are converted, they are persuaded almost
4 in the form of brain washing, but that's not a scientific
5 term. Essentially that's what happens is that people who
6 are in some way vulnerable this happens and this is very
7 predictable." Do you recall that?

8 A. Yes. You got a couple of words wrong, but yes.

9 Q. Also you appeared on a Seattle Radio Station, I
10 believe, in October of 2011 regarding innocent suspects
11 making confessions. You stated, "They don't lawyer up. You
12 want the keys to my car, here it is. You want me clothing,
13 here it is, keys to my house here it is." Do you dispute
14 that?

15 A. No.

16 Q. Furthermore at the trial of Billy Wayne Cope again,
17 didn't you testify that final statements that come after
18 hours of interrogation are a bit of a Hollywood production?

19 A. They can be something of a Hollywood production, yes
20 and we have the data to show it.

21 Q. And in Ms. Person's trial didn't you testify that the
22 goal of interrogation is to take the admission of guilt and
23 blow it into and embellish it into a full narrative
24 statement; is that correct?

25 A. Well, that -- I'm quoting interrogation manuals. Tat

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1 is the goal of interrogation is to first produce a basic
2 admission of guilt, and then to convert that admission of
3 guilt into a full narrative confession. That's not my
4 statement, I'm simply characterizing the practice of
5 interrogation.

6 Q. And when you offer your testimony in trial, do you
7 limit it to testifying regarding the phenomenon of false
8 confession or do you actively get involved in a defendant's
9 case typically?

10 A. Well, it depends on what you mean by actively get
11 involved. If I testify to certain risk factors that
12 research has pointed to and those risk factors are present
13 in a case I will certainly draw that linkage and say, you
14 know, there are these present -- risk factors present in
15 this case. What I will not do, and I've never done and
16 wouldn't do, is try to render an ultimate opinion about the
17 truth or falsity of a confession, because that is something
18 that requires a judge or a jury to make a judgment on the
19 basis of everything they've heard, not just their analysis
20 of the interrogation.

21 Q. And in State v. Cope again, do you recall Solicitor
22 Brackett asking you if you had told defense counsel "You
23 need to get someone to say the polygraph is wrong?"

24 A. I did not say that, that's untrue.

25 MS. LINDSAY: Beg the Court's indulgence.

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1 A. It may not be untrue that he said it but it's untrue --
2 if he quoted me as saying it that's untrue.

3 Q. And when Solicitor Brackett asked this you replied,
4 "Absolutely no, the answer is no." Do you recall that?

5 A. I don't recall it, but I trust I would deny it, yes.

6 Q. And the last thing I believe is Solicitor Brackett
7 actually produced this email that you had sent counsel and
8 you stated, "Yes, that's true."

9 A. Produced the email because that's not what the email
10 says. In State v. Cope the polygraph that was administered
11 to Billy Wayne Cope was an issue, and I'm not a polygraph
12 examiner. So I suggested that the attorneys contact a
13 polygraph scientist to can interpret the results, someone
14 who has published research and, in fact, who has developed
15 numerical scoring techniques to reevaluate the charts, and
16 that result 0whatever that result would have been is what
17 the result would have been.

18 MR. WHITMIRE: Beg the Court's indulgence.

19 (Break in proceedings.)

20 Q. In State v. Cope you testified that your expert
21 testimony is needed because the average juror doesn't
22 understand the principles of psychology, correct?

23 A. Correct.

24 Q. And that the average juror mythologizes the notion that
25 a confessions could be false; is that correct?

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1 A. I don't think I used the word mythologize but it's a
2 very -- false confession is a very counterintuitive
3 phenomenon. And I'm not saying that as a matter of opinion,
4 I'm saying that as an empirical fact, it's a
5 counterintuitive phenomenon. People don't know that people
6 can be induced to confess to crimes they didn't commit.
7 Everybody's baseline intuition tells them, "I would never
8 confess to a crime I did not commit," and they applied that
9 standard about themselves to others, and I understand that,
10 that is what makes sense. In addition people are not aware
11 of what tactics are used in an interrogation that might
12 pressure a suspect to give a false confession. In addition
13 people are not aware of how it is that the various elements
14 contained in a final statement necessarily got there. So I
15 have made an extensive study of numbers of interrogation
16 manuals over the years --

17 Q. Well, actually I'm interested on this particular issue
18 with the jury.

19 MS. LINDSAY: Your Honor, I'm sorry, he was in the
20 middle of an answer.

21 MR. WHITMIRE: It's not responsive to my question.

22 THE COURT: Are you finished answering.

23 THE WITNESS: I'm fine, yes.

24 Q. Have you and your colleagues conducted studies on jury
25 panels to see the rate in which they accept the idea that a

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1 false -- a confession could be false?

2 A. Yes.

3 Q. Could you elaborate on those studies?

4 A. There are two types of studies that myself and
5 colleagues have conducted. One involves surveys in which
6 people are asked questions like, "Would you ever confess to
7 a crime that you did not commit? Do you think anybody short
8 of having their life threatened would ever confess to a
9 crime they did not commit? And what conditions would that
10 happen." And uniformly the result is that people are
11 skeptical and don't believe in false confessions. I have
12 done mock jury studies where people come in and they receive
13 trial material often in the form of a transcript, sometimes
14 in the form of a video, in which there is or is not a
15 confession. And I often vary in dramatic ways the
16 circumstances under which the confession was taken such
17 that, for example, jurors often read a case where there's no
18 confession or exactly the same case where there's a
19 confession produced under relatively little amounts of
20 pressure. And then I have had another group and they're all
21 randomly assigned to one or the other of these versions read
22 a case where the confession is produced under extraordinary
23 amounts of pressure. And what happens in that third
24 condition is that jurors understand that that third
25 situation is coercive. They argue, in fact, they will make

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1 the judgment that that is a coerced confession. But then
2 when asked for a verdict, even though that confession is the
3 only real evidence in the case, they will still use that
4 evidence, that confession, as a basis for conviction. So
5 what the research does show is that while people intuitively
6 understand coercion, they still don't believe that an
7 innocent person would confess.

8 Q. But you agree that that's skeptical is different from
9 absolutely not, being skeptical that something
10 counterintuitive would occur is natural.

11 A. I don't believe as a psychologist anything is all or
12 none when it comes to people. People are very, very
13 reluctant to believe it.

14 Q. Have you conducted studies of jury panels or mock
15 studies that show a certain percentage that say a false
16 confession cannot exist, will not exist?

17 A. Well, I don't ask them can it exist, I ask them what
18 inference of guilt they draw from a confession that was
19 highly coerced, and we've done this a number of times in
20 studies that have been replicated by others. It's actually
21 kind of interesting, because not only do people trust
22 confessions when given by a particular defendant, but when
23 told that the confession was presented secondhand by an
24 informant who was highly incentivized to lie people say,
25 "Well I don't trust that statement," but then that statement

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1 increases their probability of convictions significantly.

2 So again, people have a tough time looking past the
3 confession and that's what makes it difficult. In addition
4 I've shown that people cannot distinguish --

5 Q. But isn't a confession a piece of evidence, it's an
6 admission? It's essentially going to be prejudicial, would
7 you agree?

8 A. Well, it's more than prejudicial. Even when it's
9 discredited it doesn't -- the affect lingers, and that is
10 the issue where confession is that the a lingers. And to
11 make matters worse, confession not only has this
12 overwhelming affect on juries, it also has that effect on
13 others involved in the process. So for example, there is
14 research showing that when individuals are aware of the
15 presence of a confession and they're listening to degraded
16 speech recordings, they are more likely to hear
17 incriminating information coming from the lips of the
18 suspect when they believe that suspect had confessed. I
19 have found that when I stage a crime and people become eye
20 witnesses and make an identification, if they later find out
21 that one of the members of the lineup confessed, they change
22 their -- more 50 percent change their identification with a
23 high level of confidence in identifying the confessor.

24 Q. And your identification research has been held in high
25 regard, that's correct?

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1 A. My identification research?

2 Q. The research and your testimony and admissibility of
3 trial, it's really not in dispute; is that correct?

4 A. Well, it depends on whether you're talking about my --
5 in the scientific community or in law? Again, I can't --

6 Q. We're hear talking about law, reliability of your
7 admissibility of being an expert.

8 A. I've testified in a number of states, military courts,
9 federal trials. I have not been able to -- I've not been
10 permitted to testify in some cases, that's correct.

11 Q. But unlike your proffer testimony regarding eye
12 witnesses identification, this particular field of your
13 research, the false confession, has dealt with a lot more
14 hostility towards admission at court; is that correct?

15 A. Yes.

16 Q. And today, just getting back to my original inquiry,
17 you can't tell me out of -- you have conducted a study of
18 100 potential jurors, that X numbers of jurors believed a
19 false confession could eve occur.

20 A. I have not done that study.

21 Q. Just a few more questions for you. Who is Dr. Leo?

22 A. Richard Leo is a criminologist by training, and I
23 believe he is employed with the University of San Francisco
24 Law School. He's also a lawyer. He has got a JD and a Ph.D
25 in Criminology.

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1 Q. And who is Dr. Richard Ofshe?

2 A. He is a sociologist who became interested in false
3 confessions through his interest in high pressure influence
4 groups, I believe he got interested in the 1990's.

5 Q. And Dr. Wrightsman?

6 A. Wrightsman?

7 Q. Yes.

8 A. Is a social psychologist at the University of Kansas.

9 Q. And all of these people have testified in your field in
10 courts of laws; is that correct?

11 A. I don't know if Dr. Wrightsman has testified.

12 Dr. Ofshe and Dr. Leo testify a great amount. I tend not to
13 do a lot of testimony for -- I get hundreds of calls, I
14 probably testify once or twice a year at most. But I tend
15 to refer a lot of cases to others, and Dr. Leo is one of
16 those others I have tended to refer cases to.

17 Q. What I'm interested in, in the instances where you and
18 your colleagues have testified at trial, how often do the
19 jury return verdicts of not guilty?

20 A. I don't know.

21 Q. Wouldn't that be an important statistic to keep up with
22 when you're offering testimony to the potential issues
23 concerning the confession?

24 A. To determine if we're effective?

25 Q. No. To determine if it's a false confession, the jury

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1 would have acquitted and you would have added that to your
2 research, do you agree?

3 A. No. I mean, that's not an interesting question to me.
4 But in some ways there's no way to know. There are
5 several -- I list -- actually I personally recommend on my
6 website 12 or 13 or 14 other experts because, again, I try
7 to not take on cases. And at one point couple of years ago
8 I emailed all of them to ask -- to indicate states in which
9 they've testified, and there is a high level of activity of
10 their giving testimony in a high number of states. I never
11 ask them, to get to your question, whether the cases in
12 which they testify resulted in conviction or acquittal.

13 Q. The impotence of my question is the result of, wouldn't
14 this be good research to show that, in fact, juries are not
15 aware of potential issues concerning interrogations and that
16 your testimony itself proves that?

17 A. How does it do that?

18 Q. The rate of acquittal versus the rate of acquittal for
19 other cases in that jurisdiction.

20 A. But that would not be -- see, that's not good science.
21 Because the cases in which an expert are admitted are so
22 different in so many ways from those cases in which an
23 expert is not admitted, that to draw any conclusion about
24 differences and attribute that difference to the expert's
25 presence would be misleading.

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1 Q. Isn't the jury the ultimate decider of credibility?

2 A. Of course, but that's not a clean scientific
3 comparison, that's not an experimental group and a control
4 group in which everything is held constant except for the
5 presence of the expert. There are too many other
6 differences between those cases.

7 Q. But you've made the conclusion numerous times that the
8 average juror cannot understand a false confession could
9 occur or that certain police tactics are coercive as the
10 reason for you testifying; is that correct?

11 A. Yes.

12 MR. WHITMIRE: No further questions, Your Honor.

13 MS. LINDSAY: Do I need a quick argument as to why he
14 should be admitted as an expert or do we move on?

15 THE COURT: Do y'all have some objection to his
16 admission?

17 MR. WHITMIRE: Your Honor, we object to his
18 admissibility pursuant to Rule 104-702, this issue has not
19 been cited but or appellate courts. Respondent would be
20 happy to stipulate to his further testimony and brief the
21 issue at a later time for Your Honor's discretion.

22 MS. LINDSAY: And for us, he testified at trial. Our
23 argument is simply --

24 THE COURT: My understanding, the purpose of this
25 witness is that the applicant is saying that this witness

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1 should have testified at the Jackson v. Denno hearing
2 because this witness would have brought information to the
3 Judge that would have convinced the Judge that the statement
4 was so coerced that the statement should not have been
5 allowed to be admitted in the trial itself, is that correct?
6 Would that be a fair assessment?

7 MS. LINDSAY: Yes, sir. And we believe that if he
8 would had been allowed to testify at the Jackson v. Denno
9 outside the presence of a jury he would have been able to
10 testify more thoroughly on issues such as the polygraph, and
11 the use of polygraphs in proving false confession cases.

12 THE COURT: Well, I read his testimony at trial, at
13 least the direct examination of his testimony at trial. I
14 didn't see where there was any effort to stop or curtail
15 what he could testify about, he offered his opinions. I
16 don't think he offered an opinion as to the ultimate issue
17 of was the confession false.

18 MS. LINDSAY: He did not, and he won't today as well.

19 THE COURT: Well, I mean, but generally an expert can
20 offer those opinions. But where was he stopped in the trial
21 as to being able to testify to whatever Pringle wanted him
22 to testify to?

23 MS. LINDSAY: Well, like I said, the polygraph -- they
24 had already agreed that the polygraph wasn't coming in in
25 front of the jury at all. And just the --

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1 THE COURT: Well --

2 MS. LINDSAY: -- her interrogation in general, it
3 involves three different babies and there was already a
4 severance motion which --

5 THE COURT: Well, I clearly understand that. I
6 think -- he was allowed to testify at trial by virtue of
7 Judge Lee determined he was an expert, he could testify at
8 the trial, so I would surmise she would have allowed him to
9 testify at the Jackson v. Denno hearing. So I understand
10 under State v. Council the criteria as to reliability and I
11 may have some issue in my mind as to its reliability, but
12 the Court allowed it to come in and I think for purposes of
13 continuity he could testify at the trial that he would have
14 been able to testify if they would have called him at the
15 Jackson v. Denno hearing. So for that purpose I'm going to
16 allow him to testify. I'm going to find he's an expert and
17 his expertise is limited to what he was an expert at the
18 trial and I think it was as a social psychologist with
19 sub -- I can't remember what, subtitled or sub areas or
20 fields.

21 MS. LINDSAY: Correct, false confessions and police
22 interrogations.

23 THE COURT: And I'm going to for purposes of that.

24 MR. WHITMIRE: Your Honor, just for the record in terms
25 of PCR to come back around that's why we're here today,

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1 analyzing deficiency of counsel in the prevailing norms, the
2 State's position that false confession experts, their
3 testimony has never been actually condoned by the courts,
4 never been up on appeal, it's still a novel issue all of
5 that, in fact, it wouldn't honor Jones requirements and
6 therefore counsel could not be deficient for something that
7 she's not be going to be able to defend.

8 THE COURT: Well no, that may be your ultimate argument
9 but it doesn't have anything to do with where we are at this
10 stage of the process. I think every juror in the world
11 would understand that there are some instances where a
12 confession could be coerced, and I don't know that it takes
13 a scientist to get up and testify as to that. All right.
14 Proceed there, Ms. Lindsay.

15 MS. LINDSAY: Thank you Your Honor.

16 BY MS. LINDSAY:

17 Q. Dr. Kassin, I don't -- I feel like you hit this
18 generally with Mr. Whitmire. But generally, what is a false
19 confession, the different categories of false confessions?

20 A. In part because I think it's dangerous to extrapolate
21 and make assumptions and come up with some kind of incidents
22 rate of false confessions, what I have done is looking at
23 known proven false confession cases in history, I've looked
24 at whether or not they all fit in a certain type of mold.
25 And it turns out and we -- my colleague and I published this

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1 in 1985, there were three types of false confessions. There
2 is the first category known as voluntary false confessions.
3 These are cases where individuals who are not interrogated
4 by police usually in cases where there are high profile
5 crimes will step forward and volunteer confessions to that
6 crime. The classic instance of this was in 1932 when
7 Charles Lindbergh's baby was kidnapped 200 people
8 volunteered confessions. A more recent instance of that
9 comes from, I think, Boulder, Colorado recently where John
10 Mark Karr testified and confessed to killing Jonbenet
11 Ramsey, and, in fact, the Boulder DA's office dropped the
12 charges and never charged him because he wasn't -- the
13 physical evidence suggested he wasn't involved. These are
14 voluntary false confession cases, they don't tend to pose a
15 problem for the system, because when police are confronted
16 with a voluntary false confession they react, I think, with
17 a certain degree of suspicion and they ask the confessor to
18 demonstrate guilty knowledge to basically demonstrate that
19 he knows things about the crime that were not publicly
20 available in the newspapers, and that's where false
21 confessions who were voluntary in that way, they drop out of
22 the system. In contrast to the voluntary false confessions,
23 and these happen, by the way, for a variety of reasons,
24 often they're crazy people. In contrast to those are two
25 other categories of confession that are induced by the

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1 process of interrogation. So these individuals who are
2 brought in and at first they deny involvement, and then as a
3 result of the process of interrogation they now transition
4 from denial to making some kind of statement, there are two
5 of those types, there is by far the more common type which
6 we called compliant false confessions. These are people who
7 are innocent, who know they're innocent but who are so
8 stressed by the situation or so broken down by the situation
9 or feel trapped by the situation they're in that they're no
10 longer thinking about the long-term consequence, they
11 basically say, "You know, what I just want to get out of
12 here." And so these are cases where the individual agrees
13 to sign a statement but then usually as soon as an attorney
14 appears they retract the statement and say, "I was coerced,
15 I didn't do it." There are a number of instances of that
16 and, in fact, nationally you can see numbers of these cases.
17 The Central Park Five case in New York City is an example
18 where five teenagers gave false confessions to a crime for
19 which they were later DNA exonerated. That's, I think,
20 relatively straight forward for people to understand that
21 everybody has a breaking point and that certain factors can
22 tip people over the edge. The third type of false
23 confession is what we call internalized false confessions.
24 These are cases where as a result of a highly leading and
25 suggestive method of interrogation innocent people not only

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1 agree to confess, they actually come to believe in their own
2 guilt. These are very tricky cases, but you see them all
3 over the country. There is a gentleman, for example, in
4 Illinois by the name of Gary Gauger who lived with his
5 parents on a farm in Illinois, and his parents -- the next
6 morning he found them dead and called the police. And they
7 eventually brought him in, he was subjected to many hours of
8 interrogation, he was lied to about evidence. Ultimately he
9 signed a statement and said he was confused, they told him
10 he had failed an infallible polygraph and he got confused.
11 He figured, "Maybe I could have done this and blacked out,"
12 and he eventually signed a statement and was convicted,
13 imprisoned and actually put on death row for a period of
14 time. And then some time afterward as a result of another
15 investigation a surveillance tape of a motorcycle gang
16 picked them up discussing how they murdered Gary Gauger's
17 parents and got away with it. They were ultimately
18 apprehended, charged and convicted and Gauger was set free.
19 There was a case where he says now and said then he actually
20 believed it. He was so confused by the polygraph and the
21 lies that he came to believe it. So that's the third type
22 of false confession. And, you know, this was a taxonomy
23 that we wrote about in 1985, it is universally accepted, you
24 can see evidence for it across the world, and in fact, it is
25 often referred to in interrogation manuals. In the Reid

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1 Technique Manual, for example, they talk about these three
2 types of false confession.

3 Q. And now just to be clear, the last two, the complaint
4 and internalized, those are the result of interrogations and
5 often the presentation of false evidence.

6 A. Yes.

7 Q. Okay. So false confessions actually do happen.

8 A. Yes.

9 Q. And as you touched on earlier, you really can't know
10 the rate at which they happen; is that correct?

11 A. We not only don't know the rate, but we don't know the
12 scope. For example, we're talking about false confessions
13 in a police station in the criminal justice system, but
14 we're all familiar with false confessions that America POW's
15 have had to give over the years if captured and tortured or
16 threatened, and they're put on camera to confess to war
17 crimes they didn't actually commit, so within a military
18 setting there is body of literature on false confessions.
19 And then there is a category of false confessions that can
20 be found in the loss prevention business. Loss prevention
21 managers are often trained in the same techniques that
22 police interrogators are trained in, and their goal is when
23 there is theft within the company they try to identify a
24 suspect and bring that suspect in for interrogation and try
25 to get that suspect to confess to the theft. Once they do

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1 that they try to get the suspect to then agree to return the
2 money. So there is a case I was an expert in in California,
3 for example, in which an individual had sued Auto Zone
4 because they brought him there to confess to stealing \$837,
5 in his mind it was worth \$837 to save his job which he
6 thought was the outcome of giving a statement. They got him
7 to sign a promissory note in which he agreed to pay back the
8 money from future paychecks and then he was terminated, and
9 then subsequent to that the money was found in the system,
10 it was a clerical error. He then turned around and sued
11 Auto Zone, at which point other former employees came out
12 and said the same thing had happened to me. So there is not
13 just criminal justice but in military and loss prevention
14 settings false confessions. And I should add, it's not just
15 an American issue, it happens all over the world. Wherever
16 criminal justice records are kept false confessions are
17 found. Historically in Japan and in China a the confession
18 rates overall are up around 95 or 96 percent, they're only
19 now coming to recognize the problem that many of them
20 probably were innocent. So it's a universal problem. False
21 confession is something that I think most of us are just
22 aware of now, in the post DNA world that we can actually
23 prove them, but it has been around forever. In the United
24 States before we were a country you found them in the Salem
25 witch trials. So it's a common phenomenon historically,

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1 universally and not just in criminal justice.

2 THE COURT: Dr., let me ask you a question. In this
3 particular case, is it your position that the confession was
4 an internalized false confession? She had come to believe
5 it because of for whatever reason. So is there really any
6 reason to go in to the other types of false confessions, the
7 ones that shows up and says, "I did it, let me be on TV, or
8 two, "Somebody has berated me for 46 hours in a row so I'm
9 finally going to break?" Do we need to go in to those?

10 THE WITNESS: It's not my position that it's a false
11 confession, I'm not stating it's a false confession, but of
12 the possible --

13 THE COURT: No. I understand you didn't ever conclude
14 that her confession was false, but that would be the
15 category that she would fall in based upon the facts as you
16 understand them.

17 THE WITNESS: Yes, sir.

18 MS. LINDSAY: I can move into the risk factors. Okay.
19 Q. How helpful is it when examining a confession to have a
20 recording of it?

21 A. It's almost essential.

22 Q. What can someone gain by knowing all of the details
23 leading up to the confession regarding the interrogation --

24 A. What you see in a recording, and this is why increasing
25 numbers of states have mandated the recording of

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1 interrogations, is you see first of all the physical
2 appearance of the suspect. You see how they're dressed and
3 what their demeanor looks like, and you also get to evaluate
4 two aspects of the process by which that --

5 THE COURT: Let me interrupt you again. You're talking
6 about a video recording as opposed to an audio recording?

7 MS. LINDSAY: Either is really my question.

8 THE COURT: Well, I mean, if you're talking about the
9 dress, the audio recording is not necessarily to -- unless
10 they said, "What have you got on, Ms. Smith?"

11 Q. I guess the question is video would be preferred but is
12 any recording helpful?

13 A. Yes. You know, I think the first great benefit comes
14 from audio recording. I think there's some additional
15 benefit from going to video for these purposes.

16 Q. And isn't it true that many states now require
17 recordings before confessions?

18 A. Yes, sir.

19 Q. Are there certain individual or personality traits that
20 have you found in your research to be more prevalent in
21 proving false confession cases?

22 A. Yes.

23 Q. Could you elaborate on what some of those traits are?

24 A. When you look at the cases involving proven false
25 confessions, and then you look at laboratory experiments

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1 that collaborate those patterns, what you see is that
2 certain types of people are more vulnerable than others. So
3 for example, one important very important vulnerability
4 factor is age, juveniles are more vulnerable than adults
5 are. People with low IQ's, people particularly who are
6 mentally retarded, but otherwise cognitively impaired are at
7 greater risk. People with certain types of mental illness,
8 so for example people who are socially anxiousness and are
9 particularly anxiousness in confrontational situations or
10 people who are delusional and can't quite get a grasp on
11 what reality is, they're mother vulnerable to manipulation.
12 And then -- and this will be search is not my own, but
13 mostly Gisli Gudjonsson's and others, is that people with
14 personalities that make them compliant or suggestible are at
15 increased risk for false confessions.

16 Q. Would a clinical psychologist -- as opposed to you,
17 would a clinical psychologist be qualified to evaluate
18 someone to determine their personality traits?

19 A. Yes. That is not something I would do.

20 Q. And how could you use that evaluation had there been
21 one in this case?

22 A. Well, it would tell me whether or not the defendant had
23 a dispositional vulnerability. In a case where, for
24 example, she says, "You know, I signed the statement but I
25 didn't do it, the statement was coerced and it was false,"

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1 one of my immediate reactions would be I would like to know
2 how vulnerable she was in the first place. And that testing
3 is an important metric of that vulnerability.

4 Q. And on the same lines, are some people -- have you
5 found in your research are some people just more trusting of
6 law enforcement?

7 A. Yes. One of the very interesting dispositional factors
8 suggests that being innocent in some ways is a risk factor
9 because innocent people don't believe they need an attorney.
10 They're more likely empirically more likely to waive their
11 Miranda rights. They're more likely in studies we have done
12 to waive their right to a lineup when offered an opportunity
13 to get out more quickly with a show-up. Innocent people
14 don't understand and apprehend the risks. They believe
15 injustice, they believe that the world is a fair place and
16 they believe ultimately that their innocence will prevail.
17 Ironically that means that they are more likely to put
18 themselves through the system and agree to talk and agree to
19 waive their rights and agree to take a polygraph and
20 whatnot.

21 Q. So if someone has had no prior contact with law
22 enforcement, have you found that they tend to be more
23 trusting of the process?

24 A. Yes. I worry less about people who have been through
25 the system before, they've been interrogated or arrested

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1 before, they are street smart and they now how it works. I
2 worry less about them than I would -- and again, there are
3 I'm empirical reasons for this -- someone who for example
4 has never been in trouble before.

5 Q. Do you also look for factors related to the current
6 situation a person is in such as a state of high stress,
7 grief or they're sleep or food deprived?

8 A. Yes.

9 Q. Would it be relevant in looking at a confession to know
10 whether the person was a diabetic and had not taken their
11 medicine that day?

12 A. Yes.

13 Q. If Andrea Person had testified at the Jackson v. Denno
14 pretrial hearing before you and you would have also
15 testified, and she would have said she was diabetic, had not
16 eaten, was under high stress, would you have been able to
17 then testify more fully to those factors?

18 A. I would have testified that she was in a state of
19 biological need depravation, just as sleep depravation and
20 food depravation would produce, and what that does is it
21 creates in her a sense of urgency. There is 100 plus years
22 of research in psychology in a range of settings and context
23 showing that people when faced with a tough decision where
24 there's a short term and a long term consequence. In
25 general people tend to be myopic, they tend to be short

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1 sighted particularly whether it's urgent. So when people
2 are under great stress or when they are isolated and feel
3 very alone, when for example if a diabetic needs to get an
4 insulin shot or to eat, that person now is in a state of
5 great urgency and that increases the likelihood that they
6 will do whatever it takes to stop the short term pain, and
7 they think less about the long term consequence when they're
8 in that kind of situation.

9 THE COURT: Let me interrupt again. Doctor, is that
10 something you would want to know before you testified?

11 THE WITNESS: Yes.

12 Q. When analyzing confessions, do you also look at the
13 interrogation itself? And what I'm getting at is the
14 difference between an interview and an interrogation, and
15 the common kinds of interrogations that you've done research
16 on.

17 A. Yes. An interview and an interrogation is an important
18 distinction to me. Because the leading interrogation
19 trainers in the country make a very sharp distinction
20 between what they call the interview, which is a
21 non-confrontational process, an open-ended information
22 gathering process where the goal is to not just ask
23 questions and get information from the potential suspect,
24 but to try to determine if the suspect is lying or telling
25 the truth. That's kind of an early diagnostic test. And

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1 then from the judgment they make they move on to either
2 interrogate that person or send them home. That means by
3 definition interrogation is guilt presumptive process. By
4 the time a suspect is interrogated according to these
5 manuals that is a suspect for whom the interrogator has
6 already decided is likely guilty. Now, within the
7 interrogation peridine, interrogation in the United States
8 is a confrontational process, I think we all know that. You
9 can see the Supreme Court's ruling in Miranda which they
10 talk about what they understand American interrogation to
11 be. So it is clear that there were are certain aspects of
12 the interrogation setting that can increase or decrease the
13 likelihood that somebody will confess, and that somebody
14 innocent would confess.

15 Q. And so without a video or at minimum an audio recording
16 it would -- there is really no way to know whether an
17 interrogation was an interview or an interrogation.

18 A. Correct. And more specifically there are two values to
19 seeing or hearing the interviewer or interrogation and it's
20 this: At a Jackson v. Denno hearing a judge is asked to
21 rule on voluntariness. Personally I don't know how you can
22 know the voluntariness of the situation unless you have
23 watched or heard the kind of pressure that was bearing on
24 the suspect, secondhand accounts just are not sufficient.
25 And in this case, for example, it turns out that the

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1 secondhand accounts that come both from law enforcement and
2 from the defendant are at odds with each other, they give
3 different accounts. To be honest, I can't evaluate a
4 situation like that.

5 Q. And just to be clear, the defendant didn't give her
6 account in the Jackson v. Denno.

7 A. Correct.

8 THE COURT: Let me ask, is it your position that any
9 statement that's not recorded in some form or fashion should
10 not be admitted?

11 THE WITNESS: I would love to see that legislated, but
12 no, I understand that that's not going to happen in all
13 cases. However, sometimes confession are taken in
14 situations where taping facilities are not available,
15 sometimes the defendant confesses out on the street or in a
16 police car and you don't have a tape recorder.

17 THE COURT: Was there anything -- would your testimony
18 have been any different at the Jackson v. Denno hearing than
19 it was at the trial?

20 THE WITNESS: Yes.

21 THE COURT: What?

22 THE WITNESS: It would have pertained both to
23 dispositional risk factors. When I first looked at the case
24 I did not know about the personality testing that only --
25 now I've got personality test results I didn't have then, I

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1 would have testified to those. And second and very
2 important, I think the central component of that --

3 THE COURT: Wait a minute. You would have testified if
4 testing had been done -- no. The testimony you gave knowing
5 what you knew at the time of the trial, would it have been
6 any different than at the Jackson v. Denno hearing? Not
7 what you've learned since.

8 THE WITNESS: Well, what I've learned since make some
9 factors more relevant now than they were then.

10 THE COURT: I didn't ask that. Is there anything based
11 upon the information you had at the time of the trial, would
12 it have been any different at the Jackson v. Denno hearing?

13 THE WITNESS: Yes.

14 THE COURT: Tell me why it would have been different.

15 THE WITNESS: Probably the central focus of difference
16 would have been on the polygraph. The polygraph is an
17 important --

18 THE COURT: Well, that was determined that this wasn't
19 being admissible, that wasn't admitted. I mean, you claim
20 that you would have liked to have known that she hadn't
21 eaten and all of that stuff, well, that information was
22 available to you if you've talked to her.

23 THE WITNESS: Yes. No, I knew that. I did not know
24 about the personality test results.

25 THE COURT: And when were they done?

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1 THE WITNESS: This week I believe.

2 THE COURT: All right. Well, that information wasn't
3 available to you.

4 THE WITNESS: Correct.

5 THE COURT: So I mean, the only thing we can offer is
6 what was available to you at the time of trial.

7 THE WITNESS: Correct. What was available to me at the
8 time of the trial that I could not talk about at trial,
9 these were the constraints.

10 THE COURT: I understand that. Well, do you think it
11 would have been different at Jackson v. Denno?

12 THE WITNESS: Yes.

13 MS. LINDSAY: Your Honor, just briefly, our argument
14 was that one of the reasons they were ineffective was for
15 not having her say psychologically evaluated at the time so
16 that he could testify to that. And also the reason the
17 polygraph -- the polygraph was sort of a central feature and
18 tool in her interrogation and he could have testified to
19 Judge Lee about that outside of the presence of the jury, he
20 just couldn't testify to that in front of a jury.

21 THE COURT: Well, I don't know that he could have
22 testified if judge Lee had ruled it wasn't relevant and it
23 wasn't coming in, how do you know -- I'm not hearing from
24 more than one lawyer -- so how do you know that she would
25 have said, "Oh, okay?"

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1 MS. LINDSAY: Well, she heard extensive testimony from
2 the polygraph examiner, it's just tat the defense didn't
3 offer anyone in reply to that.

4 THE COURT: But the polygraph itself wasn't going to be
5 admitted and wasn't going to be discussed.

6 MS. LINDSAY: And honestly we don't have any argument
7 with the results of the polygraph, we don't really care what
8 they were, it was just the use of the polygraph, how it was
9 used.

10 THE COURT: All right.

11 Q. Okay. Briefly, the most common interrogation
12 technique.

13 A. Well, interrogation follows a process and the process
14 involves confronting the suspect with an accusation of
15 guilt, refusing to accept denials, a process that can go on
16 for any length of time. And then often as part of that
17 process of breaking the suspect down into a state of despair
18 and hopelessness is sometimes presenting false evidence to
19 the suspect, basically pretending to have evidence that
20 doesn't exist. That tends to get a suspect sometimes
21 confused about reality or more likely feel trapped by the
22 weight of other evidence that seems to be out there. That
23 leads a suspect to feel a need to try and find a way out and
24 even to cooperate. The second process involved in all of
25 this, and this requires at the outset that the suspect be

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1 isolated, that the suspect not be interrogated in the
2 presence of friends or a lawyer and whatnot -- the second
3 aspect of the process is what has often been referred to as
4 minimization. Interrogators develop minimization themes.
5 They lead a suspect to believe that what we think you did is
6 not so bad, and if it's not so bad then maybe it's not all
7 that punishable, that we don't think morally it's a bad
8 thing that you've done. That minimization process is
9 interesting, it's perfectly lawful, but whereas making
10 explicit promises of leniency or immunity from prosecution
11 is not lawful, minimizing remarks are lawful. Research
12 shows that often when certain minimizing remarks are made,
13 people who hear them infer leniency and punishment as if
14 they were hearing an offer of leniency. So when a suspect
15 is in a state of urgency broken down and feeling trapped by
16 the weight of other evidence and offered what appears to be
17 a way out, and in this case that way out is "I don't think
18 what you did was so bad, I've got a couple of friends who
19 did the same kind of thing, it doesn't make you a bad
20 person." Those are the kind of remarks and other aspects
21 that the defendant testified to suggesting a heavy use of
22 minimization themes, that often is the precursor to the
23 false confession because it offers a way out of this very
24 bad situation.

25 Q. Let's go to the polygraph and the use of it. Can you

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1 testify generally first about the use of polygraphs in false
2 confessions?

3 A. Yes. In almost every state polygraph evidence is not
4 admissible. So when a polygraph is used sometimes it is
5 used for the purpose of determining if a suspect should
6 become a suspect, identifying truth and deception, and
7 sometimes it is used for a different purpose, for the sole
8 purpose of leveraging a confession. That's the way it was
9 used in this case. It was used such that a polygraph was
10 administered, I'm not in a position so evaluate the protocol
11 or the charts or how it was administered, but the fact is
12 that even by the polygraph examiners own --

13 MR. WHITMIRE: Your Honor, I'm going to object to
14 speculation, there's no foundation for this testimony. He
15 has not seen the video or any recording of the actual
16 interrogation with Ms. Person or anyone else, it's just
17 generic. He's making grand assumptions.

18 THE COURT: Well, I read the Jackson v. Denno, I'm
19 reading it, I couldn't tell you if why they were doing it
20 for purposes of a confession or purposes of determining
21 what, if any, involvement she might have had in the thing.
22 I'm going to let him say what he wants, I don't know how
23 much I believe it.

24 A. If I may clarify. Detective White, who administered
25 the polygraph exam, admitted in testimony that she passed

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1 the first test and he told her so, that the second test
2 result was inconclusive, but then he misrepresented that --

3 MR. WHITMIRE: Objection, improper opinion testimony.
4 Dr. Kassin is not a licensed or has any training whatsoever
5 in reading polygraph machines.

6 THE COURT: Look, I read it, and he can testify to what
7 he believes the -- wasn't it Lieutenant White?

8 THE WITNESS: Yes.

9 THE COURT: He said what he said really.

10 Q. Continue.

11 A. Lieutenant White admitted that he told her that she did
12 not clear the test, and that, in fact, is a tactic he has
13 used before, that's part of what polygraph examiners do
14 during a post-test interview. So while knowing that the
15 test result was inconclusive, he led her to believe
16 otherwise. The reason that is relevant in this case is that
17 when you look at the known false confession cases that are
18 found say in the DNA exonerations of the innocence project
19 or the registry of -- National Registry of Exonerations out
20 of Northwestern and the University of Michigan, what you see
21 is that in a very large number of false confession cases
22 polygraph evidence, misrepresentations of the polygraph were
23 used. I had mentioned earlier one tactic that is often used
24 is to misrepresent the evidence to a suspect. The polygraph
25 is a particularly potent form of evidence because it appears

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1 scientific, it appears medical. Often the polygraph is
2 presented as a device that can tell us things about yourself
3 that even you can't recall.

4 Q. On that not -- I didn't mean a interrupt you, but
5 briefly, what is a lay person's general impression of a
6 polygraph based on your research?

7 A. Most people believe that the polygraph is a reliable
8 instrument, and under properly used circumstances it can be
9 a reliable instrument.

10 Q. So whether or not regardless of what the results are,
11 telling someone that they failed could have a strong
12 impression on them.

13 A. Yes.

14 Q. And you've seen in your research in proven false
15 confessions cases where telling someone that they failed has
16 ultimately led it a confession.

17 A. Yes. And it's important to note that it's not just the
18 polygraph -- the polygraph is a subversion of really just a
19 type of a false evidence presentation, I think a
20 particularly powerful type. Several years ago a
21 psychologist at the University of Minnesota by the name of
22 David Licken wrote a book in which he referred to polygraph
23 induced false confessions as the fourth degree. The
24 National Academy of Sciences in reviewing the research on
25 polygraph and polygraph reliability cautioned about

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1 polygraph induced false confessions, and that's the National
2 Academy of Sciences, that's an outside external review board
3 not of people like me or my colleagues, but people who
4 reviewed polygraph records. So the polygraph plays an
5 important rule. I was not able to testify to that at trial,
6 and I would have liked to because I think it played an
7 important role. And I think that understanding the
8 confession for a jury would have been very difficult without
9 knowing this piece of the puzzle.

10 Q. Could you testify briefly to the forensic bias that can
11 come into play with a polygraph examiner himself?

12 A. There is published studies, some out of Israel, some
13 closer to home, showing that when polygraph examiners are
14 led to believe, for example, that the suspect they are
15 polygraphing is guilty, and in one study they did that by
16 telling them they confessed, that they later interpret
17 ambiguous charts as incriminating and it affects their
18 judgment about the charts. Now, that's not a shot at
19 polygraph examiners. In fact, you can see this with other
20 expert groups. People change their views of handwriting
21 samples and whether they match a crime scene sample. Itiel
22 Dror, a cognitive psychologist in London has published a
23 number of studies showing that some number of fingerprint
24 expert judgments are altered when they find out, for
25 example, that the defendant had confessed, that they're more

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1 likely to see that as a match. So there are a number of
2 studies showing that once some forensic examiners, or in
3 some cases lay witnesses, hear that there is a confession
4 that corrupts and taints their interpretation of new
5 evidence.

6 Q. Also somewhat relating to the polygraph, or related to
7 the polygraph, when she came in that day it's your
8 understanding -- Andrea, when they came involuntarily to the
9 sheriff's department that day, she was told she was going to
10 be interviewed about victim number three, and she was, in
11 fact, polygraphed subsequently about victims number one and
12 two and wasn't told about that previously. She was
13 blindsided by that.

14 A. Yes.

15 Q. In your proven false confession cases, how does
16 accusing someone of multiple crimes, how does that play into
17 someone's psyche?

18 A. There's no research on that specific question. My
19 concern is the research we do about people who give false
20 confessions, we try to analyze and get from them their own
21 reports as to why. And my concern here is that this being a
22 case that was some nine plus, ten years old, that in her
23 mind -- and she had a resolution to that case, she was told
24 that this child died of pneumonia, that in her mind this
25 case was already resolved. It's just not clear that brought

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1 back nine, ten years later, not knowing this was coming and
2 thinking the case is resolved, it's just not clear what she
3 apprehended to be the risk of giving a statement in a case
4 she considered closed.

5 Q. In relation to that, can you talk about the
6 minimization techniques and the promises that she can go
7 home or it was just an accident, it doesn't make you a bad
8 person, how that could play into it with a crime that was
9 ten year old?

10 A. Well, again, what actually happened is not all that
11 clear to me because there isn't a recording. There are some
12 accounts, Lieutenant White, for example, testifies that he's
13 aware of minimization themes and that that is something that
14 he has done. On the other hand, Detectives Wilson and
15 Eisenhower suggests that all they really did over the course
16 of those hours is have a conversation, and from their
17 testimony it sounds like no techniques were used. Yet when
18 reading the defendant's testimony, which I was not aware of
19 until more recently, she describes tactics that were used
20 and, in fact, she at one point says they suggested an
21 accident scenario. Well, the accident scenario is actually
22 a very specific minimization theme that is used. She
23 described techniques that are out of the book, and either
24 she has read an interrogation manual or she was subject to
25 those techniques. They are not techniques that come by

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1 intuition or by guessing. So I am left with having to
2 concede that while I have her account of what happened and
3 the law enforcement account, in the absence of a recording I
4 don't really know what happened, and that is one reason why
5 the recording is important. There is a second reason, but
6 that's key to it.

7 Q. Go ahead with the second reason.

8 A. The second reason has to do with the most compelling
9 aspect of confessions once their taken is that they are not
10 just an admission of guilt, it's not just a suspect who
11 throws up his hands in the air and says, "Okay, I give up,
12 I'll say I did it." It's an admission of guilt followed by
13 a narrative story that says this is what I did, this is how
14 I did it, this is why I did it. It's a story that often
15 contains apologizes and expressions of remorse, statements
16 that that is a statement I give voluntarily, when you look
17 at true confessions you certainly see these elements
18 present. But it turns out as well that when you look at
19 known proven false confessions these elements often are
20 present as well. So for example, my colleagues and I
21 analyzed 20 proven false confessions in a paper that we
22 published, and we found that 50 percent of those false
23 confessions by innocent people contained a statement at the
24 end saying "I agree with this and I sign this statement
25 voluntarily." 40 percent contain expressions of remorse,

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1 25 percent contain explicit apologizes, and these are false
2 confessions of known innocent people. In addition Brandon
3 Garrett, a law professor at the University of Virginia went
4 over 38 cases at the Innocence Project involving DNA --

5 MR. WHITMIRE: Objection, hearsay.

6 THE COURT: Sustained.

7 A. In a published -- I'm sorry.

8 Q. He sustained the objection. Should it raise a red flag
9 to law enforcement when the statement made is not a
10 confession to an actual crime?

11 A. Yes. And --

12 THE COURT: Is not a confession to what?

13 MS. LINDSAY: An actual crime.

14 THE COURT: A natural?

15 MS. LINDSAY: An actual crime.

16 THE COURT: Actual.

17 A. Yes.

18 Q. In this case you testified that she held her hand over
19 the baby's mouth for 15 to 20 seconds, which there's
20 testimony that that was insufficient to kill someone. Does
21 that raise a red flag?

22 A. Yes. And professional interrogation manuals will say
23 that the statement you produce should be sensible, it should
24 match the facts of the crime and, if possible, it should be
25 corroborated by proof of guilty knowledge or by some

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1 external evidence. So --

2 Q. And this one didn't meet all of those.

3 A. It did not meet those criteria.

4 MR. WHITMIRE: Objection to the last statement and ask
5 that the Court strike it from the record, it's outside of
6 his expertise regarding potential -- the rate in which a
7 baby would die being suffocated.

8 THE COURT: Well, he can't testify to that.

9 Q. Once someone has confessed, how can it influence other
10 investigators or witnesses in the case?

11 A. Confession is so potent that people presume it means
12 the person is guilty, and therefore it affects the way
13 individuals, lay people whether they're eye witnesses or
14 professionals, say forensic examiners interpret subsequent
15 evidence. I think this case illustrates that problem.

16 Q. So if a pathologist made a medical conclusion based on
17 an untested, unproven and potentially faulty confession and
18 not actual medical evidence, that would be an example of
19 forensic bias.

20 A. Yes.

21 Q. Just briefly, we're going to wrap up. If you had
22 testified, are there a number of factors present in this
23 case that give you cause for concern?

24 A. There are factors that give me cause for concern.

25 Q. And if you had testified at the Jackson v. Denno would

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1 you have been able to testify more specifically about all of
2 the risk factors present in this case, particularly the
3 polygraph, the use of minimization tactics, how Andrea was
4 blindsided by the second polygraph test and the personality
5 test?

6 A. Yes.

7 Q. And when you testified at trial did you have to be
8 careful to not bring up things the jury could not hear such
9 as the polygraph and the other two deaths?

10 A. Yes.

11 Q. For fear of opening the door for the defense?

12 A. Yes. And that all influenced my description of the
13 timeframe because, they didn't begin the interview on this
14 child until 2:00, even though she was at the station at
15 1:00. I couldn't talk about that hour.

16 Q. Because of the risk of bringing up the other two
17 babies.

18 A. Correct.

19 Q. Okay.

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

21 (Break in proceeding.)

22 Q. Last question, Dr. Kassin. Were you ever asked by
23 trial counsel to testify at the Jackson v. Denno?

24 A. I don't think so. I cannot say -- I can't swear to it,
25 I can't recall but I don't think so.

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1 Q. And you did not?

2 A. I did not.

3 MS. LINDSAY: Thank you.

4 THE COURT: How long are y'all going to be?

5 MR. WHITMIRE: Fifteen minutes.

6 THE COURT: We can do 15 minutes, but if you're going
7 to be two hours we'll break for lunch.

8 MR. WHITMIRE: Out of abundance of caution of not
9 offending the Court a break for lunch is fine with me.

10 THE COURT: Well, if we could finish we could let the
11 doctor go on his merry way.

12 MR. WHITMIRE: I'm only assuming 15 minutes, I don't
13 know.

14 THE COURT: All right. I'll give you 15 minutes, we'll
15 see what happens.

16 MR. WHITMIRE: Thank you, Your Honor. May it please
17 the Court?

18 CROSS EXAMINATION

19 BY MR. WHITMIRE:

20 Q. Let's go back in time, apologize. I believe you told
21 the Judge that this would have been an example of a
22 internalized confession. Is that correct?

23 A. No.

24 Q. Well, what did you tell the Judge?

25 A. That this is an example of compliant confession. Now,

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1 whether it's true or false is something I'm not prepared to
2 talk about. But if it were a false confession it would be a
3 come compliant false confession.

4 Q. In A compliant false confession you look at external
5 stressors; is that correct?

6 A. Yes.

7 Q. Such as --

8 A. And internal stressors.

9 Q. And internal stressors also. I believe in this trial
10 you testified on page 844 that, "I've got to be honest, it's
11 very difficult for me just by listening to confessions
12 without knowing everything there is to know to figure it
13 out;" is that correct?

14 A. Yes.

15 Q. Did you ever listen to the confessions in this case?

16 A. They weren't available. I read the transcripts.

17 Q. And at the Cope trial I believe you testified that you
18 rely on primary sources; defendant's handwritten statement,
19 audio and visual recordings of the interrogation that
20 elicited the confession and the police reports; is that
21 correct?

22 A. Yes.

23 Q. Did you meet with applicant prior to her trial?

24 A. No.

25 Q. Have you met with applicant prior to today?

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1 A. No.

2 Q. But didn't you just testify on direct that in her mind
3 she believed the case was closed.

4 A. No. I testified to the possibility that that might be
5 the way that someone interprets the situation. I don't ever
6 interview a defendant in part, because, again, it is not my
7 goal to say that their confession was true or false. I'm
8 talking about general principles that I think is useful for
9 a jury to know.

10 Q. Then in determining what the defendant would reply upon
11 what she would say at a Denno hearing or at trial, who
12 provides that information to you?

13 A. Well, if I had personality test results I would have
14 had that. I had information about the polygraph, I had
15 information from Lieutenant White's polygraph notes. I knew
16 that she had been presented the feedback that she failed the
17 test, so I had that information, I just couldn't testify to
18 it at trial. I knew, for example, she had been to the
19 station at 1:00, that it didn't really start at 2:00, but
20 that prior hour was about a different child.

21 Q. If I heard correctly on direct you just testified that
22 Lieutenant White had misrepresented the polygraph; is that
23 correct?

24 A. Yes.

25 Q. Now, in preparing today have you reviewed the trial

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1 transcript?

2 A. Yes.

3 Q. The Denno transcript?

4 A. Yes.

5 MR. WHITMIRE: Referring to page, 71, Your Honor --

6 THE COURT: Of what?

7 MR. WHITMIRE: Of the Denno hearing. My apologizes.

8 Q. Didn't Lieutenant White explain his methodology?

9 A. I don't know whether -- you know, I can't tell you
10 whether my reading of his methodology and what he did comes
11 out of the Jackson v. Denno or trial transcript.

12 Q. So when he testified to clear, not clear and fail, when
13 you don't pass you don't clear; is that correct?

14 A. No. He indicated that the result was inconclusive but
15 that he told her she didn't clear the test.

16 Q. And didn't he testify this is how he explains that
17 particular result every time it occurs?

18 A. That may be, but that's negative feedback. And in this
19 case given she didn't fail the test it's negative feedback
20 that it is false.

21 Q. And regarding the testimony today, have you or opposing
22 counsel consulted a polygraph expert to base your testimony
23 on?

24 A. I'm not testifying about his conduct at the polygraph,
25 just the fact that he gave her that feedback which I get

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1 from his own words.

2 Q. The foundational results itself, to get to the notion
3 that it was a misrepresentation.

4 A. He admits it's a misrepresentation, he says it was
5 inclusive and I told her she didn't clear it, those words
6 come from him.

7 Q. And in preparing for trial, did you discuss the case
8 with Ms. Pringle?

9 A. Yes.

10 Q. Didn't Ms. Pringle consult two independent polygraph
11 experts? Did she tell you this?

12 A. I don't know.

13 Q. Did you and Ms. Pringle discuss you possibly testifying
14 at the Denno hearing?

15 A. I don't recall.

16 Q. Would you have notes of that if you did?

17 A. Doubtful.

18 Q. So you don't record the actual conversations with
19 defense counsel regarding the representation and what's
20 being asked and how you can help; is that correct?

21 A. That's correct.

22 Q. But you're here making assumptions today saying this,
23 this, and this didn't happen.

24 A. I'm not making assumptions, I'm reporting what
25 Lieutenant White said in his own testimony.

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1 Q. Did you ever make a trip to South Carolina to meet with
2 Lieutenant White or any of the other officers prior to
3 trial?

4 A. No.

5 Q. Did you study a history of past interrogations or
6 confessions in Richland County?

7 A. No.

8 Q. Did you look at any past police reports from
9 interrogations and confessions from Lieutenant White or the
10 other two officers?

11 A. No.

12 MR. WHITMIRE: Beg the Court's indulgence.

13 (Break in proceedings.)

14 Q. If I recall correctly you testified to different
15 internal stressors that could make a potential person
16 vulnerable to eliciting an untrue confession; is that
17 correct?

18 A. Yes.

19 Q. And age is one of them; is that correct?

20 A. Yes.

21 Q. Isn't Ms. Person an adult?

22 A. Yes.

23 Q. Is she college educated?

24 A. Yes.

25 Q. With a degree in Psychology?

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1 A. I don't believe she got a degree.

2 Q. Well, two credits short. And you testified the high
3 risk groups are typically teens and persons who have mental
4 health deficiencies.

5 A. Those are risk factors, yes.

6 Q. You wouldn't have been able to testify at the Denno
7 hearing to the manner in which Ms. Person was interrogated.

8 A. All I would have been able to testify to is the
9 accounts that I read about secondhand, that's correct.

10 Q. In State v. Cope didn't you state in analyzing the
11 techniques utilized by police in eliciting Billy Wayne
12 Cope's confession, "The two tapes are the only materials I
13 can rely on because I'm seeing it come out of his mouth."
14 Does that sound familiar?

15 A. I don't know.

16 Q. Is there a difference between an interrogation and an
17 interview?

18 A. Yes.

19 Q. Can you briefly elaborate on what those differences
20 are?

21 A. An interview occurs pre-interrogation, it's
22 non-confrontational. It involves the police officer
23 questioning in an information gathering way the suspect to
24 determine whether or not that suspect can be believed or
25 not, and whether then that suspect should be interrogated.

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1. Interrogation is then the follow-up process that's conducted
2 with a guilt presumed suspect, and the goal of an
3 interrogation is to get the confession.

4 Q. If I recall correctly in Charleston in State vs. Wesley
5 Max Myers didn't you testify that the absence of a videotape
6 it's very difficult for you to determine if it's in fact
7 interrogation?

8 A. Again, it depends on the secondhand -- everything is
9 more difficult not just for me, it's more difficult for
10 prosecutors, judges and juries to know what happened when
11 they don't see the process. You know, to judge the
12 voluntariness and credibility of a statement in which you
13 don't see the process by which it produced, it's very
14 difficult.

15 Q. But you didn't do any sort of extensive research on
16 Lieutenant White or the other officers --

17 A. It's not my goal to come in here and claim that she
18 gave a false confession. It's my goal to talk about the
19 factors that a jury should consider in determining whether a
20 confession was true or false.

21 Q. But didn't you just tell the Judge that you had some
22 concerns about this case and that you believed that this
23 could potentially be a coerced compliant confession?

24 A. Well, yes, I do have concern, that's why I am here. I
25 take very, very few cases and that's why I'm here is I do

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1 have concerns.

2 MR. WHITMIRE: Objection, Your Honor, to this last
3 answer and ask that it be stricken from the record, it's
4 improper bolstering.

5 THE COURT: Overruled.

6 Q. So on the day in question, April 17th in which
7 Ms. Person met with several different officers in several
8 different environments, without video or audio it would be
9 very difficult for you to determine what was an
10 interrogation and what was an interview.

11 A. Correct.

12 Q. And I believe you said you had some general concerns
13 due to the length of the meeting she had with the police
14 officers?

15 A. When did I say that?

16 Q. I believe at the very end of your testimony you had
17 some concerns with the overall duration.

18 A. Not with regard to this one case. I mean, I do have a
19 concern about time but it's not a prominent concern,
20 because, in fact, from start to finish this is probably a
21 four hour interrogation.

22 Q. And I believe you just recently testified that you
23 would have presented your testimony differently at a Denno
24 hearing than at trial if you would have known that
25 Ms. Person was vulnerable due to certain personality

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1 disorders; is that correct?

2 A. Yes.

3 Q. Have you spoken with the psychologist that just
4 recently interviewed her?

5 A. No, I merely read his report.

6 Q. And you had testified to that, did you have any
7 knowledge or insight as to what that psychologist might have
8 relied upon?

9 A. Yes.

10 Q. What was that?

11 A. He administered three tests. He administered the
12 Paulhus Deception Survey, the MMPI and a third personality
13 inventory whose name I can't recall.

14 Q. Do you have any source of any outside information that
15 this doctor relied upon?

16 A. No.

17 Q. So you wouldn't know if the doctor had spoken with her
18 family, would you?

19 A. It is my impression that the doctor did not speak with
20 the family, that his conclusions were based on the test
21 results.

22 Q. But in testifying you would have went through these
23 test results, you're assuming that he didn't meet the
24 family; is that correct?

25 A. I'm not making an assumption, I'm simply reading his

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1 report and his conclusions. I can't attest to the
2 credibility of his conclusions, I just saw what he wrote,
3 and I know something about a couple of tests that he
4 administered.

5 Q. And then a clinical psychologist reviewing and meeting
6 with Ms. Person, was that your idea?

7 A. Yes. I wanted to know more about her vulnerabilities.
8 Actually, you know what? We had talk about vulnerabilities,
9 actually I think the idea came from counsel.

10 Q. One final question. It's your contention as of today
11 you have no recollection of any conversations you had with
12 Ms. Pringle regarding you testifying in the Denno hearing.

13 A. I assume I did not because I would have said yes, but I
14 don't honestly recall.

15 Q. So you never came to South Carolina to visit with her
16 or review potential police documents; is that correct?

17 A. The first time I came to South Carolina on this case
18 was the day I testified.

19 Q. And you did not keep notes of your conversations with
20 Ms. Pringle or Mr. Strickler; is that correct?

21 A. Correct.

22 Q. And how much did you get paid to offer your testimony
23 in this case?

24 A. In the past?

25 Q. No, in this particular case.

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1 A. Right now, today?

2 Q. No, at her trial?

3 A. I don't recall.

4 MR. WHITMIRE: No further questions, Your Honor.

5 REDIRECT EXAMINATION

6 BY MS. LINDSAY:

7 Q. Dr. Kassin, it is not your testimony today that all
8 risk factors were present in this case but a number of them
9 were; is that correct?

10 A. Correct.

11 Q. Is it your recollection that you suggested to trial
12 counsel, either Fielding or Doug, to have the defendant
13 examined by a clinical psychologist in advance of your
14 testimony?

15 A. Way back then? I don't recall if I did or not.

16 Q. And although you testified extensively that video and
17 audio recordings are helpful, is it not true that you
18 believed that the absence of them, if anything, should make
19 someone more critical of confession, not to just say it must
20 be per se reasonable because I can't look at a video?

21 A. The problem is that when the defendant gives one
22 account of what transpired over the course of four hours and
23 law enforcement gives a second account, there's no way to
24 reconcile those differences, except by inference it's clear
25 that the defendant knew something about certain tactics that

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1 she couldn't otherwise have known and it's a problem that
2 could have been resolved with a tape recorder. There's one
3 point at which Detective Eisenhower was asked, "Well, were
4 you equipped in your cubical to tape?" And he said, "No."
5 And I don't know what that means. You pull out a tape
6 recorder, you get them for \$15 at Radio Shack, and now the
7 best evidence you are about to produce in this case is
8 recorded. I don't understand in this day and age being if
9 the police station having access to recording devices and
10 not using them and it makes them more difficult --

11 MR. WHITMIRE: Objection, asked and answered.

12 THE COURT: That doesn't matter. The fact of the
13 matter is it wasn't recorded. I mean, what a better
14 practice would be is not an issue in this case.

15 Q. Right. So my follow-up question was the absence of it,
16 if anything, should make someone more critical and not just
17 per se accepted confessions.

18 A. Well, it certainly weighs on my mind as to why not. I
19 think it's the simplest -- particularly in this case the
20 practice for taking that final statement is to do a Q and A
21 session in which the detective is typing the question and
22 then recording and typing the answer, it just seems like a
23 tape recorder would have been so much easier.

24 Q. And in this case at the pretrial Jackson v. Denno,
25 which the focus of that was the confession, both sides, the

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1 defendant didn't actually testify, it was just the one side,
2 the law enforcement testified, right?

3 A. Yes.

4 MS. LINDSAY: Thank you. No further questions.

5 THE COURT: All right. Let me ask you a couple of
6 questions. You didn't give an opinion as to the ultimate
7 issue of whether it was false or not at the trial.

8 THE WITNESS: Correct.

9 THE COURT: You would not have at the Jackson v. Denno?

10 THE WITNESS: Right.

11 THE COURT: Both instances all you're going to do is
12 point out these are risk factors and these need to be
13 considered by the trier of the facts in determining whether
14 it's a false confession or not a false confession, and the
15 more risk factors probably the higher probability that there
16 may be a false confession, right?

17 THE WITNESS: Yes, your Honor. If you would just let
18 me add to that. I give enough talks to law enforcement
19 groups and judges and prosecutors to know what they know and
20 don't know, and I keep getting invitations to come back and
21 I keep hearing that what I'm saying is not something they
22 are necessarily aware of. I think it is simply useful for
23 fact finders at all levels to have the information
24 available. And I say that, too, about police officers.
25 There's -- there have been cases -- now that so many states

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1 are recording the unanimous survey results on whether
2 detectives who didn't used to record and now do is that they
3 love it and they say that they go back over the tapes and
4 hear things in them they didn't otherwise recall. And so
5 it's in light of all of this it is I think an important
6 procedure, and it's not just about providing food for
7 thought or for an expert --

8 THE COURT: Look, I 100 percent agree and I don't
9 understand why every law enforcement agency doesn't video
10 and audio, but we don't have a case where that happened.
11 I'm trying to determine what you would have done or not done
12 based on the facts as they exist now and then in terms of
13 what you would have offered either the Court and/or the
14 jury.

15 THE WITNESS: And if I may, I think that my testimony
16 is less important at trial if there is a video for the jury
17 to see, because I believe that if the jury can use their own
18 wisdom seeing --

19 THE COURT: Well Doctor, that may all be well and good
20 but I'm still trying to -- I agree with you, it's hard to
21 dispute a picture, a picture is worth 1,000 words. But
22 every risk factor you could have told the jury in this case
23 based on the information you had then that maybe not how it
24 effected her but young age, mental condition, education, all
25 of those things you can explain to the jury that those are

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1 factors that need to be considered, right?

2 THE WITNESS: Yes.

3 THE COURT: And you would have been able to tell the
4 Judge that at the Jackson v. Denno hearing as well, correct?

5 THE WITNESS: Yes.

6 THE COURT: But you would never have opined that this
7 was a false confession.

8 THE WITNESS: No.

9 THE COURT: All right. So ultimately what you're
10 telling me is you want the ultimate trier of the fact to be
11 able to make that decision based upon this information that
12 you give them hoping to educate them that this is something
13 that they need to seriously consider when they determine the
14 reliability of the confession.

15 THE WITNESS: Yes. And that's where my testimony
16 stops.

17 THE COURT: All right. Thank you, sir, you may step
18 down. All right. We're going to break for lunch and then
19 we will -- do y'all have the -- well, we'll let the Doctor
20 know if you want to head back to Massachusetts, have a safe
21 trip and thank you for coming. What have you got after
22 lunch?

23 MS. LINDSAY: Dr. Harari, the psychologist, and Andrea.

24 MS. HARRIGAN: And we'll have both trial counsel.

25 THE COURT: We should finish this afternoon.