

Volume II of II

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Eugene C. Griffith, Jr., Circuit Court Judge

MARK R BOLTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2011-186252

APPENDIX

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VELVET MOORE - RECROSS

1 by lunch if we start by 9:45. I don't know how
2 long she's going to take on cross-examination but I
3 think, I'm going to call either one or two
4 witnesses and I should be done in the morning. I'm
5 not planning on taking all day.

6 THE COURT: Well, if there will be reply,
7 then prepare for it, get into it tomorrow and try
8 to give this case to the jury tomorrow afternoon.

9 MS. MAYES: Yes, sir, Your Honor.

10 THE COURT: We'll do everything, as you have
11 heard the jurors told, we'll do what we can to get
12 it to them tomorrow but the Court is not going to
13 unduly rush you, Mr. Grose.

14 MR. GROSE: I understand.

15 THE COURT: Anything further?

16 MS. MAYES: No, sir, Your Honor.

17 MR. GROSE: Thank you, Your Honor.

18 THE COURT: Stand in recess. Thank you.

19 (Recessed at 5:33 p.m.).
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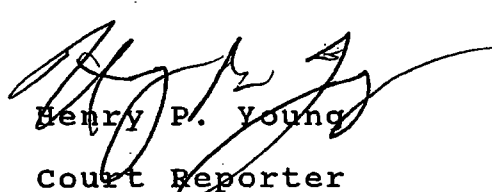
VELVET MOORE - RECROSS

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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Abbeville County, South Carolina, on the 9th day of September, 2004.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 28, 2004



Henry P. Young
Court Reporter

STATE OF SOUTH CAROLINA

COURT OF GENERAL SESSIONS
2003-GS-01-296

COUNTY OF ABBEVILLE

THE STATE OF SOUTH CAROLINA,)

-VS-)

MARK BOLTE,)

Defendant.)

B E F O R E:

HONORABLE WYATT T. SAUNDERS

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

LAURA SUZANNE MAYES, Esquire
Attorney for the State

E. CHARLES GROSE, Esquire
Attorney for the Defendant

Henry P. Young
Court Reporter

VOLUME IV OF IV

September 10, 2004

1 (Reconvened at 9:51 a.m).

2 THE COURT: We'll open the record. This is
3 in the matter of State of South Carolina versus
4 Mark Richrd Bolte, indictment 2003-GS-01-296.

5 Anything from the State before the jurors
6 come out, please, Miss Mayes?

7 MS. MAYES: No, sir, Your Honor.

8 THE COURT: From the defense?

9 MR. GROSE: Yes, sir. I will just tell the
10 Court at this time that while we were planning on
11 calling witnesses last night, we have given some
12 thought overnight and decided, what I want to do is
13 move the calendar 2002 and 2003 into evidence and
14 rest.

15 THE COURT: All right, let's take up the
16 matter of the calendars now. Miss Mayes, how says
17 the State with regard to those calendars becoming
18 evidence?

19 MS. MAYES: Your Honor, I have no objection
20 to them being used by counsel for demonstrative
21 purposes during closing argument but I do object to
22 them going into evidence. There was some testimony
23 about uncertainty as to some of these dates and I
24 see a lot of writing, not saying it's inaccurate,
25 but according to some of the witnesses there was

1 some discrepancies about some of the dates, but no
2 objection for any purpose outside of evidence in
3 the jury room.

4 THE COURT: Thank you, Miss Mayes. Do you
5 wish to be heard on the objection, counsel?

6 MR. GROSE: Well, where there was some
7 discrepancy in dates, if they said it was about a
8 month, my recollection was that the writing was
9 next to the month that they said. If they said it
10 was, you know, around or near it, and Miss Mayes is
11 not suggesting that, you know, that's not, you
12 know, what's there is not accurate, that it's not
13 accurate, indeed not accurate to what we know some
14 of the dates to be from the documentation. Almost
15 everything was put up there with regard to
16 documentation.

17 One of the things she's referring to would be
18 August, 2003, where I circled August, police
19 report, divorce hearing. We later determined
20 through examination that the police report was on
21 August 6th and the divorce hearing was on August
22 14, and that's really the only writing that's not
23 linked to a date except for the place where I
24 inadvertently put something in February and moved
25 it to March, and that was all done in front of the

1 jury. So, I think that's the only thing that she
2 was objecting to. That was after the testimony was
3 August and it was verified it was the 6th and 14th
4 through other witnesses who actually either viewed
5 documents or in the case of the police report on
6 the 6th.

7 THE COURT: The objection is sustained. It
8 will be used as demonstrative evidence during
9 argument and not be evidence but it will be marked
10 for identification only.

11 MR. GROSE: That's fine. I would like for it
12 to be marked to be part of the permanent record.
13 Can we do that now?

14 THE COURT: Yes, that will be done. The
15 Court will point out for the reviewer of the record
16 that anyone who reviews the record would observe
17 there were some estimated dates on two or more of
18 the dates that were put there and they were by two
19 different witnesses who estimated the dates on two
20 or more times, and all of the writing other than
21 the printed calendars was put there by counsel and
22 not by the testifying witness, therefore it would
23 not be evidence but may be used for demonstrative
24 purposes. They will be marked for identification
25 to go with the permanent record in the case.

1 (Defense Exhibits 13 and 14 were marked
2 for identification).

3 MR. GROSE: Just for the record, 13 is the
4 calendar for 2002 and 14 is the one for 2003.

5 THE COURT: Thank you, Mr. Grose. Now, does
6 the Court understand correctly that the defense
7 intends to rest when the jurors come out?

8 MR. GROSE: That is correct, Your Honor, and
9 if the State does not intend to do any reply, I
10 could put motions on the record now. If not, it
11 would probably be best to wait until after reply.

12 THE COURT: Thank you. Miss Mayes, if you
13 need some time to consider what you wish to do it
14 will be given. However, if you have a position to
15 take now with regard to reply, let's have it.

16 MS. MAYES: No reply from the State, Your
17 Honor.

18 THE COURT: Very well. We'll hear your
19 motions.

20 MR. GROSE: Without any reply, Your Honor, at
21 this time we would renew our motion for directed
22 verdict on the remaining three counts of the
23 indictment, two counts having been dismissed with
24 prejudice. The remaining three that are on trial,
25 criminal sexual conduct with a minor, incest and

1 lewd act, we would move for directed verdict on the
2 grounds that we made our initial motion at the
3 close of the government's case and on the
4 additional ground that after the close of our
5 evidence the State has failed to present
6 substantial evidence either direct or
7 circumstantial upon which this jury could convict
8 beyond a reasonable doubt.

9 THE COURT: Thank you, Mr. Grose. The motion
10 is denied.

11 Now, are there requests to charge from either
12 side?

13 MS. MAYES: Your Honor, the State, we have a
14 request as to expert witnesses.

15 THE COURT: That will be given.

16 MS. MAYES: In addition, the State would
17 request a charge as to South Carolina Code Section
18 16-3-657, that the Court would charge the jury as
19 the statutory language that the testimony of a
20 victim need not be corroborated for prosecution
21 pursuant to criminal sexual conduct.

22 THE COURT: Will you say that number again?

23 MS. MAYES: South Carolina Code Section
24 16-3-657.

25 THE COURT: Thank you.

1 MS. MAYES: And, Your Honor, there has been
2 some discussion yesterday about a possible request
3 by the State for an instruction as to the Court's
4 direction that witnesses not discuss the testimony.
5 I'm withdrawing that at this time, I don't think
6 that's any longer an issue.

7 THE COURT: Thank you. Special requests for
8 charge from the defense?

9 MR. GROSE: I don't have any special
10 requested charge, Your Honor, but I would like to
11 be heard on the request regarding Section 16-3-657.

12 THE COURT: All right, sir. Hold it just a
13 minute.

14 All right, Mr. Grose.

15 MR. GROSE: Your Honor, looking at Section,
16 and I believe you have it in front of you,
17 16-3-657, I would raise two points. The first
18 point is that there is a case State versus
19 Rayfield, R-a-y-f-i-e-l-d, which is 357 South
20 Carolina 497, 593 Southeast 2d 486, decided this
21 year in 2004 by the Court of Appeals.

22 THE COURT: Let me put down that cite, I'm
23 sorry, I was looking at something else.

24 MR. GROSE: I'm sorry, Your Honor. 357 South
25 Carolina 497, 593 Southeast 2d 486, Court of

1 Appeals, 2004.

2 THE COURT: Yes, sir, thank you.

3 MR. GROSE: And in Section Two of that
4 opinion they deal with the charge under Code
5 Section 16-3-657, and the argument was, is that
6 the, that they should not have given that. I
7 believe they might have been arguing that would be
8 a charge on the facts. They went back to the
9 Schumpert case, which of course we have already
10 discussed in other context today, and talked about
11 the safeguards that have to be given with that
12 charge.

13 So, if the Court decides to give that charge
14 we would request the Court to look at Schumpert and
15 Rayfield and make certain that those additional
16 safeguards are given to the finders of fact, let's
17 see, "The jury must be properly instructed they
18 were the sole finder of the facts with the
19 discretion to determine the credibility of
20 witnesses," and I'm saying they were saying this
21 was correctly done in Rayfield, that it was
22 correctly charged, our state constitutional mandate
23 prohibiting the Court from commenting on the facts
24 and in that case stated, "The law does not permit
25 me to have an opinion about the facts of this

1 case," and they correctly charged the State's
2 burden of proof.

3 I think you would probably cover all those
4 but we would certainly want them to be there. They
5 go on to say in the last sentence, "While Section
6 16-3-657 charge is not mandatory, such charge does
7 not constitute reversible error when the Schumpert
8 safeguards are present."

9 So, I think there is some discretion whether
10 you give that charge or not and I think these cases
11 are warning that if you give that charge and you
12 don't give these other safeguards you're getting
13 dangerously close to violating the constitutional
14 mandate about commenting on facts.

15 There is another reason, though, why I think
16 that the Court should not give it in this case, or
17 if they do give it, if you do give it, to give
18 additional limiting language, and that comes from
19 Section 16-3-657 itself. It's limited to charges
20 under 16-3-652 through 16-3-658, which would be the
21 criminal sexual conduct charge. That's only one
22 charge in this indictment, at least what remains
23 for this jury to consider.

24 The lewd act count is codified in South
25 Carolina Code Section 16-15-140, so it's outside of

1 the parameters of the charge that Miss Mayes asked
2 for, and incest is in 16-15-20, so that charge is
3 not appropriate for two-thirds of the remaining
4 charges in the case, and because of that, giving
5 the charge would arguably mislead the jury that
6 that applies to all three of the charges that are
7 in the case, and certainly since the conduct that
8 they are alleging for the incest and the conduct
9 they're alleging for the criminal sexual conduct,
10 both involve some type of penetration, it would be
11 easy for the jury to mistakenly be misled and make
12 that leap.

13 So, if the Court decides to charge the
14 testimony of the victim need not be corroborated in
15 the prosecution for criminal sexual conduct, I
16 would ask that you give the limitation that this
17 does not apply to charges for lewd act or incest.
18 I think the better practice would be in your
19 general charge, which I believe the Court is going
20 to cover adequately, state that the jury is the
21 sole finders of fact, they can believe one witness
22 against all other witnesses and that sort of thing.

23 The spirit and the intent of 16-3-657, it
24 would be covered by what I believe you're going to
25 charge as your standard charge based on having

1 tried numerous cases in front of you in the past,
2 that if you give this charge in the context of this
3 case and don't limit it, it's going to mislead the
4 jury, would be our position.

5 THE COURT: Thank you, Mr. Grose.

6 Miss Mayes, comments, remarks?

7 MS. MAYES: Yes, sir, Your Honor. As to the
8 Rayfield case, I don't know if counsel has a copy
9 to submit to the Court or if the Court has that
10 case available. I do not at this time. I was the
11 prosecutor in State v. Rayfield, and that case also
12 involved additional charges besides criminal sexual
13 conduct. There were lewd acts charged as well.
14 And the charge as to the no corroboration statute
15 was, I believe, just a sentence or two incorporated
16 into the Court's greater charge as to weight and
17 credibility of witnesses and things of that nature,
18 and that's how the safeguards were complied with
19 that the Court addressed in Rayfield.

20 MR. GROSE: I don't believe, and I could be
21 wrong, but I don't believe that the specific
22 grounds that I was raising was raised in Rayfield.
23 I have a copy of Rayfield, I just have one copy but
24 I will let you and Miss Mayes share it if you want
25 to review it.

1 THE COURT: If it's not on the recent disc in
2 my materials I may have to ask you to let me have a
3 copy of it to determine how, if at all, to
4 incorporate this 16-3-657 into the charge.

5 MS. MAYES: Does Your Honor have a copy of
6 the greater charge concerning credibility of
7 witnesses? I may, if I could just have a chance to
8 review that, it may be that I can make an argument
9 as to the statute without actually having the
10 statute made part of the charge.

11 MR. GROSE: I have no objection to, you know,
12 her having a look at your charge on that. I don't
13 have it memorized word for word but I'm probably at
14 an advantage, being more familiar with it. I know
15 she's tried cases in front of you but I think I
16 have tried more over the last several years in
17 front of you.

18 THE COURT: The Court could share with you
19 that which you may remember and Mr. Grose is
20 definitely familiar with without question, either
21 on all fours or very similar to all charges in that
22 general area, credibility of witnesses and weight
23 to be given to any testimony or evidence and any
24 other charge you have heard. So, if you have some
25 suggestion, if you want to think about it, let me

1 know where you think it ought to appear and how it
2 ought to appear.

3 MS. MAYES: Well, my expectation would be I
4 would simply argue to the jury that the testimony
5 of the victim alone is sufficient evidence to
6 convict, without even referencing the statute
7 because if it's not going to be part of the Court's
8 charge, because that is certainly something I would
9 intend to argue to the jury, and have the Court's
10 charge go as is without the statutory addition.

11 THE COURT: Well, we may have to return and
12 discuss this. The immediate concern is that the
13 charge has to be compiled. We are close to having
14 it ready for you to review the pertinent parts.
15 The only parts with which you might not be familiar
16 with exactly are how the alleged violations of the
17 law are going to be stated, and we're close to
18 having that ready for you to review. The rest of
19 the charge concerning those things that you
20 mentioned, Miss Mayes, it is not unusual and it's
21 more or less a, quote, standard charge.

22 So, the only thing that the Court needs to do
23 is see how we're going to deliver the options and
24 we also need to let you agree upon a verdict form.
25 We worked last night to get started on that, too,

1 but we don't have it firmed up right yet, so that's
2 going to take a little while. I propose we let the
3 jury go for about an hour.

4 MR. GROSE: You said let the jury go for an
5 hour?

6 THE COURT: Yes, sir.

7 MR. GROSE: That suits, Your Honor, that way
8 we can get all these issues resolved.

9 THE COURT: We might let them go until 11:30.
10 That would be an hour and fifteen minutes by the
11 time we get out of here.

12 MR. GROSE: Yes, sir.

13 THE COURT: Is that all right with you, Miss
14 Mayes?

15 MS. MAYES: Yes, sir, Your Honor.

16 THE COURT: Show the jury in, Mr. Simpson,
17 please. Mr. Grose, will you stand and rest your
18 case when they are actually in the box?

19 MR. GROSE: Yes, sir.

20 THE COURT: So they will understand what we
21 now know?

22 MR. GROSE: Yes, sir.

23 THE COURT: Thank you.

24 (The jury returned to the courtroom
25 at 10:12 a.m.).

1 THE COURT: The matter lies with the defense.
2 Mr. Grose.

3 MR. GROSE: Your Honor, the defense rests.

4 THE COURT: Thank you, Mr. Grose. Ladies and
5 gentlemen, that is the case for the defense.
6 That's the defense in chief.

7 The case in reply for the State?

8 MS. MAYES: No reply, Your Honor.

9 THE COURT: That is the full case, ladies and
10 gentlemen, Madam Forelady, that is all the evidence
11 in the case.

12 Now, we will, having alerted you to the
13 possibility of the extension of the case, it
14 appears we will be able to give you the case, argue
15 and charge the case today, let's see, in about an
16 hour and fifteen minutes. We have some things to
17 do to prepare to give you the case, that we can't
18 do, we were going to do it over the lunch period
19 but we have to excuse you for a little while, you
20 can go about your way and enjoy your beautiful
21 square here in Abbeville, it's a pretty day right
22 now, I hope it will remain good weather, but we're
23 going to excuse you until 11:30, until 11:30. That
24 will be an hour and fifteen minutes. We feel that
25 will be enough time for us to do everything we need

1 to do to give you the case, and what will happen
2 when you return is you will receive, hear the final
3 arguments of the attorneys, they will make their
4 final, it's called final argument but, Madam
5 Forelady and ladies and gentlemen, it has evolved
6 into a final discussion. The attorneys used to
7 more or less argue but now it is a close intimate
8 discussion with you about what you might be
9 considering as an important factor or what you
10 might not consider as an important factor or a
11 review of the facts and the law as it may apply or
12 as the attorneys think it may be applicable and the
13 Court might charge. So, it's important that you
14 pay close attention. These skilled attorneys will
15 bring the facts for you and before you that they do
16 not want you to fail to consider during your
17 deliberations, so it's an important time.

18 After they make their remarks, then the Court
19 will charge you, which you know is simply inform
20 you or tell you what the law is as it may apply to
21 the facts as you find the fact to be, your being
22 the only fact finders in any case. The jury is the
23 only finder of facts, no one can invade that jury
24 box and make any determination of the facts, what
25 happened, if you will, other than you.

1 So, we'll release you now until 11:30 this
2 morning with this warning. Don't talk about the
3 case by, between and among yourselves or with
4 anyone else. If anyone speaks to you about the
5 case please alert them that you are a juror and you
6 are not permitted to talk about the case. If after
7 having alerted anyone that you are a juror, and
8 they continue to speak to you about the case, that
9 would be highly improper, wrong and illegal and you
10 should see to it that every effort is made to
11 discover the identity of any person or persons who
12 tries to talk with you after you say you are a
13 juror, and report that to one of the bailiffs or to
14 the Court Clerk as soon as you return, in private,
15 and that will be investigated and dealt with in
16 proper fashion.

17 Now, if there were to be any newspaper, radio
18 or television coverage please disregard it if it
19 were to fall upon your ears or eyes, because it's
20 not evidence and you should disregard it if you do
21 hear, see or read anything having to do with this
22 case.

23 Now, having said that, ladies and gentlemen,
24 Madam Forelady, please relax for about an hour and
25 fifteen minutes, be back in the jury room, let's

1 say 11:35. 11:35. That will give everybody enough
2 time. Thank you. The jurors are excused, every
3 one else remain seated.

4 (The jury left the courtroom at
5 10:18 a.m.).

6 THE COURT: Anything from the State before
7 the record is closed, please?

8 MS. MAYES: No, sir, Your Honor.

9 THE COURT: Anything from the defense?

10 MR. GROSE: No, sir.

11 THE COURT: Would you please stay close so we
12 can conference if we need to about the charge?

13 MR. GROSE: Yes, sir.

14 THE COURT: Thank you. We are in recess,
15 please.

16 (Recessed at 10:19 a.m.).

17 (Reconvened at 12:07 p.M.).

18 THE COURT: We'll come back into session,
19 please, State of South Carolina versus Mark Richard
20 Bolte, indictment 2003-296.

21 BAILIFF: Miss Mayes will be right back.

22 THE COURT: All right.

23 THE COURT: Mr. Grose, do you have anything
24 for the record, sir?

25 MR. GROSE: If we could wait on Miss Mayes?

1 THE COURT: Yes, sir. I'm just asking you,
2 to think about it.

3 Miss Mayes, do you have anything for the
4 record before we commence final statements?

5 MS. MAYES: No, sir, Your Honor.

6 THE COURT: Mr. Grose?

7 MR. GROSE: I would just state for the record
8 that we had discussed in chambers the format that
9 we were going to follow and there was discussion
10 about who would open and who would have the last
11 argument. Of course we presented a called witness,
12 so the government gets the last argument. It was
13 my feeling that it would be better for the State to
14 have to open in full on the law and the facts,
15 allow us to respond and then respond. We had a
16 discussion about it and I believe you said Miss
17 Mayes could decide how to do it and there is a
18 practice of opening on the law, applying some of
19 the facts to the law, us opening in full and then
20 their main argument coming in the end.

21 We just feel that the confrontation right is
22 more consistent with them opening in full on the
23 law and facts and then us doing it and them having
24 the final say in a case like this, a little bit
25 different than what procedure is, although some

1 judges have followed the procedure I have outlined,
2 and I understand we're going to let them go in that
3 order, but we would just make that in the form of a
4 motion to protect the record.

5 THE COURT: Mr. Grose, thank you for
6 reminding the Court that we did have a charge
7 conference that spilled over, if you will, into a
8 discussion of how the final arguments or final
9 statements would be made, and in that discussion
10 Miss Mayes said she would prefer to open on the law
11 and then expanded that she would have to touch on
12 the facts in order for the law to be sensibly
13 presented in an opening, and it was then agreed
14 that she more or less, depending upon what she
15 wanted to do, would open in full and you would then
16 have your full closing and she could respond in any
17 way she wishes either by a broad response or
18 limited response to what you raised.

19 Now, it is believed that your remarks and
20 those remarks would cover our discussion concerning
21 the closing arguments. Do you condur with that,
22 Miss Mayes?

23 MS. MAYES: Yes, sir, Your Honor.

24 THE COURT: Thank you. Anything further?

25 MR. GROSE: Not with regard to that. I would

1 just let the Court know that I intend for my
2 closing to be somewhere between a half an hour and
3 hour, it may take as much as the full part of that
4 hour, so I give that information, not knowing how
5 long Miss Mayes is going to take in her first
6 statement, so you can decide whether or not there
7 should be breaks between some of the arguments.

8 THE COURT: We probably will take a break, it
9 depends on how long your opening takes, as to
10 whether we'll give them a break at that time.
11 We'll just wait and see, and this judge's policy is
12 to let them have a break at not more than an hour
13 and fifteen minutes, if possible, so we'll proceed.

14 MS. MAYES: Thank you, Your Honor.

15 THE COURT: Thank you both.

16 (The jury returned to the courtroom at
17 12:13 p.m.).

18 THE COURT: Ladies and gentlemen, it is now
19 time for final statements. Please give the
20 attorneys your undivided attention as they address
21 you in their final statements.

22 Miss Mayes.

23 MS. MAYES: Thank you, Your Honor. If it
24 please the Court.

25 Ladies and gentlemen, on behalf of the State

1 of South Carolina I would like to thank each of you
2 for showing such careful attention throughout the
3 course of the trial. I know it's been a long week
4 and we thank you for the careful attention that you
5 have shown. I'm going to address you just briefly
6 now on the issue of the law. When I'm done
7 addressing you, at a later point Mr. Grose on
8 behalf of his client Mark Bolte will have the
9 opportunity to address you with the defense's
10 closing argument and then finally the State, we
11 will have a chance to respond to any additional
12 issues. But now as to the law.

13 As I said initially in opening argument, the
14 law in this case is actually very simple. There
15 will be three charges for you, in no particular
16 order, and the first charge that I'm going to
17 address is the charge of incest. Incest is the
18 crime of people of blood relation or close relation
19 engaging in carnal intercourse, which is sexual
20 intercourse.

21 In this case the State has proven beyond a
22 reasonable doubt that Mark Bolte engaged in sexual
23 intercourse with his daughter [REDACTED] and that
24 incident occurred in the white house as [REDACTED]
25 testified about, the white house on [REDACTED] [REDACTED]

1 and you may recall that she testified about a
2 series of sexual acts that were being committed
3 against her basically throughout her life, and
4 continued to escalate.

5 And then she talked about how when the
6 decision was made to move into the white house that
7 her father did what he called sanctifying it, that
8 he sanctified the house, in his version of
9 religion, and told her that in that house nothing
10 bad would happen to her, that he would not do these
11 things with her anymore. She testified for several
12 weeks after moving into that house, she testified,
13 "He took my virginity from me," and that was
14 something that she testified was special to her
15 because she was raised in a religious home with her
16 own religious beliefs, and at that point that is
17 when she began to resist him and resist the future
18 acts that would be committed against her. That,
19 ladies and gentlemen, is the crime of incest
20 because it involves actual sexual intercourse.
21 There is no requirement that she be of any
22 particular age, that can occur at any age as long
23 as it is committed between a father and a daughter.

24 As to all the crimes that we're going to
25 address, there is no requirement that the victim

1 resist the attempt, there is no requirement that
2 the State must prove that these acts were committed
3 by force, and that is again, I submit, because
4 we're talking about a father taking advantage of
5 his daughter in her own home.

6 The second charge before you is the charge of
7 attempting or committing a lewd act upon a child.
8 [REDACTED] testified that when they first arrived here
9 in Abbeville County they were staying at this blue
10 house in Donalds. Her mom testified that just
11 within three days of arriving here in Abbeville
12 County she got a job at Carolina Springs Academy
13 working the third shift, 9:00 at night to 9:00 in
14 the morning, and when she did so [REDACTED] was left
15 alone in this house and the future houses with the
16 defendant all during the night. She testified that
17 he woke her up in this house and took her
18 downstairs to a bedroom, that her mom wasn't there,
19 and in the defendant's bedroom alone with him he
20 would commit several acts which qualify as lewd
21 acts upon a child. That is, touching or fondling
22 or attempts to touch and fondle.

23 And she specifically talked about one of the
24 acts that she remembered was that he would try and
25 force her to touch him and that if she wasn't

1 touching him in a way that he liked or that he
2 preferred, that he would get frustrated with her
3 and make her stand in front of him, directing her
4 to remove her clothing and stand in front of him
5 like a statue, she said, and then he would touch
6 himself as he watched her. She also testified that
7 in this house fondling occurred as well.

8 Any of those acts, ladies and gentlemen,
9 committed against a child who is under age sixteen
10 by a person who is over age fourteen is lewd act
11 upon a child. I submit that charge has been proven
12 by the State as well beyond a reasonable doubt.

13 The final charge for you, and additional
14 charge, is criminal sexual conduct with a minor in
15 the second degree, and that's just a fancy way of
16 saying sexual battery with a child who is under age
17 sixteen. Sexual battery can be several things. It
18 can be oral contact such as fellatio. She
19 described him making her put her mouth on his
20 private parts on more than one occasion. It also
21 can include vaginal intrusion, which is any
22 intrusion, however slight, into the vagina. That
23 includes penetration with a finger, which she has
24 testified occurred not only in the blue house in
25 Donalds, but also on many, many occasions in the

1 primary family home which was this trailer on
2 [REDACTED] and in this trailer she testified
3 under age sixteen there was the oral contact or
4 oral sex in addition to the vaginal intrusion or
5 insertion of the defendant's finger into the
6 vagina.

7 Ladies and gentlemen, all three charges are
8 before you. The State submits that all three
9 charges have been proven beyond a reasonable doubt.
10 You may convict on all three charges.

11 As I said before, it is essential that we
12 make clear that consent by the victim or the fact
13 that the victim was submissive and complied and
14 went along with his wishes is not a defense to be
15 used by Mark Bolte. The State is not required to
16 prove force because she was his daughter and
17 because she was a minor.

18 And finally I would just like to address the
19 issue of reasonable doubt. Reasonable doubt can be
20 defined in a lot of ways and when I'm done speaking
21 at the very close of this case the judge will
22 charge you on exactly what reasonable doubt is, but
23 I submit to you ladies and gentlemen that
24 throughout this case, from the witnesses supplied
25 by the State and the witnesses supplied by the

1 defense, the facts of this case are undisputed.
2 One thing stands like stone. He did it and there
3 is no other reasonable explanation for why we're
4 here.

5 Thank you.

6 THE COURT: Mr. Grose.

7 MR. GROSE: May it please the Court, if I
8 could just have a moment to rearrange, Your Honor.

9 THE COURT: Take your time, sir.

10 MR. GROSE: Let's make no mistake about it,
11 we're going to ask you to find Mark Bolte not
12 guilty on all three charges because the State has
13 not proven, has not proven, has not proven their
14 case. There are three reasons why I'm going to ask
15 that you find Mark not guilty of all charges. The
16 first one is the motive for the divorce. The
17 second one is the unbelievability of the witnesses
18 that they presented and the claims that they're
19 making, and the third is the lack of any medical
20 findings.

21 I'm going to come back and talk about each
22 one of these areas in turn but before I do that I
23 want to start off by talking with you about some of
24 the rights and responsibilities that you have as
25 jurors.

1 The judge has already told you that you will
2 be the finders of fact in this case, that you are
3 the ones who decide the facts of the case, that is
4 your sole province. Nobody can invade that, the
5 judge can't tell you that, nobody can tell you how
6 to decide the facts. Not only that, each and every
7 person has the right to have an opinion on the
8 facts of the case and to express that opinion in
9 the jury room.

10 The judge is going to tell you the verdict
11 has to be unanimous. It's not a majority vote,
12 it's not most. The verdict has to be unanimous.

13 The reason that you've been told that you
14 can't talk about this case before now or before the
15 judge tells you, gives you the signal at the end of
16 all the argument and the charge on the law is
17 because you're supposed to consider everything
18 before you begin to make up your mind and express
19 an opinion and to share that with others.

20 And as a part of that, everybody, everybody
21 has a right to be heard, everybody has a right to
22 their opinion, everybody has the right to have that
23 opinion respected. Nobody at anytime can ever ask
24 you to do anything, in finding the facts, to
25 violate your conscience.

1 The law. There is going to be two types of
2 law that you're going to hear from the judge, sort
3 of the more general law that applies in every case,
4 and then the more specific law that only applies to
5 the charges or the crimes that are being brought.

6 Talking about the general law for a second,
7 the burden of proof is beyond a reasonable doubt.
8 The burden of proof is on the government to prove
9 their case at all times. It's on the government to
10 prove their case beyond a reasonable doubt. The
11 judge is going to tell you that you all are the
12 people that decide what a reasonable doubt is, that
13 a reasonable doubt is a doubt that you can assign a
14 reason to, and there is plenty of reasons in this
15 case to assign doubt, more than one of them.

16 The judge is going to tell you that you can
17 consider somebody's motive in testifying. The
18 judge is going to tell you that you can consider
19 whether or not a witness has contradicted
20 themselves, been caught in contradictions. The
21 judge is going to tell you that you can consider
22 whether or not one witness contradicted another
23 witness. These are all things that you can take
24 into account when determining credibility and
25 determining whether or not there is a reasonable

1 doubt.

2 The judge is also going to tell you that you
3 can consider corroboration. He's going to tell you
4 that a witness doesn't have to be corroborated, and
5 I would almost guarantee you they are going to
6 argue that the testimony of a victim in a case does
7 not have to be corroborated in a criminal sexual
8 conduct case, or any case, for that matter.

9 The judge is also going to tell you that
10 testimony may be corroborated. When you're
11 considering corroboration you should consider
12 whether or not they came forward and in their
13 claims, their accusations, the testimony they gave,
14 whether or not they provided, they provided you
15 with information that if true should have been
16 corroborated and wasn't in this trial, and I'm
17 going to come back and talk about that at the end.

18 When we started I told you that this case was
19 about marriage and family and divorce, about Ester
20 Lopez and Mark Bolte getting married, raising a
21 family and unfortunately and tragically about a
22 divorce. I began, the very first thing I told you
23 was that it is March 23rd, 2002, and Ester Bolte
24 wants to go on a trip to Gatlinburg, Tennessee and
25 that they couldn't go on that trip and that she was

1 upset about it and she went on a walk and while she
2 was on that walk she decided, "I am no longer his
3 wife." And we delivered on that. If you look at
4 the witnesses that have been called in this case,
5 the people that we called, we went to what we
6 talked about in the beginning, the divorce, the
7 motive of the divorce, and we called Mark's ex-wife
8 and her divorce lawyer to go to what we talked
9 about in the beginning, the motive of divorce, and
10 throughout this trial we spent some pains taking
11 time going through the dates of the divorce and the
12 dates of the criminal case. It probably wasn't
13 very clear in the beginning, kind of like in the
14 old days before the digital cameras or if you think
15 of a Polaroid shot, at first the picture is not
16 clear but as more time goes on it develops and
17 becomes clearer and clearer and clearer, and that's
18 what happened in this trial. We told you that she
19 had made that statement and she had reached that
20 conclusion March 23rd, 2002. During her testimony
21 we not only showed you that she reached that
22 conclusion, but that that statement was made to the
23 police in August, 2003, when she made her
24 statement.

25 In the trial you heard evidence about

1 domestic dispute and police being called out. You
2 heard certainly one date that it was pinned down
3 to, April 20th, and some suggestion that there may
4 have been another date that it was in April but
5 Judy Davis, when she looked at her file, had her
6 file on the stand, couldn't give you the date of
7 any other time. April 20th, 2002, is after March
8 23rd, when Ester Lopez decided, rather, "I am no
9 longer his wife."

10 We told you in the beginning that after she
11 reached that decision, that she began making
12 preparations to leave the home. She was mad at
13 Mark, she wanted to get back at Mark, she wanted to
14 hurt Mark in the place that would hurt him most,
15 taking his family, and she began making
16 preparations. You heard that it was in April,
17 April of 2002 that Judy Davis first got involved.

18 You also heard it was after the involvement
19 of Judy Davis that the officials from the safe home
20 got involved in the case. Motive, motive,
21 beginning making the preparations.

22 The problems you heard, a lot of the problems
23 you heard and a lot of things they are talking
24 about that was going on in this family, you heard
25 about that going on through the spring and into the

1 fall, and what's telling is when you get to
2 November 26th, when we can tie documents to dates,
3 that court papers were being filed. This was done
4 not long after, not long after Ester Bolte left and
5 went to the safe home. Her and [REDACTED] signed
6 papers on the same day with the Family Court and
7 it's this day, November 26th, 2002, that is the
8 first written documentation of these so-called
9 allegations of sexual abuse. It's also the same
10 day, the same day that Ester Bolte signed the
11 papers and said she wanted to have possession of
12 the house.

13 Now, they may make a big thing about they
14 didn't own the house, that it was a rental house,
15 she wanted possession of the house, she wanted
16 possession of the items in the house, she wanted
17 the automobiles of the marriage, and all of this
18 was done at the same time, at the same time.

19 Now, they're going to tell you, they're going
20 to tell you that the reason that she decided to do
21 this in November was because [REDACTED] had just
22 disclosed to her about the sexual abuse. But they
23 are also going to tell you it doesn't matter that
24 she didn't tell the judge the same thing that she
25 told you all, that she referred to that as

1 attempted rape and not as actual intercourse and
2 rape and what they brought forward in this trial.

3 The hearing on both documents, both motions
4 was in December of 2002. Again we have this exact
5 overlap, the exact overlap. No charges are
6 brought, no charges are brought. At this point in
7 time the next thing that happens, January 21st,
8 2003, she signed the divorce papers.

9 Let's look at how this goes. She decides
10 she's no longer his wife. CDV call, Judy Davis
11 from the Sheriff's Department here in Abbeville,
12 she refers her to the safe home and they refer them
13 to the divorce lawyer. Playing the system,
14 manipulating the system, it all began March 23rd,
15 2002.

16 They brought out that the divorce petition
17 was filed February 4th, 2003, two weeks after she
18 came in and signed the papers, and that the answer
19 came in in March of 2003, and in Mark's answer he
20 said he did not want the divorce, that he wanted
21 the Court to order counseling, he wanted the Court
22 to assist with a reconciliation of the marriage, if
23 that couldn't be done, there were three children
24 that still had not reached age eighteen, he wanted
25 joint custody of the children and visitation with

1 the children.

2 The next thing that happens in the case is a
3 letter from the divorce lawyer in July, July 21st,
4 2003. The letter from the divorce lawyer asserting
5 Mrs. Lopez's position, she does not want any
6 reconciliation, she's going to oppose the joint
7 custody and she's going to oppose visitation.
8 By this time they knew what the date of the hearing
9 was going to be, in August.

10 The next thing that happens is August 12th,
11 two days before the hearing, a letter to DSS
12 outlining their plans to oppose visitation.
13 Actually that wasn't the next thing. The next
14 thing after the letter was the 6th of August. The
15 6th of August was the day of the police report.
16 Then the letter picking up on the prior letter,
17 "We're going to use the allegations of sexual abuse
18 to oppose the visitation," two days before the
19 hearing. And then we get to the hearing August
20 14th. Ester Bolte signs her police statement, Judy
21 Davis said she notarized it. The same day of the
22 divorce hearing.

23 They're going to tell you, as they probably
24 suggested in some of their questioning, that the
25 sexual abuse allegations and the divorce

1 allegations are two separate things but remember
2 they're claiming that in December the reason that
3 she decided to go, or November of 2002, the reason
4 she decided to go into the safe home and to do this
5 was because [REDACTED] had just disclosed. Never mind
6 that they are living in two separate residences at
7 that time, one in the dorm, the other one in the
8 family home, and they talk about that at the
9 hearing.

10 And then when the hearing is getting closer
11 the sexual abuse allegations and the divorce
12 proceedings overlap. And then they tell you that
13 the order was signed later in the month, August
14 25th, 2003, then the warrants, September, the
15 criminal warrants, September 22nd, and supposedly
16 these allegations, the supposed allegations having
17 been out in the open since at least November, for
18 the first time there is a referral to counseling
19 after the warrants and the first counseling visit
20 is not until October 23rd.

21 We took the painstaking time to put this out
22 and lay it out and show how it overlapped, because
23 when the picture begins to develop over time and it
24 becomes more clear you see that the allegations and
25 the motive for divorce overlap. They overlap in a

1 concerning and troubling way, and that is a doubt
2 that you can assign a reason to, that is a
3 reasonable doubt.

4 The second area that I said I would talk
5 about is general unbelievability of their case, the
6 accusations that they made in this courtroom.
7 What the State wants to do, and they even made
8 reference to it in their opening statement. What
9 the State wants you to do is to look at a picture,
10 look at the picture that the whole world saw of an
11 intelligent, active, well adjusted young lady and
12 say that that's not the real picture. They come in
13 here and tell you, claim and accuse that these
14 accusations of criminal sexual conduct in some
15 degree, some type of mistreatment, some type of
16 abuse, whether it meets the definition of sexual
17 conduct or not, misconduct or not, some type of
18 abuse started as early as she could remember and
19 continued all the way to her eighteenth birthday,
20 as early as she could remember would be in
21 California or shortly thereafter when they moved to
22 Illinois, and when they moved to Illinois we know
23 that she was a straight A student in Illinois. A
24 young child supposedly going through that, a
25 straight A student? She graduates eighth grade,

1 her junior year as valedictorian, number one
2 student of her junior high school.

3 She comes to South Carolina in the middle of
4 her ninth grade year, she's got good grades when
5 she comes down here, she comes into Dixie High
6 School, she continue to make all A's. They claim
7 to you that during the stress and transition of a
8 move, within just a few days of being here in South
9 Carolina that this alleged conduct continues on and
10 she's able to make that adjustment in Dixie High
11 School with the academic achievement award for good
12 grades.

13 They tell you that it continued and it
14 escalated over time. Well, look what was going on.
15 She transfers into Abbeville High School because
16 they had courses she wanted, college preparatory
17 courses, she transfers into Abbeville High School
18 and she continues to make straight A's. This was
19 at least part of her transcript, Defendant's
20 Exhibit Number 1, and the lowest score on here
21 looks to be a 95, I'm sorry, a 94, and her tenth
22 grade year or eleventh grade year and her senior
23 year she continues to be a straight A student.

24 Coach, or Mr. Gosnell, nominates her for
25 American Scholar Award. The date on that down here

1 at the bottom, May, 2000. FCA's star student
2 award, April 27th of 2000. Not only is she a star
3 student, but she gets very involvement in one of
4 her extracurricular activities.

5 October 30th, 2000, the National Beta Club
6 certificate.

7 A letter dated December 22nd, 2000,
8 Congressional Youth Leadership Council, recognized
9 as an outstanding student, gets to go to
10 Washington, D.C. We don't have a document but
11 there was a similar award and honor where she got
12 to go to Columbia and meet with state government
13 officials.

14 March, 2001, University of South Carolina
15 Spartanburg Gold Dome Junior Scholar Certificate.

16 July 13th, 2001, the summer between her
17 junior and her senior year, successful completion
18 of requirements for South Carolina Business Week.

19 2001, J. D. Rickman Certificate of
20 Excellence, same time.

21 They want you to believe that chronic ongoing
22 long term sexual abuse for over ten years did not
23 affect her ability to perform, achieve and excel.
24 The picture they want you to see, they want you not
25 to look at that picture, they are going to give you

1 explanations as to why. They are going to say
2 people that are abused sexually sometimes make
3 really good grades because they are throwing
4 themselves into their academic work. We heard
5 testimony about how active she was in student
6 government, clubs, sports, doing that, trying to
7 spend time out of the house.

8 This is another area where it's almost
9 unbelievable, it is unbelievable, you can't believe
10 it. They bring in a counselor, and remember the
11 counseling's not set up until September, 2003, no
12 visits until October 23rd, 2003. The counselor
13 comes in here and she tells you "Well, some
14 students really excel academically when they are
15 being sexually abused, some students don't do well
16 when they're being sexually abused, and some
17 students just do it in the middle." They've got
18 everything covered.

19 She talked about anxiety and depression and
20 sleep deprived. Some people with depression sleep
21 too much, some people are sleep deprived. What she
22 also told you, and she was a psychologist, what she
23 also told you was the only history that she got was
24 from [REDACTED] and the only observations she made was
25 at this first visit or afterwards. Of course

1 [REDACTED] was a double major and I believe she
2 testified that one of her majors was psychology.

3 I asked her if she ever went and got any
4 doctors' records from where [REDACTED] went to a doctor
5 here or Illinois to confirm that there was some
6 type of symptoms of anxiety or depression or
7 something of that sort during any of these periods
8 that they are claiming all this sexual abuse took
9 place. Everything was entirely based on the same
10 statements or the statement that came from [REDACTED]

11 Now, let's talk again about another
12 unbelievable aspect of this. They asked Judy Davis
13 who was listed as the complainant, the victim, who
14 was the victim on this domestic violence. Listed
15 on the report, Ester Bolte. We asked, "Did you see
16 any visible signs of injury?" Judy Davis, "No, I
17 didn't see any visible signs of injury." Ester
18 Bolte tells you, "Well, there was a bruise on my
19 foot that didn't come up until later, nobody saw
20 it, I never showed it to anybody."

21 What they want you to believe from their
22 testimony is that Mark strangled his daughter,
23 straddled her, pinned her to the floor and she saw
24 that and she didn't make a complaint of domestic
25 abuse about that, only for a bruise that nobody

1 ever saw. Unbelievable aspect of the claims and
2 the accusations that they make.

3 We already talked about the unbelievability
4 of saying that she filed these papers for one
5 reason, claiming it was for the sexual abuse but
6 not having to really talk about that, be consistent
7 with that at that hearing.

8 Let's talk about what they say about some of
9 the abuse itself. They started off talking about
10 the blue house, only being there for about three
11 months.

12 The [REDACTED] [REDACTED] address was March of '99,
13 so we're talking about a three month period
14 beginning either in December of '98 or January of
15 '98, going three months, January, February, March.
16 Twelve people living in that house, six members of
17 the Bolte family, six members of the Rice family,
18 twelve people living in that house, nobody ever
19 heard it. They want to dismiss that as it being a
20 crime of secrecy.

21 The next house, the [REDACTED] [REDACTED] where
22 they lived most of the time, two bedroom trailer.
23 [REDACTED] testified not only about the sanctification
24 allegations that they talked about, [REDACTED]
25 testified about some bizarre religious experiences

1 happening after this abuse occurred, screaming,
2 chanting and yelling. They want to talk about it
3 as a crime of secrecy and silence, but then they
4 talk about screaming and chanting and yelling, two
5 bedrooms, her brother is only a couple years
6 younger than her. Unbelievable.

7 Even the answering machine tape they are
8 going to make a lot out of is kind of questionable
9 because if you go through and you listen to
10 everything, they couldn't tell you the exact dates,
11 they say around this time in November. They say
12 that it's in the same condition and they offer some
13 explanation, "Well, we never set the date or the
14 time," I don't remember exactly what she said, but
15 something about it. But when you listen to the
16 dates, and they go day after day after day after
17 day, it goes well into two weeks, almost a two week
18 period, and what they want you to believe is that
19 by this time when their plan is well under way, we
20 have already gone from Judy Davis to the safe house
21 and all these other people are involved, the
22 preparations are being made, that during that
23 almost two week period [REDACTED] got no other phone
24 calls, not from a friend, fellow student at
25 Erskine, not from somebody she knew in high school,

1 not from her mother, not from anybody. It just
2 makes you wonder.

3 [REDACTED] said, testified, talking about the
4 rules, the rules. One of the rules was you can't
5 wear a swimsuit at the bench. We asked her to
6 repeat that and then we bring out a photograph of
7 [REDACTED] wearing a swimsuit at the beach. They tried
8 to explain it at that point. She said never, not
9 allowed to do it, always shorts, always cover up.
10 She said her father took this picture, her and her
11 mother and presumably her brother. The father took
12 the picture, that wasn't going behind the back,
13 caught in the contradiction and then they try to
14 explain them away.

15 Another rule was about skirts, can't go out
16 in a skirt any length without wearing some type of
17 shorts, wearing shorts underneath it. Asked her
18 about that, pulled out another picture, dressed in
19 a cheerleading outfit, getting ready to go to a
20 dress-up day.

21 When dealing with credibility you can
22 consider whether or not somebody was contradicted.
23 We've got two photographs of contradictions.

24 As part of the overall testimony she wants
25 you to believe that she was basically abandoned at

1 ten years old, at the time she was ten years old
2 her mom, her mother, was working out of the home
3 and she was taking care of the children. And when
4 the younger children were born, and of course at
5 ten they would have been born shortly thereafter,
6 about that time she was talking about with Mark.
7 She told you that her father taught her how to cook
8 and that when she took on some of the cooking in
9 the household that's something she learned from her
10 father, and again this goes back to that picture
11 that everybody sees, the intelligent, active, well
12 adjusted child. That doesn't come from abandonment
13 at ten years old and having to do everything for
14 yourself as well as your younger siblings at that
15 age. It's just common sense. It doesn't work that
16 way. It does not work that way.

17 What you had was a family, it may not have
18 been what we consider a traditional family, but
19 families aren't the traditional family anymore,
20 1950's, '60's, the Disney family they talk about is
21 the exception rather than the rule these days. You
22 had a family where the mother Ester Bolte had the
23 training, had the career and was the chief bread
24 winner in the family. Ester Bolte told you when we
25 called her as a witness that Mark did a lot of the

1 child raising, the cooking, the taking to doctors'
2 appointments, homework, getting the kids to school.
3 A reversal of the traditional roles but a family
4 that's functioning, not a family of abandonment at
5 ten years of age.

6 They want you to believe, they want you to
7 believe that Mark was possessive and wouldn't let
8 [REDACTED] go anywhere without him, wouldn't let them
9 have any friends, let her have any friends. We
10 asked Ester Bolte specific names of specific people
11 from the time in Illinois, and only then did they
12 concede that there was people that she did things
13 with. We asked about specific people, got her to
14 name specific people from around here, Daniel
15 Banks, Michael Burgess, T. J. Keith.

16 They said she wasn't, claimed she wasn't
17 allowed to do anything outside of school, yet we
18 found out there was special cross country friends,
19 cross country team friends. Asked them for names,
20 "Can't give you anything." We're getting off
21 script, this is inconsistent, but we caught them in
22 the contradictions. The more we talked, the more
23 questions we asked, the contradictions, the
24 inconsistencies and the unbelievability.

25 Cross country was one of her activities. It

1 turns out there was some cookout where the cross
2 country team came over to the house, another
3 inconsistency, but the things that they told you,
4 the thing they told you, that they want you to
5 believe, the claim in the accusation was, is that
6 Mark Bolte wouldn't let his daughter stretch with
7 the team, had to do it separately and with him.

8 They're going to tell you they don't have to
9 corroborate allegations. This isn't allegations of
10 criminal sexual conduct, allegations in secret
11 where there wouldn't be any corroboration.

12 Corroboration hasn't been offered, they have not
13 brought you one cross country teammate, they have
14 not brought you one cross country coach even though
15 they used one of the coach's houses in Myrtle Beach
16 when they went there for visits. They have not
17 brought you one student or teacher or anybody to
18 corroborate that this happened. Unbelievability.

19 We talked earlier about the Congressional
20 Youth Leadership Council award, it only goes to a
21 handfull of people in South Carolina, involved a
22 trip to Washington D.C., no chaperone. At least
23 not Mark or Ester. A trip to Columbia to state
24 government, Mark and Ester weren't the chaperones.
25 FCA trips, cross country trips. They are going to

1 talk about, well, "He followed me to the football
2 game." Younger brother [REDACTED] played football. His
3 father is in South Carolina. Fathers in South
4 Carolina can't watch their sons play football?
5 Football season has started, we know what that is,
6 unbelievability.

7 The prom incident, no teacher, student or
8 other chaperone from that prom has come in here to
9 corroborate. Unbelievability.

10 The whole thing about Michael Burgess, kind
11 of a murkey and unclear thing. What we have
12 learned is [REDACTED] was the one that first met him
13 and perhaps that was at this business week course
14 in that summer. After telling you that she wasn't
15 allowed to do anything outside of school with
16 people, we talk about Michael Burgess and his
17 relationship to her cross country training is what
18 came out. Now, I asked her about how much time she
19 spent with cross country and you will remember she
20 told you that she was very good and very fast and
21 could run three miles in twenty minutes and that
22 would be very good and very fast, it would be less
23 than seven minutes a mile. And because of that she
24 told you that she finished her cross country
25 training with the team quickly, so add in a little

1 bit of time, twenty minutes, a little bit of time
2 to get ready, to get out there, a little bit of
3 time at the end, thirty minutes a day, five days a
4 week, two and a half hours, add a little bit more
5 time and you may be getting up to three, three and
6 a half hours.

7 I showed her an application that she filled
8 out for scholarship where she talked about the
9 amount of time that she devoted to various
10 activities, and one of those activities was cross
11 country. And on that application she put down
12 fifteen hours a week, and when confronted about
13 that she said, "That is because, that is because I
14 did training in addition to that."

15 Well, Michael Burgess, she said he was a man,
16 he ran, "He's faster than I am, so we would go on
17 runs together." We have got less than five hours a
18 week at school, assuming practice every day, and a
19 total of fifteen hours and a running partner.
20 Contradictions within her own testimony.

21 Then we found out some other things where it
22 gets murkey, cloudy and unclear, that Michael
23 Burgess would be at the Bolte household at times
24 when both Mark and [REDACTED] weren't there. That when
25 Ester told you about a trip to Myrtle Beach where

1 she and [REDACTED] went, it just happened, just
2 happened that Michael Burgess was there that trip,
3 somebody that she was spending time with when her
4 daughter and her son, her daughter and her husband
5 were not there. And then there is this odd and
6 curious trip by Michael Burgess to see Ester
7 Bolte's parents in Wisconsin. And all this is
8 going on during the time after March 23rd, 2002,
9 when she's decided, "I'm no longer his wife."

10 Talking about credibility, there is a whole
11 issue of Defendant's Exhibit Number 12 that you all
12 are going to get an opportunity to look at.
13 Remember the commotion that this caused? Because
14 what happened is, [REDACTED] got up there and testified
15 that sometimes she would write notes, put her
16 mother's name on there because she was doing things
17 with the children, the other children, that she was
18 exercising that parental role. She wanted to talk
19 about rebellion versus fighting back. Cutting
20 classes. Somebody is going to graduate
21 valedictorian, go off to college and have
22 scholarships, cutting classes for most people could
23 endanger their ability to make good grades.

24 Now, [REDACTED] talked about, you know, it was
25 uncommon, the incomplete, once you got in college,

1 incomplete, uncommon for somebody of her ability to
2 have to take incomplete, and perhaps she had the
3 ability to cut class and still make the grades that
4 we know she made, but the law in South Carolina is
5 that you are supposed to go to school. We pulled
6 out the notes. "My daughter [REDACTED] [REDACTED]
7 needs to be excused from school at 11:05, she will
8 return by 4:00 o'clock. Thank you. Esterlina
9 Bolte." But [REDACTED] signed that.

10 "To whom it may concern. My daughter [REDACTED]
11 [REDACTED] has been absent for the past two days due to
12 an illness." That's not her younger brother and
13 sister sick or going to the doctor. It's her
14 claiming an illness. Signed purportedly by her
15 mother.

16 "To whom it may concern. My daughter [REDACTED]
17 [REDACTED] [REDACTED] also needs to be out early for school
18 on October 27, 2000. She will return, however." I
19 can't read parts of it, something about her
20 brother, she is needed at home to go to the church,
21 something about youth -- the copies are bad. "She
22 has our permission to sign out of school at 11:00
23 o'clock and return by 1:00," I'm sorry for all the
24 confusion, "Thank you again." The name is
25 Esterlina Bolte but it's signed by [REDACTED]

1 Here's one. "My son [REDACTED] needs to be out
2 of school early due to weekend fellowship at church
3 retreat. He needs to be dismissed out of class
4 12:30 on October 27, 2000. He will be picked up by
5 a member of the church. He has a full hundred
6 percent permission to leave. Thank you for your
7 time." Here she's signing for [REDACTED]

8 Some for her brother, some are for other
9 family members, some are for her. Here is one.
10 "She needs to be excused for an appointment. Thank
11 you for your time and understanding." February
12 16th, '01, [REDACTED] signed it but it's her mother's
13 name.

14 Here's one, "[REDACTED] and [REDACTED] both have a 24
15 hour illness." Signed by [REDACTED]

16 "My daughter [REDACTED] [REDACTED] was late due
17 to her sickness." It's catching up with her, she
18 needs her rest, she needs to stay home but she
19 demands not to miss certain classes, "please excuse
20 her today." Signed by [REDACTED] [REDACTED] but it's her
21 mother's name.

22 "Late due to having to drop off her car."
23 She admitted it was a forgery.

24 "My daughter [REDACTED] [REDACTED] slept late."
25 Again a forgery.

1 Now, they want to tell you this is all okay
2 in their view of the world. Credibility,
3 credibility. If you write a note and sign somebody
4 else's name and then you give that note to somebody
5 intending them to rely on the fact that the person
6 whose name appears is the person who signs it, you
7 are intending to deceive them, intending to deceive
8 them. Not only that, it sounds like they got away
9 with it, it sounds like [REDACTED] got away with it.

10 Not only is there contradictions about what
11 some of these notes were about, this is also
12 evidence of deception, successful deception, and we
13 know she was cutting class because she told you her
14 junior and her senior year she was suspended.
15 Deception is something that you can consider to be
16 a reasonable doubt. And remember how she wanted to
17 come back and try to explain this, explain it,
18 explain it. She was surprised. She did not plan
19 or intend or expect to get caught about this, and
20 she did. Something you can take into account for
21 reasonable doubt. But when she was fighting back
22 about it, trying to explain it, she never denied
23 that she forged those signatures.

24 Corroboration. They are going to tell you
25 that they don't have to offer it. The judge is

1 going to tell you that's true, they don't have to
2 offer it but it may be offered. I suggest to you
3 that the third area of reasonable doubt, third
4 category of reasonable doubt follows the motive, is
5 consistent with the unbelievableness of all these
6 claims and accusations that you heard, and this
7 area of corroboration comes from their testimony,
8 their testimony meaning [REDACTED] testimony and
9 Ester's testimony. And you add in just a little
10 bit of additional understanding about the system
11 that we learned from Judy Davis, a police officer
12 who works for the sheriff and a victims advocate.
13 What did [REDACTED] tell you and what did Miss Mayes
14 talk about when she started here in her first
15 argument today?

16 In addition to all these years of fondling,
17 abuse, they talk about digital penetration,
18 inserting the finger into the vagina. [REDACTED] also
19 claimed and alleged that just prior to her
20 eighteenth birthday her father took her virginity,
21 the actual sexual intercourse, and that it
22 happened, I believe she said five more times. Miss
23 Mayes talked about [REDACTED] own religion, and I
24 believe [REDACTED] said something to the effect that
25 she wanted to save herself for marriage and that

1 her father took that away.

2 Ester Bolte testified, not when I was asking
3 her questions, but when Miss Mayes was asking
4 questions, testified about she wanted to take
5 [REDACTED] to an OB/GYN for a pap smear, for a
6 gynecological exam, and they claim that Mark was
7 afraid of that, didn't want that to happen. In
8 fact, that's probably going to be the thing, and
9 during this period of time the government's going
10 to claim, try to argue that during this period of
11 time when Ester had decided, "I am no longer his
12 wife," that things were happening and Mark was
13 scared or afraid, and this is one of them, this is
14 something they claim, they suggested his fear of
15 that, and the reason they suggested that is just
16 common sense, because they're saying, they're
17 claiming that Mark didn't want her to have that
18 exam because that would uncover the secret
19 activities, that that would uncover this shameful
20 crime, that that would produce and show evidence of
21 this shameful crime.

22 Well, remember Judy Davis, police officer,
23 victims advocate? What did she tell you about her
24 job and how the system works? Referring people for
25 services. That's how she got eventually to the

1 psychologist.

2 THE COURT: How much longer, Mr. Gross?

3 MR. GROSE: I'm about to wrap up, Your Honor.

4 Referrals. There is one witness that you
5 haven't heard from, one witness that you haven't
6 heard a name of, and the reason you haven't heard
7 from them and they don't know the name of is
8 because the witnesses do not exist, and that's the
9 medical doctor that they claim Mark was afraid of.
10 What we know is, [REDACTED] said she was saving herself
11 for marriage, the religious beliefs, she's not
12 married.

13 You can imagine the examination of the
14 doctor. "Would you please state your full name for
15 the record? Doctor, would you tell the jury where
16 you went to medical school? When did you graduate
17 from medical school? Did you do a residency? Did
18 you do any medical training? Did you do any
19 internships? Where did you do those? Have you
20 specialized in any particular areas of medicine?
21 Have you ever performed examinations, gynecological
22 examinations? Have you ever performed sexual
23 trauma examinations? How many examinations have
24 you performed, doctor? In this case did you
25 perform an examination on [REDACTED] [REDACTED] When did

1 you perform that examination? Did you follow any
2 procedures in that examination? Are your
3 procedures always the same? Did you document your
4 examination, your findings? As part of your
5 examination did you receive any medical history
6 that helps you reach any diagnosis? Did you
7 receive a history of sexual abuse from the youngest
8 age that she could remember, on up to eighteen?
9 Did you receive a history of digital penetration
10 over multiple years? Did you receive a history of
11 complete full sexual intercourse with a grown man?
12 Did you receive a history that this intercourse
13 happened on multiple occasions? Doctor, what were
14 the findings of your exam?"

15 They are going to talk about corroboration
16 and that they don't have to offer it. But from the
17 testimony that they presented in this case they not
18 only talked about her father taking her virginity,
19 they claimed, alleged, accused that he was afraid
20 of an exam but they don't offer you that
21 corroboration. That's something they brought up,
22 they brought up, because the motive is divorce.
23 And because of the numerous, numerous, numerous
24 aspects of unbelievability about these claims and
25 accusations and because of the lack of medical

1 corroboration that they told you should be there,
2 you should find Mark Bolte not guilty.

3 There are going to be three places to check,
4 not guilty, not guilty, not guilty.

5 THE COURT: Madam Forelady, ladies and
6 gentlemen of the jury, we'll take a recess at this
7 time. Do not discuss the case by, between and
8 among yourselves and retire to the jury room.

9 (The jury was excused from the courtroom
10 at 1:26 p.m.).

11 THE COURT: We'll be in recess for a few
12 minutes, please.

13 BAILIFF: Can they go smoke?

14 THE COURT Yes, but let somebody be with
15 them. Mr. Manning is going to have to leave in a
16 few minutes.

17 BAILIFF: Okay.

18 THE COURT: Supervise it.

19 (Recessed at 1:27 p.m.).

20 (Reconvened at 1:43 p.m.).

21 THE COURT: The record is open in 2003-296,
22 the State versus Mark Richrd Bolte. Show the jury
23 in, please.

24 (The jury returned to the courtroom
25 at 1:44 p.m.).

1 THE COURT: All the jurors are present, with
2 the foreperson and the alternates properly seated.

3 Miss Mayes, the jurors are with you, please.

4 MS. MAYES: May it please the Court.

5 Ladies and gentlemen, I know it's been long
6 and I know today has been long and I will try be as
7 brief as possible, but I listened carefully to Mr.
8 Grose's argument, and it's as if we were in two
9 different courtrooms this week, because I took from
10 it one simple thing. If you were to find Mr.
11 Grose's argument credible on all the arguments
12 about the witnesses and the different stories and
13 the divorce and all these things as somehow playing
14 a factor in this, then we would be ignoring the
15 most important aspect of this case, and that is
16 that the voice of a victim matters. It rings
17 strong and it rings true and it can never mean more
18 than when it comes from here, sworn oath in a
19 courtroom. The hardest thing [REDACTED] [REDACTED] has ever
20 had to do. And you know what's so hard about a
21 sexual assault case and what makes it different
22 from other crimes is it's not like an armed robbery
23 where a videotape camera is playing as a culprit
24 comes in and holds up a store and we can come in
25 here and show you that videotape, and it's not like

1 another crime like burglary where there might be
2 fingerprints left behind at the scene and we can
3 come in and say, "Look, the fingerprints match, now
4 we know who did it." Sexual assault and sexual
5 abuse of children is a secret crime and that's
6 really the most fundamentally important aspect of
7 this case and it leaves behind most commonly one
8 witness, like [REDACTED] who carries with her on the
9 inside all of the scars of what has happened.

10 And there has been a lot of talk about things
11 [REDACTED] did outside of school, and I submit to you
12 that the reason she was able to excel outside of
13 school is because it was the one thing in her life
14 that she had control over, because she had no
15 control at home. It was the one thing in her life
16 that made her feel good about herself because
17 everything happening in her own home made her feel
18 dirty and disgusting and weak.

19 And when we talk about Mark Bolte and his
20 control and isolation of [REDACTED] it is undisputed
21 in this case [REDACTED] mom called by the defense as
22 a defense witness confirmed every aspect of that.
23 He would listen in on her phone calls, he would
24 monitor everywhere she went and if she wasn't home
25 when she should be home he would check the mileage

1 on her car. He had these rules that he imposed
2 about what she should wear and where she should
3 wear it, and if what she was wearing didn't meet
4 his satisfaction he would check.

5 [REDACTED] testified by her senior year she
6 realized, she gained independence and realized
7 those were his rules and they weren't right and
8 they weren't what she was seeing as being normal
9 with other students at her school and out in the
10 real world, and so certainly at that age she may
11 have chose to dress a little bit more like maybe
12 she wanted to and confront his rules, and she
13 testified how that was constantly a source of
14 friction because he continually tried to impose his
15 rules and his wishes upon her.

16 Now, that's fine, every parent has a right to
17 have rules in their own home about how their
18 children should dress and what they should wear,
19 but as Ester Bolte described to you, what he did
20 was unhealthy and it was crazy and weird in his
21 wife's own words and she had seen that same
22 behavior before from him during the early part of
23 their marriage and that is how controlling and
24 possessive he was of her.

25 There has been a lot of talk by the defense

1 about the fact that Ester Bolte filed for divorce.
2 The good thing about being jurors is you don't have
3 to leave your common sense at home. That same
4 common sense you rely upon every day in your life
5 and in your families as parents, you get to bring
6 to this courtroom. What parent wouldn't file for
7 divorce, what parent would not leave him once their
8 daughter finally discloses the reality of
9 everything that had happened, and that's the bottom
10 line, that's exactly how it happened. There is
11 nothing unusual about that. There is no motive
12 here. It's just about survival and it's about
13 common sense, and that's exactly how it happened.

14 Ester Bolte testified that she began getting
15 suspicious and having doubts about him but, as she
16 said, there were twenty years of marriage invested.
17 Maybe she was too submissive, I submit she was, but
18 it was too difficult for her to leave. She was
19 seeing things and hearing things which caused her a
20 lot of doubt. As she said, "I didn't even know who
21 I was married to anymore," and that was around the
22 time of their anniversary back in March. She heard
23 a phone call from him to [REDACTED] and said she
24 thought he might be having an affair because of the
25 things he was saying in the phone call, and then

1 when she realized he was talking to her own
2 daughter, she had doubts about the marriage. She
3 stayed in that marriage.

4 On prom day [REDACTED] is a senior, she wants to
5 go to the prom, she has a prom dress, he is
6 insisting that he go to the prom as well. Tensions
7 run high, he doesn't want her to go to the prom, if
8 she goes, he's got to go, too. He ends up hiding
9 her dress and locking her in her room. Ester Bolte
10 tries to intervene on her daughter's behalf. He
11 becomes so violent and so agitated that she has to
12 call 911 and the Due West Police Department has to
13 come out there because that is how he is reacting
14 to the idea of his daughter going to a prom.

15 So, on prom day the police show up. Right in
16 front of the police, you heard Ester Bolte's
17 testimony, he comes at her, he's yelling, he's
18 hostile and he's doing all this right in front of
19 Officer Davis with the Due West Police, and so he
20 gets himself arrested because of his behavior in
21 front of that police officer, arrested for criminal
22 domestic violence.

23 Ester Bolte, twenty years of marriage, she
24 explains, she goes and bails him out of jail.
25 She's not out to get him. She is as submissive to

1 him as she has been all those twenty years. And
2 what is the one thing he does when he leaves the
3 jailhouse on April 20, 2003? He gets bonded out of
4 jail and goes down to the prom to find out what
5 [REDACTED] is doing, and as she's at the prom dancing
6 on the dance floor he shows up, and she talks about
7 what shame, humiliation all that brought.

8 So, she goes away to Erskine, earning her
9 scholarship because she knew that was the only way
10 she would ever get to go, he would have never paid
11 for her college. I submit he would have never
12 allowed her to leave. She leaves on her own, she's
13 living in the dorm and he won't stop. She lived
14 with the secret, she's out in the real world, she
15 hasn't told anyone but she's starting to find out
16 that the real world is different than the world she
17 knew and the world she used to live in is wrong in
18 so many ways.

19 So, she's living her life and making it.
20 There is already a trespass notice against him at
21 Erskine, he can't come on campus but he won't stop
22 calling, and he calls and he calls and he calls,
23 and she won't return his calls. And he's getting
24 scared and he's getting nervous because she's
25 starting to spend time alone with her mom,

1 something she never really did before.

2 You herd her say, "My daughter made good
3 grades." None of that even matters, there is a lot
4 more to parenting than that, none of that stuff
5 even matters if the child is suffering or hurting
6 and you are too blind to see it, and she was. Her
7 daughter is out on her own and starts confiding in
8 mom and tells her mom about some of the things that
9 have happened, tells her mom that, "Daddy has been
10 touching me." When mom lets him know that she
11 knows, that's when it really gets out of control.
12 He's calling, he's saying, "You better fix it,
13 you're going to take this roof from my head, you're
14 going to ruin this family, you better fix it, devil
15 child," all those threats, he's trying to continue
16 to intimidate her and harrass her. All of these
17 messages from him over and over and over again.

18 (A portion of State's Exhibit 10 was
19 played to the jury).

20 MS. MAYES: "It is sad how much I really
21 loved you, it is sad." Those are his words. It is
22 sad and wrong and all of those things that a father
23 should be, that he was not to [REDACTED] because she
24 trusted him and she loved him and expected him to
25 care for her as a father should, and he twisted

1 that into something ugly.

2 And and so he says to her, "Oh, your mother
3 is wonderful now, thank you very much. Heed God's
4 warnings, honor thy father and mother, you have
5 plenty of time, you had plenty of warnings, you
6 better be careful, I'm not playing."

7 But she doesn't back down. She stands by the
8 truth, she tells her mom what's happening, and when
9 he won't stop she seeks that order of protection
10 like anybody should and would in that situation and
11 her mom finally has the courage to leave him
12 because she knows she's got other kids in that
13 house, [REDACTED] little sister, she cannot stay.
14 They go to that safe house. Mom seeks an order of
15 protection as well.

16 After they are at the safe house mom files
17 for divorce, it's over, how could she possibly go
18 back to that marriage, a divorce is the only common
19 sense answer at this point. When she files for
20 divorce she never alleges sexual abuse, that was
21 never any motive. You can get a divorce in this
22 state just for living apart for a year. She never
23 alleged sexual abuse as a reason for the divorce
24 and it never entered into the divorce order as a
25 final reason for the divorce. It was never

1 mentioned in divorce pleadings at all. You heard
2 the testimony from the attorney. The only time it
3 was ever mentioned was at the very end when he came
4 up and said, "Well, I would like to have custody of
5 the kids," and then that attorney had a duty to
6 say, "Well, we will have to appoint a guardian ad
7 litem first because there have been sexual abuse
8 allegations in this case, we're aware of sexual
9 abuse allegations." There is no attorney or court
10 official that would ever agree or consent to
11 custody without a guardian ad litem, knowing that
12 history, and then finally what happened, he agreed,
13 agreed that sole custody would go to the mother, by
14 his agreement. This whole divorce thing is an
15 excuse, the only excuse he can come up with and it
16 does not play. [REDACTED] [REDACTED] has no motive to lie,
17 she has nothing to gain, she has everything to
18 lose. She has now taken on three jobs and is a
19 full-time student and is working just to pay the
20 rent, just to pay the rent for this trailer where
21 her mom and siblings now live. That is not a
22 resort, she's taken on more burdens than any twenty
23 year old should have to but it's about survival for
24 her and protecting her little sister.

25 In addition to that I ask you to consider

1 what she's lost, her innocence, all those years
2 with him, her privacy by coming into this
3 courtroom, having to testify before strangers about
4 the most personal and shameful and humiliating of
5 experiences. And then most of all she lost her
6 dignity by doing so. Think about that as the price
7 she paid for justice and give it to her.

8 You heard the testimony about even after she
9 stopped submitting and all those years she did
10 submit to him he's not charged with raping her by
11 force. There is no allegation he used force,
12 because she was his daughter and he told her that
13 it was her duty and after he was done he would ask
14 for her forgiveness, and she talked about how in
15 her heart she tried to forgive him but now she
16 knows she really couldn't, and all those times that
17 the locks was broken on this door, not just from a
18 one time event in the daytime where he had an
19 argument with her and pushed his way in, but all
20 the different times this door has been locked and
21 broken and when that lock is broken he would come
22 right into her bedroom, she said, and so many
23 nights she fled just out on the street to get away
24 from him, through her own bedroom window. She
25 slept in a press box at Dixie High School just to

1 escape him.

2 Mr. Grose spoke with you about medical
3 evidence in this case, and as I said before, the
4 good thing about being a juror is you don't have to
5 leave your common sense at home. DNA evidence such
6 as fresh blood or fresh semen or things like that,
7 I submit those things might can be found in a very
8 fresh case that happened right away, within hours.
9 By the time the police were involved in the
10 investigation in this case it was 2003, over one
11 year later. There would be no DNA or forensic
12 evidence, there would be no evidence of fresh cuts
13 or bruises or anything of that nature. There would
14 be no conclusive medical evidence to be recovered.
15 And again you get to rely on your own experiences.
16 College students, they are out there, they are
17 active, sports, college students use tampons,
18 things of that nature. I submit there is no
19 medical evidence in a case like this that is going
20 to be found in an adult female over one year after
21 the last sexual contact.

22 You are the conscience of the community and I
23 submit to you that this case has been proven beyond
24 a reasonable doubt. The testimony of [REDACTED] [REDACTED]
25 alone is proof beyond a reasonable doubt of his

1 guilt. Her testimony was corroborated by numerous
2 people, by his own words on that tape. [REDACTED]
3 [REDACTED] has no motive to lie, nothing to gain and
4 she's had everything to lose. You have before you
5 the most noble of opportunities, the chance to
6 strike back against injustice and deliver a verdict
7 which speaks the truth. Ladies and gentlemen, that
8 verdict is guilty of criminal sexual conduct with a
9 minor, guilty of incest, and guilty of attempting
10 or committing a lewd act upon a child.

11 Thank you.

12 THE COURT: Miss Mayes, would you move your
13 easel, please.

14 Madam Forelady and ladies and gentlemen of
15 the jury, the State of South Carolina in this
16 indictment, which is not evidence, charges Mark
17 Richard Bolte with the crimes of incest, criminal
18 sexual conduct with a minor in the second degree,
19 and commission of a lewd act on a minor. Now, you
20 are familiar with the terms of the indictment, so
21 the Court will not repeat the allegations contained
22 in the indictment. You should distinctly
23 understand again that the indictment contains
24 allegations by the State and is in no way to be
25 considered as evidence. The only evidence in the

1 case is the testimony of the witnesses who
2 testified before you, exhibits that have been
3 introduced, and there was no other evidence, as
4 there were no stipulations, testimony of witnesses
5 and exhibits that have been introduced.

6 Now, to the indictment the defendant comes
7 forward and says that he is not guilty of any
8 crime. That places upon the State of South
9 Carolina the burden of proving the defendant
10 guilty, as the defendant never has to prove his
11 innocence. The State of South Carolina bears the
12 burden to prove the defendant guilty beyond a
13 reasonable doubt.

14 It is a vital and important rule of law that
15 a defendant in a criminal trial, no matter how
16 great or serious the offense with which he may be
17 charged is, must always be presumed innocent until
18 his guilt has been proven beyond a reasonable
19 doubt. This presumption of innocence remains with
20 the defendant at all times throughout the trial and
21 is only removed when and if the State proves his
22 guilt beyond a reasonable doubt.

23 It is your solemn duty, ladies and gentlemen,
24 if you are not clearly convinced of the guilt of
25 the defendant here on trial beyond a reasonable

1 doubt, to find him not guilty.

2 It has been the intention of the Court to be
3 absolutely fair and impartial both to the State of
4 South Carolina and to the defendant Mark Richard
5 Bolte. If you have drawn any inference from any
6 ruling, word or deed of the Court, no matter how
7 slight, it was absolutely unintentional and you
8 should disabuse yourself completely of any such
9 inference.

10 So, the burden of proof is upon the State to
11 establish by evidence to your satisfaction, Madam
12 Forelady and ladies and gentlemen of the jury, that
13 the defendant is guilty beyond a reasonable doubt.
14 The Court will not attempt to define for you what
15 is meant by the term beyond a reasonable doubt, for
16 this is up to you to decide whether there is a
17 reasonable doubt. A reasonable doubt is simply a
18 doubt which you find to be reasonable. A
19 reasonable doubt can arise from the evidence
20 presented or from the lack of evidence presented.
21 If the evidence presented by the State has removed
22 all reasonable doubt from your minds as to the
23 defendant's guilt as to any one of the three
24 charges for which he stands on trial, then it's
25 your duty to find the defendant to be guilty.

1 However, if you are left with a reasonable
2 doubt it's your duty to find the defendant to be
3 not guilty. Madam Forelady and ladies and
4 gentlemen of the jury, if you have any reasonable
5 doubt as to the defendant's guilt you must resolve
6 it in favor of the defendant.

7 Under our constitution you and you alone are
8 the finders of the facts. No one can invade that
9 jury box and find facts in this case other than
10 you. The Court has no right to pass upon the facts
11 or to even express an opinion as to the facts. The
12 Court may not suggest in any way what the Court
13 thinks about the guilt or the innocence of the
14 defendant here on trial. You should, as aforesaid,
15 form no opinion with regard to that from anything
16 that has been said or done or any ruling that has
17 been made.

18 You are the judges of the facts and of the
19 credibility of the witnesses who testified before
20 you. The credibility of the witnesses is simply
21 the believability of the witnesses. In passing
22 upon the credibility or the believability of the
23 witnesses here are some suggestions for you to
24 consider. You may or you may not take into
25 consideration any or all of these things. That's

1 within your province. You may consider the
2 demeanor or the way or the manner that a witness
3 testified, was the witness forthright, was the
4 witness hesitant, was the witness believable or
5 credible. You may consider whether the witness had
6 a reason to be biased or prejudiced for or against
7 the State or for or against the defendant. You may
8 consider whether a witness' testimony was
9 contradicted on the one hand, or corroborated,
10 which means supported, on the other hand.

11 You may consider the witness' opportunity to
12 observe and to come to know the things about which
13 they may have testified. You don't decide this
14 credibility or believability simply by counting the
15 witnesses who may have testified for one side or
16 the other. It's up to you to decide the
17 credibility of the witnesses or the believability
18 of the statements that they made before you. You
19 may believe a small portion of a witness'
20 testimony, you may believe all of a witness'
21 testimony. You may believe none of a witness'
22 testimony or some of one witness' testimony and
23 some of another. You may believe none of a
24 witness' testimony and all of another. So, it's up
25 to you to consider all of these things, bearing in

1 mind that you should give the defendant the benefit
2 of any reasonable doubt.

3 Now, you have heard the testimony of a
4 witness in this case who has been found to be an
5 expert in a certain field of learning. In
6 considering the opinion of an expert witness that
7 has been admitted in the trial you should consider
8 the factual evidence first. An expert witness may
9 base her opinion upon the factual evidence
10 presented in the trial or the expert may base her
11 opinion upon facts and data which are not in
12 evidence and which are not before you. You may
13 consider the expert's opinion if you find that the
14 testimony is based upon facts that are reasonably
15 relied upon by experts in that field. You must
16 consider expert testimony in the same manner as you
17 do any other witness' testimony and give it such
18 weight as you believe it deserves when considered
19 with all the other evidence in the case. Such
20 testimony is given for the purpose of helping you
21 to understand the evidence and not for the purpose
22 of controlling your judgment. The value of expert
23 testimony does not depend upon the skill and
24 knowledge professed to be had by the expert, but
25 the skill and knowledge that she actually

1 possesses, and that is up to you to determine and
2 to evaluate.

3 In this regard you may consider her training,
4 experience, ability to communicate her ideas, the
5 logic of her opinion and the factual support for
6 her opinions and any other factors just as you
7 would judge the credibility and the testimony of
8 any other witness. The value and effect of expert
9 testimony is a matter solely to be estimated by the
10 jury. No mere opinion of an expert can be accepted
11 in and of itself truthful or reliable but must be
12 weighed and convince your judgments beyond a
13 reasonable doubt with the same force and effect as
14 any other fact to be proved in this case before you
15 can rely upon it as the basis of a conviction.

16 You have heard the testimony of an expert
17 witness who has special knowledge, training and
18 skill and education and experience in a particular
19 field and who have, and who has rendered an expert
20 opinion in the case. In determining the weight to
21 be given to those opinions you should consider the
22 qualifications and the credibility of the expert
23 and the reasons given for her opinions. You are
24 not bound by the opinions. You must give them the
25 weight, if any, to which you deem those opinions

1 are entitled.

2 There are two types of evidence which are
3 generally presented during the course of any trial.
4 Those are direct evidence and circumstantial
5 evidence. Direct evidence is the testimony of a
6 person who asserts or claims to have actual
7 knowledge of a fact or facts involved, such as an
8 eyewitness, such as a person who has gained their
9 knowledge as a result of the use of their senses,
10 their sight, their smell, their touch, other things
11 that are actually witnessed, real, knowledgeable
12 testimony, that's direct evidence which you can
13 believe or not believe. You can give it such
14 credibility as you believe it is entitled.

15 There is also circumstantial evidence. Now,
16 that is the proof of a chain of facts and
17 circumstances which in turn indicate the existence
18 of a fact. The law makes no distinction between
19 direct evidence and circumstantial evidence. The
20 law doesn't make a distinction between the weight
21 or the value to be given to either direct or
22 circumstantial evidence, nor is a greater degree of
23 certainty required of circumstantial evidence than
24 is required of direct evidence.

25 You may have some direct evidence and some

1 circumstantial evidence such as a combination of
2 the types of evidence on any disputed fact in any
3 case.

4 Where circumstantial evidence is undertaken
5 by the prosecution in a criminal case to prove the
6 guilt of an accused, not only must the
7 circumstances be proven beyond a reasonable doubt,
8 but they must also point conclusively, that is, to
9 a moral certainty to the guilt of the accused.
10 They must be wholly and in every particular
11 perfectly consistent with each other and they must
12 further be absolutely inconsistent with any other
13 reasonable hypothesis than the guilt of the
14 accused.

15 You should weigh all of the evidence, Madam
16 Forelady and ladies and gentlemen of the jury, and
17 if after weighing all the evidence you are not
18 convinced of the guilt of the defendant beyond a
19 reasonable doubt you must find him to be not
20 guilty.

21 The evidence with which you are to decide the
22 case has already been discussed, the sworn
23 testimony of the witnesses both on direct and
24 cross-examination, regardless of who called the
25 witness, and the exhibits that have been admitted

1 into evidence. Nothing else is evidence. Nothing
2 else should be considered evidence. In reaching
3 your verdict, Madam Forelady and ladies and
4 gentlemen of the jury, you may consider only the
5 testimony and exhibits that have been admitted.

6 Certain things are not evidence and we shall
7 discuss them in brief fashion. The arguments and
8 the statements by lawyers are not evidence. The
9 lawyers are not witnesses. What they have said in
10 their opening statements, closing arguments and at
11 other times is intended to help you interpret the
12 evidence but it is not evidence. If the facts as
13 you remember them differ in any way from the way
14 the lawyers have stated them, your recollection of
15 the facts controls.

16 Also not evidence are the questions and
17 objections that have been made by the attorneys
18 during the course of the trial. The attorneys have
19 a duty to their clients to object when they believe
20 a question may be improper under our rules. You
21 should not be influenced by anything that was, any
22 statement or objection nor by the Court's ruling
23 upon any such objection.

24 Also not evidence is testimony that has been
25 excluded or stricken or that you have been

1 instructed to disregard. It is not evidence and it
2 must not be considered as evidence.

3 In addition, the testimony or exhibits that
4 have been received, if any, for a limited purpose
5 must be used only in the way that they were
6 admitted and for nothing else whatsoever.

7 It is important, Madam Forelady and ladies
8 and gentlemen of the jury, for you to know and
9 understand and apply the rule of law that nothing
10 that you have heard or seen or believe you know
11 from any source whatsoever outside the walls of
12 this courtroom can in any way be considered
13 evidence in this case. You are to decide the case
14 solely and only upon the evidence that's been
15 received during the course of this trial right in
16 front of you. Nothing else applies at all.

17 The same Constitution that makes you and you
18 alone to be the finders of the facts make the Court
19 and the Court only the determinator of the law.
20 You must accept as correct the law as the Court
21 charges it to you and apply the law to the evidence
22 as you find it to be in reaching your verdict.

23 You must put aside any conceptions that you
24 may have had as to what the law may have been
25 before you came to the courtroom during the trial

1 of this case. You must accept the law as the Court
2 is now instructing it to you. You should not be
3 concerned under any circumstances with what you
4 thought the law was, ought to be, could be or
5 should be, but only what the law is as it is now
6 being told to you.

7 The defendant is charged with incest. The
8 State must prove beyond a reasonable doubt that the
9 defendant had sexual intercourse with certain types
10 of relatives. Now, the indictment was read to you
11 when you were sitting as a venire, and all the
12 possible relatives, a man with his mother,
13 grandmother, granddaughter, stepdaughter,
14 stepgranddaughter, stepmother, sister,
15 grandfather's wife, son's wife, grandson's wife, et
16 cetera, all of those things are incest. They
17 include the defendant's daughter.

18 The defendant is charged with second degree
19 sexual conduct with a minor. The State must prove
20 beyond a reasonable doubt that the defendant
21 engaged in a sexual battery with the victim. A
22 sexual battery is sexual intercourse, cunnilingus,
23 fellatio, anal intercourse or any intrusion,
24 however slight, of any part of a person's body or
25 any object in the congenital or anal openings of

1 another person's body except when the intrusion is
2 accomplished for medically recognized treatment or
3 diagnostic purposes.

4 The State must then prove not only a sexual
5 battery consisting of any of the things that have
6 just been said to you, but the State also must
7 prove, in order to prove criminal sexual conduct in
8 the second degree with a minor beyond a reasonable
9 doubt that the victim was less than sixteen years
10 old but at least fourteen years old and that the
11 defendant was in a position of familial, that means
12 family type, custodial or official authority to
13 coerce the victim to submit or that the victim was
14 older, excuse me, or that the defendant was older
15 than the victim.

16 The consent, willingness, indifference or
17 ignorance of the minor, if any, as to what was
18 taking place does not in any way affect the charge
19 of second degree criminal sexual conduct with a
20 minor.

21 The testimony of the alleged victim in
22 connection with accusations of criminal sexual
23 conduct with a minor in the second degree does not
24 need to be corroborated but corroborating evidence
25 is permitted in a charge of this nature.

1 The defendant is also charged with committing
2 a lewd act on a minor. Now, with this charge the
3 State must prove beyond a reasonable doubt that the
4 defendant was over the age of fourteen, that the
5 defendant was over fourteen years old. The State
6 must prove that the defendant willfully, lewdly
7 committed or attempted a lewd or lascivious on or
8 with the body or its part of a child under the age
9 of sixteen with the intent to arouse, appeal to, or
10 gratify the lust, passions or sexual desires of the
11 defendant or the child. Willfully means
12 voluntarily and intentionally, with the specific
13 intent to do something that the law forbids to be
14 done.

15 Lewd means obscene, lustful, indecent or
16 lecherous. Lascivious means tending to incite
17 lust, lewd, indecent, obscene or tending to deprave
18 the morals in respect to sexual relations.

19 Madam Forelady and ladies and gentlemen, it
20 is emphasized to you that the fact that a defendant
21 does not testify in his own behalf in a criminal
22 trial is not a factor to be considered by you in
23 any way in your deliberations. You must not
24 consider the fact that the defendant has chosen not
25 to testify when you determine the guilt or the

1 innocence of the defendant. It must not be
2 considered by you in any manner or way whatsoever
3 either against or for the defendant. A defendant
4 has the constitutional right to remain silent. The
5 assertion of that constitutional right cannot and
6 must not be considered by you in your
7 deliberations. Under your oath, then, you are to
8 draw no inference and reach no conclusion
9 whatsoever from the fact that the defendant in this
10 case did not testify.

11 The fact that the defendant did not testify
12 should not even be discussed in your jury room.
13 The burden of proof, as you have been alerted and
14 know, is upon the State and remains upon the State
15 throughout the trial. It is not the burden of the
16 accused to prove his innocence. The burden of
17 proof remains upon the State to prove the guilt of
18 the defendant beyond a reasonable doubt in the
19 three crimes with which he stands accused. Again,
20 it's emphasized to you that the fact that a
21 defendant does not testify is not a factor to be
22 considered by you in determining the guilt or
23 innocence of a defendant or in any other aspect of
24 your deliberations.

25 Criminal intent is a necessary element of

1 each crime and it must be proved by the State
2 beyond a reasonable doubt. Criminal intent is
3 always a matter to be determined by any jury in a
4 criminal trial. There is no way to prove intent to
5 a mathematical certainty. There is no way that
6 medical science can dissect a person's brain to
7 determine what he may have had in mind, so the law
8 says the criminal intent may be inferred from the
9 circumstances shown to have been in existence at
10 the times in question. This is how the jury makes
11 a determination whether or not the element
12 requiring criminal intent is present. Criminal
13 intent is a state of mind which operates jointly
14 with the act of the commission of a crime.
15 Criminal intent is a mental state, a conscious,
16 knowing wrongdoing, so it is up to you the jury to
17 determine what the defendant intended to do based
18 upon the circumstances shown to have been in
19 existence.

20 You are instructed that the State must prove
21 criminal intent beyond a reasonable doubt just as
22 the State must prove every element beyond a
23 reasonable doubt, as you have previously been
24 instructed. It is not necessary to establish
25 intent by direct and positive evidence but intent

1 may be established by inference in the same way as
2 any other fact, by taking into consideration the
3 acts of the parties and all the facts and
4 circumstances of the case. While the State may
5 prove motive, it is not necessary that the State
6 prove motive, however the State must prove intent.

7 You must disregard completely any testimony
8 which you may have inferred that the defendant was
9 charged or convicted of a crime other than those
10 for which he stands accused. It would be improper,
11 as there was no inquiry as to whether he was guilty
12 or innocent of any crime other than that for which
13 he stands accused or that it was in any way
14 connected with the crimes with which he stands
15 accused here today.

16 You have been selected as fair and impartial
17 jurors, sworn to impartially try and determine the
18 facts of this case and when you comply with your
19 oath to do that, then no one will have any right to
20 criticize your verdict and you will have fully
21 discharged your duty as jurors. If any of you have
22 made notes during the proceedings, that is okay and
23 acceptable. However, you must, before you commence
24 your deliberations, number one, not share the fact
25 that you have even made notes with anybody, and

1 completely and absolutely destroy your notes
2 without even telling anybody that you made them.
3 That is so that a person who made notes will not be
4 given greater weight between and among you in their
5 ability to recollect the facts. If you have made
6 notes and you have your notes there may be greater
7 weight given to that person and their ability to
8 recall the testimony and the exhibits as they were
9 introduced, so you are not permitted to take your
10 notes into the jury room, even share the fact that
11 you made notes with your fellow jurors, although it
12 is permitted that you have made notes, that's okay,
13 don't worry about it, but don't share the fact with
14 anyone and don't take them into the jury room, tear
15 them into little pieces, do something, destroy
16 them, don't share them with anyone whatsoever.
17 You have the right to equally recall the evidence
18 as you recall it.

19 Now, Madam Forelady, the defendant in this
20 case is charged with three different offenses.
21 They are incest, criminal sexual conduct with a
22 minor in the second degree, and commission of a
23 lewd act on a minor. You are to consider each
24 charge separately and consider the evidence
25 separately for each offense. Therefore, if the

1 evidence warrants it, you may convict the defendant
2 on all counts, on one count and not the other two,
3 or on two counts and not the other one, and so on,
4 or you can find the defendant not guilty on all
5 counts. You will write a verdict of guilty or not
6 guilty for each charge alleged in the indictment.

7 Now, in each of the charges there is an
8 option for you, one of guilty and one of not
9 guilty. Now, Madam Forelady and ladies and
10 gentlemen, there is no significance to be placed
11 upon the order in which these possibilities appear.
12 Here is the verdict form. We prepared this for
13 you, for your ease in making a determination. The
14 top of the form simply is the title of the case and
15 the case number and the fact that it is a verdict
16 form. And number one is the first thing you will
17 consider, or you can consider either one, you can
18 go and consider number three first if you want to,
19 or number two first if you want to, however you
20 wish to do it. But the first one we placed on here
21 just to have one first is, "As to incest we the
22 jury find the defendant Mark Richard Bolte," and
23 it's got some brackets, you're some distance there,
24 I know you can't see it from there, but it has a
25 bracket guilty and a bracket not guilty. Don't

1 make any significance as to the fact that the
2 options appear guilty before not guilty. It could
3 just as easily be, and we often do, put the option
4 of not guilty first. One simply has to appear
5 before the other, so there is no indication to be
6 inferred by you from the Court as to what you
7 should check just simply because one appears before
8 the other.

9 Now, as you go along, number two is, "As to
10 criminal sexual conduct with a minor in the second
11 degree, we find the defendant Mark Richard Bolte,"
12 the option is guilty or not guilty. One simply has
13 to appear before the other, the Court is not trying
14 to imply anything to you.

15 And number three here is, "As to the
16 commission of a lewd act on a minor, we the jury
17 find the defendant Mark Richard Bolte," guilty or
18 not guilty. It's dated today, Madam Forelady, and
19 when you reach a verdict you will please write your
20 signature over where it says foreperson. That's
21 when you have reached a verdict on all three of the
22 charges.

23 Your verdict must be unanimous. That means
24 it must be the verdict of all twelve of you. When
25 everyone agrees upon a verdict and everyone has

1 agreed upon a verdict in all three of the charges,
2 then you will fill in your name as foreman. When
3 all the verdicts have been reached you will then
4 knock on the door and you will be, the door will be
5 opened by the bailiff when we have assembled for
6 you. It will take possibly just a few minutes but
7 not long for us to get everybody back in the
8 courtroom and prepare to receive your verdict.

9 Now, remember that the signal in this case
10 for you to begin your deliberations and begin your
11 discussions of the case will be when you receive
12 the exhibits and the verdict form. We're going to
13 excuse you, all twelve of you, all twelve are here,
14 and to the alternates, the Court extends its thanks
15 and appreciation for your service. If there had
16 been a mishap or emergency as to any of your fellow
17 jurors we would have had to ask you to move over
18 and help in deliberations and in the reaching of a
19 verdict in this case, but you will now be excused
20 or shortly thereafter, just keep your seats right
21 now but don't go into the jury room at this time.

22 Ladies and gentlemen of the jury, do not
23 discuss the case until you receive the signal,
24 which is the verdict form and the exhibits.

25 Now, the court has to discuss with the

1 attorneys whether something has been left out and
2 if so, we will ask you back out and accomplish
3 that, but you should be receiving your food right
4 away but we're going to ask that the food not be
5 delivered to you until it's determined whether we
6 have to get you back out, and for that we have to
7 talk with the attorneys. Don't talk about the case
8 until you receive the signal, which is the verdict
9 form and the exhibits in the case, and that will be
10 forthcoming in just a few moments unless we have to
11 ask you out.

12 Thank you. The alternates will remain out,
13 all other jurors will retire. Thank you, Madam
14 Forelady, ladies and gentlemen.

15 (The jury was excused from the courtroom
16 at 2:34 p.m.).

17 THE COURT: Are there exceptions to the
18 charge or requests for additional charges, from the
19 State?

20 MS. MAYES: Not from the State, Your Honor.

21 THE COURT: Thank you. Are there exceptions
22 to the charge or requests for additional charge
23 from the defense?

24 MR. GROSE: No, sir, Your Honor.

25 THE COURT: Thank you. Will you please, with

1 your court reporter, marshal all the evidence and
2 agree.

3 Lady and gentleman, then, who are alternates,
4 the Court deeply and sincerely thanks you and
5 appreciates your service. It is hoped that you
6 have garnered some learning about how our system of
7 justice works and that you will go from here
8 enriched in your understanding of our way of
9 government. The Court appreciates your service and
10 you are excused. I believe we might have ordered
11 some food for you so please get that before you go.

12 Mr. Hiller, you will stay with us, please,
13 sir, and see what occurs.

14 Mr. Manning, when the attorneys have agreed
15 with the court reporter the evidence is assembled
16 you may send in the verdict form.

17 MR. GROSE: Your Honor, while we're on the
18 record I want to make clear that the photographs
19 are being taken off those boards.

20 MS. MAYES: Yes.

21 THE COURT: Yes, sir, you all agree. If
22 there is a disagreement the Court will rectify it.
23 We're in recess, please. The record is closed.

24 (Recessed at 2:37 p.m.).

25 (Reconvened at 2:47 p.m.).

1 BAILIFF: They want something to play the
2 tape on.

3 THE COURT: All right, we need Mr. Bolte.

4 MR. GROSE: He's right back here, we'll get
5 him, Your Honor.

6 THE COURT: If they want something to play
7 the tape they're entitled to have it.

8 MS. MAYES: No objection.

9 THE COURT: And any mechanical assistance
10 they need.

11 MR. GROSE: Would you rather do that or have
12 them hear it in the courtroom?

13 THE COURT: No, they can have it in the jury
14 room.

15 MR. GROSE: Okay.

16 THE COURT: Play it all, as many times as
17 they want to. Now, Mr. Simpson, will you just open
18 the door and hand that in there, they can figure
19 out how to work it.

20 BAILIFF: If they can't, they'll knock on the
21 door.

22 THE COURT: All right, the record is closed.

23 (Recessed at 2:49 p.m.).

24 (Reconvened at 4:15 p.m.).

25 THE COURT: The record will open, please.

1 This is State of South Carolina versus Mark Richard
2 Bolte, 2003-296.

3 The Court understands that the jurors have
4 reached a verdict. Is there anything before the
5 jury comes in, from the State?

6 MS. MAYES: Beg the Court's indulgence.

7 Yes, sir, we have one family member that I
8 believe she's walking up the steps now.

9 THE COURT: Miss Mayes?

10 MS. MAYES: Yes, sir, Your Honor, the State
11 is prepared.

12 THE COURT: Thank you. Mr. Grose?

13 MR. GROSE: Yes, sir.

14 THE COURT: Thank you. Show the jury in,
15 please.

16 (The jury returned to the courtroom
17 at 4:16 p.m.).

18 THE COURT: Madam Clerk.

19 THE CLERK: Madam Forelady, ladies and
20 gentlemen of the jury, has the jury reached a
21 verdict?

22 JUROR: We have.

23 THE CLERK: Thank you.

24 THE COURT: The verdict is in order and it
25 may be published.

1 THE CLERK: State of South Carolina, County
2 of Abbeville, in the Court of General Sessions,
3 2003-GS-01-296, the State versus Mark Richard
4 Bolte, verdict form. As to incest, we the jury
5 find the defendant Mark Richard Bolte guilty.

6 Count Two. As to criminal sexual conduct
7 with a minor in the second degree, we the jury find
8 the defendant Mark Richard Bolte guilty.

9 Number three. As to the commission of a lewd
10 act on a minor, we the jury find the defendant Mark
11 Richard Bolte guilty.

12 Signed Julia C. Bowie, foreperson, 10th day
13 of September, 2004, Abbeville.

14 Madam Forelady, ladies and gentlemen of the
15 jury, if that be your verdict, so say you all,
16 please indicate by raising your right hands.

17 Your Honor, the jury has responded, all have
18 responded in the affirmative.

19 THE COURT: Thank you, Madam Clerk.

20 MR. GROSE: We move that the jury be polled,
21 Your Honor.

22 THE COURT: Thank you, the jury will be
23 polled, Madam Clerk.

24 THE CLERK: As I call the names of the jurors
25 I'm going to ask you to please stand and I will ask

1 you this question.

2 Emily Page. Is this your verdict and is it
3 still your verdict?

4 JUROR: Yes, ma'am.

5 THE CLERK: Okay. Julia C. Bowie. Is that
6 your verdict and is it still your verdict?

7 JUROR: Yes, it is.

8 THE CLERK: Ernestine Burton. Is that your
9 verdict and is it still your verdict?

10 JUROR: Yes, ma'am.

11 THE CLERK: Susan P. New. Is that your
12 verdict and is it still your verdict?

13 JUROR: Yes, ma'am.

14 THE CLERK: Anne M. Foust. Is that your
15 verdict and is it still your verdict?

16 JUROR: Yes.

17 THE CLERK: Terry V. Turner. Is that your
18 verdict and is it still your verdict?

19 JUROR: Yes, ma'am.

20 THE CLERK: James F. Vinson. Is that your
21 verdict and is it still your verdict?

22 JUROR: Yes, it is.

23 THE CLERK: Shannon O. Holloway. Is that
24 your verdict, is it still your verdict?

25 JUROR: Yes, ma'am.

1 THE CLERK: Michelle N. Wells. Is that your
2 verdict, is it still your verdict?

3 JUROR: Yes, ma'am.

4 THE CLERK: Jessica D. Tatum. Is that your
5 verdict, is it still your verdict?

6 JUROR: Yes, ma'am.

7 THE CLERK: Robert H. Hamby, Jr. Is that
8 your verdict, is it still your verdict?

9 JUROR: Yes, ma'am.

10 THE CLERK: Billy New. Is that your verdict,
11 is it still your verdict?

12 JUROR: Yes, ma'am.

13 THE CLERK: Your Honor, the jury has been
14 polled and they have all answered in the
15 affirmative.

16 THE COURT: Thank you, Madam Clerk. Is there
17 anything from the State?

18 MS. MAYES: Yes, Your Honor. [REDACTED]
19 does wish to address the Court briefly concerning
20 sentencing.

21 THE COURT: We'll provide the jury may leave
22 unless there is something further concerning the
23 jury.

24 MS. MAYES: No, sir, Your Honor.

25 THE COURT: Mr. Grose, from the defense?

1 MR. GROSE: Not concerning the jury, Your
2 Honor.

3 THE COURT: Yes, sir. Thank you. Madam
4 Forelady and ladies and gentlemen of the jury, the
5 Court extends its deepest and sincerest gratitude
6 to you and each of you for your service as jurors
7 in this case. It is hoped that the experience that
8 you have endured will remain with you and stay with
9 you as a learning experience which you have had in
10 your life. Some people are never summoned to be a
11 member of a venire, and further, few people in
12 total ever get chosen to be on a trial jury, so you
13 have had the opportunity to see the system at work
14 and to see in reality how your government works.
15 You have fulfilled your duty. As you know, you can
16 talk about your verdict or you can refuse to talk
17 about your verdict. If someone persists in trying
18 to talk with you about your verdict and you don't
19 want to talk about it, then please contact the
20 Sheriff's Department and that person will be dealt
21 with and if necessary the Sheriff's Department will
22 contact this judge and it will be dealt with.

23 So, if you want to talk about it you may, if
24 you don't, you don't have to. But again, thank you
25 sincerely for your service, and you may stay in the

1 courtroom if you wish or you may leave the building
2 if you wish, and you will receive your checks, or
3 are they available now, Madam Clerk?

4 THE CLERK: We'll send their check and their
5 excuses in the mail.

6 THE COURT: You will receive those things, as
7 Madam Clerk just said, in short order. Thank you
8 each. You're welcome to stay if you wish or you
9 may leave the building if you wish. Thank you.
10 Everybody else remain seated.

11 (The jury was excused from the courtroom).

12 THE COURT: The defendant will approach,
13 please.

14 MR. GROSE: Your Honor, prior to sentencing we
15 would just make a motion for a new trial, renew our
16 directed verdict motions and make a motion for new
17 trial based on the grounds stated in the directed
18 verdict motions and for the reason that the State
19 failed to present substantial evidence by which a
20 jury could convict beyond a reasonable doubt.

21 THE COURT: Thank you, Mr. Grose. Do you
22 wish to be heard, Miss Mayes?

23 MS. MAYES: No, sir, Your Honor. The State
24 has presented sufficient evidence.

25 THE COURT: Thank you. The motion is

1 respectfully denied.

2 MR. GROSE: Thank you for hearing it, Your
3 Honor.

4 THE COURT: Miss Mayes, take your time.

5 MS. MAYES: Yes, sir. Your Honor, I'm
6 submitting the sentencing sheets as to each count.

7 Your Honor, as to prior record, as the Court
8 has already heard, Mr. Bolte was arrested for
9 criminal domestic violence April 20, 2002, and
10 convicted of that offense on May 8, 2002, and
11 [REDACTED] the victim in this case, does wish to
12 address the Court as to sentencing.

13 THE COURT: Come around, please. Miss Mayes,
14 if you will show her where to stand right there.
15 And you will be heard if you will state your name.

16 [REDACTED]

17 THE COURT: You well be heard. Take your
18 time and compose yourself, please, there is no
19 rush.

20 THE WITNESS: "Dear Judge. Where can one
21 even think to begin with this plea I'm about to lay
22 before you this day. I stand before you this day
23 as a 21 year old lady and a citizen of the United
24 States of America who deserves her justice.
25 However, I ask myself what is this to me? With

1 today's verdict will my childhood be given back to
2 me, will I ever feel the loving arms of a father,
3 will my old memories be replaced? No, but I have
4 stood my ground, I'm taking this stand and I am
5 preventing my nightmares from becoming anyone
6 else's. I am not looking for payback or revenge, I
7 am wholeheartedly wanting to live my life without
8 the threats, the fears and the thoughts that my
9 monster Mark Bolte could ever have the advantage of
10 hurting one of my family members. There is an
11 innocent beautiful seven year old girl named
12 Charaya. I desire and need the safety of her to be
13 secure. I request as a victim that my monster be
14 gone long enough that my family and siblings can
15 defend themselves. I was just a child, I grew up
16 in hypocrisy to the greatest extent. As a very
17 troubled young lady, all inside of me screams
18 maximum punishment. This is through the eyes,
19 though, which have not been able to forgive the man
20 that is in this courtroom due to the hell he has
21 made so evident in my life. I stand here at this
22 moment because my fears have met face to face with
23 any hope that there will be brighter days for
24 myself, simply thinking about all this, the little
25 girl in me is dead but don't ever forget the one

1 that I'm trying to save. Thank you. God bless
2 you."

3 THE COURT: Thank you. Miss Mayes?

4 MS. MAYES: That is all from the State, Your
5 Honor.

6 THE COURT: Thank you. Mr. Grose?

7 MR. GROSE: Could I have a moment, Your
8 Honor?

9 THE COURT: Of course.

10 MR. GROSE: Thank you.

11 THE COURT: Yes, sir, Mr. Grose?

12 MR. GROSE: Your Honor, I have been
13 representing Mark pretty much since all this, the
14 charges were brought, when I first met with him but
15 it was sometime fairly shortly after the case
16 started, you know, September or October, sometime
17 of last year. I forget his exact age but he's
18 about 39, 40 years old.

19 THE DEFENDANT: 41.

20 MR. GROSE: 41 years old. He has several
21 siblings, one of his brothers Brian is sitting back
22 here, he has some other family members that are
23 confronting some health issues, possibly cancer, I
24 think. I'm sorry, heart transplant for one of his
25 other brothers. You have heard a little bit, he

1 too was in the Navy for a period of time and after
2 that he had worked different jobs throughout his
3 life, some construction jobs, some cooking jobs.
4 He worked here in the Abbeville community and
5 various different jobs. You heard from the State
6 that the only prior record that he had was the
7 charge, that criminal domestic violence charge that
8 came up in connection with this case and you heard
9 testimony about in this courtroom.

10 We would ask the Court to be as merciful as
11 possible under the circumstances.

12 THE COURT: Thank you, Mr. Grose. Is there
13 anything further?

14 MR. GROSE: I don't believe so, not at this
15 time.

16 THE COURT: Miss Mayes, the penalty for
17 incest is ten years?

18 MS. MAYES: That is correct, Your Honor.

19 THE COURT: And the penalty for lewd acts
20 upon the child is?

21 MS. MAYES: Fifteen. Both of those are
22 nonviolent.

23 THE COURT: All right, thank you.

24 All right. In indictment 2003-GS-01-296, as
25 to Count Three, wherein Mark Richard Bolte has been

1 convicted of criminal sexual conduct with a minor
2 in the second degree, he is committed to the State
3 Department of Corrections for a term of twenty
4 years.

5 In Count Four, wherein Mark Richard Bolte
6 has been convicted of lewd act upon a minor child,
7 he is confined to the State Department of
8 Corrections for a term of fifteen years consecutive
9 to Count Three as aforesaid.

10 In Count One, wherein Mark Richard Bolte has
11 been convicted of incest he's confined to the State
12 Department of Corrections for a term of ten years
13 consecutive to Count Four of this indictment.

14 Is there anything further or additional from
15 any quarter?

16 MR. GROSE: Not at this time, Your Honor.

17 MS. MAYES: No, sir, Your Honor.

18 THE COURT: These proceedings are closed.

19 (Adjourned at 4:33 p.m.).
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I, the undersigned Henry P. Young, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case in the Circuit Court for Abbeville County, South Carolina, on the 10th day of September, 2004.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 28, 2004



Henry P. Young

Court Reporter

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Wyatt T. Saunders, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARK BOLTE,

APPELLANT

INITIAL ANDERS BRIEF OF APPELLANT

ELEANOR DUFFY CLEARY
Assistant Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

#2

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STATEMENT OF ISSUE ON APPEAL

Was the rape trauma evidence outside the scope of evidence allowed by State v. Shumpert, 312 S.C. 502, 435 S.E.2d 859 (1993)?

STATEMENT OF THE CASE

Appellant Mark Bolte was indicted by the Abbeville County grand jury in October 2003 for incest, two counts of criminal sexual conduct (CSC) with a minor, lewd act on a minor, and first-degree CSC. ROA p. *. The Honorable Wyatt T. Saunders presided over his jury trial on the charges of incest, CSC with a minor in the second degree, and lewd act on a minor. ROA p. *. The state dismissed the other charges with prejudice. Tr. p. 395.

The jury found appellant guilty and Judge Saunders sentenced appellant to twenty years in prison for CSC with a minor, fifteen years for lewd act on a minor, and ten years for incest, to be served consecutively. ROA p. *.

This appeal follows.

ARGUMENT

The rape trauma evidence admitted into evidence was outside the scope of evidence allowed by State v. Shumpert, 312 S.C. 502, 435 S.E.2d 859 (1993).

Appellant's college-aged daughter, Jane Doe (DOB [REDACTED]), testified that appellant engaged in sexual activity with her, including penetration, from the time she was four or five (1988-1989) until she was eighteen years (2002) old. Tr. p. 137, line 12; p. 138, lines 17-21; p. 139, lines 14-16; p. 148, lines 13-20. Doe testified that she did not tell anyone about the activity until she reached eighteen and moved out of her house to a nearby college dormitory. Tr. p. 157, lines 11-15; p. 159, lines 3-9; p. 168. In December 2002, Doe obtained an order of protection against appellant. Tr. p. 184. He was arrested for offenses on September 22, 2003. Tr. p. 383, lines 19-20.

Doe's therapist testified at trial about Doe's behavior and about post traumatic stress disorder as it related to Doe and sexual assault victims. Tr. pp. 348-351.

The state's theory of the case was that appellant molested Doe while her mother worked long hours and neglected her home; appellant attempted to control Doe with religion and heightened supervision; Doe became a stellar student to make up for her troubles at home; and she failed to report because of delayed reporting syndrome. Tr. pp. 87-89.

The defense case hinged on appellant's assertion that the sexual abuse allegations were motivated by the divorce proceeding, the state's witnesses lacked credibility, and that there was no medical evidence presented. Tr. p. 90-95; p. 529. Specifically, appellant argued that it was not credible that Doe would be such a good student and involved in so many extracurricular activities if appellant controlled and molested her;

that Doe was attempting to aid her mother in her divorce case; and that Doe was rebelling against appellant's strict rules. *Id.*

Prior to the testimony of the therapist, appellant objected to the testimony of the counselor. Tr. p. 394, lines 8-9. He argued that it was more prejudicial than probative and that it put "a stamp of approval on the victim's statement." *See* Tr. pp. 296-300. The judge ruled that the counselor could testify but that she could not state her opinion as to the victim's truthfulness. Tr. pp. 315-317.

At trial the counselor testified that she treated Doe for post traumatic stress disorder. Tr. p. 344, lines 4-5. She stated that Doe suffered from anxiety, hypervigilance, an inability to relax, and a feeling of being chased. Tr. p. 344, line 8 – p. 345, line 17. This accounted for her "keeping the crazy schedule." Tr. p. 345, lines 20-21.

The prosecutor asked her why "symptoms of trauma follow sexual abuse?" Tr. p. 346, lines 11-12. She testified that the victim's life was like a war zone and the victim developed anxiety from constantly being on alert. Tr. p. 346, lines 13-21.

She testified that Doe's symptoms were consistent with sexual abuse. Tr. p. 347, lines 15-19. She also said that [REDACTED] had been a good student and that she did so to compartmentalize her life. Tr. p. 350, lines 7 – p. 351, line 7. She also stated that Doe's delayed reporting of the abuse was because she did not want to lose her family or be embarrassed by the disclosure. Tr. p. 351. Specifically, the following colloquy occurred:

Prosecutor: How, if at all, what were those factors consistent with Doe's history of sexual abuse?

Counselor: Doe has been a very good student, as we have heard presented as evidence, and every time she does, performs in some way that she is rewarded publicly, it's

personal praise and it's, it's almost as though the world is saying to her we see that you're very normal and very successful.

Prosecutor: How may that occur in light of a home life that is unstable or abusive?

Counselor: Compartmentalization is another important factor here, too, because you can only sustain this level of intense fright and hypervigilance for so long, and so being able to compartmentalize and sort of divide your brain into sections and say this part of my life I live this way, in this part of my life I live this way. I guess a good example would be if you have a rowdy little boy and he can misbehave a little bit at home. That's okay because we can tolerate that, everybody understands he's just rowdy. But he goes into church and he as a different set of behaviors. He knows that once he gets in there he has got to behave himself and so he does it. He conforms to that. And so, it is with children who have been victims of sexual assault, they have this set of behaviors for this place and this set of behaviors for another situation.

Prosecutor: How, if at all, may shame or embarrassment be consistent with Doe's delayed reporting of sexual abuse?

Counselor: No child ever wants to be labeled. They don't want to be different, they want to try to fit in, they want that consistency, as I mentioned earlier, of the family where everybody loves everybody else and everybody is kind to everybody else and there is no threat, and to have the shame of something going on that's very secretive and very dark at your house is not something that any child wants to have exposed to a community. You have had or may have known people in the family who were alcoholics and that might have been a problem in the family, oh, my goodness, we can't let them see Uncle Ralph because he is not anywhere near decent today, or something like that, that you took on a personal shame.

So, in these kind of cases they don't want the exposure because it means shame not just to themselves, but to the rest of the family as well, especially if you have close ties to the other siblings.

Tr. pp. 350, line 4 – p. 352, line 5.

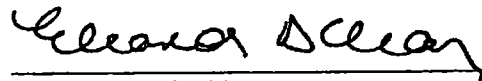
This testimony exceeded the boundaries allowed by State v. Shumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). In Shumpert, the Supreme Court held that expert testimony and behavioral evidence are admissible as rape trauma evidence to prove the sexual offense occurred where the probative value of such evidence outweighs its prejudicial effect. *Id.* at 506, 435 S.E.2d at 862. However, this Court has also emphasized that “[a]n expert may not render an opinion on whether a witness is credible in any trial in this state.” State v. Dempsey, 340 S.C. 565, 571, 532 S.E.2d 306, 309 (Ct. App. 2000); State v. Morgan, 326 S.C. 503, 515, 485 S.E.2d 112, 119 (Ct. App. 1997).

In this case, the counselor’s testimony, as outlined above, was essentially a statement of her belief that Doe was telling the truth when she testified she was abused by appellant. She went beyond stating that Doe’s symptoms were consistent with sexual abuse. Therefore, the counselor’s testimony should have been excluded as improper corroboration that went beyond that which is allowed by Shumpert.

CONCLUSION

Based on the foregoing, appellant is entitled to a new trial.

Respectfully submitted,



Eleanor Duffy Cleary
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of August, 2006.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville CountyWyatt T. Saunders, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARK BOLTE,

APPELLANT

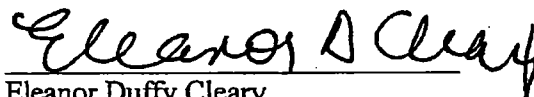
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Mark Bolte states:

1. She is Assistant Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. She has reviewed the record of appellant's trial before Judge Wyatt T. Saunders, Jr., which was held on 9-10-04, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Mark Bolte.

Respectfully submitted,


Eleanor Duffy Cleary
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of August, 2006.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville CountyWyatt T. Saunders, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARK BOLTE,

APPELLANT

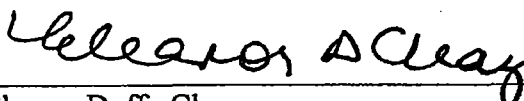
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Entire trial transcript
- (2) Arrest warrants
- (3) Sentencing sheets
- (4) True-billed indictment.

I certify that this designation contains no matter which is irrelevant to this appeal.

August 4th, 2006



Eleanor Duffy Cleary
Assistant Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Wyatt T. Saunders, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARK BOLTE,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, and Mark Bolte, #304800 at McCormick Correctional Institution this 4th day of August, 2006.

Eleanor Duffy Cleary

Eleanor Duffy Cleary
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of August, 2006.

Harvey D. Elliott (L.S.)
Notary Public for South Carolina
My Commission Expires: March 13, 2007.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Mark Bolte,

Appellant.

Appeal From Abbeville County
Wyatt T. Saunders, Jr., Circuit Court Judge

Unpublished Opinion No. 2009-UP-361
Submitted June 1, 2009 – Filed June 24, 2009

APPEAL DISMISSED

Appellate Defender Eleanor Duffy Cleary, of
Columbia; and Mark Bolte, pro se, for Appellant.

Attorney General Henry Dargan McMaster, Chief
Deputy Attorney General John W. McIntosh,
Assistant Deputy Attorney General Salley W. Elliott,

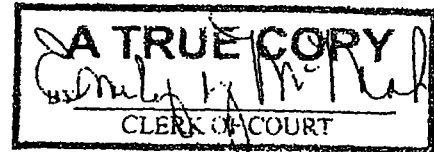
all of Columbia; and Solicitor Jerry W. Peace, of Greenwood, for Respondent.

PER CURIAM: Mark Bolte appeals his convictions and sentences for incest, lewd act on a minor, and second degree criminal sexual conduct with a minor. Bolte argues the trial court erred by admitting evidence outside the scope of allowable evidence pursuant to State v. Shumpert, 312 S.C. 502, 435 S.E.2d 859 (1993). Bolte also filed a pro se brief. After a thorough review of the record and both briefs pursuant to Anders v. California, 386 U.S. 738 (1967) and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss the appeal and grant counsel's motion to be relieved.¹

APPEAL DISMISSED.

HEARN, C.J., and THOMAS and KONDUROS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.



STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of ABBEVILLE)

09-CP-01-304

MARK R. BOLTE, #304900)

Full name and prison number, if any, of applicant.)

APPLICATION FOR

v.)

POST-CONVICTION RELIEF

STATE OF SOUTH CAROLINA,)

Name of Respondent)

STATE OF SOUTH CAROLINA
CLERK OF COURT
09 DEC 23 PM 11 31
CLERK OF COURT

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. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant 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 McCormick Correction Institution
386 Redemption Way, McCormick, S.C. 29899
2. Name and location of Court which imposed sentence ABBEVILLE COURT OF GENERAL SESSIONS
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2003-GS-01-296 INCEST
 - (b) " " CSC W/ Minor, 2nd Degree
 - (c) " " LEWD ACT UPON CHILD UNDER SIXTEEN
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) September 10, 2004 Ten (10) Years Confinement
 - (b) " " Twenty (20) Years Confinement
 - (c) " " Fifteen (15) Years Confinement

5. Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty PLEA OF NOT GUILTY

(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. COURT OF APPEALS

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. APPEAL DISMISSED

ii. _____

iii. _____

(c) the date of each such result:

i. June 24, 2009

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. Unpublished Opin. No. # 2009-UP-361

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) SEE ATTACHMENTS

(b) "

(c) "

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) SEE ATTACHMENTS

"

(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 ?

NO

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

NO

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) NO

(d) any other petitions, motions or applications in this or any other Court?

NO

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? YES

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. Grounds 3, 4, 6(a), 6(c), 6(d), 6(e), 6(f)

- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. ALL ON DIRECT APPEAL
- 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) INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSELS
- (b) AS TO EACH SUCH GROUND
- (c) _____

16. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? UNKNOWN
- (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 application with respect to this conviction, which you filed? NO

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ABBEVILLE)

VERIFICATION

I, MARK RICHARD BOLTE, 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.



Sworn to and subscribed before me

This 18 day of December, 2009.

Jennifer (Franklin) L.S.

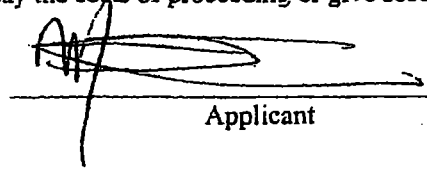
Notary Public for South Carolina

My Commission Expires 01-31-2010

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
 OF COSTS AND AFFIDAVIT
 IN SUPPORT THEREOF**

I, MARK RICHARD BOLTE, 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 or 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 proceeding or give security therefor.



Applicant

Sworn to and subscribed before me

This 18 day of December, 2009

Jennifer (Franklin) L.S.

Notary Public for South Carolina

My Commission Expires: 01-31-2010

Mark A. Polite, 3304330/504233
McCormick Correction Institution
306 Redemption Way
McCormick, South Carolina
29580

Mark A. Polite
Roxville, Kentucky
John, Courthouse, Room 103
Columbia, South Carolina
29201-0393

December 14, 2009

Re: Request for Civil Action Cover Sheet

Dear Sirs:

I would respectfully request one Civil Action Cover Sheet, which I understand your office requires to be attached to any civil action initially being filed with the court. If this is not the case, please advise us at your earliest convenience.
Sincerely,
Mark A. Polite

Mark A. Polite

Copy/

Applicant hereby asserts that he is being held in custody of the State of South Carolina in violation of the provisions of the United States Constitution, including but not limited to the First Amendment, Fifth Amendment, Sixth Amendment, and Fourteenth Amendments, the Due Process Clause, the Equal Protection Clause, the Fair Trial Clause, the Confrontation Clause, the Impartial Jury Clause, and the Full Faith and Credit Clause of the United States Constitution, and their counterparts in the South Carolina Constitution. Applicant specifically avers that in this setting, his continued confinement based upon unlawful, illegal, and wrongful conviction constitutes a denial of fundamental fairness shocking to the universal sense of justice. Applicant asserts and alleges that such violations eroded the fundamental fairness of the entirety of the State court proceedings calling into question the integrity, reliability and legality of the conviction, verdict, sentence, and his confinement; amounting to a fundamental miscarriage of justice, fundamental unfairness, implicating the accuracy of the entire proceedings. Said violations, did in the setting, constitute plain error, structural error, clear error, gross miscarriage of justice, fundamental miscarriage of justice shocking to the conscious and to the universal sense of justice. Applicant is actually innocent of the offenses charged against him.

Question #9:

GROUND FOR RELIEF:

- 1) The Applicant was denied and/or deprived of his Sixth and Fourteenth Amendment rights to effective assistance of trial counsel under the United States Constitution, and their counterparts in the South Carolina Constitution. Trial counsel's acts and omissions fell below an objective standard of reasonable professional judgment resulting in prejudice, such that there exists a reasonable probability that absent counsel's deficient performance, the result of the proceedings would have been different.
- 2) The Applicant was denied and/or deprived of his Sixth and Fourteenth Amendment rights to effective assistance of appellate counsel under the United States Constitution, and their counterparts in the South Carolina Constitution. Appellate counsel's acts and omissions fell below an objective

standard of reasonable professional judgment resulting in prejudice, such that there exists a reasonable probability that absent counsel's deficient performance, the result of the proceedings would have been different.

- 3) The Court of General Sessions for Abbeville County lacked subject-matter jurisdiction and/or territorial jurisdiction where the indictment was not filed with the Clerk of Court. Alternately, Applicant was denied due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and their counterparts under the South Carolina Constitution.
- 4) The Court of General Sessions for Abbeville County lacked subject-matter jurisdiction and/or territorial jurisdiction, where during Applicant's jury trial, the judge's charge to the jury constructively amended Count Two of the indictment broadening the scope for a finding of guilt, materially altered the charging portion of the indictment, and the evidence adduced at trial constituted fatal variance with the allegations of the indictment.
- 5) The Applicant's rights under the Due Process Clause of the United States Constitution, and its counterpart in the South Carolina Constitution was violated where Applicant was not afforded the right of allocution prior to imposition of the sentences.
- 6) Substantive Claims, not available on direct appeal, due to ineffective assistance of trial and/or appellate counsel in failing to raise, properly preserve, or otherwise not cognizable:
 - a. The trial court erred where during the Applicant's jury trial the judge's charge to the jury constructively amended the indictment, broadened the scope for a finding of guilt, materially altered the charging portion of the indictment, and the evidence adduced at trial constituted fatal variance with the allegations of the indictment, and further resulted in denial of due process, a fair trial, and impartial jury. (Age of Victim)
 - b. The trial court erred where during the Applicant's jury trial the judge's charge to the jury constructively amended the indictment, broadened the scope for a finding

of guilt, materially altered the charging portion of the indictment, and the evidence adduced at trial constituted fatal variance with the allegations of the indictment, and further resulted in denial of due process, a fair trial, and impartial jury. (Date of Offense Count Three)

- c. The trial court erred where it was divested of subject-matter jurisdiction, due to failure to spread upon the record any indication that the Applicant had been but to bar and arraigned on the charges in the indictment.
- d. The trial court erred where during closing arguments it permitted the Solicitor to repeatedly comment on Applicant's right to remain silent, and his exercise of the right to remain silent, characterizing the State's evidence as "uncontradicted" and "undisputed" where only the Applicant could have contradicted or disputed the State's evidence, resulting in a denial of due process, a fair trial, and impartial jury. The comments so infected the trial with unfairness as to make the resulting conviction a denial of due process under the Fifth and Fourteenth Amendments of the United States Constitution and their counterparts in the South Carolina Constitution.
- e. The trial court erred it permitted the Solicitor to vouch for the credibility of the State's key witness and improperly bolstering her testimony, where the State relied on circumstantial evidence as a basis of guilt, resulting in denial of due process, a fair trial, and an impartial jury.
- f. The trial court erred where it permitted defense counsel and the solicitor to erroneously define the concept of reasonable doubt, and the court's own jury charge on reasonable doubt equating the concept with a "moral certainty", and reasonable explanation was misleading, confusing, and unconstitutionally lowered the standard of proof required for a guilty verdict, resulting in denial of due process, a fair trial, and impartial jury.
- g. The trial court erred where it erroneously admitted testimony regarding other crimes including Criminal Domestic Violence, and Trespassing, as well as other

uncharged sexual crimes allegedly committed outside the State of South Carolina, for which there had been no conviction or sentence entered.

- h. The trial court erred where it failed to give a jury instruction of the weight to be accorded to prior inconsistent statements, where the State's key witness admitted making prior inconsistent statements which differed from her testimony at trial.
- i. The trial court erred where it failed to give a curative instruction, when during the Solicitor's closing argument, the Solicitor misquoted the victim's trial testimony, and improperly bolstered her credibility. The comments so infected the trial with unfairness as to make the resulting conviction a denial of due process under the Fifth and Fourteenth Amendments of the United States Constitution and their counterparts in the South Carolina Constitution.
- j. The trial court erred where it admitted the testimony of Cnercy MacTaggart who was admitted as an expert witness, and whose testimony included matters tending to improperly bolster the credibility of the alleged victim.
- k. The trial court erred where it denied Applicant's motion for a directed verdict of not guilty.
- l. The trial court erred where it failed declare as a hostile witness Esterlina Bolte, the victim's mother, who was called by the defense, and whose testimony was prejudicial to the defense.
- m. The trial court erred where during its charge to the jury, the court instructed the jury that "a reasonable doubt is simply a doubt which you find reasonable. A reasonable doubt can arise from the evidence presented or from the lack of evidence presented" and and that "if the evidence presented by the State has removed all reasonable doubt from your minds ... it is your duty to find the defendant to be guilty. Thus violating Applicant's right to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and their counterparts under the South

Carolina Constitution.

- a. The Applicant rights under the Double Jeopardy Clause of the United States Constitution and its counterpart in the South Carolina Constitution was violated where Count One and Count and Three of the indictment arose from the same act or series of acts with an overlap in time frames from the 1st day of January 1998 until the 29th day of January 2000; and where Count One and Count Four arose from the same act or series of acts, with an overlap of times frames from the 1st day of January 1998 until the 29th day of January 2000; and where Count Three and Count Four alleged an overlapping time frame from the 30th of January 1998 until the 29th day of January 2000.

QUESTION #10:

SUPPORTING FACTS:

- 1) The Applicant was denied and/or deprived of his Sixth and Fourteenth Amendment rights to effective assistance of trial counsel under the United States Constitution, and their counterparts in the South Carolina Constitution. Trial counsel's acts and omissions fell below an objective standard of reasonable professional judgment resulting in prejudice, such that there exists a reasonable probability that absent counsel's deficient performance, the result of the proceedings would have been different.

a. Trial counsel failed to object or move for dismissal of the indictment where the Court of General Sessions for Abbeville County lacked subject-matter jurisdiction and/or territorial jurisdiction where the indictment was not filed with the Clerk of Court. Alternately, Applicant was denied due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and their counterparts under the South Carolina Constitution.

b. Trial counsel failed to object or move for dismissal of the indictment where the Court of General Sessions for Abbeville County lacked subject-matter jurisdiction and/or territorial jurisdiction, where during Applicant's jury trial, the judge's charge to the jury constructively amended the indictment broadening the scope for a finding of guilt, materially altered the charging portion of the indictment, and the evidence adduced at trial constituted fatal variance with the allegations of the

indictment.

c. Trial counsel failed to object or preserve the issue for direct appeal where the Applicant rights under the Due Process Clause of the United States Constitution , and its counterpart in the South Carolina Constitution was violated where Applicant was not afforded the right of allocution prior to imposition of the sentences. X

d. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred where during the Applicant's jury trial the judge's charge to the jury constructively amended the indictment, broadened the scope for a finding of guilt, materially altered the charging portion of the indictment, and the evidence adduced at trial constituted fatal variance with the allegations of the indictment, and further resulted in denial of due process, a fair trial, and impartial jury. (Age of Victim)

e. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred where during the Applicant's jury trial the judge's charge to the jury constructively amended the indictment, broadened the scope for a finding of guilt, materially altered the charging portion of the indictment, and the evidence adduced at trial constituted fatal variance with the allegations of the indictment, and further resulted in denial of due process, a fair trial, and impartial jury. (Date of Offense Count Three)

f. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred where it was divested of subject-matter jurisdiction, due to failure to spread upon the record any indication that the Applicant had been but to bar and arraigned on the charges in the indictment.

g. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred where during closing arguments it permitted the Solicitor to repeatedly comment on Applicant's right to remain silent, and his exercise of the right to remain silent, characterizing the State's evidence as "uncontradicted" and "undisputed" where only the Applicant could have contradicted or disputed the State's evidence, resulting in a denial of due process , a fair trial, and impartial jury. The comments so infected the trial with unfairness as to make the

resulting conviction a denial of due process under the Fifth and Fourteenth Amendments of the United States Constitution and their counterparts in the South Carolina Constitution.

h. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred it permitted the Solicitor to vouch for the credibility of the State's key witness and improperly bolstering her testimony, where the State relied on circumstantial evidence as a basis of guilt, resulting in denial of due process, a fair trial, and an impartial jury.

i. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred where it permitted defense counsel and the solicitor to erroneously define the concept of reasonable doubt, and the court's own jury charge on reasonable doubt equating the concept with a "moral certainty", and reasonable explanation was misleading, confusing, and unconstitutionally lowered the standard of proof required for a guilty verdict, resulting in denial of due process, a fair trial, and impartial jury.

j. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred where it erroneously admitted testimony regarding other crimes including Criminal Domestic Violence and Trespassing as well as other uncharged sexual crimes allegedly committed outside the State of South Carolina, for which there had been no conviction or sentence entered.

k. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred where it failed to give a jury instruction of the weight to be accorded to prior inconsistent statements, where the State's key witness admitted making prior inconsistent statements which differed from her testimony at trial.

l. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred where it failed to give a curative instruction, where during the Solicitor's closing argument, the Solicitor misquoted the victim's trial testimony, and improperly bolstered her credibility. The comments so infected the trial with unfairness as to make the resulting conviction a denial of due process under the Fifth and Fourteenth Amendments of the United States Constitution and their

counterparts in the South Carolina Constitution.

m. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred where it admitted the testimony of Cherry MacTaggart who was admitted as an expert witness, and whose testimony included matters tending to improperly bolster the credibility of the alleged victim.

n. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred where it denied Applicant's motion for a directed verdict of not guilty.

o. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred where it failed declare as a hostile witness Esterlina Solter, the victim's mother, who was called by the defense, and whose testimony was prejudicial to the defense.

p. Trial counsel failed to object or preserve the issue for direct appeal where the Solicitor improperly engaged in extensive use of leading questions during the direct and redirect examination of the State's witness in chief, who was the victim of the alleged offenses.

q. Trial counsel failed to move for a jury instruction or preserve for direct appeal the issue where the alleged victim admitted making prior inconsistent statements.

r. Trial counsel failed to move for dismissal of the indictment or for a directed verdict of not guilty where the evidence adduced at trial demonstrated that certain of the alleged offenses were not within the territorial jurisdiction of the State of South Carolina at the time they were allegedly committed; or that the alleged victim was of an age not charged in the indictment, resulting in fatal variance or constructive amendment of the indictment, and otherwise resulting in conviction for offenses not charged in the indictment.

s. Trial counsel failed to object or preserve the issue for direct appeal where the Solicitor exceed the scope of matters covered on direct examination of defense witness Esterlina Lopez, who was the mother of the alleged victim.

t. Trial counsel failed to move upon the court to have defense witness Esterlina Lopez declared a hostile witness or to preserve the issue for direct appeal where the trial judge failed to do so and failed to issue a jury instruction with regard to this witness.

u. Trial counsel failed to object or preserve the issue for direct appeal where the trial court erred where during its charge to the jury, the court instructed the jury that "a reasonable doubt is simply a doubt which you find reasonable. A reasonable doubt can arise from the evidence presented or from the lack of evidence presented" and that "if the evidence presented by the State has removed all reasonable doubt from your minds ... it is your duty to find the defendant to be guilty. Thus violating Applicant's right to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and their counterparts under the South Carolina Constitution.

v. Trial counsel failed to object or preserve the issue for direct appeal where during the opening charge to the jury, the trial court erroneously instructed the jury that the attorneys for both the State and the Applicant "will try and educate us as to what the facts are to support the allegations of the indictment", thus denying Applicant a due process, fair trial and impartial jury. The error further nullified the court's instruction on the presumption of innocence, by suggesting that defense counsel would be seeking to prove his own client guilty in attempting to educate the jury as to the referenced facts "to support the allegations of the indictment."

w. Trial counsel failed to object or preserve for direct appeal the issue where Applicant rights under the Double Jeopardy Clause of the United States Constitution and its counterpart in the South Carolina Constitution was violated where Count One and Count and Three of the indictment arose from the same act or series of acts with an overlap in time frames from the 1st day of January 1998 until the 29th day of January 2000; and where Count One and Count Four arose from the same act or series of acts, with an overlap of times frames from the 1st day of January 1998 until the 29th day of January 2000; and where Count Three and Count Four alleged an overlapping time frame from the 30th of January 1998 until the 29th day of January 2000.

2) The Applicant was denied and/or deprived of his Sixth and Fourteenth Amendment rights to effective assistance of appellate counsel under the United States Constitution, and their counterparts in the South Carolina Constitution. Appellate counsel's acts and omissions fell below an objective standard of reasonable professional judgment resulting in prejudice, such that there exists a reasonable probability that absent counsel's deficient performance, the result of the proceedings would have been different.

- a. Appellate counsel failed to raise on direct appeal an exception where the Court of General Sessions for Abbeville County lacked subject-matter jurisdiction and/or territorial jurisdiction where the indictment was not filed with the Clerk of Court. Alternately, Applicant was denied due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution, and their counterparts under the South Carolina Constitution.
- b. Appellate counsel failed to raise on direct appeal an exception where the trial court erred where it was divested of subject-matter jurisdiction, due to failure to spread upon the record any indication that the Applicant had been but to bar and arraigned on the charges in the indictment.
- c. Appellate counsel failed to raise on direct appeal an exception where the trial court erred where it admitted the testimony of Cherry MacTaggart who was admitted as an expert witness, and whose testimony included matters tending to improperly bolster the credibility of the alleged victim.
- d. Appellate counsel failed to raise on direct appeal an exception where the trial court erred where it denied Applicant's motion for a directed verdict of not guilty.
- e. Appellate counsel failed to raise on direct appeal an exception where the Applicant rights under the Double Jeopardy Clause of the United States Constitution and its counterpart in the South Carolina Constitution was violated where Count One and Count and Three of the

indictment arose from the same act or series of acts with an overlap in time frames from the 1st day of January 1998 until the 29th day of January 2000; and where Count One and Count Four arose from the same act or series of acts, with an overlap of time frames from the 1st day of January 1998 until the 29th day of January 2000; and where Count Three and Count Four alleged an overlapping time frame from the 30th of January 1998 until the 29th day of January 2000.

- 3) The indictment was not filed with the clerk of court; and bears no indicia of having ever been filed.
- 4) The indictment alleged that the victim was at least the age of eleven (11) but less than the age of fourteen; however, the trial court instructed the jury that in order to find the Applicant guilty, the State had to prove that the victim was less than sixteen (16) years old but at least fourteen (14) years old.
- 5) The Applicant was never specifically addressed by the trial court, and asked whether he would like to make a statement or offer evidence in mitigation of the possible sentences to be imposed; thus the failure of the court to make such inquiry or provide such opportunity requires reversal of the conviction and sentences.
- 6) The Applicant hereby incorporates by reference, as if re-stated verbatim the entirety of the matters set forth and alleged hereinbefore as Grounds For Relief, Number 6(a) through 6(n); and the entirety of the trial transcripts and record on appeal, as factual support for each of the substantive claims raised herein; as well as the claims related to ineffective assistance of trial and appellate counsels. The detailed facts pertaining to these allegations will be further presented at the hearing on this matter.

Note!! Applicant hereby leaves this Application for Post-Conviction Relief open for amendment, pending appointment of counsel, and meaningful opportunity for counsel to review the contents hereof pursuant to Rule 71.1(d), South Carolina Rules of Civil Procedure.

STATE OF SOUTH CAROLINA,)
)
 COUNTY OF ABBEVILLE.)

IN THE COURT OF COMMON PLEAS.

Mark R. Bolte, #304800)

Applicant,)

v.)

State of South Carolina,)

CERTIFICATE OF SERVICE BY MAIL

09-CP-01-304

The undersigned, an employee of the Abbeville County Clerk of Court's Office, does hereby certify that copy of Application for Post Conviction Relief in the above-referenced PCR case was made upon the following persons by placing same in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 30th day of December, 2009, addressed as follows:

Attorney General's Office
 ATTN: PCR Dept.
 Post Office Box 11549
 Columbia, SC 29211

Mark R. Bolte, #304800/F4B233
 McCormick Correctional Institution
 386 Redemption Way
 McCormick, SC 29899

Solicitor's Office
 P. O. Box 516
 Greenwood, SC 29648


 Peggy A. Payne, Common Pleas Clerk

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

Mark R. Bolte, # 304800,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT
Case No.: 2009-CP-01-304

RETURN

In response to the post-conviction relief application filed on December 23, 2009, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Abbeville County Clerk of Court. The Abbeville County Grand Jury returned a five-count indictment during the October 2003 term¹ indicting the Applicant for Incest, two counts of Criminal Sexual Conduct With a Minor-second degree, Committing or Attempting to Commit a Lewd Act Upon a Child Under Sixteen Years of Age, and Criminal Sexual Conduct With a Minor – first degree² (2003-GS-01-296). E. Charles Grose, Jr., Esquire, represented him. On September 7-10, 2004, the Applicant proceeded to trial and was convicted by a jury of Incest, one count of Criminal Sexual Conduct With a Minor-Second degree, and Committing or Attempting to Commit a Lewd Act Upon a Child Under Sixteen Years of Age. The Honorable Wyatt T. Saunders, Jr., sentenced the Applicant to confinement for a period of twenty (20) years for the criminal sexual conduct charge, fifteen (15) years for the lewd act charge, and ten (10) years for incest, all sentences running

¹ The indictment was signed by the Foreman of the Grand Jury on

consecutively.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The Applicant also filed a *pro se* Anders response brief. The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Bolte, Op. No. 2009-UP-361 (S.C. Ct. App. filed June 24, 2009). The Applicant then filed a *pro se* Petition for Rehearing, which the Court of Appeals denied on August 25, 2009. The Remittitur was also issued on August 25, 2009.

Attached herewith and incorporated herein by reference are the records of the Abbeville County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and appellate court records.

II.

In his application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel;
2. Ineffective assistance of appellate counsel;
3. Subject matter jurisdiction; and,
4. Trial court error.

III.

In his first allegation, the Applicant contends he received ineffective assistance of trial counsel. Respondent asserts that the Applicant's attorney rendered effective assistance well within the standard of reasonableness within professional norms for a criminal defense attorney, and that this allegation is without merit.

Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the

trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668, 104 S. Ct. 2052. 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 v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. 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, 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 v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Applicant also alleges he received ineffective assistance of appellate counsel. Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. Thus, Respondent contends this allegation also lacks merit.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v.

Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate 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. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

The Applicant has also claimed that the trial court lacked subject matter jurisdiction due to defects and amendments of his indictment. Defects in the indictment do not affect subject matter jurisdiction. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); See also U.S. v. Cotton, 535 U.S. 625, 122 S.Ct. 1781 (2002). The indictment is a notice document, and any challenges to its sufficiency

must be made in accordance with S.C. Code Ann. § 17-19-90 (2003). See also S.C. Code § 17-19-20 (2003). Subject matter jurisdiction is the power of a court to hear a particular class of cases, and it has nothing to do with the indictment document. See Gentry, 363 S.C. 93, 610 S.E.2d 494; Dove v. Gold Kist, Inc., 314 S.C. 235, 442 S.E.2d 598 (1994).

In post-conviction relief, an applicant wishing to raise challenges to the sufficiency of an indictment must do so in the context of ineffective assistance of counsel, basically alleging that his trial counsel failed to properly move to quash the indictment in accordance with S.C. Code Ann. § 17-19-90 (2003).

An Applicant may still challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by Gentry, 363 S.C. 93, 610 S.E.2d 494. However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, 363 S.C. at 101, 610 S.E.2d at 499; See also S.C. Const. Art. V, § 7. Thus, the Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Here, Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

To the extent the Applicant alleges the trial court did not have subject matter jurisdiction to hear his case, the Respondent submits the allegation that the trial court lacked subject matter jurisdiction should be summarily dismissed. To the extent the Applicant alleges trial counsel was ineffective for failing to object to the indictment, the Respondent submits this allegation should be analyzed under Strickland, *supra*.

The Respondent further submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test with regard to the ineffectiveness claims against trial counsel regarding the indictment. However, this allegation, as presented within the context of ineffective assistance of trial 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. Sharper v. State, 279 S.C. 264,

305 S.E.2d 247 (1983).

VI.

The Applicant also claims the trial court committed several various errors. These allegations raise direct appeal issues that are not cognizable in an action for post-conviction relief and are specifically barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised, and did in fact raise, these issues at trial or on appeal. These allegations do not state a ground for post-conviction relief. Therefore, the Respondent submits the Court should summarily dismiss this allegation.

VII.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of trial counsel and ineffective assistance of appellate 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.

VIII.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied. The Respondent reserves the right to amend this Return upon the receipt of any relevant information or materials.

IX.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held.

(Signature continued on next page.)

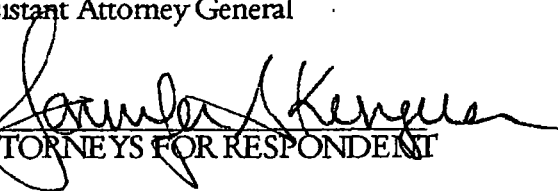
Respectfully submitted,

HENRY D. McMASTER
Attorney General

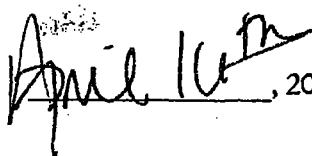
JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

JENNIFER A. KINZELER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

 , 2010.

State of South Carolina)
County of Abbeville) Court of Common Pleas
) 2009-CP-01-304

Post Conviction Relief

Mark Bolte)
 vs.) Transcript of Record
)
State of South Carolina)
 Defendant)

October 27, 2010
Newberry, South Carolina

B E F O R E:

Honorable Eugene C. Griffith, Jr., Judge

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

Jennifer Kinzeler, Assistant Attorney General
Attorney for the State

Jon Newlon, Esq.
Attorney for Mark Bolte

Joy E. Holston
Official Court Reporter

I N D E X O F W I T N E S S E S

1		
2	(IC) - Denotes In Camera	
3	(DW) - Denotes Defense Witness	
4	(SW) - Denotes State's Witness	
5	(PW) - Denotes Plaintiff's Witness	
6	<u>PW - Suzanne Mayes</u>	
7	Direct examination by Mr. Newlon:	7
8	Cross-examination by Ms. Kinzeler:	19
9	Direct examination by Mr. Newlon:	25
10	Cross-examination by Ms. Kinzeler:	28
11		
12	<u>PW - Charles Grose</u>	
13	Direct examination by Mr. Newlon:	29
14	Cross-examination by Ms. Kinzeler:	70
15	Redirect examination by Mr. Newlon:	81
16		
17	<u>PW - Mark Bolte</u>	
18	Direct examination by Mr. Newlon:	82
19	Cross-examination by Ms. Kinzeler:	88
20		
21		
22		
23	Certificate of Reporter	107
24		
25		

EXHIBITS

1

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3

4

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(NO EXHIBITS WERE INTRODUCED.)

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1 THE COURT: Ms. Kinzeler.

2 MS. KINZELER: Your Honor, the next case we have
3 today is Mr. Mark Bolte versus the State of South
4 Carolina. Case number 2009-CP-01-304. Mr. Bolte was
5 indicted and tried by a jury for, he was indicted for--

6 THE COURT: Is he here?

7 MS. KINZELER: Oh. I didn't realize he wasn't in
8 here.

9 THE COURT: Let's get him in.

10 (Whereupon, Mr. Bolte enters the courtroom.)

11 THE COURT: All right.

12 MS. KINZELER: Okay. I will just introduce the case
13 again. This is, again, Mr. Bolte versus the State of
14 South Carolina, 2009-CP-01-304. Mr. Bolte was originally
15 indicted by the Abbeville County Jury. It was a five
16 count indictment. Of the five counts Mr. Bolte went to
17 trial on three counts on that indictment. That included
18 incest, criminal sexual conduct with a minor and a lewd
19 act or attempting to commit a lewd act with a child under
20 16 years of age. The other two counts in that indictment
21 were nolle prossed. Mr. Grose represented Mr. Bolte at
22 trial which occurred on September 7th through the 10th in
23 2004. The Honorable Judge Saunders sentenced him to
24 confinement for a period of 20 years for this CSC, 15 for
25 the lewd act and 10 for incest. All sentences running

1 consecutively. Did I miss state that, Jon?
2 Consecutively. Then there was a direct appeal filed in
3 this case. That appeal was dismissed by the Appellate
4 Court. In June of 2009 Mr. Bolte filed a pro se petition
5 for a rehearing which the Court of Appeals also denied in
6 August of 2009. And this post conviction relief action
7 follows. I believe there are a lot of allegations raised
8 in the application but Mr. Newlon has sort of clarified
9 and narrowed them down to about ten or a dozen or so. And
10 I will turn it over to Mr. Newlon at this time.

11 MR. NEWLON: Your Honor, this is a witness list,
12 everybody was subpoenaed and it appears that Cherry
13 Mactaggart has not showed up and number six, Ms. Lopez
14 will not be coming.

15 THE COURT: Who is the expert, she is from Columbia?

16 MR. NEWLON: Greenwood.

17 MS. KINZELER: I didn't know anything about this
18 witness list so I can't speak to anybody who is or isn't
19 here. I didn't issue any subpoenas except I believe for
20 Mr. Grose. So, I will leave it up to Mr. Newlon about
21 what he wants to do with someone who is not here that he
22 wished were here.

23 MR. NEWLON: I think, Your Honor, for purposes of
24 this matter, I think that, I think that Mr. Grose will be
25 able to testify about his recollection of events of the

1 trial and I can let the transcript of her testimony speak
2 for itself. And I will submit as an exhibit.

3 THE COURT: All right.

4 MR. NEWLON: Your Honor, if it please the Court, the
5 AG has gone through the procedural aspect of this, the
6 background of this particular case. And the main issues
7 on PCR have to do with the Court's jury charge,
8 obstructively amending an indictment, the Court permitting
9 the Solicitor to comment repeatedly on both of his
10 decisions to remain silent. The Court allowing the
11 Solicitor to vouch for the credibility of witnesses, the
12 Court's reasonable doubt charge, the Court permitting CDV
13 trespass to enter into evidence, the Court's failure to
14 give curative instruction regarding the State's bolstering
15 the key witnesses. The admission of Mactaggart's
16 testimony as an expert, what she was allowed to say,
17 overlapping indictments. And then as far as Counsel,
18 failure to object to preserve his right of allocution,
19 failure to object to the Court's jury charge, the Court
20 obstructively amended the indictment unsupported by
21 evidence. Counsel failed to object to the Court's
22 permitting the Solicitor to comment on the right to remain
23 silent, bolstering, credibility and there is some others,
24 Counsel's failure to object during trial and preserve
25 issues for appeal. And that is what essentially we are

1 going forward today on. And there is also issues of
2 convicted on counts one, two and three; sentenced on
3 counts, one, three and four. And has to do with jury
4 selection error by Mr. Grose in this particular case. We
5 are prepared to go forward on those issues and at this
6 time we will call Mr. Grose to the stand, excuse me, I am
7 sorry. We would call Ms. Mayes to the stand.

8 Suzanne Mayes, after being duly sworn,
9 testified as follows:

10 Direct Examination

11 By Mr. Newlon:

12 Q Ms. Mayes, I just want to cut to it, I just want to
13 bring up a couple of issues to discuss with you. One of
14 them is, in this particular case in closing argument do you
15 recall ever commenting or alluding to Mr. Bolte's failure
16 to testify?

17 A Well, I was provided a copy of the transcript this
18 morning. And the Assistant Attorney General informed me
19 that the phrase, I guess that is in question is on page
20 529. And that was the use of the word, undisputed, where
21 I said throughout this case from the witnesses supplied by
22 the State and the witnesses supplied by the defense the
23 facts of this case are undisputed. And to further answer
24 the question, no, that was not a comment on Mr. Bolte not
25 testifying. That was a reference to the numerous

1 witnesses presented throughout the case by both the State
2 and then the witness offered by the defense and the fact
3 that the testimony did corroborate the victim's account.

4 MR. NEWLON: I beg the Court's indulgence. I am
5 looking at 529.

6 Q What page are you looking at?

7 A I am looking at the top of 529 and that is a
8 continuation of the previous sentence on 528.

9 Q Thank you, I see it now. In this particular case, as
10 far as witnesses available to testify to the substance of
11 events that actually occurred, the only witness would be
12 who?

13 A You are referring to the actual sexual battery?

14 Q Yes.

15 A Well, that is not what our case was about. I mean,
16 that is the actual charge on the indictment but the crux
17 of the State's case was about the relationship between the
18 victim and the defendant throughout her childhood and then
19 into her teenage years.

20 Q Just answer my question. In regards to the
21 particular case, on the substantive issues put before the
22 jury who were the available witnesses who could testify to
23 the allegations themselves of criminal sexual conduct,
24 incest or lewd act?

25 A Well, I mean the victim would obviously be available

1 to testify and she was.

2 Q Who else?

3 A Well, those would be the only witnesses that the
4 State could offer, if the defendant had chosen to testify
5 then he could have but that was not part of the State's
6 case.

7 Q I am not asking the State's case. I am talking about
8 witnesses available to testify at trial. Very simple
9 question. Okay, [REDACTED], now [REDACTED] the victim you
10 said. Who else could testify to those events?

11 A Well, the State would not have any other witness on
12 that particular matter.

13 Q I am not asking about what, who the State would call
14 to testify. I am talking about witnesses at trial
15 available to testify at trial. Who can testify, your
16 knowledge of this case who was able to testify about these
17 events. The victim and who else?

18 A Well, available would only be the victim. The
19 defendant was present in the courtroom but he is not
20 available as a witness.

21 Q Okay. Well, you didn't, the State didn't call him?

22 A Right.

23 Q Okay. The State could of called him?

24 A No.

25 Q You couldn't?

1 A We could not call Mr. Bolte.

2 Q Even if he wanted to testify?

3 A No.

4 Q Okay. But he chose, for whatever reason he chose not
5 to testify?

6 A Correct.

7 Q So, the victim, Mr. Bolte who chose not to testify,
8 who else could testify to the substantive events that
9 substantiated the charges or allegations of criminal
10 sexual conduct, incest and lewd act, anybody else?

11 A Well, again that goes into the interpretation of what
12 you mean by substantive. Part of the relationship with
13 the incest charge was the father and daughter relationship
14 and a lot of that involved descriptions by the mother and
15 other witnesses about why it was unhealthy. But as to the
16 actual carnal intercourse, that was from the victim.

17 Q Okay, we are going to be here for a while. Very
18 simply put. With regard to the actual acts of criminal
19 sexual conduct, incest and lewd act, other than the victim
20 what other person has knowledge of those events that you
21 are aware of in your investigation of this case?

22 A Mr. Bolte would.

23 Q Other than Mr. Bolte and the victim in this case who
24 else, according to your investigation and law enforcement
25 investigation had any other information regarding those

1 specific events in supporting a claim for criminal sexual
2 conduct, incest and lewd act?

3 A Well, I believe that the mother did. I believe part
4 of her testimony was about overhearing a conversation on
5 the phone and thinking that Mr. Bolte was possibly having
6 an affair and then finding out he was in fact talking to

7 [REDACTED]

8 Q Wait a minute. Ms. Mayes, I am not talking about, I
9 understand what you are talking about and the record can
10 speak for itself and I mark the record for the Court's
11 reference. But with regard to what this lady observed,
12 what the mother observed is it not true that she did not
13 offer any testimony of any direct observation or evidence
14 of any criminal sexual conduct, incest or lewd act
15 allegedly committed by Mr. Bolte in this case?

16 A There were no eyewitnesses to him having sex with his
17 daughter.

18 Q Okay. So, with regard to the actual events
19 themselves, events that would lead to a charge of criminal
20 sexual conduct, incest and lewd act, this was basically a
21 case of the daughter testifying against the father.
22 Without the daughter's testimony the State would not have
23 had a case?

24 A That is correct.

25 Q Okay. So, then in closing argument when you alluded

1 and you made the comment that the testimony that had been
2 presented is undisputed, the only other testimony that the
3 State was aware of at that time, would of been aware of
4 would of been Mr. Bolte's testimony if he had of
5 testified. Isn't that correct?

6 A That is not what that referenced to undisputed
7 testimony you are referring to. That was not about--

8 Q That is not my question, Ma'am. I am going to ask
9 you to answer my question and then you can certainly
10 explain it. The question is, simply put, that when you
11 made that statement that it is undisputed that at that
12 time you were aware that the only person who could of
13 testified to those events leading to those charges would
14 of been the defendant, Mr. Bolte?

15 MS. KINZELER: Your Honor, I am going to object a bit
16 to leading and also on the ground that, if her answer to
17 that question is that that wasn't her reference then that
18 would be part and parcel of her answer to whether she knew
19 Mr. Bolte who could dispute it. What is important is what
20 it was she was referring to because you don't know who
21 could or couldn't dispute it if we don't clarify what she
22 was referring to in saying undisputed. I don't know if
23 that is a sufficient stated ground for my objection.

24 MR. NEWLON: Your Honor, two things. Number one, she
25 is clearly becoming an adverse witness in this case and I

1 would move to be able to examine her under Rule 611 or
2 whatever the rule, I can't remember what the rule is as an
3 adverse party which would allow me to lead at this point.
4 And it is clear that she has already been evasive in my
5 questioning. And the other thing is that she can
6 certainly explain what she wants but the question I asked
7 is what knowledge did she have of witnesses when she made
8 that statement and she didn't answer that question. Now,
9 she answered the question, the only witnesses I am aware
10 of would of been the victim and Mr. Bolte and then go on
11 in and explain. But when I said that I didn't mean what
12 you are inferring then that is fine. But she needs to
13 answer my question before she explains.

14 MS. KINZELER: And if she is allowed to explain I
15 will withdraw my objection.

16 THE COURT: You ask the questions, you may lead her,
17 she may explain her answers.

18 MR. NEWLON: Thank you.

19 Q Isn't it true, Ms. Mayes, that at the time that you
20 made this statement in closing argument that this
21 testimony was undisputed that the only witnesses would of
22 been [REDACTED] in this case and the claimant in this
23 particular PCR who chose not to testify at trial?

24 A It is true that [REDACTED] and Mr. Bolte would of been
25 the only witnesses to the sexual intercourse. However

1 that phrase when I am talking about the facts of the case
2 being undisputed throughout witnesses supplied by the
3 State and witnesses supplied by the defense is a reference
4 to the overall supporting evidence about the home
5 environment and the relationship that [REDACTED] described
6 between herself and the defendant.

7 Q Now, Ms. Mayes, isn't it true that any testimony with
8 regard to the home environment, how difficult it may of
9 been or how challenging it may of been, how difficult it
10 may of been, would not carry the day with the jury or the
11 Court in sustaining a verdict for criminal sexual conduct,
12 incest and lewd act?

13 A In a case like this it is very important.

14 Q That is not my question. That testimony undisputed
15 that he was a bad father, mean father, very strict,
16 monitored his children very aggressively, that in and of
17 itself would sustain the verdicts in this case. Isn't
18 that correct?

19 A Well, I have to disagree with that. If you are
20 talking about putting up evidence that he had sex with
21 her, we would need a lot more than just her saying that.
22 we have to offer supporting evidence about the
23 relationship.

24 Q I understand that. My question again--

25 THE COURT: I understand your question.

1 MR. NEWLON: You understand my question?

2 THE COURT: I understand and she has answered and she
3 has disagreed with you because her experience as a
4 prosecutor it is going to be very difficult for you to
5 overcome or get her to deny that is her, that has been her
6 career.

7 MR. NEWLON: I understand.

8 THE COURT: I understand her answer and I understand
9 your question.

10 Q And in this commentary in this particular situation,
11 in this closing argument that you made and it says
12 undisputed you didn't qualify and eliminate the fact or
13 elude, avoid any illusion or anything that you were making
14 a reference in some way that Mr. Bolte didn't testify.
15 Did you qualify it in any way?

16 A On that particular segment it was very broad and I
17 did not. However, on page 562 I did. When I used the
18 same term, undisputed, I stated when we talk about Mark
19 Bolte and his control and isolation of [REDACTED] it is
20 undisputed in this case. [REDACTED] mom called by the
21 defense as a defense witness confirmed every aspect of
22 that. He would listen in on her phone calls, he would
23 monitor everywhere she went and if she wasn't home when
24 she should be he would check the milage on her car. And
25 then I went on to describe the prom event and several

1 other things that the mother had witnessed. And so that
2 is when I used the same term, undisputed, and I did
3 clarify it there.

4 Q And that is an interesting point, you make that.
5 That in fact, on 562 you ask to clarify what facts you
6 were trying to say were undisputed. But previous to that
7 you did not, correct?

8 A Previous to that I used it in a very broad sense,
9 correct.

10 Q Okay. Also in the course of your closing isn't it
11 true that you actually attempted to bolster [REDACTED]
12 testimony, take advantage of the fact that Mr. Bolte
13 didn't testify?

14 A Can you refer me to the page and to the segment that
15 you are referring to?

16 Q Yes, page 571 at the bottom. I will read it for you.
17 You are the conscious of the community. I submit to you
18 that the case has been proven beyond a reasonable doubt,
19 the testimony of [REDACTED] alone is proof beyond a
20 reasonable doubt.

21 A That would not be an attempt to bolster, that would
22 be saying that her testimony alone, even if not
23 corroborated could support a conviction.

24 Q Couldn't you have been just as effective in that by
25 saying simply that the testimony of [REDACTED] is proof

1 beyond a reasonable doubt as opposed to saying alone
2 instead of emphasizing the fact that she was the only one
3 that testified?

4 A Well, again we do have a statute that testimony of
5 the victim could not be corroborated. And so her
6 testimony alone can amount to proof beyond a reasonable
7 doubt.

8 Q Effectively you could of left out the word, alone and
9 just said her testimony is proof beyond a reasonable
10 doubt. Should you not have done that and still have
11 avoided the possibility of bolstering the witness or
12 trying to establish or allude to the fact that Mr. Bolte
13 hadn't testified?

14 A The testimony of [REDACTED] is proof beyond a
15 reasonable doubt?

16 Q Yes.

17 A I believe that, I would interpret it the same either
18 way. The testimony of [REDACTED] is proof beyond a
19 reasonable doubt. The testimony of [REDACTED] alone is
20 proof beyond a reasonable doubt.

21 Q And last thing, you understand as a criminal lawyer
22 in your practice and your training, education and training
23 that it is inappropriate in closing argument to appeal to
24 a jury sense of community to try to persuade them with
25 passion and prejudice to convict a particular defendant.

1 Are you aware of the body of case law that talks about
2 that?

3 A I think it has been addressed more recently, that is
4 something that we don't, as prosecutors I think most of us
5 do not use that type of language today. This was in 2004
6 and I am not sure at what point some of those cases came
7 out. Again, that was on 571?

8 Q Yes, ma'am. The case I am talking about started in
9 1999 which would of significantly preceded today, this
10 trial.

11 A So, here I say, you are the conscious of the
12 community and I submit to you that this case has been
13 proven beyond a reasonable doubt.

14 Q That is right. So, you talked to them and you are
15 appealing to their conscious as a community and you asked
16 them later on in your closing argument to strike back, a
17 blow for these victims. Is that, would that be something
18 appropriate given your understanding, you may not be
19 familiar with State versus Liberty and Sims and the
20 progeny of cases that follow that.

21 A In terms of the strike back against injustice, I do
22 not find that objectionable at all.

23 Q Appealing to the conscious of the community, after
24 using some of the language that those cases talks about,
25 wouldn't that be inappropriate?

1 A Again, I wouldn't use that language today.

2 Q But in this particular case you shouldn't of used it,
3 isn't that correct?

4 A Well, I can only say that in that particular case I
5 don't see it as appealing to anything in particular other
6 than reminding them that they are there for jury duty and
7 they are the conscious of the community in that role.

8 Q But you no longer do it today, is that correct, it is
9 something that you would avoid?

10 A I would try and avoid that.

11 Q Okay. That is all the questions that I have. Thank
12 you, Ms. Mayes.

13 Cross-Examination

14 By Ms. Kinzeler:

15 Q Ms. Mayes, how long have you been a prosecutor?

16 A 18 years.

17 Q 18 years. Do you know roughly how many sexual
18 conduct cases you have tried?

19 A Over fifty would be my estimation, yes.

20 Q And this trial back in 2003 or 2004, is that correct?

21 A September of 2004, I believe is what was previously
22 discussed.

23 Q Okay. And at that time you had about 12 years of
24 experience as a prosecutor?

25 A Correct.

1 Q Do you recall this case?

2 A Yes.

3 Q I just want to clarify for the record, when you use
4 the words, unrefuted and undisputed what is your
5 understanding of the law when the defense presents
6 evidence as far as whether or not you are allowed to use
7 that language. What is your understanding of the law
8 based on your knowledge and experience?

9 A First I believe that the term was undisputed. I
10 don't believe it was unrefuted. And the undisputed was
11 used on 523, I believe, I am sorry, 529 in the broad sense
12 of that stating that witnesses supplied by the State and
13 witnesses supplied by the defense the facts of this case
14 are undisputed. And then it was further clarified on page
15 562 in saying it is undisputed in this case, [REDACTED] mom
16 called by the defense as a defense witness confirmed every
17 aspect of that.

18 Q I will ask you a better question that is not so
19 broad. We all agree that the only people who has supplied
20 to what physically actually happened between these two
21 people are the victim and the defendant. We all agree to
22 that. The only people who could testify to the actual
23 event that happened would be the two involved in the
24 event?

25 A To the sexual intercourse, correct.

1 Q Right. How much of your case developed as far as
2 witnesses involving the circumstances and environment that
3 supported the State's theory?

4 A Well, in a situation like this where you have a
5 victim who is pretty much going to be alone with the
6 defendant and it is unwitnessed which is the large
7 majority of our sexual assault cases, very few are
8 witnessed events. So, in that type of situation the case
9 relies a lot on circumstantial evidence. And
10 circumstantial evidence can be the home environment, it
11 can be the relationship between the alleged perpetrator
12 and the child as witnessed by other people and all of the
13 surrounding circumstances that go with that. That is
14 especially true in cases of ongoing sexual abuse as this
15 was. [REDACTED] alleged that it started when she was a child
16 and that it continued up until her teenage years. And
17 ultimately she left and went to Erskine College and while
18 she was at Erskine College is when she disclosed the
19 abuse. So, it became important to establish what that
20 situation had been like in the home and how he, as she
21 described it in her testimony, how he had had control and
22 manipulation of her for so many years.

23 Q And you presented a witness to that effect through
24 the State's case?

25 A [REDACTED] testified in great detail about what she

1 called the controlling behavior, how she was isolated,
2 what would be, I guess described as manipulation in that
3 he would monitor all of her phone calls, he would go
4 through her book bag for her notes, he seemed very
5 possessive of her.

6 Q So, the defense, when you rested your case and you
7 had other witnesses during your case, the defense put up
8 the victim's mother which was also the defendant's wife or
9 soon to be ex-wife at some point. Is that right?

10 A That is right and she corroborated, as I stated, she
11 corroborated every aspect of what [REDACTED] testified to in
12 that regard.

13 Q And when you say every aspect and in that regard,
14 your references now and at the time of the trial were to
15 the home environment and the circumstances and the
16 isolation, is that right?

17 A And the relationship, what was described by the
18 mother as an unhealthy relationship between Mr. Bolte and
19 [REDACTED] He, even on the day of her prom he hid her dress
20 from her and locked her in a room because he did not want
21 her to go to the prom.

22 Q And these are things that the defense witness, the
23 mother testified to?

24 A That is correct. She witnessed those events and in
25 fact ultimately [REDACTED] did go to the prom. Mr. Bolte

1 became so irate and outraged that she ended up having to
2 call 911 to the home because of his reaction to [REDACTED]
3 going to the prom. Again, she was a witness to that and
4 confirmed [REDACTED] earlier accounts of the events.

5 Q So, in your closing when you say undisputed, can we
6 clarify for the record that you are referring to these
7 events and the circumstances rather than the actual sexual
8 events themselves?

9 A Right.

10 Q In hindsight do you feel like the jury could of
11 interpreted that any other way?

12 A I think they would have interpreted what I was
13 talking about in the correct context because I went
14 further to explain it on page 562.

15 Q Are you aware of any case law that says that a
16 Solicitor is never allowed to use the word, undisputed in
17 your closing argument?

18 A Well, in a situation where they didn't offer any
19 evidence at all, then no it wouldn't be relevant and it
20 wouldn't be used. But in a case where they actually do
21 offer a witness and then that witness confirms our
22 victim's account of the events then I believe it is used
23 appropriately.

24 Q So, the law is clear that you are not permitted to
25 comment on a defendant's exercise of his right to remain

1 silent?

2 A Yes and that was not a reference to Mr. Bolte.

3 Q And with regard to your talking about the victim's
4 testimony being sufficient beyond a reasonable doubt, that
5 question you were asked on direct, there was a jury
6 instruction that you and Mr. Grose sort of handled outside
7 the presence of the jury regarding that statute. Was that
8 the purpose of your, including it in your closing argument
9 given that the jury instruction would follow?

10 A Right, in other words and that was included, just to
11 clarify that, that was included in Judge Saunders charge
12 to the jury and that would be South Carolina Code section
13 16-3-656 I believe or 657. That was part of his charge?

14 Q Yes. According to the transcript that was charged,
15 you all discussed it and then that was charged to the
16 jury. So are you aware of any law that says that you
17 shouldn't say that whether or not, let me rephrase that.
18 Whether or not the applicant thinks there may have been a
19 better way for you to say something in your closing, is
20 there any law that you are aware of that prohibits you
21 from saying the victim's testimony alone would have been
22 sufficient particularly in light of the jury charge?

23 A No, that particular charge is discretionary and in
24 the past some Judges have charged it and some have not.
25 Even when Judges do not charge it they will often say to

1 me, you can argue that but I am not going to charge that
2 or you can let them know that her testimony alone is
3 sufficient. But in this particular case if it was charged
4 by Judge Saunders and apparently it was then it is routine
5 to also address that in closing because that charge is
6 going to be coming from the Court. And saying that [REDACTED]
7 [REDACTED] testimony alone can amount to proof beyond a
8 reasonable doubt is really a simplification, I suppose in
9 lay person's terms of the statute itself which says that
10 the testimony of a victim in a criminal sexual conduct
11 case need not be corroborated.

12 Q Do you recall the Judge giving a jury instruction
13 that the closing arguments aren't evidence?

14 A That is a normal charge. I haven't read through his
15 charges in this particular case but that is a routine
16 charge.

17 Q I think that is all I have.

18 THE COURT: Mr. Newlon, anything else?

19 Redirect Examination

20 By Mr. Newlon:

21 Q A couple real quick. Ms. Mayes, you would agree with
22 me that that there is a big difference between saying that
23 the victim's testimony alone can sustain a verdict versus
24 the victim's testimony is undisputed. There is a
25 significant difference between those two, isn't it?

1 A I don't believe I said her testimony was undisputed.

2 Q You have already testified that on page 528 leading
3 into page 529, undisputed testimony, you didn't qualify
4 which would necessarily include [REDACTED] testimony
5 too, wouldn't it?

6 A The facts of the case, I believe, is the way I put
7 it, that the facts of the case were undisputed and that
8 would include her testimony and the testimony of any other
9 corroborating witnesses.

10 Q Right. And in your subsequent commentary on page, I
11 believe it is 571, you are sitting here today testifying
12 that you further clarified what you meant by undisputed
13 but there is no where between page 528 and 529 and 571,
14 some or excuse me, 562, some 30 or 40 pages later where
15 you said I now will further clarify what I meant by
16 undisputed. Did you ever say that?

17 A Well,--

18 Q You can look for it and tell me if you can find it.

19 A Well, on page 529 I believe that was actually the end
20 of my opening on the law. And at that point is when I
21 would of sat down and Mr. Grose would of given his closing
22 argument and then I would have gotten back up at some
23 point and then that is when I further clarified it.

24 Q But, again, let's go back to the question. The
25 question is between those two points of the transcript no

1 where in there did you say I would like to further clarify
2 what I meant by undisputed. You never said that?

3 A I didn't feel it was necessary because I was not
4 addressing Mr. Bolte in any way.

5 Q Just to make the record correct, you never said it,
6 is that not correct?

7 A No, it is not stated until page 562.

8 Q And where is it stated on 562 that I would like to
9 further clarify what I meant by undisputed earlier?

10 A Well, I am not saying that that is exactly what, the
11 way it was termed. I believe what I have previously
12 testified to is that on page 562 I gave further
13 clarification.

14 Q Do you agree with me that you, the record, the
15 transcript of your closing on page 562 speaks for itself
16 and that is what you said on that day is what you intended
17 to say?

18 A What I intended to say that it is undisputed in this
19 case, [REDACTED] mom called by the defense as a defense
20 witness confirmed every aspect of that.

21 Q And, again, what you said is what you intended to say
22 on that day and nothing more, nothing less?

23 A That is what I intended.

24 Q Thank you. No further questions.

25

Recross-examination

1 By Ms. Kinzeler:

2 Q It is not that you didn't clarify until 40 or 50
3 pages later, that was your closing argument during that
4 time period?

5 A Page 529 is when I would have made no further comment
6 until I got back up again and that was on page 561.

7 Q And then this clarification we are discussing, that
8 is on page 562, is that right?

9 A On page 562, yes.

10 Q And when you refer to that, "that", can you tell us
11 what you are referring to one more time. Are you
12 referring to the defendant's failure to testify or are you
13 referring to the witness' evidence that was presented in
14 the totality?

15 A That is correct, I was referring to the State's case
16 and that was not a reference to Mr. Bolte. As it is
17 stated here, it was a reference to the fact that [REDACTED]
18 mom confirmed [REDACTED] account of the events inside the
19 home such as listening in on her phone calls, monitoring
20 where she went, checking the milage on the car, the rules
21 that he imposed and then the events that occurred on prom
22 night.

23 Q And so in that description you are never saying her
24 mother confirmed that this sexual encounter happened. You
25 are describing the events that Ms. Bolte confirmed?

1 A That is correct and I believe, in my opinion I
2 believe that was clear to the jury that I was making a
3 reference to all of the surrounding events which were a
4 very significant part of this case.

5 Q That is all I have.

6 MR. NEWLON: No further questions.

7 THE COURT: Thank you, Ms. Mayes.

8 MR. NEWLON: Your Honor, we call Mr. Grose to the
9 stand.

10 Charles Grose, after being duly sworn,
11 testified as follows:

12 Direct Examination

13 By Mr. Grose:

14 Q State your name for the record.

15 A Charles Grose.

16 Q Have you ever represented Mr. Bolte before?

17 A I did.

18 Q In what capacity, how did that start out?

19 A It started out when I was appointed shortly after he
20 was arrested on the charges that we went to trial on and
21 we are here to talk about today.

22 Q Do you have any recollection on how many times you
23 went and saw this gentleman from the time of appointed to
24 the time of trial?

25 A I do not, I went to the jail a good bit. There was

1 probably times I went more than others and but I did see
2 him a good bit.

3 Q In preparation for this particular trial did you seek
4 out an interview of any witnesses?

5 A You are going to have to be a little bit more
6 specific than that. I know that I did a lot of
7 investigation. I don't think that I interviewed the
8 victim or some of his children. But we had obtained a lot
9 of records and I remember going and driving around once or
10 more than once, I am not really sure in the area of where
11 this happened, in some of the locations.

12 Q Did you ever, I understand that there were young
13 children in the household?

14 A There were, I can't remember the exact ages but there
15 was a wide range.

16 Q Did you ever talk to [REDACTED] brother, the one that
17 is a couple of years younger than her?

18 A I don't think that I talked to any of the children.

19 Q Did you ever interview or talk to any of the
20 representatives or employees or agents from Erskine
21 College?

22 A I do not recall. I know that we had a lot of
23 documentation. You know, there were some witnesses that
24 were from Erskine. We had a lot of documentation about,
25 you know, what they might say but I can't recall if I

1 talked to them or not.

2 Q Did you Rule 5 or did you Brady the State in this
3 case and get information?

4 A I did as well as subpoena additional documents and
5 court records and order transcripts from some of the
6 family court proceedings and that sort of thing.

7 Q Did you ever speak with or interview Cherry
8 Mactaggart before the trial?

9 A No. We had her records, we had her file. I mean it
10 was not any surprises to what she was going to say. And
11 in fact we got, you know, those records precisely for that
12 reason. You got to remember, a lot of these witnesses
13 were going to be hostile witnesses. And, you know, I
14 wanted to know what they were going to say and to be able
15 to have things to cross-examine to them and I put into a
16 situation where somebody is saying, oh, do you remember
17 when you interviewed me I told you X, Y and Z. It is
18 different than what I am trying to cross-examine them
19 about. We don't have the luxury of depositions in a
20 criminal case.

21 Q With regard to the conduct of the trial itself I want
22 to go over some particular issues. Let's talk about Ms.
23 Mactaggart's testimony. What is your understanding and
24 purpose of Ms. Mactaggart's testimony in this trial?

25 A Well, I think the intention was to call her and have

1 her talk about her treatment of Mr. Bolte's daughter and
2 offer evidence about what she had said and that she was a
3 victim of sexual abuse. I think that Judge Saunders
4 limited that somewhat.

5 Q But you understood what she was going to testify to?

6 A Oh, yes, I understood that her purpose of being there
7 was to convey to the jury that she was treating [REDACTED] for
8 sexual abuse.

9 Q What was and you already mentioned it, you made a
10 motion to limit her testimony?

11 A Actually I think my motion was to exclude her
12 testimony.

13 Q What was your concern?

14 A Bolstering, that this would convey to the jury that
15 an expert witness believed the victim's story.

16 Q Okay. And specifically if you had never gotten and
17 made your motion to exclude it and the testimony be
18 limited, what were you afraid that she was going to say,
19 specifically if you can anticipate what she would say.

20 MS. KINZELER: Your Honor, I am going to object to
21 that question just because, if she didn't say it at trial,
22 if she didn't say it then it didn't happen. We don't need
23 to speculate about why he was afraid of what she was going
24 to say. If she didn't say it then it is not an issue. He
25 admitted that Ms. Mactaggart's testimony was the exact

1 issue raised and ruled upon on direct appeal.

2 MR. NEWLON: What I am trying to lay is a foundation
3 for why he would of made this motion and understand what
4 it was he was trying to preclude from happening and then
5 what happened and why preserve the issue which he has
6 already preserved for PCR is why the Court made an error
7 even letting her testify in the limited way that she did.

8 MS. KINZELER: Objection in trial Court error in
9 letting her testify is the exact issue already raised and
10 ruled upon by the Court of Appeals. Now, the issue of Mr.
11 Grose handling Mactaggart at some point either on the
12 motion or cross-examination then that would be relevant.
13 But trial Court admitting her testimony in the limited
14 fashion that he did was already ruled upon by the Court of
15 Appeals.

16 THE COURT: Mr. Newlon, what about that.

17 MR. NEWLON: If I may just for a minute, the glossed
18 over procedural history of this particular case. The
19 appeal was actually handled, the issues raised were six
20 issues.

21 THE COURT: Well, you have to be more specific then.
22 Mr. Grose anticipated some harmful testimony would bolster
23 and he made a motion to exclude but the Judge ruled
24 against him and the Appellate Court affirmed. How was
25 that ineffective assistance for your client?

1 MR. NEWLON: I was trying to find the issues on
2 appeal. I am not sure that that particular issue had been
3 previously raised.

4 MS. KINZELER: The exact issue raised by Appellate
5 Counsel in the Anders brief was the great trauma evidence
6 outside the scope of what was led by Shumpert which was
7 the case that was argued at trial. And this is directly
8 related to when we talk about great trauma evidence, that
9 is Ms. Mactaggart's testimony. Not to mention the fact
10 that the response brief that I argued before Your Honor
11 before that in an Anders, this issue was raised by both
12 Appellate Counsel in some fashion and by Mr. Bolte who is
13 a pro se response. In the Anders the Court reviews the
14 entire record to determine if there is any issue of merit
15 and among all the other issues he raised this was one of
16 them and the Court dismissed this appeal. So, I think the
17 claims against, having to do with Mactaggart have already
18 been ruled on.

19 THE COURT: Mr. Newlon.

20 MR. NEWLON: Other than arguing an error by the Court
21 I believe that due to the record that Mr. Grose properly
22 presented the argument and the cases to the Judge. And
23 the testimony went forward but to my recollection of the
24 record, I don't believe that when she actually said the
25 words, consistent with and when I say she, Mactaggart said

1 the words, consistent with, what [REDACTED] was saying that
2 there was an objection on the record.

3 MS. KINZELER: And that would be because the trial
4 Court ruled that Mactaggart was allowed to testify not as
5 to specific conclusion, I conclude this happened or that
6 but the trial Court ruled in the transcript, around page
7 300, I don't know the exact page number at the top of my
8 head. But she is permitted to testify, "consistent with",
9 et cetera, whatever it was her testimony would be. The
10 Court permitted her to use the words, consistent with and
11 that is what she used during her testimony. Now, if there
12 is a specific claim having to do with Mr. Grose then we
13 can get there but I am trying to avoid hashing out direct
14 appeal issues for two hours. They are not appropriate for
15 PCR where they have been raised and ruled on.

16 MR. NEWLON: Then I can ask a very simple question
17 and I will go past all of the testimony.

18 Q Despite the fact that the Court ruled that the expert
19 can say, consistent with, isn't it true that on the record
20 itself you never objected even though the Court made that
21 ruling you can still object to it, right, and preserve it?

22 A I could still object, yes.

23 THE COURT: Didn't the Judge make a ruling and
24 objection noted without further speaking to it.

25 MR. NEWLON: I don't recall him doing that, Your

1 Honor.

2 THE COURT: I might be on the wrong page but I am on
3 page 318.

4 MS. KINZELER: And at some point, Your Honor, right
5 before Mactaggart testifies Charles and Ms. Mayes, they
6 both agreed that they are not going to object throughout
7 the entire testimony, it was preserved for the record and
8 not to continue to object in front of the jury. So, it
9 was addressed in several ways.

10 THE COURT: I may be at the wrong witness.

11 MR. NEWLON: Your Honor, I will let the record speak
12 for itself. The record clearly says that which I don't
13 recall it, preserving that. I believe it was a ruling and
14 everybody acquiesced to it. There was another mention of
15 other objections and that it would be preserved for the
16 record without further having to object on the record. If
17 I am in error then the State is entitled to granting its
18 motion. If I am not then the Court should be permitted to
19 hear the fact that he didn't object when that testimony
20 was offered.

21 THE COURT: This was the day before. Ms. Mactaggart
22 starts testifying one morning. I am looking at the start
23 of III of IV. Just prior to that, there is a long
24 colloquy between the attorneys regarding the testimony
25 just before recess. And Judge Saunders stated--

1 MR. NEWLON: What page are you on, sir?

2 THE COURT: I am on page 318.

3 MR. NEWLON: Thank you.

4 THE COURT: A long discussion regarding what was
5 going to be allowed tomorrow when she comes in and what
6 are you going to allow. And I think Mr. Grose probably
7 presented all of his motions to exclude all the testimony.
8 And Judge Saunders at the top of 318. Ms. Mayes, avoid
9 any direct testimony drawing those conclusions,
10 descriptive things happening consistent with. "Consistent
11 with". Your objection is noted without further speaking.

12 MS. KINZELER: And, Your Honor, it is page 330 and
13 331 where Mr. Gross says for the error of preservation
14 issues, when they call the witness it will be for that
15 purpose. So, the witness was called, the objection placed
16 on the record outside the presence of the jury and then
17 they conduct the examination of the witness. So, it is
18 just my position that all of this Mactaggart testimony,
19 unless it has to do with something Mr. Grose failed to do
20 or should have done we should move on, it is not
21 appropriate for a PCR.

22 MR. NEWLON: What page is that?

23 MS. KINZELER: 330, 331, the trial Court and Charles,
24 the objection outside the presence of the jury so it
25 wouldn't be prejudicial to either party to do that in

1 front of the jury.

2 MR. NEWLON: I see that and I also see where he said
3 that, and I won't have to make an objection when they call
4 this witness in front of the jury. I see that, I didn't
5 see that before. Thank you. I will move on.

6 Q Mr. Grose, what is your understanding for the purpose
7 of an arraignment?

8 A To notify somebody what they are charged with,
9 obviously to set bond. But we don't exactly do
10 arraignments in this State the way other State's do.

11 Q Okay. Is there, are you aware of any requirement in
12 South Carolina that a criminal defendant be arraigned
13 before they go to trial?

14 A I think the initial bond hearing is considered an
15 arraignment where they are, serves the function of it
16 anyway where they, they have been served with the warrants
17 and they are put on notice of what the charges are and
18 advised of their rights to a trial and that sort of thing.
19 And there can be arraignments when there are charges that
20 are directly indicted. It is in part a, I guess, a
21 personal jurisdiction issue so that the State has
22 jurisdiction over the person in addition to the subject
23 matter.

24 Q Do you know if there was a bond hearing in this case?

25 A I image that there was when he was initially

1 arrested. I don't remember if we did any bond reduction
2 hearings in the case or not. It seems like we were in
3 court before we went to trial but I don't remember.

4 Q Okay. You have been here when Ms. Mayes testified in
5 this particular case and I brought up some testimony about
6 closing argument, do you recall that?

7 A I do.

8 Q And two of the issues that I raised had to do with
9 commenting or alluding to the defenadnt's failure to
10 testify and bolstering State's witnesses. Do you recall
11 that?

12 A I do.

13 Q Okay. In this particular case with regards to the
14 evidence being presented of the actual criminal sexual
15 conduct incest and lewd act itself, the evidence necessary
16 to sustain indictments, sustain the verdict, what was your
17 understanding of the testimony, the evidence that was
18 presented just on those issues?

19 A And I think to clarify your question, what you are
20 asking is is the elements of the crime satisfy the
21 particular elements of the three crimes that were charged.
22 And the only two witnesses would be to that would be Ms.
23 Bolte, [REDACTED] and Mark Bolte.

24 Q Was there any forensic evidence?

25 A There was none.

1 Q Was there any other witnesses who in any way can
2 testify to circumstances that would put these two
3 individuals together alone late at night in a closed
4 quarters or a small setting or something where they had an
5 opportunity?

6 A I am not certain that I completely understand that
7 question because I think that, I don't think that there
8 was anybody who would have testified like what you might
9 present in a divorce setting. I saw A and B go into a
10 house. There was no other cars around, no evidence of
11 anybody else was around. They were in there for a couple
12 of hours, they came out, were acting affectionate or
13 whatever. No, there was none of that but I think there
14 was a, given the nature-ship of the parent/daughter
15 relationship, the fact that he was the primary caregiver
16 of all the children and everything like that that there
17 was certainly reason to believe that they would probably
18 be alone at some point. But, you know, as far as putting
19 it in that context like what would be divorce kind of case
20 to prove infidelity, there was no witnesses like that I
21 don't think.

22 Q And the witnesses, other than the victim in this
23 particular case, the witnesses the State offered, the
24 nature of that testimony, generally what was the nature of
25 that testimony?

1 A That was observation about the relationship between
2 the parties or observations about the individuals in
3 particular, the circumstantial kind of stuff that Ms.
4 Mayes was talking about.

5 Q So, and I will read it to you and I will ask a
6 question. This is Ms. Mayes in her closing. I submit to
7 you, ladies and gentlemen, that throughout this case,
8 throughout this case from the witnesses supplied by the
9 State and the witnesses supplied by the defense, the facts
10 of this case are undisputed. One thing stands in stone,
11 he did it and there was no other reasonable, there was no
12 other reasonable explanation for why we are here.

13 A I should have objected to that.

14 Q That was my question, in your mind the fact that this
15 was a, "he said she said", type of case where the State
16 was relying heavily on the evidence of the testimony of
17 the victim without forensic evidence, without some of this
18 ancillary testimony that in fact, in that closing that she
19 may not have been specifically alluded to it or not,
20 specifically stating it but at least alluding and
21 referring to his failure to testify. And why did you not
22 object to it?

23 A I can't give you a good reason. What I can tell you
24 is two things. One is that after the trial I remember
25 reading some cases and there was actually a case that came

1 out the same week, probably the same day because this was
2 tried Labor Day weekend of 2004 where one of the issues
3 dealt with prosecutor commenting upon the facts. Neither
4 the case itself or one that it dealt with dealt with the
5 term undisputed or unrefuted or something like that and
6 called attention to the fact that if there is an issue in
7 this case it is not the witnesses that testify, whether or
8 not somebody, my understanding, it is not the witnesses,
9 whether the defense called witnesses but whether there is
10 an issue in the case that only the defendant and the
11 victim would have knowledge of. Then to say that that was
12 undisputed is a reference to the right to remain silent.
13 In fact I think I was, I couldn't remember exactly what
14 had been said but I read the case and thought back to what
15 had happened in the trial. I think I even sent Mr. Bolte
16 a letter saying that I wanted to review the transcript and
17 I intended to get a copy from the court reporter but I
18 never actually saw it until we were getting ready for this
19 PCR a few weeks ago. The other thing that I would point
20 out is looking at this, and Ms. Mayes alluded to it, there
21 was three arguments here. And I think I had pushed
22 because Judge Saunders had a procedure that he followed
23 that not a lot of other Judges did where if the defense
24 put up witnesses the State would open and then we would
25 respond in full and then there would be a rebuttal much

1 more like what is in a civil case. And I think I had been
2 pushing for that but had not obtained that. And what
3 happened here is Ms. Mayes made her argument on law and at
4 5:23 where she begins she is talking about, she says on
5 524 at 5 and 6, I am going to address you just briefly now
6 on the issues of the law. And let's see, she talks at the
7 bottom of the page about reasonable doubt. She talks
8 about, she is talking about [REDACTED] testimony on 525 and
9 then she talks about the fact, at the bottom of 25 on to
10 26 there is no requirement that it is committed by force,
11 that she has to resist. And she is going through in this
12 the, she must have already talked about the first charge
13 because on 526 at line 6 she is talking about the second
14 charge. And 527 she is talking about the final charge
15 before you. And then in 528 the paragraph right before
16 what we have been focusing on she is again talking about
17 the charges and that the victim can be submissive because
18 of the nature of them, that it is not a consent kind of
19 issue. And then she makes that statement. So, in the
20 context of where that statement is made it is in the
21 context of her argument on the law about the elements that
22 she has to prove, the things that she doesn't have to
23 prove and, you know, maybe her interpretation is a fair
24 interpretation but also a fair and I think probable
25 interpretation is that she was saying [REDACTED] testified

1 that this happened and Mark Bolte didn't dispute it.

2 Q Are you familiar with the case of the State versus
3 Sweet?

4 A I believe that is one that I have looked at in
5 getting ready for this hearing. I would have to look at
6 it again to be sure but it sounds familiar.

7 Q And in reading that case and the progeny of cases
8 that precede that all the way back to 1961, no where in
9 any appellate court have they considered whether or not
10 the State viewed or had an opinion about how their
11 statement would be received. They looked at the language
12 itself. Isn't that correct?

13 A I think that they looked at the language itself and
14 they looked at the context of it. For example, one of the
15 cases that I read where I, there are cases that have
16 decided the issue both ways. But they are looking at the
17 language, they are looking at the context of the
18 situation. And one of the cases that I looked at and I
19 couldn't give you the name, said that if, it was okay in
20 that case. The State said, talking about the crime, it
21 was undisputed that the crime happened, something like a
22 robbery or something of that nature. And that that was
23 okay in the context of that case because the fact that the
24 crime that happened was undisputed and the defense was
25 alibi. But here the context is different because we were

1 disputing that the crime ever took place.

2 Q Like in the State versus Sweet and some of these
3 other cases where you are really looking at limited
4 testimony and in this particular case that he said she
5 said case, wouldn't that comment necessarily have a more,
6 have a greater effect than on a case where you have 30 or
7 40 people testifying on the issue?

8 A I think so because I think it is just like what Ms.
9 Mayes testified to, that these types of crimes when they
10 do really happen are often not witnessed by anybody else.
11 So it is a victim versus defendant issue.

12 Q And just to make sure we have got on the record and
13 when this was stated and I am looking in the record that
14 you did not object to it at the time?

15 A There is no objection.

16 Q And you believe you should have?

17 A Going back and looking at this and looking at the law
18 that I have read both right after the trial and preparing
19 for this hearing, I should have definitely objected at
20 that point because of the context that it was in and the
21 statement that was made.

22 Q On page 571 of the record, again at the closing
23 argument--

24 A You say 571?

25 Q Yes, sir. I believe it is 571.

1 A Okay, this the alone comment at line 25?

2 Q Yeah, where it says, let me find it. On the bottom
3 of page 571 in the last paragraph, last two sentences,
4 talking about conscious community which is another issue
5 in itself. The testimony of [REDACTED] alone is proof beyond
6 a reasonable doubt. Did you see anything wrong with her
7 stating it that way?

8 A You know, to be honest I see the point that you are
9 making as far as that reference to the word, alone, may be
10 referenced to Mark not testifying. But I, you know, I
11 think it is also consistent with the general charge that,
12 not so much the specific charge that Ms. Mayes was talking
13 about, about corroboration in a CSC case but about the
14 charge that a Judge gives that you can believe one witness
15 or more than one witness or none of the witnesses.
16 Whatever that language that we hear all the time. You
17 know, I don't know that I would object to that now, that
18 part of it. If I am wrong I am wrong but I don't know
19 that I necessarily, I see your point but I don't know that
20 I necessarily see it that way. I see that fitting into
21 what we always are doing in a trial and being more of an
22 argument that, you know, if you believe the victim that it
23 happened then you can convict based on that. And I think
24 that is consistent with the law.

25 Q You see that as a bolstering on that particular

1 witness at all?

2 A Well, I think it is, I don't know that I see it as
3 bolstering the way that I use that word legally. I think
4 it certainly, Ms. Mayes arguing that the jury should
5 believe that witness and rely on it which you would expect
6 her to do as a prosecutor. But I don't think it is her
7 saying, you know, some of the things that have been held
8 improper like, you know, a witness who testified for the
9 State got right with God and you should believe them. You
10 know, some of those kinds, I don't think it fits into
11 those cases.

12 Q Let's move on. I want to talk about the courses of
13 the closing arguments and the Judge's charge dealing with
14 reasonable doubt. Do you recall your definition or your
15 attempt to define reasonable doubt in this case?

16 A Where, I don't. I have read a good bit of this and I
17 have a recollection of this trial. If you can refer me to
18 a page.

19 Q Page 531.

20 A Okay.

21 Q This is your closing?

22 A Right.

23 Q And how did you define reasonable doubt to the jury?

24 A What I said there was is that the Judge is going to
25 tell you that you are the people who decide what a

1 reasonable doubt is, that a reasonable doubt is a doubt
2 that you can assign a reason to and then I say, there is
3 plenty of reason in this case to assign doubt, more than
4 one of them.

5 Q Okay. And you can hang onto that a minute. And go
6 back to 528.

7 A Okay.

8 Q 528 and 529, I believe this is the Solicitor's
9 closing. And in there the Solicitor states reasonable
10 doubt can be defined in a lot of ways. The Judge is going
11 to define it for you and then she moves right into the
12 witnesses supplied the facts, by the State and the
13 defense. The witnesses supplied the facts of this case,
14 they are undisputed. There is that undisputed again. Is
15 it objectionable for her to try to define reasonable doubt
16 as equated to undisputed evidence in the case. Is that a
17 definition of reasonable doubt? In other words, the fact
18 that it is undisputed evidence there is no doubt?

19 A I don't think that that would be a definition of
20 reasonable doubt. I don't think that that is what she was
21 doing there though. I think that she was saying that the
22 Judge will give an instruction on reasonable doubt and
23 that she believed that the facts were undisputed. I don't
24 know that--

25 Q Isn't our message to the jury, that because it is

1 undisputed facts there is no doubt about what happened in
2 this case--

3 MS. KINZELER: Your Honor, I am going to object to
4 this line of questioning. It is speculative for Charles
5 to try and interpret what Ms. Mayes meant in that scene
6 that she was making. We had Ms. Mayes here on the stand
7 and he could of asked her that and I don't think it is
8 fair for Charles to be required to speculate to what he
9 thinks Ms. Mayes meant particularly since she is still
10 sitting right here.

11 MR. NEWLON: I think it is relevant because at some
12 point he is going to have to read between the lines and
13 hear what this attorney is saying and make an objection.
14 So, it is very relevant as to how he interprets what this
15 lady is saying.

16 MS. KINZELER: Well, he answered that that wasn't his
17 interpretation.

18 THE COURT: He has answered exactly that. He didn't
19 think that is where she was going with it. I think he has
20 answered it.

21 A Now, this is the language that we looked at before
22 about undisputed. I should have objected to that but I
23 don't understand that was an improper issue of reasonable
24 doubt.

25 Q You didn't perceive that she was trying to put all

1 connections between the definition of reasonable doubt and
2 the fact that there was undisputed testimony in this case.

3 MS. KINZELER: Your Honor, that has been asked and
4 answered.

5 THE COURT: It is either, I don't believe, I believe
6 you can carry the question both ways. The comment on is
7 it fair to testify now, is it an unfair indirect
8 definition of reasonable doubt. And he said he didn't
9 think so. So, he candidly admitted that it was a comment
10 on the failure to testify but not otherwise.

11 MR. NEWLON: I am trying to point out to the Court
12 that this is all in the same sentence. And that it
13 started out on a comment of what reasonable is going to
14 be. But all these people that have testified and the
15 facts are undisputed. All in the same sentence. And I am
16 also alluding to counsel's attempt to define reasonable
17 doubt. And then I am going to allude to what the Judge
18 said about reasonable doubt and how all of these people in
19 this case ignored the proper definition of reasonable
20 doubt which has already been upheld by the appellate
21 courts in this State for as long as I can remember about
22 that it would because--

23 THE COURT: She doesn't define reasonable doubt, the
24 Judge defines reasonable doubt.

25 MR. NEWLON: I understand that.

1 MS. KINZELER: Your Honor, I can clarify. Ms. Mayes
2 was permitted to open on the law. When she got to the
3 portion she was opening on the law regarding to reasonable
4 doubt she deferred to the Judge, makes a comment about
5 undisputed. And I believe there is two issues on there.
6 Point one is they are to object to her reference
7 undisputed on the ground that it would of been an unfair
8 comment. And two, whether or not it was a misstatement of
9 the law on reasonable doubt regarding this undisputed
10 connection. And Charles testified that he doesn't think
11 that is what it was.

12 MR. NEWLON: I will make the argument in closing.

13 THE COURT: I understand your argument. He has been
14 candid with you, he didn't think that it was a reasonable
15 doubt definition on the failure to testify comment.

16 MR. NEWLON: Thank you, Your Honor, I will move on.

17 Q Are you aware of what has been viewed as the proper
18 definition for beyond a reasonable doubt in criminal
19 cases?

20 A I am aware that, I am aware of the State versus
21 Manning charge which is the one that you were starting to
22 quote earlier. There is also the Victor v. Nebraska
23 charge which has been approved. And this, you know, what
24 Judge Saunders typically charged in a case. I don't know,
25 I think we did try to appeal it once and that case was

1 years later and that case was reversed on another issue
2 and they didn't decide that issue.

3 Q Did you at any time ask the Judge to instruct the
4 jury the definition of reasonable doubt as causing someone
5 to hesitate to act?

6 A I did not. You mean in this case, I mean I have
7 asked that in other cases. I don't think I gave the Judge
8 a charge on reasonable doubt in this case. I don't
9 remember it, if I did it would be in the record but I
10 don't think I did.

11 Q Did you review in the record, have you had an
12 opportunity to look at the Judge's actual charge on
13 reasonable doubt?

14 A I have, I have looked at his charge and I have looked
15 at that part and it impresses me as what he typically
16 gave.

17 Q Did you see anything objectionable in his charge to
18 the jury particularly with alluding to moral certainty at
19 one point?

20 A Well, can you show me where you are referring to on
21 that because it is, there is a reasonable doubt charge on
22 page 524 and then there is the circumstantial evidence
23 charge--

24 MS. KINZELER: It is page 580 where the reasonable
25 doubt jury charge and the context of circumstantial

1 evidence where the moral certainty comment is made.

2 A Which line are you looking at, is it starting on line

3 4.

4 Q Lines 4 through 14, the moral certainty language is
5 on line 9.

6 A Line 9. I am, I am also familiar with, there is a
7 case, Battle versus State, I believe from 2009 that,
8 affirmed that particular charge.

9 Q The use of moral certainty?

10 A In context in circumstantial evidence charge.

11 Q Okay.

12 A If you will bear with me for a second. The case is
13 Battle versus State, 382 SC 107, 575 SE 2d, 736. And it
14 looks like on 203 and 204 they talk about the moral
15 certainty charge and then they go on to talk about it in
16 the context of circumstantial evidence, found that that
17 was not error.

18 Q And just point of record, in this paragraph he does
19 begin to charge and define circumstantial evidence, is
20 that correct?

21 A Right and it is line 4 where circumstantial evidence
22 is undertaken by the prosecution. This seems to be the
23 old Edwards charge, I think, prior to this they had given
24 approval to another charge on circumstantial evidence. It
25 seems to be consistent with the old Edwards charge that

1 the defense is always asking for.

2 Q I will move on. Do you recall there being brought up
3 at trial an effort by the State to introduce CDV and
4 trespass charges?

5 A I remember that it came into the trial, I don't
6 remember exactly how it came in. But you are talking
7 about other things involving Mr. Bolte.

8 Q I will have to go back and look at the record, I
9 believe it was in the cross-examination of Ms. Lopez, the
10 mother. She had already testified for you and on
11 cross-examination the evidence of existence of a prior CDV
12 and trespass came out. Do you recall ever objecting to
13 that?

14 A I don't think that I did. I think that I had
15 probably just figured that all of this is going to come in
16 because as Ms. Mayes was saying their case involved the
17 broader relationship between Mark and his daughter. And
18 we certainly knew that going in, our case was going to
19 involve that and it was also going to involve the
20 additional relationship with him and his wife. And, you
21 know, rightly or wrongly I think I just figured that when
22 we made the decision to make it about not just the father
23 and daughter relationship but the father, daughter,
24 husband, wife family relationship thing and bring in
25 things to try to establish that the motive for the false

1 allegations was the divorce and [REDACTED] taking her mother's
2 side on the divorce. That, and when I started bringing in
3 some of this other stuff that other stuff was going to
4 come in as part of the relationship. And while its, I
5 guess there are crimes and allegations of crimes, and that
6 is bad, it is not terribly bad like a prior CSC would be
7 or a prior burglary in a burglary case or something like
8 that.

9 Q So, you saw it as having some scintilla of probative
10 value?

11 A What I think I was looking was the overall defense
12 strategy which was going to, you know, not only encompass
13 the father, daughter relationship but this broader
14 relationship in thinking that there was a lot of things
15 that would be helpful to the defense and then probably
16 some things that weren't helpful that were going to come
17 in with that. The calculation being that what we got was
18 going to outweigh the bad things that came with it.

19 Q Regardless of the probative value, if there is any
20 for that, is there any, would there not be some
21 prejudicial effect in bringing in CDV and trespass as it
22 relates to the husband, wife relationship?

23 A Oh, I certainly think so. I mean, you know, like the
24 cases say sometimes or why the evidence is brought in by
25 the State is prejudicial. You know it is whether the, it

1 is so prejudicial to outweigh probative value.

2 Q Given the fact that it was prejudicial even though in
3 your mind believed there was some probative value
4 shouldn't you have at least objected to preserve that
5 issue?

6 A I could have objected, yes.

7 Q Have you reviewed or looked at the convicted, the
8 convictions themselves, the counts themselves that Mr.
9 Bolte was convicted on versus what he was sentenced on?

10 A Yeah, I have looked at that some and you had told me
11 what your position is going to be and I am not certain
12 that I completely follow it. If you can refer me to
13 something I will be happy to look at that. I have looked
14 at it, I don't know that I have looked at everything that
15 you would want me to look at to answer that question.

16 Q In looking at the indictments in this particular
17 case, the indictments themselves as enumerated--

18 A I have a copy of indictment 03-296 in front of me.

19 Q In looking at these documents and if you don't have
20 them let me know. Count one being incest, violation
21 16-15-20.

22 A Okay.

23 Q Count two was nolle prosequi. It is just a matter of
24 record.

25 A I, we went to trial on three and five charges.

1 Q I am not asking you to verify it, I am just trying to
2 move this along. Count two, nolle prosequi and then there
3 was count three which would have been the CSC with a minor,
4 second degree. And then there was a count four and that
5 was the lewd act upon a child. And then there was a count
6 five that was also nolle prosequi. So, the actual counts
7 were one, three and four in which he was sentenced
8 according to these sheets. Okay.

9 A Okay.

10 Q Now, looking at the record itself, page 597, this is
11 the Clerk reading the verdict form. And apparently the
12 verdict form that was given to the jury says count two as
13 to criminal sexual conduct finding him guilty. Count two
14 was nolle prosequi, right?

15 A Well, in the stuff that I have, I don't know that I
16 have the copy of the verdict form. I see what you are
17 saying but she reads as to incest and then second charge
18 was CSC with a minor, second degree. And then it says
19 number three as to the commission of a lewd act. There
20 was just three charges submitted to the jury. I mean when
21 the Judge is called, I guess when Ms. Mayes calls the case
22 but when the Judge called the case and actually read the
23 indictments on page 14 he said, he doesn't refer to a
24 count but on 14 at line 20 it appears he is talking about
25 incest because he goes through the various relationships

1 that would apply on and that paragraph goes on to page 15
2 and ends at line 9. And on line 10 he announces count
3 three and reads that, that is criminal sexual conduct.
4 And then at line 21 he announces count four. When the
5 trial commenced that was put on the record. Like I say, I
6 have not, I may have and I probably do have a copy of it
7 in my file but I have not looked at the verdict form here
8 today. I imagine it is listed as one, two and three
9 because those were the three charges that were submitted
10 to the jury.

11 Q If I understand you correctly--

12 MS. KINZELER: Your Honor, if I could just clarify.
13 I don't have a verdict form either but the front of the
14 indictment does reference warrant numbers and there is a
15 reference to information in regard to the lewd act upon a
16 child, count four on the sentencing sheet. I don't have a
17 verdict form either but there is a notation on the front
18 of the indictment and the warrant numbers may not be
19 corresponding but the sentencing sheets and the sentences
20 themselves are all sufficient.

21 THE COURT: Mr. Newlon, how long are you going to be
22 because it is past my lunch time.

23 MR. NEWLON: Five minutes.

24 Q So, what I understand you are telling me is that the
25 way the Clerk actually read this, if you look at the third

1 paragraph it says number three, she was reading and
2 numerically listed on the verdict form. That wasn't a
3 reference to the actual counts?

4 A That is the conclusion that I am drawing from that
5 based on my experience of how a verdict form could be
6 drafted. You can draft a lot of different ways. Looking
7 at what was called and what was, what he was sentenced on.

8 Q The last issue I want to bring up with you has to do
9 with the jury strikes. Have you had the opportunity to go
10 back and review the sequence of events dealing with jury
11 strikes particularly one juror named New, I think is her
12 last name?

13 A Yes.

14 Q Can you please tell the Court exactly what transpired
15 with regard to Ms. New and then I want to ask you a couple
16 of questions.

17 A What I recall and I have gone back and looked at my
18 notes. And I could not find in my file but I do recall us
19 doing some additional jury investigation that we wouldn't
20 normally do in a case. My recollection was that Ms. New
21 had some allegations of some sort of abuse. But I have
22 some notes which are in my voir dire file portion of the
23 file. And it looks like I made the first part, I have got
24 some list of strikes on top and I have Ms. New, number 106
25 as somebody that I had intended to strike. It looks like

1 I made some more notes on the bottom of that page before I
2 came out of voir dire. Then I also have what I have, the
3 final strike list and if you look at the record I think I
4 asked for a break to review some of the information
5 because there was an extraordinary number of people who
6 stood up and knew people or events or places or whatever.
7 The record is clear, more people than usual stood up in
8 this case. I think we had more people or places that
9 would trigger them to respond. So, I went back and I
10 wrote a final strike list and she is under the crime
11 victim things and where she had responded and I had her
12 listed on that page as well. And then I also have a note
13 which I had not, and this note is not all in my
14 handwriting but it is part of the file. I am not certain
15 exactly who wrote it, it could of been one of three other
16 people but I remember the conversation that Tommy Hite
17 came in sometime during the trial and had some recognition
18 of some of the people on the jury. And first he, well,
19 what the notes says is, Tommy Hite said that five years
20 ago juror, first name unknown, New was accused of child
21 molestation, these charges were later dropped. And then
22 there was a note said, no, it was his brother. And then
23 there is a note down here that says Tommy says the woman
24 in the red is New's ex-wife. Apparently there were two
25 jurors that were named New and then the other guy, they

1 were sitting together and then the other guy was the
2 brother, it was the person who was accused that was on the
3 jury. And I had written down and I don't know which one
4 this was, Joe, dark male. And so I can say from looking
5 at my notes that Ms. New was somebody I intended to strike.
6 And for whatever reason I did not when her name was
7 called.

8 Q Do you happen to have the page reference where you,
9 where Ms. New's name came up? Mr. Grose, I just point
10 that, 106. Looking at pages 64, 65 it appears the Clerk
11 identified 106, Susan New. What says the State. The
12 State says please seat. And then asked you and you said
13 please seat the juror?

14 A I did. According to my notes she is somebody that I
15 intended to strike, for whatever reason I did not.

16 Q Now, in the process of this voir dire, these jurors,
17 when someone stood up and identified themselves as being a
18 victim of criminal sexual conduct or something of that
19 nature did the Judge query that particular person and ask
20 them individually about those circumstances?

21 A Are you talking in generally or are you talking about
22 her because there is not, when her name was called during
23 voir dire there is not a lot of discussion at that point.
24 I mean, Judges will sometimes call people up and discuss
25 something but I don't remember any off the record

1 discussion on that.

2 MS. KINZELER: Your Honor, the transcript indicates
3 on page 526 that the trial court Judge asked everyone who
4 responded to that question which would of included Ms. New
5 whether they could be fair and impartial in light of
6 whatever reason they were standing for regarding CSC
7 whether you are a victim or a family member. And she
8 didn't say she would be prejudice. Had she said I would
9 be prejudice or I couldn't be fair and impartial she would
10 of been excused and she obviously wasn't. So I think we
11 established Charles didn't strike her and we can move on.

12 MR. NEWLON: Well, there is more to it than that,
13 Judge.

14 THE COURT: I am ready for a lunch break. You have
15 gone on for seven minutes. I wanted to go to lunch at
16 1:00. My wife is texting me, she is at home sick and the
17 water is off at my house. I am going to take a break.
18 This is going to keep going. And so we will be back in a
19 little bit, we will take a lunch break.

20 MR. NEWLON: Thank you, Your Honor.

21 (Whereupon, a lunch break was taken.)

22 THE COURT: Mr. Newlon.

23 Continue Direct Examination

24 By Mr. Newlon:

25 Q Before the break we were talking about jury

1 selection. Can you go back to page 54. I think I
2 misspoke, the middle of page 53. At that point the venire
3 is being voir dired by the Court and it appears that the
4 question on the record was, have you or a family member or
5 a close friend ever been a victim of criminal sexual
6 conduct. And then on page 54 people began identifying
7 themselves and the bottom of page 54 starting at line 20
8 it says, The Court: Thank you, remain standing. The lady
9 in the wine blouse, would you say your name and number.
10 Susan New, 106. Do you see that?

11 A I do.

12 Q Okay. Now, if you notice in the course of all of
13 this questioning when these people identified themselves
14 the Judge asked them and inquires into the personal
15 circumstances a little bit like, if you read back up.

16 A Line 3 and 4, number 52.

17 Q Yeah, who was charged, I was charged one time. And
18 then my daughter was charged. But in this particular case
19 looking at line 23, did the Court address Susan New to
20 find out the circumstances?

21 A No.

22 Q Nothing?

23 A No.

24 Q Did you as an attorney, once she identified herself
25 did you ever go back and inquire, make an inquiry or ask

1 the Court to find out what the circumstances were?

2 A No. And, you know, I think that I normally would and
3 all I can think is here that I did not because as I
4 testified earlier, my notes, based on the information that
5 we had, whatever it was, the basic information we had
6 before trial she was already on my list of the people that
7 I was planning on striking.

8 Q So, you did have some information that if this person
9 showed up that you would actually have an intention to
10 strike her?

11 A That is right. I mean, like I say, I couldn't find
12 it when I looked through my file. I am pretty certain it
13 was based on the family court records with us alleging
14 this motive for the false allegations and the divorce, I
15 had somebody go and pull records on the jurors who had
16 history in family court.

17 Q Now, going back in looking at the actual jurors
18 selected for this particular trial, do you know whether
19 Ms. New actually ended up being on the jury?

20 A She did, yes.

21 Q Okay. So, we have an individual who is on the jury,
22 we don't know the circumstances although you testified you
23 had some information about her and you had an intent to
24 strike her but she wasn't struck?

25 A Right.

1 Q Can you explain why she wasn't struck?

2 A All I can, well the short answer is that it got past
3 me somehow. All I can say is that, and we were talking
4 about this just a little bit before lunch. That there was
5 an unusual number of people who stood up. I think there
6 was a number of questions that were relevant to the case
7 that triggered different people to have a response. And,
8 you know, we were being inundated with a lot of
9 information and trying to process it as it was coming in,
10 trying to discern what was important and what was not as
11 important. And all I can think is that it got lost in the
12 shuffle somehow even though she was on my, what appears to
13 be my pretrial list of people that I wanted to strike.

14 Q Just to make sure, this lady, was she herself
15 according to your notes, if you recall, a victim herself
16 or one of her family members?

17 A Well, I don't remember exactly what was in the
18 divorce pleadings. According to this, I mean she stood up
19 in response to the question about anybody having been a
20 victim of a crime.

21 Q Either her or a close family member or a close
22 friend?

23 A Hold on just a second. On my notes on the final
24 strike she, you know, I have her listed under a crime
25 victim kind of thing. But beyond that I don't have any

1 notes. What I testified to earlier about what Tommy Hite
2 said, those allegations, that was something that came to
3 me during the trial. That would of been after the jury
4 was selected.

5 Q Okay. Given how she identified herself in this
6 particular case can you see, can you foresee whether or
7 not having her on the jury would of have been prejudicial
8 to Mr. Bolte?

9 MS. KINZELER: Your Honor, that is an objection to
10 speculation.

11 MR. NEWLON: Your Honor, it is not speculation, it
12 goes to his analysis of the witness whether or not it
13 should have been struck or not. If he recognized the fact
14 that it would have been prejudicial to have her on the
15 jury then that goes to the very essence of a PCR.

16 MS. KINZELER: Well, Your Honor, I don't think Mr.
17 Grose's speculation as to whether or not that could of
18 been prejudicial is sufficient to prove prejudice. We
19 don't have any evidence that her ability to remain fair
20 and impartial was hurt at all by her circumstances and in
21 fact the record speaks to the contrary. I mean it is
22 obvious that Mr. Grose intended to strike her.

23 THE COURT: He didn't strike her. He had some sort
24 of belief that she may be, not the type of juror he wanted
25 on this case. So he thought it had an impact. That is

1 what I understand. That is why he had her on the list.

2 MR. NEWLON: I will get it all together at the end
3 here.

4 Q So, I will strike that question, I will recapture it
5 in another way. So, looking back in retrospect in this
6 particular case, Mr. Grose, we have covered a number of
7 things today. I am going to hit the high points. One of
8 them has to do with an allegation by the Solicitor or an
9 allegation by the claimant that the Solicitor improperly
10 commented on defendant's failure to testify by inference
11 given the number of witnesses that were available and that
12 you did not object in that particular setting. There was
13 a disagreement about whether or not the Solicitor
14 bolstered their own clients. But with regard to
15 commenting on conscious of the community, the fact that
16 she would ask them to be the conscious of the community
17 and strike back a blow for justice for these victims.
18 That would have been something that you would have, should
19 have objected to as well, correct?

20 MS. KINZELER: Your Honor, I am going to object,
21 asked and answered. I think that we have covered all of
22 these things.

23 THE COURT: He can ask that question.

24 Q Moving on and with regard, I understood it with
25 regard to the reasonable doubt charge, that you didn't see

1 any error based on the law in that particular setting.
2 That you did not object to the CDV trespass that came in
3 and then the jury that we have just spent some time on.
4 Given those items together in this particular case you
5 believe that your, that your representation of Mr. Bolte
6 to the extent of those particular items we have just
7 discussed, that your representation was ineffective as to
8 those particular items?

9 A You asked a lot in that. And I think I should of
10 objected to that comment that we discussed about the,
11 whatever her language was about that there was arguably a
12 comment on the facts and I think I should have struck the
13 jurors. So, I definitely think I made mistakes in those
14 two regards.

15 Q And you have had a number of opportunities to testify
16 in PCR hearings. Do you understand the significance of
17 prejudicial effect in these cases?

18 A I would like to think that I do. I know that is
19 ultimately a decision for the Court.

20 Q And in view of what you just, the view of the
21 failures that you just mentioned, the failure to object on
22 some of these things and allowing the, one particular
23 juror in I do believe that your failures prejudiced Mr.
24 Bolte's case?

25 MS. KINZELER: Your Honor, that is my same objection,

1 speculation. It is the same question and the same
2 objection I just said three minutes ago.

3 THE COURT: That is an issue for the Court, isn't it,
4 exactly what you just asked him. His three failures, you
5 think that is--

6 MR. NEWLON: It may be a legal issue for the Court
7 for purposes of PCR but I think that the meaning of
8 prejudice in and of itself, I think he can comment on
9 whether or not he felt like it prejudiced the case. He
10 can certainly say, well even to despite these things it
11 really didn't affect the outcome.

12 THE COURT: Let him answer.

13 Q Do you believe it prejudiced Mr. Bolte's case
14 allowing that particular witness on the jury and failure
15 to object to some of the comments by the Solicitor in
16 closing arguments?

17 A I think that the comment by the Solicitor that we
18 discussed in my testimony about, you know, about her
19 initial opening remark. My feeling is is that if you look
20 at that line of cases in a continuum of things, my feeling
21 is is that fits more in the, with what the Court's have
22 said, it is not allowed because of the statement that she
23 made and in the context that it was. And I should have
24 objected. I think that would of been a good issue for the
25 appeal. As far as Ms. New, I think this should be clear

1 from my testimony. Obviously I didn't want her because I
2 thought that she would be a bad juror for Mark Bolte.
3 Whether or not that was ultimately prejudicial or not I
4 think the Court is going to have to decide because there
5 was still eleven other people who voted. And I am not
6 sure if I am overlooking another part of that question.
7 Is there something else that I need to address in that
8 answer?

9 Q No, those are the highlights. I have no further
10 question.

11 THE COURT: All right. Ms. Kinzeler.

12 Cross-examination

13 By Ms. Kinzeler:

14 Q Ms. Grose, you are currently employed as the Chief
15 Public Defender of the Eighth Circuit?

16 A That is correct.

17 Q And how long have you been doing criminal defense
18 work?

19 A Since May, I believe, but certainly the Spring of
20 1996.

21 Q 14 year-ish?

22 A I think that is correct.

23 Q And prior to that were you in civil practice?

24 A I was.

25 Q How many years have you been a lawyer ultimately?

1 A Since May of 1993, so 17 years, is that right.

2 Q And you and Mr. Bolte met several times in
3 preparation for trial. You just can't remember the
4 specific number?

5 A I can't remember the specific number, it would be
6 more than several.

7 Q And because you were asked about it on direct I am
8 not sure that it is an allegation. Is there a reason why
9 you didn't interview all of the other much younger
10 children in preparation for trial, did they play any part
11 of your case or was there a reason for it?

12 A You know, some of the children were really young.
13 And I don't know that there was any reason to make them
14 witnesses in the case. I don't remember the ages of all
15 of them. I think it gets back to in what we talked about
16 before with regards to the elements of the crime. There
17 was no indication that any of them would have anything to
18 say directly on that whether the actual sexual abuse took
19 place or not. They might have had some ability to testify
20 to some of this circumstantial evidence that, as you have
21 heard, both sides were interested in to introduce it and
22 having an interpretation of. And also my recollection was
23 that they were all with the ex-wife, the mother. And I
24 don't remember how this factored into the calculus or not
25 but, you know, there was an awful lot going on in this

1 situation. And from our perspective, from my perspective
2 looking at it an awful lot of opportunities for them to be
3 poisoned as witnesses against Mr. Bolte because the other
4 side, when I say the other side I am including the victim
5 and the mother and they had continuous access to them
6 where as we had virtually no access to talk to them.

7 I mean could have gone out there and talked to them but--

8 Q -- they may have not talked to you?

9 A Well, they may not have and I may not have been able
10 to get a chance where I could of interviewed them alone
11 either. But, you know, if as I was concerned that they
12 were being poisoned by the other side because there was
13 certainly a lot of negative things being said by, being
14 said against Mr. Bolte. You go out there and you talk to
15 them and then they are going to be subject to more
16 influence after that later.

17 Q And none of these children testified at trial and the
18 same for the State?

19 A They didn't testify for either side, no.

20 Q And you were able to prepare a defense in your trial
21 strategy for Mr. Bolte?

22 A Yes.

23 Q And that was something to the effect that this was
24 all sort of fabricated and pursued in the divorce, is that
25 accurate?

1 A I think and I skimmed through it this morning. My
2 opening statement pretty much lays out the defense and
3 basically after a number of years of marriage where Ms.
4 Bolte had been the primary bread winner and Mark had been
5 the primary caregiver and disciplinarian for the children,
6 that after 20 or some years of marriage she decided that
7 she wanted a divorce. And after she decided she wanted a
8 divorce that is when all of this stuff started happening.
9 First it was the phone calls to the police about some of
10 the CDV things, moving to the allegations that Mark abused
11 [REDACTED] came up in the divorce proceedings. There was
12 orders of protection where, you know, and I wanted to go
13 into some of that because that I thought went to the
14 motive for Ms. Bolte, Ms. Lopez now I guess, she was
15 trying to get the house, it became an issue to whether it
16 was a rental or a ownership. But she was getting custody
17 of the house and all the possessions and the kids and
18 these allegations of sexual abuse were being used against
19 Mark in family court to not only kick him out of the
20 house, not only keep him from getting visitation but to
21 make it where he couldn't even see his children. There
22 would be no custody before but they were using it to
23 prevent visitation as well.

24 Q And this is the strategy for the defense that you
25 spoke about with Mr. Bolte?

1 A That is correct.

2 Q You all discussed this together?

3 A Yes.

4 Q Moving forward, I think we covered the Mactaggart
5 expert issue. You filed discovery, the arraignment. I do
6 want to ask you though, you testified that you should have
7 objected to the undisputed comment. Given the context
8 that that comment was made in as far as what State
9 witnesses and what defense witnesses will say, in that
10 context, do you still believe that you should have
11 objected from the grounds it was a comment on Mr. Bolte's
12 right to remain silent?

13 A Yes. I think that we--

14 Q And if you agree you can just say that you still
15 agree you should have objected.

16 A Well, I agree. Let me add this explanation. I think
17 we are confusing or at risk of confusing some comments
18 here or there are some different principles here. It
19 would be, for example, it would be improper to say that a
20 witness is available and the defense did not call if the
21 defense didn't put up a witness because that is a right
22 not to do that. It is appropriate to say that there is a
23 witness other than the defendant the defense could have
24 called if the defense put up witnesses because that
25 doesn't apply any more. And I think we were getting

1 earlier, that was getting confused with this because this
2 is the, the issue here is not whether or not, this goes to
3 the elements of the crime.

4 Q This would of been whether Mr. Bolte could of been
5 the only person to refute what [REDACTED] says about the
6 actual incidents that he was actually charged with in the
7 indictment?

8 A Right. And that is why I think it fits in with that
9 part of that--

10 Q That is why it would of been objectionable.

11 A Right. I mean if it had been like the other example,
12 could it have been a alibi defense case, like an armed
13 robbery and it was an alibi defense case and they said it
14 was undisputed that, you know, the victim got robbed at
15 gunpoint. Well, that would not be an objectionable thing.
16 Here the defense was, is he didn't do it. Only he and
17 [REDACTED] are the real ones that would know the answer to
18 that question.

19 Q Okay. I understand your testimony about the
20 bolstering, the victim's testimony alone, that was
21 addressed by you and the Solicitor regarding jury charges
22 and the statute that was charged to the jury as far as
23 victim's testimony not needing to be corroborated. That
24 was something that you addressed at trial?

25 A I recall there being a discussion and some of it may

1 have been in chambers. I didn't want that statute about
2 non-corroboration testimony. The cases suggest that
3 Judges should not give, they are allowed to give it.

4 Q And you argued that?

5 A Right. And what I did want to have happen was, that
6 charge also only implies to certain, for example by a lewd
7 act. So, I didn't want it to be giving it away where the
8 jury could and I forget, the charge says which sections it
9 refers to. And I didn't want the jury thinking that that
10 applied to more and I think Judge Saunders did a pretty
11 good job of including that in the part of the CSC and not
12 with the other charges.

13 Q And then I think we handled the jury instruction
14 about malice or moral certainty, I am sorry, not malice,
15 moral certainty. This CDV trespassing issue, do you
16 recall and if the record indicated that this may have
17 happened. Would you agree that the record is correct, do
18 you recall having an in-chambers discussion about the
19 admissibility of the CDV and the trespassing and coming
20 back out and sort of agreeing that they would be
21 admissible based on your in-chambers discussion with the
22 Solicitor and the Judge?

23 A Can you refer me to a page.

24 Q I would love to and I have been looking for this page
25 and I know I have seen it.

1 A I am not going to dispute the record. And I will be
2 candid and say that I have not read the entire record. I
3 have read the parts that sort of have been, I felt like
4 were called to my attention about what I needed to
5 address.

6 Q I have read it twice and I cannot tell you the exact
7 page number. If the record indicates, and I will keep
8 looking for it, that there was an in-chambers discussion
9 about that would you agree with what the transcript says?

10 A I would certainly agree that that is what happened.

11 Q And it is my understanding, I am going to keep
12 looking for it while we continue to talk. It is my
13 understanding that the CDV and trespassing would have been
14 admissible in the opinion of the Court, maybe not the
15 opinion of the defense but those two things would have
16 been admissible because they were part of the
17 circumstances involving the allegations he was on trial
18 for. They weren't prior bad acts necessarily because they
19 were involved in the same set of events surrounding these
20 allegations. Is that accurate?

21 A Well, sort of accurate. I would have to go back and
22 look at what, you know, some of the laws. And some of the
23 allegations apply, I think involve Mark and [REDACTED] and
24 some of them involve the, Mark and Ms. Lopez, the mother.
25 And I am not surprised that the Court would rule that that

1 would come in given the fact that all of those
2 relationships were important to the defense and apparently
3 the prosecution.

4 Q I think I have a page number that will help. It is
5 not all that clear. But page 109, at the bottom, 17 to
6 22. You filed a motion to exclude evidence of prior bad
7 acts but there were two incidences that were referred to
8 that you didn't necessarily include in that motion because
9 you weren't contesting them is what I am reading, lines 17
10 through 22. You know, there are prior allegations of
11 misconduct that are probably admissible and I am not
12 contesting that. It would just be if they get into bad
13 acts involving somebody other than that. Does that
14 refresh your recollection at all or is it still pretty
15 vague? I will still keep looking for the in-chambers.

16 MR. NEWLON: Your Honor, if I may. I believe that
17 there was a discussion that had to do with Rule 404 and
18 there is a litany of pages and it goes over and talks
19 about it. I remember that the Court ruled that he was
20 going to let it in. I don't remember there being an
21 agreement to it. I just remember the Court ruling that it
22 come in. My question on direct to him is that he didn't
23 object to it.

24 MS. KINZELER: It wasn't a new objection.

25 A And this part that you referred to me and I have not

1 read this whole thing but the part you referred to me, at
2 line 17 and 18 are things dealing with this particular
3 alleged victim. There is a line of cases where the, even
4 what would be considered prior bad acts involving the same
5 victim, that those are admissible in sex abuse cases
6 because of the whole pattern of conduct of what the victim
7 was suggesting. So, I knew all of that was going to come
8 in, that would be I think separate than what goes with
9 Mark's ex-wife.

10 Q The CDV was connected to the prom night incident. Is
11 that correct?

12 A Right. And there was, and certainly there was stuff
13 about the prom night incident that was relevant and I
14 don't remember all the details of that but the record can
15 clear that up.

16 Q I can clarify. On page 106 the Solicitor is talking
17 about two incidences mentioned in the motion that they
18 were concerned and wanted to come in. The incident
19 involving the senior prom at the bottom of page 106
20 observing from the dance floor and then if you flip over
21 to 107 there is a confrontation that resulted from that.
22 That would be the CDV I am assuming and then in addition
23 there was an event where the defendant came up to the
24 college campus, that is line 6 through 8. There is the
25 two incidents we are talking about?

1 A And those both involve [REDACTED] right?

2 Q Right.

3 A I think that those would be admissible under that
4 line of cases that deal with other bad acts involving the
5 victim of a CSC.

6 Q Meaning that it is your understanding that those be
7 admissible?

8 A Right. Because it goes to, now, I mean obviously
9 from Mark's perspective we had a different interpretation
10 of a lot of this circumstantial evidence. But that goes
11 to the relationship, what was ongoing between [REDACTED] and
12 Mark and that is the type of thing that my understanding
13 is admissible in this type of case. It might not be
14 admissible in other types of cases but it would be here.

15 Q So, I guess that the issue is then later when this
16 does come out you don't renew your objection for the
17 purposes of preserving for appeal, I guess, is what the
18 allegation is. We could agree to rely on the transcript
19 of that issue as to whether or not there was an objection?

20 A Yes. And I doubt that I would have objected to that
21 because it looks like that, what I am saying over there
22 later on that stuff involving the same victim would come
23 in. So, yes, if there is no objection in the transcript I
24 didn't make the objection.

25 Q And then this, the juror issue, I just want to make

1 sure I don't miss anything. I think that is all I have.

2 Thank you.

3 THE COURT: Mr. Newlon.

4 Redirect Examination

5 By Mr. Newlon:

6 Q Just one last thing. Do you have the record there?

7 A Yes.

8 Q Page 529.

9 A Okay.

10 Q I stopped short in an earlier question that the facts
11 of the case are undisputed, the witness supplied by the
12 State, she was talking about reasonable doubt charge on
13 the previous page, undisputed. And then it goes on to say
14 one thing stands in stone, he did it and there is no other
15 reasonable explanation for why we are here. Did you
16 object to that?

17 A No, I did not.

18 Q Do you see that as a possible commentary on his
19 failure to testify by inference?

20 A Well, I mean, I think this is the part that we
21 discussed.

22 Q No, I didn't discuss that sentence. I stopped short
23 and we didn't even discuss it.

24 A Well, I certainly think with the undisputed and
25 saying no other reasonable explanation probably wrapped

1 with that. All of that is consistent and in that
2 statement should have been objected to.

3 Q Thank you. No further questions.

4 MS. KINZELER: Nothing further.

5 MR. NEWLON: Can I have a moment, Your Honor.

6 THE COURT: Sure.

7 MR. NEWLON: We call Mark Bolte to the stand.

8 Mark Bolte, after being duly sworn,
9 testified as follows:

10 Direct Examination

11 By Mr. Newlon:

12 Q Mr. Bolte, where are you currently being held?

13 A At Lee Correctional Facility.

14 Q Okay. And what sentence are you currently serving?

15 A 45 years.

16 Q And you have heard some discussion today to make
17 things easy and moving things along that this is a, as a
18 result of consecutive sentencing for criminal sexual
19 conduct with a minor, incest and lewd act upon a minor,
20 allegedly?

21 A Yes, sir.

22 Q And in this particular case you did, in fact, go to
23 trial. Did you, prior to trial did you have an
24 opportunity to meet with Mr. Grose and adequately prepare
25 in your mind?

1 A We got together several times, we just discussed
2 several times which way we wanted to go completely because
3 I wanted to make sure the truth got out, you know, I
4 wanted to make sure it got out in court. And we decided
5 on going, you know, with the basics of how the family was
6 just terrorizing me and going against me, you know,
7 instead in depth of each and every situation we just got
8 to the basics of the truth.

9 Q As I understand the defense or the defense that was
10 presented basically was a defense retaliation with
11 marriage kind of went south, bad relationship with the
12 kids. [REDACTED] is now going out of the house, going on to
13 college and that they used that opportunity to not only
14 bring these charges against you but your wife actually
15 filed for divorce. Is that your understanding?

16 A Except that all of this happened before there was any
17 allegations or anything like this, you know, my wife was
18 having contact with the State without me being aware of
19 it, about leaving the home. And I had found out about it
20 later when they called trying to talk to her from the
21 victims side and then they lied on the phone and pretended
22 like they weren't doing it. And, you know, my daughter
23 was doing all of this rebelling at this time and we were
24 going through all of these problems and, you know, I was a
25 very strict parent. I mean, without a shadow of a doubt.

1 But you made a statement about not having a relationship
2 with my other child, I had a perfect relationship with my
3 children. It was only my oldest daughter who had been
4 rebelling and my wife who was planning on leaving me and
5 who was doing things that were against the qualities of a
6 marriage that, you know, that caused all of this to
7 happen.

8 Q So, then the problems with the marriage would be CDV,
9 the, strike that. The problems with the marriage,
10 relationship with your wife, the filing of the divorce,
11 the relationship with your children and the relationship
12 with your daughter. That all occurred before these
13 charges were brought?

14 A Yes, sir.

15 Q Was that a strategy that you discussed with Mr.
16 Grose?

17 A Yes.

18 Q Is that a defense that he presented in the case?

19 A Not completely, no.

20 Q What is it that he didn't completely present?

21 MS. KINZELER: Your Honor, I am going to object at
22 this point. I don't know where this is going but I am
23 unaware of any allegations that are presented to the
24 defense. If I can know what the allegations are going to
25 be so I can have some idea of how to respond. We can't.

1 call Ms. Mayes back, all the witnesses are gone except Mr.
2 Grose. I don't know where we are going now.

3 THE COURT: Mr. Newlon, where are you at?

4 MR. NEWLON: Your Honor, quite frankly I was trying
5 to find out if some of the things that he, the direction
6 that he thought he was going to go had anything to do with
7 the PCR claims that he has already made. If they don't
8 then she can object, he hasn't even answered yet.

9 MS. KINZELER: Objecting after the fact isn't going
10 to help much.

11 THE COURT: I guess to the extent of the PCR
12 application.

13 MR. NEWLON: I will be more specific. Leading an
14 open-ended caused a problem.

15 Q All right. Did you all discuss, we have had
16 discussions about the CDV charge and trespass. Just so
17 the Court understands, what was the CDV about?

18 A It was about my daughter had stolen my car and she
19 was gone for three days and I didn't know where she was.
20 I was trying to find out where she was and she had been at
21 Hester Bottoms Campground getting drunk all weekend and
22 then decided to come home on prom night so she could go to
23 the prom. And as soon as she got in the house we started
24 having an argument. And I was going to tell her she
25 couldn't go to the prom because of what she had done.

1 Because of all the processes that had led us, I don't want
2 to take up the Court's time, because of what really
3 happened, all the situations is my daughter was using the
4 law against me.

5 Q Let's stay focused. The CDV--

6 A It was me yelling at my daughter for being drunk and
7 gone for three days.

8 Q But who actually brought the charges?

9 A There were no charges, they just called and the
10 police said that he had to arrest me because he showed up
11 at the scene. No one actually put charges on me, they
12 tried to prevent the police from even taking me.

13 Q When you say they tried to prevent?

14 A And my daughter and my son.

15 Q That is the CDV charge. What is the trespass about?

16 A My daughter had snuck out the window at night and
17 went to a college dorm and got drunk. And I went to that
18 dorm to confront that person. I was put on trespass
19 notice and said not to trespass.

20 Q This wasn't a conviction for trespass?

21 A No, no sir.

22 Q So, you got a CDV that the officers appear and charge
23 you with that your family tried to get out of. You had a
24 trespass notice, not a conviction. Was Mr. Grose aware of
25 the circumstances of the CDV and the trespass?

1 A I believe he was.

2 Q Did y'all talk about it?

3 A I believe so, sir.

4 Q Did you take the time to explain to him as you have
5 explained to me here today how all of this happened?

6 A Yes, sir.

7 Q Okay. You did not testify in this case?

8 A No, sir.

9 Q I don't need to know the reasons why but the decision
10 not to testify, you made that decision?

11 A I made that decision based on advice from my counsel.

12 Q Did you all discuss, the risks and benefits of you
13 not testifying?

14 A Yes, sir.

15 Q Prior to the trial of this case did you all discuss
16 Cherry Mactaggart's role in this case and her potential
17 testimony?

18 A I don't quite remember anything involving a
19 conversation with me about it. I know he was involved in
20 talking to the Judge behind chambers. Me, particularly, I
21 don't remember.

22 Q Okay. We have talked a little bit about this juror
23 error that occurred. This woman in a wine colored dress
24 named New, juror 106. When the juror selection was going
25 on were you aware that this lady, when she was selected,

1 may have been a victim of criminal sexual conduct?

2 A No, sir.

3 Q Did Mr. Grose, the information that he mentioned on
4 the stand about notes that he had about these jurors and
5 information he might of gleamed from another attorney, did
6 he ever share any of that with you?

7 A After the trial was over with.

8 Q But at the time the jury would be picked?

9 A No.

10 Q You have heard the testimony today, the issues that
11 have been raised about the Solicitor's comments and jury
12 selection and other issues. Is it your position that Mr.
13 Grose was ineffective in this case in representing you?

14 A Yes, sir.

15 Q I don't have any other questions. Please answer any
16 questions that the State will have.

17 Cross-examination

18 By Ms. Kinzeler:

19 Q Mr. Bolte, you just testified on direct that Mr.
20 Grose never discussed the jury selection with you. The
21 juror New, this lady that has been an issue today and you
22 heard Mr. Grose testify today. The information that he
23 learned about Ms. New as far as who was a victim of CSC or
24 something to that effect, that is information he learned
25 about the jury was selected. Is that accurate?

1 A Excuse me, Ma'am?

2 Q You all knew that you wanted to strike Ms. New?

3 A No, I did not.

4 Q You didn't know anything about that?

5 A No, Ma'am.

6 Q He never discussed anything about jury selection to
7 you?

8 A Well, he discussed what they meant and then we got
9 three, I think it was or something like that. And for
10 reason for having them was but I never knew anything about
11 that particular incident.

12 Q And you were listening to the jury part standing up
13 and answering questions?

14 A I am not understanding the question.

15 Q At the beginning of trial you are sitting with your
16 attorney and the Judge is asking the jurors a lot of
17 questions. And some of them stand up and give specific
18 answers.

19 A Right, the whole courtroom is full of jurors.

20 Q Potential jurors?

21 A Yeah, potential jurors.

22 Q Do you recall Mr. Grose taking a break during the
23 jury selection to go back and to go over everything and
24 discuss it before coming back in to view the strikes. Do
25 you recall that during a break?

1 A I don't know, we had several breaks, Ma'am, I don't
2 know. I was always taken to the back and put in a little
3 room so I don't know what went on during the breaks.

4 Q So, you were never with Mr. Grose during these
5 breaks?

6 A A couple of times, yes I was.

7 Q I think that is all I have. Thank you.

8 THE COURT: Anything else?

9 MR. NEWLON: Nothing further, Your Honor.

10 THE COURT: You may step down.

11 MR. BOLTE: Thank you, sir, thank you for your time.

12 MR. NEWLON: That is the conclusion of the applicants
13 case. At this time I would like to make a brief closing.

14 THE COURT: All right. Ms. Kinzeler, would you like
15 to do the same?

16 MS. KINZELER: I would like to do the same.

17 MR. NEWLON: Your Honor, interesting case. Mark
18 Bolte, this actually went, some of these issues that have
19 been pointed out by the Attorney General potentially went
20 to the Court of Appeals and they decided it per curiam on
21 how these issues were raised so then there is no analysis
22 done, there is no discussion about what the Solicitor did
23 or didn't do, what is the value, the per curiam decision.
24 So, we don't really know, this is kind of unusual. We
25 don't really know what the Appellant Court would do given

1 if they really looked at this information. I mean they
2 don't really see anything by default but there is really
3 no discussion of it from that point of view, discussions
4 of these cases that we have alluded to. This is like so
5 many times in these particular cases, it is a case of and
6 I don't mean to simplify to the extreme to insult the
7 parties involved, but it is he said she said case. And of
8 course there are some ancillary testimony that certainly
9 established that there were problems in the marriage. And
10 that solidified a phone call, or phone calls that he may
11 have made to his daughter trying to find out where she was
12 and what she was doing to establish that he had been on
13 the campus and some of the things that happened on prom
14 night and all that kind of stuff. But the interesting
15 thing about it is is that of all of that corroborating
16 testimony that was offered, none of it went to the merits
17 of the counts that he was eventually convicted of. It
18 really kind of painted the picture in this particular case
19 of him being a bad daddy and then oh, by the way you have
20 the victim who is going to come in and testify of all of
21 these things that happened and he of course didn't take
22 the stand. The only real true testimony, fact testimony
23 because what Cherry Mactaggart offered was not fact. Fact
24 testimony was from the mouth of the victim so we have a he
25 said she said case. The State knew this, the defense knew

1 this and once he elected not to testify when the State
2 started making commentary in their closing about something
3 being undisputed twice and she tried to get up here and
4 say, oh, I clarified it later and to clarify I was only
5 referring to undisputed what the ancillary information was
6 that I have already alluded to. That didn't happen. The
7 intent was to say that the victim has testified, I have
8 got some corroborating people out here that are
9 corroborating the circumstances of this guy's
10 relationship, his wife and his kids. And basically the
11 nail in the coffin was he did it and, "there is no other
12 reasonable explanation for why we are here." She knew
13 that, she knew that from the getgo. And he didn't
14 testify, the case is over with, she knows he is not going
15 to testify, there is no other testimony, she knows what is
16 out there. In the case of State versus Sweet which is not
17 necessarily on all fours but the language in there is very
18 instructive and they analyze a series of case law that
19 goes back all the way to 1961 I think. One of the things,
20 a couple of things the Court says is it is prosecutorial
21 comment whether direct or indirect on a defendant's
22 failure to testify is impermissible. And it said where
23 the Solicitor refers to certain evidence is uncontradicted
24 and a defendant is the only person who can contradict a
25 particular evidence. The State is viewed as a comment on

1 the defendant's failure to testify. Now, if this had been
2 a case where you had had five, ten, twenty witnesses or
3 something like that coming out there to testify and all of
4 these witnesses were testifying for the State she could
5 certainly make a comment on the weight of that testimony.
6 And then in that circumstance it would kind of dilute the
7 comment about being uncontradicted or whether it was no
8 other reasonable explanation. But in this case there is
9 only one and that was the defendant in this case and that
10 was a direct commentary by inference. In this particular
11 case, State versus Sweet says in this case, it says the
12 Solicitor stated Sweet could rebut the victim's testimony.
13 Specifically he told the jury, nobody else knows what
14 happened that night except the two girls and the
15 defendant. And then stated there isn't any testimony that
16 conflicts with what the girls say. I can't say that the
17 facts are necessarily on all fours but clearly the comment
18 referred to Sweet's failure to testify was not merely a
19 comment on the evidence. I think the strongest argument
20 that Mr. Bolte has in this particular case is that the
21 Solicitor, because the nature of the case and because it
22 was a he said she said case, because the Solicitor knew
23 when she made those comments in closing the testimony was
24 over with, she knew exactly who testified and when she
25 made that comment it was directed at the claimant, Mr.

1 Bolte, in that case. And it would be improper under the
2 authority that we have in this State and also the United
3 States Supreme Court. The only other thing, the other
4 thing that comes to mind has to do with this, the juror,
5 not striking this particular juror, that is pretty
6 interesting. The juror 106, Ms. New, when the question
7 was asked, have you or a family member or a close friend
8 been a victim of a number of things and one of them was
9 criminal sexual conduct. She stood up, now the Court
10 queried every one of those people individually to find out
11 what the circumstances were. But he missed her. And I
12 can't understand why he missed her, he goes to, she stands
13 up and he identifies her and then he goes on to talk to
14 another guy. He said, yes sir, Mr. so and so. Apparently
15 somebody, this man may have stood up or done something to
16 get his attention, got him off from asking this lady. So
17 nobody knows exactly what, she may have been a personal
18 victim more than once and she may have a specific hatred
19 for these people. I think it is important for a trial
20 lawyer, a defense attorney and I am not talking about
21 whether or not it could be necessarily cured by a general
22 question, can you be fair and impartial given your
23 circumstances. Well, the problem is is that we don't, we
24 may not really know what her circumstances are. And the
25 Judge should have asked and if he didn't ask Counsel

1 should have said, Judge, I would like to know what the
2 circumstances are with this lady, juror number 106.
3 Should have done it. And more importantly when that juror
4 showed up in the jury pool, should have struck her, he had
5 a strike, he could have done it and he should have done it
6 because now someone gets, no matter what she says to the
7 Judge whether she can be impartial or not, everybody knows
8 that there are circumstances in a trial where an
9 individual will try to say that they can be impartial but
10 the circumstances or so enlightened with the case the Judge
11 strikes them. And says, well, I am going to excuse you
12 under these circumstances. And we don't know, we didn't
13 get there because he never asked that question. We don't
14 know because Counsel didn't ask the Judge to ask the
15 question. And it may have been something that this juror
16 could have been excused like other jurors were excused in
17 this particular venire. So, I would suggest to the Court
18 that the failure to object by Counsel, certainly the
19 mentioning of the Solicitor of the, commenting on his
20 failure to testify indirectly, given the circumstances of
21 this case and the Counsel's failure to object when those
22 statements were made at those several places in closing
23 argument by the Solicitor and Counsel's failure to
24 properly monitor the voir dire of the potential jurors and
25 make a query to find out. And then failed to strike that

1 individual knowing what he admitted he knew about her
2 anyways was prejudicial to my client's case. One person
3 on that jury who we don't know the extent of her
4 circumstances could of had a traumatic effect on the
5 outcome of this trial. The only, the other minor issues,
6 when I say minor, not as relatively important as, it had
7 to do with appealing to the jury by the Solicitor, the
8 conscious of the community, strike back a blow for
9 victims. He didn't strike back a blow for victims in and
10 of itself, probably not too bad. But the problem with it
11 is prefaced with you are the conscious of the community
12 and you need to make a statement. And the State versus
13 Liberty and Sims, I believe that is the case that
14 comments, that talks about comments like that by attorneys
15 in closing argument. Trying to appeal to the passion and
16 prejudice of the jurors under those circumstances. But
17 she could of simply asked them to do the right thing based
18 on the evidence. My client deserves justice, that is
19 okay. But to turn around and start appealing to the sense
20 of the community goes beyond the bounds on what she is
21 allowed to do. I believe, Your Honor, in that respect all
22 the other issues have been properly addressed in the
23 course of the Court's, in the course of this hearing and I
24 am not going to go over them again. But those are the
25 more setting points that I would like to bring out on

1 behalf of the claimant and ask this Court to find that
2 Counsel was ineffective for one or more of those
3 particular reasons I have enumerated. And certainly that
4 this man's case was prejudice by those failures and allow
5 him to have another trial on the merits. Thank you.

6 THE COURT: Ms. Kinzeler.

7 MS. KINZELER: May it please the Court, Your Honor.
8 I am not exactly sure at this point if they are waiving
9 allegations about the arraignment and the moral certainty
10 jury charge. I will just rely on the Court to determine
11 those issues. It appears to me that they are being waived
12 but nonetheless the testimony is clear that really
13 shouldn't be granted on any of those issues because the
14 law is clear, the trial transcript itself. So, I am going
15 to move on to what Mr. Newlon described is the more
16 salient points. I do want to point out first and foremost
17 that, you know, there are a whole host of issues raised on
18 the application. And there are a whole host of issues
19 raised today. And the majority of those issues if not all
20 of them were raised in some context in the direct appeal,
21 whether it be the appellant Counsel's Anders brief or Mr.
22 Bolte's pro se brief. To the extent there is something
23 that is to preserve, those are direct appeal issues and
24 aren't appropriate for a PCR. And I will just rely on the
25 Court to review our materials that we have provided to

1 you. When we get down to Mr. Newlon's comment about the
2 per curiam decisions that we have no analysis about all of
3 these things. The reasons for that is because there was
4 an Anders brief and in the Anders brief the appellate
5 attorney moved to be relieved because she didn't find any
6 issues that were meritorious to brief. And in Anders, the
7 Court looks at everything in the record to see if there is
8 any meritorious issues whatsoever. The opinions states
9 and I have provided one with, to the Court, if I can find
10 it. This opinion states that and it is per curiam. And
11 it states the issues being appealed and it says after a
12 thorough review of the record and both briefs including
13 Mr. Bolte's pro se brief, pursuant to Anders versus
14 California and State versus Williams we dismiss the appeal
15 and grant Counsel's motion to be relieved. That motion
16 being I move to be relieved because I don't see any
17 meritorious issues here. Necessarily in Anders brief and
18 an Anders opinion like this means I don't see any
19 meritorious issues here, that comes directly from the
20 Court of Appeals so I don't really think we need to, you
21 know, blast the Court of Appeals for not discussing these
22 any further because their finding is that there is nothing
23 to discuss, that is what their finding is. Mr. Bolte then
24 filed a pro se, petitioned for a rehearing and the Court
25 of Appeals saying, y'all missed these things, I really

1 think you really need to look at this, raise some other
2 issues. And then again the Court of Appeals issued
3 another order denying the petition for rehearing and says
4 that after careful consideration the petition for
5 rehearing the Courts are unable to discover that any
6 material fact or principle of law has been either
7 overlooked or disregarded hence there is no basis for
8 granting a hearing and it is denied. Now, I will say that
9 I know there is always an issue as to what wasn't
10 preserved then it can't really be said to have been an
11 indirect appeal issue. So, I will leave that with Your
12 Honor. I do acknowledge that that may be a point to be
13 made from the other side. But in essence the Anders
14 review is what it is. The Court said these aren't
15 meritorious and on that I will just rest and move on. I
16 think that the Solicitor's comment, the only at issue, I
17 think the second layer of comment in her closing on the
18 facts is very clear that when she said this was undisputed
19 she is talking about the victim witness testimony and the
20 witnesses that the State presented and the mother's
21 testimony for the defense. And also the defense presented
22 a second witness who I believe was the divorce attorney
23 for the mother, I believe, I may be misspeaking. But
24 there were two defense witnesses who testified, several
25 for the State. It cleared later in the transcript when

1 she is closing on her case and the facts that the fact
2 that those witnesses testimonies were undisputed that is
3 clear, that is not a comment on his failure to testify or
4 his constitutional right to remain silent and I don't
5 think I need to belabor that point. Now, when we get to
6 the part where she first says in her opening on the law, I
7 am going to defer the Court on reasonable doubt but the
8 facts in this case are undisputed. You know, just prior
9 to that she is talking from the witnesses supplied by the
10 State and the witnesses supplied by the defense, the facts
11 of this case are undisputed. She is testifying here today
12 that the majority of the facts that she is presenting are
13 about the environment and the relationship and that there
14 was much more of their case than whether or not something
15 physically and inappropriate actually happened. That is
16 the indictment, that is the charge. But her basis for
17 saying that she made clear was not having anything to do
18 with Mr. Bolte, it is about these witnesses and the
19 defense witnesses and how nothing they say is a
20 discrepancy. They testified the same way about the
21 environment and the relationship. Now, even if and I know
22 Mr. Grose said he felt like he should have objected to
23 that and that was an objectionable comment. Let's assume
24 that there should have been an objection and let's assume
25 that was--

1 THE COURT: Wait, you need, the Court Reporter.

2 COURT REPORTER: I don't think, I mean, please slow
3 down.

4 MS. KINZELER: Okay. Go back to the Solicitors
5 opening on the law. She differs to the Judge on
6 reasonable doubt and in this several sentences of
7 discussion she says, the State's witnesses and the defense
8 witnesses, these facts are undisputed. The Solicitor
9 testified today that the facts she is referring to were
10 the entire facts presented in the State's case which is
11 the facts that the environment she grew up in, the rules,
12 the mother's testimony, she thought he was having an
13 affair and it turned out to be her daughter on the other
14 end of the phone. Those are obviously the facts that she
15 is referring to when she said they are undisputed. Now
16 Mr. Grose said he felt that was an objectionable comment
17 on the grounds that it was improper comment on Mr. Bolte's
18 constitutional right to remain silent and not testify.
19 And I know that there is some law about whether or not Mr.
20 Bolte could be the only one to refute the victim's
21 testimony about what actually happened because there is no
22 other witnesses. Now, we agree he is the only one that
23 could refute, it is the victim said, he did these things
24 to me and the defendant says I didn't do those things to
25 her. But there is a whole host, ninety percent of the

1 rest of this case is about the environment, the nature of
2 the relationship and all of those things. So, while Mr.
3 Grose may have felt like he should of objected it is still
4 my position that that wasn't an improper comment on his
5 failure to testify or his exercises of his right to remain
6 silent. Because he is not the only person that could have
7 refuted the facts to which she was referring which were
8 facts about the environment she grew up in, the stress, et
9 cetera. So, I think we are talking about different facts
10 and I think the Solicitor wasn't referring to the incident
11 themselves. And I will move on because I do have, I will
12 also rely on the State versus Sweet for, I think it is
13 State versus Sweet which is that, you know State versus
14 Sweet does say and I will direct the Court, it would be
15 right at 348 where the Solicitor refers to certain
16 evidence as uncontradicted and the defendant is the only
17 person who could contradict that particular evidence, the
18 statement is viewed as a comment on the defendant's
19 failure to testify. Our position would be that the
20 particular facts she is referring to weren't the
21 incidences themselves, they were things that could be
22 refuted by the other witnesses and the witnesses didn't
23 refute that. And that is what her comment was.
24 Nonetheless the law is clear that, if I can find it,
25 improper comment during the Solicitor's closing argument

1 automatically required reversal if you are not prejudicial
2 to the defendant and that is Simmons versus State, 331, SC
3 333. And if you go on the Court's have said that the
4 relevant question is whether the Solicitor's comments so
5 affected the trial unfairness as to make the resulting
6 conviction the denial of due process. And I think here in
7 this case the record is void of any indication that those
8 comments were so prejudicial that Mr. Bolte didn't get a
9 fair trial on that ground. Moving on to the juror issue.
10 You know, it is obvious Mr. Grose didn't want her on the
11 jury and he meant to strike her. And I am not going to
12 sit here and speculate as to why she stood up, whether she
13 was a victim or she was alleging at a divorce proceeding
14 that her child was a victim. Mr. Grose wanted to strike
15 her, he said I am going to strike her, I didn't strike
16 her, she ends up on the jury. We are in agreement on that
17 point. Now, the Judge asked all of these jurors who had
18 been sworn under oath and who are standing up in response
19 to this question, whatever you are standing up for cause
20 you any inability to remain fair and impartial. And every
21 juror who said yes, I can't remain fair and impartial
22 because of X, Y, Z was excused by the Court and Ms. New
23 did not say anything. So, necessarily she didn't feel
24 like whatever it is she stood up for was going to render
25 her unfair or partial in any way or she would have said so

1 It is, was the statement made. And in the light of the
2 statement what were the intended or surrounding
3 circumstances. And in this particular case, as pointed
4 out but this is the case of he said she said case, the
5 comment about obviously the facts doesn't matter. And
6 when there is a reference to that particular evidence,
7 when you talk about in the State versus Sweet where it
8 talks about to contradict that particular evidence, when
9 the Solicitor made three different places, undisputed,
10 undisputed and no other reasonable explanation three times
11 in the record. Now, there is one time in the record where
12 she prefaces this comment with her, follows this comment
13 with some references to some testimony by some witnesses
14 and I understand that. But that doesn't cure the other
15 problems, it is already launched out there. The jury has
16 already considered it, the question is whether can,
17 objectively if you look at that, was it qualified to the
18 point where the jury would not be confused or take that as
19 the Solicitor is saying that, hey, he could have testified
20 and he didn't do it. The cases that have been talked
21 about by the AG, some of these cases there is no prejudice
22 because the Judge gives a curative instruction. That
23 never happened in this case because it was never objected
24 to. So, those cases are out. The other cases that she
25 has alluded to has to do where there was overwhelming

1 evidence of guilt. The Judge looks at the entire record
2 and they say, there is just so much evidence here it
3 doesn't matter whether the Solicitor makes this comment
4 because the evidence in and of itself was a sustained
5 verdict. Well, the problem in this case is the only
6 evidence that we really have on the merits of the case
7 come from the child. And the Solicitor sold it to the
8 jury that it was uncontradicted and that there is no other
9 reasonable explanation. That changes the flavor of what
10 happened in this case.

11 MS. KINZELER: May I just briefly make a comment.

12 THE COURT: Very briefly.

13 MS. KINZELER: I want to direct the Court's attention
14 to the jury instruction that the trial Court gave. I am
15 not going to say the page and line records right now. But
16 the trial Court Judge did instruct the jurors after
17 closing argument that they were not, that the Solicitor's
18 closing arguments were not evidence and that they were not
19 to consider the defendant's failure to testify in
20 deliberating. And I will just leave it at that.

21 THE COURT: All right. Thank y'all for the hearing.
22 And I have the full transcript on a CD. I will let you
23 know my decisions.

24 MS. KINZELER: Thank you, Your Honor.

25 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

1 CERTIFICATE OF REPORTER

2

3 State of South Carolina)

4 County of Abbeville)

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6

7 I, Joy E. Holston, Official Court Reporter for the
8 Eighth Judicial Circuit of the State of South Carolina, do
9 hereby certify that the foregoing is a true, accurate and
10 complete transcript of record of the proceedings had and
11 evidence introduced in the trial of the captioned case,
12 relative to appeal, in the Court of Common Pleas, Post
13 Conviction Relief in the County of Abbeville, South
14 Carolina, on the 27th day of October, 2010.

15 I do further certify that I am neither of kin,
16 Counsel nor interest to any party hereto.

17

18

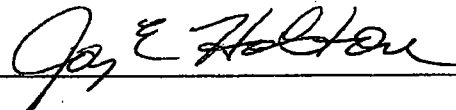
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May 16, 2011

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Joy E. Holston, Court Reporter

23

My Commission expires: March 13, 2016

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STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT
Case No.: 2009-CP-01-304

Mark R. Bolte, # 304800,

Applicant,

v.

State of South Carolina,

Respondent.

Emily Y. McMahon
CLERK OF COURT

ORDER OF DISMISSAL

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2011 JAN 31 PM 10 17
EMILY Y. MCMAHAN
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed on December 23, 2009. The Respondent made its Return on or about April 16, 2010. An evidentiary hearing into the matter was convened on October 27, 2010, at the Newberry County Courthouse. The Applicant was present at the hearing and was represented by Jon E. Newlon, Esquire. Jennifer A. Kinzeler, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. L. Suzanne Mayes, Esquire, and E. Charles Grose, Jr., Esquire, also testified. This Court also had before the records of the Newberry County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, and the appellate court records including the trial transcript.

Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Abbeville County Clerk of Court. The Abbeville County Grand Jury returned a five-count indictment during the October 2003 term indicting the Applicant for Incest, two counts of Criminal Sexual Conduct With a Minor-second degree, Committing or Attempting to Commit a Lewd Act Upon a Child Under Sixteen Years of Age, and Criminal Sexual Conduct With a Minor –

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first degree¹ (2003-GS-01-296). E. Charles Grose, Jr., Esquire, represented him. On September 7-10, 2004, the Applicant proceeded to trial on three of the aforementioned charges, Incest, one count of Criminal Sexual Conduct With a Minor-Second degree, and Committing or Attempting to Commit a Lewd Act Upon a Child Under Sixteen Years of Age, and was convicted by a jury of those charges as indicted. The Honorable Wyatt T. Saunders, Jr., sentenced the Applicant to confinement for a period of twenty (20) years for the criminal sexual conduct charge, fifteen (15) years for the lewd act charge, and ten (10) years for incest, all sentences running consecutively.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected pursuant to Anders v. California, 386 U.S. 738 (1967). The Applicant also filed a *pro se* Anders response brief. The South Carolina Court of Appeals dismissed the Applicant's appeal. State v. Bolte, Op. No. 2009-UP-361 (S.C. Ct. App. filed June 24, 2009). The Applicant then filed a *pro se* Petition for Rehearing, which the Court of Appeals denied on August 25, 2009. The Remittitur was also issued on August 25, 2009.

At the hearing, the Applicant alleged he is entitled to post-conviction relief based on the following claims:

1. Solicitor's improper comments during closing argument regarding:
 - a. erroneously defining "reasonable doubt"
 - b. the Applicant's exercise of his right to main silent
 - c. the jurors' roles as the "conscience of the community"
 - d. bolstering witness testimony
2. Ineffective assistance of counsel for
 - a. failing to object to the prosecutor's comments during closing argument regarding:
 - i. the Applicant's exercise of his right to main silent
 - ii. the jurors' roles as the "conscience of the community"
 - iii. reasonable doubt
 - iv. bolstering of witness testimony
 - b. failing to object to the trial court's jury charge regarding reasonable doubt

¹ In violation of §16-3-652

- c. failing to object to the admission of trespassing and criminal domestic violence charges
- d. failing to strike juror # 106
- 3. Trial court error in admitting forensic interviewer's expert testimony
- 4. Applicant never had an arraignment
- 5. Applicant was convicted of counts I, II, and IV of the indictment but sentenced to counts I, III, and IV

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Solicitor's Closing Argument

The Applicant alleges he is entitled to relief due to the solicitor's improper remarks during closing argument. A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009); State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). The solicitor cannot, through evidence or argument, comment upon a defendant's exercise of a constitutional right. Id.; State v. Johnson, 293 S.C. 321, 360 S.E.2d 317, 319 (1987). However, a solicitor has the right to state his version of the testimony and to comment on the weight to be given such testimony. Id. at 552, 590. Where the defense presents evidence in its case in chief, the solicitor has the right in closing argument to comment on its consistency or inconsistency, and its weight. State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995); See

also, State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2009)(a prosecutor may fairly respond to claims made by the defendant or his counsel).

Regardless, improper comments do not automatically require reversal if they are not prejudicial to the defendant. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998); State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997). When reviewing a solicitor's closing argument for impropriety, the argument must be reviewed within the context of the entire record, including whether the judge's instructions adequately cured the improper argument. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). Further, a criminal defendant is entitled to a fair trial, not a perfect one, and the Petitioner has the burden of proving he did not receive a fair trial because of the alleged improper argument. Id.; State v. Mizell, 332 S.C. 273, 504 S.E.2d 338 (Ct. App. 1998); Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Humphries, 351 S.C. at 373.

At the end of the Applicant's trial, the solicitor closed briefly on the law and facts, first; trial counsel then gave his full closing argument, followed by the solicitor's closing argument in full. During the solicitor's initial closing on the law and facts, she stated in relevant part:

"And finally, I would just like to address the issue of reasonable doubt. Reasonable doubt is defined in a lot of ways and when I'm done speaking at the very close of this case the judge will charge you on exactly what reasonable doubt is, but I submit to you ladies and gentlemen that throughout this case, from the witnesses supplied by the State and the witnesses supplied by the defense, the facts of this case are undisputed. One thing stands like stone. He did it and there is no other reasonable explanation for why we're here." (Tr. p. 528-529)(allegations 1(a) and 1(b)).

Trial counsel then gave his closing argument in full on behalf of the Applicant in which he essentially contended that the jurors should return a verdict of not guilty because the charges were motivated by the Applicant's and his wife's divorce, the witnesses were not believable, and the lack of any medical or

physical evidence. (Tr. p. 529-560). Then, the solicitor gave her closing argument in full. (Tr. p. 561-572). During this latter portion of her closing argument, at the very end of the argument, the solicitor stated in relevant part:

"You are the conscience of the community [allegation 1(c)] and I submit to you that this case has been proven beyond a reasonable doubt. The testimony of [REDACTED] alone is proof beyond a reasonable doubt of his guilt. [allegation 1(d)]. Her testimony was corroborated by numerous people, by his [the Applicant's] own words on that tape. [REDACTED] has no motive to lie, nothing to gain and she's had everything to lose. You have before you the most noble of opportunities, the chance to strike back against injustice and deliver a verdict which speaks the truth. Ladies and gentlemen, that verdict is guilty of criminal sexual conduct with a minor, guilty of incest, and guilty of attempting or committing a lewd act upon a child. Thank you." (Tr. p. 571-572).

Comment on Exercise of Right to Remain Silent and Reasonable Doubt

Suzanne Mayes, the solicitor who prosecuted the underlying case, testified at the PCR hearing. She testified that he has been a prosecutor for eighteen years and that at the time of the Applicant's trial she had about twelve years of experience. She stated further that she has tried more than fifty criminal sexual conduct cases.

Counsel for the Applicant first questioned her about her comment during her closing argument that the facts in the case were "undisputed." While Ms. Mayes agreed that there were no other eyewitnesses to the actual sexual batteries themselves other than the victim and the Applicant, who did not testify at trial, she testified that she believes the other witnesses presented at trial had knowledge of the facts. Ms. Mayes explained that in situations like this, where the victim is alone with the defendant when the acts take place, as they are in the majority of CSC cases, there are no other witnesses to the acts themselves. Thus, these cases rely largely on circumstantial evidence of the relationship between the victim and defendant as witnessed by other people.

Ms. Mayes recalled testimony from the mother of the victim, who the defense called as a witness, and stated that her testimony corroborated the evidence presented by the State regarding the

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relationship between the victim and the defendant and the overall home environment. She referred to testimony from the victim's mother regarding, for instance, the prom incident, and having to call 911 to come to the home because the defendant became so irate. Ms. Mayes testified that the victim's mother witnessed that incident, testified in the defense's case in chief, and that her testimony corroborated the incident as testified to by the victim. She also recalled testimony from the mother regarding a phone conversation between the Applicant and someone and believed the Applicant was having an affair; she later learned he was talking to their daughter, the victim.

Ms. Mayes testified that although she knew at the time she made the "undisputed" remark that the victim and the Applicant were the only witnesses to the sexual batteries themselves, her remark was not made in reference to the specific acts. Rather, she was referring to the overall supporting evidence presented at trial, stating that she believes the witness testimony presented at trial from both the State and the defense was undisputed as to the Applicant's role as the victim's father, their relationship, and the home environment, and that such undisputed facts would be sufficient, in her mind, to support a conviction. Ms. Mayes testified that her statement during closing argument can be interpreted to mean evidence regarding the victim's family life and their relationship was undisputed, and she thinks the jury would have interpreted it that way at that time she made the remark. In sum, she believes she used the term ("undisputed") appropriately when the defense's witnesses corroborated the State's evidence.

Ms. Mayes contended that her comment was not an improper comment about the Applicant's failure to testify, because she was not commenting on evidence that could only be contradicted by the Applicant himself as he contends. Rather, in light of the fact that the defense presented evidence in its case in chief, she was permitted in closing argument to comment on its consistency or consistency and its weight. She testified her position is further supported by her full closing argument, after trial counsel concluded his closing argument, in which she reviews all of the witness testimony and her position regarding its consistency, although she does not believe her earlier statement made in her initial closing

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on the law and facts required any clarification.

Ms. Mayes further testified that during her initial closing argument on the law, she deferred to the judge regarding the law on reasonable doubt and that she did not think her remarks in conclusion, following her comment that the judge would explain the law regarding reasonable doubt to the jurors, were part of her explanation of reasonable doubt nor did she think the jury interpreted them that way.

This Court finds the Applicant failed to meet his burden of proving he is entitled to relief on this ground. First, with regard to the solicitor's comment regarding reasonable doubt, this Court finds the solicitor's remark, that the judge would explain to the jurors more specifically the law regarding reasonable doubt, was sufficient and that her comments following that remark in conclusion were not an extension of her explanation of the law regarding reasonable doubt. Further, and regardless, the judge instructed the jurors regarding the State's burden of proof, reasonable doubt, and specifically instructed the jurors that the statements and arguments made by the lawyers are not evidence. Accordingly, this Court finds the Applicant failed to meet his burden of proving the solicitor's remark regarding reasonable doubt deprived him of a fair trial. This allegation is denied.

Second, this Court finds the solicitor's comment that, "from the witnesses supplied by the State and the witnesses supplied by the defense, the facts of this case are undisputed" was not an improper comment on the Applicant's exercise of his constitutional right to remain silent. While the Applicant may have been the only other witness to the acts themselves, it is clear that here, where the defense presented witnesses in its case in chief, the solicitor's argument only reflected on the content and consistency of the testimony presented by the witnesses for both the State and the defense. The solicitor's remark that the facts of this case were "undisputed" was based on her version of the testimony presented by the State and the defense, rather than a suggestion that the Applicant was under any duty to testify. Thus, her comment was not prejudicial. It is clear from a review of the entire record, which the PCR court had before it, that the solicitor's remark was a clear reference to the

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defense's witnesses whose testimony did not dispute the testimony and evidence presented by the State.

The solicitor's comment did not refer to the Applicant's right to or failure to testify in any way.

Additionally, the evidence to which the solicitor was referring, testimony regarding the relationship between the victim and the Applicant and their home environment, is not evidence that could have only been refuted by Petitioner. In fact, the purpose of the defense witnesses' testimony, the victim's mother's testimony for example, was to refute the State's witnesses' testimony and their theory of the case. When the defense witnesses' testimony did not accomplish that result, the solicitor so noted in closing. Certainly, even if capable, Petitioner would not have been the *only* witness who could have disputed the evidence presented at trial regarding the Applicant's controlling behavior, his relationship with the victim, the incident on prom night, and other matters related to the home environment and his relationship with the victim.

Furthermore, this Court finds that the solicitor's remarks regarding reasonable doubt were neither improper nor prejudicial. The solicitor deferred to the court concerning instructions to the jury regarding reasonable doubt. Her comment that there was "no other reasonable explanation why we're here" was not part and parcel of her closing on the law regarding reasonable doubt as the Applicant suggests. Further, the solicitor was permitted to respond in closing argument to the Applicant's theory of the case, that the allegations were motivated by divorce, for instance. Therefore, in light of the entire record, it can hardly be said that the solicitor's remarks were in any way a comment on Petitioner's failure to testify or that Petitioner was denied a fair trial as a result of these remarks.

Moreover, any prejudice caused by the solicitor's remarks was eliminated by the trial judge's instructions to the jury prior to deliberation, which emphasized that the burden of proof rested solely on the State, that the attorneys' statements and arguments were not evidence, and that Applicant's decision to exercise his constitutional right not to testify was not a factor to be considered by them. See Cooper, supra. Jurors are presumed to follow the law as instructed to them. State v. Grovenstein, 335 S.C. 347,

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517 S.E.2d 216 (1999); State v. Queen, 264 S.C. 515, 216 S.E.2d 182 (1975). Accordingly, this allegation is denied.

Improper Bolstering

Ms. Mayes testified that she was not bolstering the victim's testimony when she stated in her closing argument that the victim's testimony alone is proof beyond a reasonable doubt of the Applicant's guilt, because this statement is proper according to the statute, §16-3-657, which specifically states that the victim's testimony in a prosecution for these charges need not be corroborated. Ms. Mayes testified that the purpose of telling the jury they could consider the victim's testimony alone was in reference to a jury charge that the trial court judge was going to give them after closing argument which was discussed with the court and defense counsel prior to giving the arguments (outside the presence of the jury). She stated that even when the trial court judge does not charge the statute that a victim's testimony need not be corroborated, judges still allow prosecutors to argue that fact during closing argument and that it is actually routine to do so. Ms. Mayes stated her comment was a simplification of and consistent with the statute. Therefore, she was not bolstering the victim's testimony in making this remark.

A prosecutor cannot vouch for the credibility of a witness by expressing or implying his personal opinion concerning a witness' truthfulness. State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (2001). Improper vouching occurs when the prosecution places the government's prestige behind a witness by offering express personal assurances of a witness's veracity, or when a prosecutor implies he has facts that are not before the jury for their consideration. Id. See also, State v. Kelly, 343 S.C. 350, 540 S.E.2d 851 (2001). Furthermore, our Supreme Court has held that in passing §16-3-657, our legislature determined that it is "reasonable and appropriate in criminal sexual conduct cases to make abundantly clear-not only to the judge but also to the jury-that a defendant may be convicted solely on the basis of a victim's testimony." State v. Rayfield, 369 S.C. 106, 631 S.E. 2d 244 (2006).

Here, the solicitor's comment was not an assurance of the victim's veracity, nor was the solicitor vouching for the victim's veracity by implying she had more facts than the jury. The solicitor's remark that the victim's "testimony alone" was sufficient was clearly consistent with the statute, §16-3-657, which states verbatim "the testimony of the victim need not be corroborated in prosecutions under Sections 16-3-652 through 16-3-658." The instant case certainly qualifies. To the extent the Applicant would contend that the solicitor's remark, that the victim's "testimony alone" is so distinguishable from the language in the statute as to render it improper, this Court disagrees. "The victim's testimony alone" and the victim's testimony "need not be corroborated" are synonymous and consistent, and the semantics are a distinction without a difference. The solicitor did not comment that she had personal knowledge the victim was telling the truth, and the remark was consistent with the statute, which the judge instructed the jury after closing argument. The solicitor's comment did not constitute improper vouching or bolstering, and, regardless, was hardly one that so infected the Applicant's trial with unfairness as to deny him a fair trial. Accordingly, this allegation is denied.

Appeal to the Jury's Sense of Community

Ms. Mayes testified that although she and other solicitors may not use that language in a closing argument today, in this particular case she does not believe the language she used was appealing to anything objectionable. Rather, in referring to the jurors as the "conscience of the community," to "strike back against injustice," she stated she was appealing to their role and responsibility as jurors.

In State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975), our Supreme Court set forth the parameters of permissible prosecutorial argument, stating that the solicitor may:

"legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law; he

has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider."

The Court further held that relevant question is whether the defendant was prejudiced to the extent that he was denied a fair trial, and that the burden of proving that he did not receive a fair trial is upon the defendant himself. *Id.*; See also Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007)(concluding any impropriety in the solicitor's closing argument was not sufficient to grant defendant post-conviction relief where solicitor's improper use of the pronoun "I" was limited, did not recur throughout his argument, there was overwhelming evidence of the defendant's guilt, and the trial judge instructed the jury not to consider counsel's statements as evidence).

This Court finds that, reviewing the solicitor's comments in the context of the entire record as the Court is required to do, the comments did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Humphries, supra; Donnelly v. DeChristoforo, 416 U.S. 637 (1974); State v. Lindner, 276 S.C. 304, 278 S.E.2d 335 (1981). The facts in the instant case are clearly distinguishable from those cases in which our courts have held a solicitor's closing argument deprived a criminal defendant of a fair trial. Here, the solicitor did not inject her personal opinion into the proceedings in making the remark, nor did the solicitor's diminish the role of the jury to decide the credibility of the evidence and the Applicant's fate. The solicitor here did not attack the courage or lack thereof to convict or acquit the Applicant. Further, the solicitor's comments came at the very end of her closing argument and were limited to that one isolated instance, and the trial court judge instructed the jury that the attorneys' closing arguments were not evidence. The solicitor's comments did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Therefore, this allegation is denied.

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Ineffective Assistance of Counsel

The Applicant also alleges he received ineffective assistance of trial counsel. In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test 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, 385 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.

Failure to Object to Solicitor's Closing Argument

Mr. Grose, the Applicant's trial counsel, testified that he believes he should have objected to the solicitor's comments that, "from the witnesses supplied by the State and the witnesses supplied by the defense, the facts of this case are undisputed." Trial counsel could not explain why he did not object at the time the comment was made. Counsel agreed that the only witnesses to the actual incidents

themselves were the Applicant and the victim. Counsel also stated that the nature of the State's evidence was witness testimony as to circumstances in the home as Ms. Mayes previously testified. He further testified that, after the trial, he remembered reading a case that came out around the time of the Applicant's trial where one of issues on appeal addressed a prosecutor's comment on the facts with the term "undisputed" or a similar phrase in a case where only the defendant and victim had knowledge of the incident and the word used was construed as a reference to the defendant's failure to testify.

Trial counsel further testified that Ms. Mayes argued first on the law, and that her comment could be construed as one made in context of the elements of law and what she had to prove. He stated she may have had a fair interpretation, that the defense witnesses did not refute the evidence and testimony presented by the State, but that another fair interpretation could be that the victim's testimony was not disputed by the Applicant. Counsel stated he knows that case law decides the issue both ways. He testified that, nonetheless, he did not object and now believes he should have objected due to the context of the solicitor's comment.

With regard to the solicitor's comment that the victim's testimony "alone" was sufficient to meet the State's burden of proof, counsel testified that he believes the comment was consistent with the jury charges that the jurors "can believe one witness over another," for example, and that it was consistent with the statute stating that the victim's testimony need not be corroborated in prosecutions for these kinds of charges. Counsel testified that he concern was that he did not want the jury to think that the statute allowing them to convict based only on the victim's testimony could be applied to other charges contained in the indictment to which the statute does not apply, but that he addressed this concern with the solicitor and the trial court judge and believes it was adequately addressed during the judge's jury charges. Counsel stated he does not believe that comment was objectionable and does not believe it was a comment on the Applicant's failure to testify. Counsel further testified that he does not believe the comment constituted "bolstering." Rather, he sees it as the solicitor arguing the jury should believe

that witness (the victim) and that the solicitor what doing what she is expected to do as a prosecutor.

Trial counsel also testified that he did not believe the solicitor was attempting to define reasonable doubt when she commented that "there is no other reasonable explanation for why we're here." He explained that he viewed the solicitor's comments as first deferring to the judge regarding the law on reasonable doubt followed by a comment that the facts were undisputed.

This Court finds the Applicant failed to meet his burden of proving counsel rendered deficient performance regarding the solicitor's closing argument or that he was prejudiced by these alleged deficiencies. The Court incorporates its findings above regarding the solicitor's closing argument, while further reiterating that counsel's performance regarding the "conscience of the community," reasonable doubt, and the victim's testimony "alone" as sufficient evidence to convict did not fall below an objective standard of reasonableness. The solicitor's comment concerning the "conscience of the community" was not improper, the solicitor's comment regarding "no other reasonable explanation for why we're here" was not an attempt to define the law of reasonable doubt and was not improper, and the solicitor's comment that the victim's testimony "alone" was sufficient to convict did not constitute impermissible bolstering; therefore, counsel was not ineffective in failing to object to those comments. Even if counsel had objected, the trial court would have overruled him where the comments were not improper. This Court further finds the Applicant failed to meet his burden of proving the result would have been different had counsel objected to these comments, incorporating again its previous findings on this issue.

With respect to trial counsel's testimony that he should have objected to the solicitor's comment that the facts of this case were "undisputed," this Court finds that while counsel believes this comment was objectionable, his performance did not fall below an objective standard of reasonableness for failing to do so. As previously stated above, this Court finds the solicitor's "undisputed" comment was a permissible comment, particularly in the context in which it was made, given that both the State and the

defense presented evidence through witness testimony in the Applicant's trial. The solicitor was permitted to comment, then, on the consistency or inconsistency and the weight to be given to such testimony. Her comment was in specific reference to her position that the witnesses for the defense did not dispute the facts presented from the witnesses for the State as those facts related to the majority of the circumstantial evidence presented throughout the trial regarding the victim's home environment and her relationship with the victim. See, Cooper, supra; Raffaldt, supra; McClure, supra (a prosecutor may fairly respond to claims made by the defendant or his counsel). Regardless, the Applicant failed to prove the result of his trial would have been different had trial counsel objected to this remark; counsel's objection would have been overruled in light of the applicable case law that permits the solicitor to make such comments when the defense presents evidence in its case in chief. Therefore, this allegation is denied.

Failure to Object to Trial Court's Jury Charge Regarding Reasonable Doubt

Counsel also testified that, with regard to the trial court judge's jury instruction regarding reasonable doubt and "moral certainty," that he believes the instruction given is what Judge Saunders typically charged based on his experience. Counsel also referred to recent case law, Battle v. State², where the Court affirmed "moral certainty" language in jury instructions given in the context of a circumstantial evidence charge, as the trial court judge did in the Applicant's case.

At the end of the Applicant's trial, the judge charged the jury in pertinent part as follows:

"Where circumstantial evidence is undertaken by the prosecution in a criminal case to prove the guilt of an accused, not only must the circumstances be proven beyond a reasonable doubt, but they must also point conclusively, that is, to a moral certainty to the guilt of the accused. They must be wholly and in every particular perfectly consistent with each other and they must further be absolutely inconsistent with any other reasonable hypothesis than the guilt of the accused." (Tr. p. 580).

² Battle v. State, 382 S.C. 197, 675 S.E.2d 736 (2009)

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This issue is analogous to the issue presented in Battle v. State, 382 S.C. 197, 675 S.E.2d 736 (2009). In that case, the judge's jury instruction on this point was almost identical to the instruction given in the Applicant's case. There, the judge charged the jury in pertinent part as follows:

"To the extent that the State relies on circumstantial evidence, it must prove all the circumstances relied on beyond a reasonable doubt. These circumstances must in every way perfectly be consistent with one another; and they must point conclusively, that is, to a moral certainty, to the guilt of the accused to the exclusion of every other reasonable hypothesis or explanation. In other words, the circumstances must be absolutely inconsistent with any other reasonable hypothesis or explanation than the guilt of the accused."

Id. at 200-201. The Court reversed the lower court's decision to grant post-conviction relief, finding that "moral certainty" language is not *per se* reversible error. Id. at 203. The Court held that, viewing the charge in its entirety and not in isolation, there was not a reasonable likelihood that the jury applied the trial court's instruction in a way that violated the Constitution where the trial court "repeatedly emphasized" that it was the State's burden to prove the defendant's guilt beyond a reasonable doubt. Id. at 204 (also noting the trial court's additional instruction that the circumstances must point "conclusively" to the defendant's guilt, and that guilt must be shown to the exclusion of every other reasonable hypothesis."); See also, Todd v. State, 355 S.C. 396, 399, 585 S.E.2d 305, 306 (2003)(upholding a similar charge, recognizing that "moral certainty language cannot be sequestered from its surroundings").

In the Applicant's case, the trial court used the "moral certainty" language one time, in the circumstantial evidence charge, and repeatedly emphasized it was the State's burden to prove the Applicant guilty beyond a reasonable doubt. Therefore, this Court finds that, not only is the use of this language not reversible *per se*, that when read in its entirety, the trial court's use of this language did not result in burden shifting or a deprivation of the Applicant's right to a fair trial. Accordingly, this allegation is denied.

Failure to Object to the Admission of Trespassing and CDV Charges

The Applicant also alleged trial counsel was ineffective for failing to object to the admission of his CDV and trespass charges at trial, although he contended the strategy was not "completely presented" to him by counsel. The Applicant testified that he and counsel discussed several times their trial strategy and the path they intended to go down at trial. He testified the basic idea was about how his family was "terrorizing" him and that he wanted to go to the truth. He stated that his oldest daughter was rebellious and that his wife was planning to leave him, and contended those were the reasons why these charges developed.

The Applicant testified that his charge for criminal domestic violence arose when his daughter stole his car and was gone for three days. He testified he was trying to find out where she was and learned "she was getting drunk all weekend" and then wanted to go to the prom. When he told her that she could not go, an argument ensued. He contends that, in essence, his yelling at his daughter for being gone for three days resulted in the CDV charge and that the cops said they had to arrest him because they showed up at the scene. Regarding the trespass, the Applicant referred to a night when his daughter snuck out, and went to a male's dorm room and got drunk. He stated that he was not convicted for this offense, only charged. The Applicant testified that he believes his attorney was aware of these two instances prior to trial and that he believes he discussed these two instances with counsel.

Counsel testified that while he believes those matters coming in at trial may be prejudicial, he also believes there was some probative value to their admission. He testified he did not object to evidence regarding these charges coming in at trial, because he believes the charges were actually admissible. According to the record, trial counsel filed a motion for the State to comply with Rule 404, SCRE, regarding the use of other the defendant's other crimes, wrongs or acts, but that counsel discussed the CDV and trespass charges with the solicitor and judge and understood those acts would be admissible. According to the record, the CDV and trespass charges were admissible where those acts

involved conduct by the defendant concerning the victim that were logically related to the crime with which the defendant was charged and were admissible under Rule 404(b). See State v. Fletcher, 379 S.C. 17, 664 S.E.2d 508 (2008); State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999).

This Court finds the Applicant failed to meet his burden of proving that counsel rendered deficient performance regarding this ground or that he was prejudiced such that the result of the trial would have been different. It is clear that the Applicant and trial counsel discussed these two charges prior to trial, that counsel discussed these two instances with the solicitor and the trial court judge, and that all were of the position that they would be admissible under the applicable rules of evidence and case law. Further, the Applicant failed to prove prejudice, such that the result of his trial would have been different had counsel objected to the admission of these offense, where it is clear from the record that testimony about these two instances was admissible at trial; the evidence would have been admitted over counsel's objection had he made one. Accordingly, this allegation is denied.

Failure to Strike Juror

The Applicant further contends he received ineffective assistance of counsel for failure to strike juror # 106, because that juror was the victim of a CSC. The Applicant testified that he was not aware the juror may have been a victim of CSC until after the trial was over, at which time he stated trial counsel told him about the juror.

Trial counsel testified that he recalls investigating the potential jurors for the Applicant's trial, including reviewing family court records at the clerk's office to determine whether any jurors a similar family history in family court. He testified that according to his notes made prior to and during jury selection, that juror # 106, (Susan N.) was a juror he intended to strike because he had her listed as a "crime victim." Counsel recalled a conversation that he had with someone who came in during the trial and recognized some people on the jury, this person told him that the juror at issue was accused, or had

a brother that was accused, of child molestation but the charges were later dropped.

Counsel explained that during jury selection there were an unusual number of people who stood up and responded to the judge's questions during voir dire, and they were being inundated with a lot of information that they were trying to process it as it came in. He missed this juror, and she ultimately ended up on the jury. He could specifically recall whether she herself was the victim of a crime or knew someone who was a victim of crime, he just had her listed a "crime victim." He testified he believes he should have stricken this juror and made a mistake in this regard. Counsel agreed that whether or not this mistake prejudiced the Applicant was a question for the Court to decide, as there were eleven other jurors on the Applicant's jury which unanimously found him guilty of the three charges.

In PCR proceedings, a defendant must provide credible evidence that the trial attorney's refusal to strike a juror prejudiced the defense. Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999); Magazine v. State, 361 S.C. 610, 606 S.E.2d 761 (2004). A criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury. Id. at 516. Here, the record is void of any evidence that the juror was unable to serve fairly and impartially. The record in fact indicates the opposite; the trial court judge inquired at the end of the voir dire whether any member of the venire felt he or she could not remain fair and impartial for any reason whatsoever, at which time there was no response. (Tr. p. 58-59). The jurors were also instructed repeatedly that their verdicts must be based solely on the testimony and evidence presented at trial. Jurors are presumed to follow the instructions of the trial court. State v. Queen, 264 S.C. 515, 521, 216 S.E.2d 182, 185 (1975). The failed to present any evidence establishing that his right to a trial by a competent and impartial jury was violated. Therefore, this Court finds the Applicant failed to meet his burden of proving prejudice as a result of counsel's failure to strike the juror at issue. This allegation is denied.

Other Allegations

The Applicant also alleges he is entitled to relief because he was never arraigned for these

charges. Trial counsel testified that a defendant can be arraigned at a bond hearing, and that he believes there was a bond hearing in the Applicant's case although he could not specifically recall. This Court finds the Applicant failed to meet his burden of proving he is entitled to relief on this ground. Our Supreme Court has held that arraignments are a "mere formality," such that the failure to arraign does not result in a due process violation so long as it appears that the accused had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. State v. Ariail, 311 S.C. 35, 426 S.E.2d 751 (1993); See also, State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) (arraignment is not a constitutional or statutory right but, rather, a mere formality); Garland v. Washington, 232 U.S. 642, 645, 34 S.Ct. 456, 457 (1913). According to the testimony and evidence before this Court, the Applicant had sufficient notice of the charges brought against him and an adequate opportunity to defend himself. The Applicant failed to present any evidence that he is entitled to relief on this ground. Accordingly, this Court finds this allegation is denied.

The Applicant further alleged that he is entitled to relief because he was convicted of counts I, II, and IV of the indictment, but was sentenced to counts I, III, and IV. The Applicant's indictment contained five counts, but the solicitor only proceeded to trial against the Applicant for three of the five counts (Counts 1, 3, and 4). Counts 2 and 5 were nolle prossed. The record indicates the clerk referenced "Count 2" in reading the jury's verdict. Trial counsel testified that the reference to "count 2" regarding criminal sexual conduct meant the second of the three counts that were submitted to the jury, rather than a specific reference to Count 2 as originally charged indictment. In short, Counts 1, 2, and 4 of the indictment were, for purposes of publishing the jury's verdict, referred to as counts 1, 2, and 3 numerically, because the Applicant was tried and convicted of three charges. The references were not to counts as originally brought against the Applicant. The sentencing sheets and trial transcript confirm that the Applicant was tried, convicted, and sentenced for counts 1, 3, and 4. Thus, this allegation is denied.

The Applicant also claims the trial court erred in admitting the forensic interviewer's expert testimony. This allegation is a direct appeal issue that is not cognizable in an action for post-conviction relief and is specifically barred by S.C. Code Ann. §17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Further, the Applicant did in fact raise this issue on direct appeal; the Court of Appeals dismissed the Applicant's appeal pursuant to Anders v. California, 386 U.S. 738 (1967). This issue has already been raised and ruled upon and cannot now be pursued in the current action for post-conviction relief.

To the extent the Applicant contends trial counsel was ineffective in failing to object to the admission of the expert's testimony at trial, this claim is directly refuted by the record. Not only did counsel object to this witness's testimony, he did so vigorously. The trial court judge ruled the testimony was admissible, and prescribed certain parameters for this testimony. The record confirms the expert's testimony remained within the parameters set forth by the trial court in overruling counsel's objection. Accordingly, this Court finds the Applicant's allegation concerning this issue is both directly refuted by the record and is further barred as it is a direct appeal issue that is not cognizable in the instant PCR action.

As to the remaining allegations concerning overlapping indictments, deprivation of the right to allocution, amendments to the indictment, and additional allegations raised in the application but not presented or pursued at the hearing and were not specifically addressed in this Order, this Court finds that the Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that the Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are denied and dismissed with prejudice.

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CONCLUSION

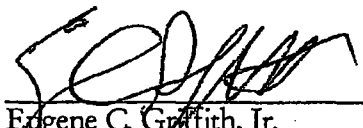
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED! This 20th day of January, 2010.


 Eugene C. Griffith, Jr.
 Residing Circuit Court Judge
 Eighth Judicial Circuit

Lamens, South Carolina

**THE STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE**

INDICTMENT FOR

1. INCEST
2. CRIMINAL SEXUAL CONDUCT WITH A MINOR
3. CRIMINAL SEXUAL CONDUCT WITH A MINOR
4. COMMITTING OR ATTEMPTING LEWD ACT UPON A CHILD UNDER SIXTEEN YEARS OF AGE
5. VIOLATION SECTION 16-3-652

At a Court of General Sessions, convened on the 27th day of October, 2003, the Grand Jurors of Abbeville County present upon their oath:

COUNT ONE

That MARK RICHARD BOLTE, did in Abbeville County, state aforesaid, between the 1st day of January, 1998, and the 1st day of June, 2002, wilfully and unlawfully have carnal intercourse with each other within the following degrees of relationship, to wit: a man with his mother, grandmother, daughter, granddaughter, stepmother, sister, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister, or mother's sister, to wit: that the said defendant, being a man, did have carnal intercourse with [REDACTED] his daughter, in violation of the provisions of Section 16-15-20 of the South Carolina Code of Laws, 1976, as amended

COUNT TWO

That MARK RICHARD BOLTE did in Abbeville County, state aforesaid, between the 1st day of January, 1998, and the 29th day of January, 1998, being older than the victim, wilfully and unlawfully commit criminal sexual conduct with a minor in the second degree, to wit: that the said defendant did engage in sexual battery upon a person who is at least the age of eleven (11) years but less than the age of fourteen (14) years, to wit: one [REDACTED] in violation of Section 16-3-655 of the South Carolina Code of Laws, 1976, as amended

COUNT THREE

That MARK RICHARD BOLTE did in Abbeville County, state aforesaid, between the 30th day of January, 1998, and the 29th day of January, 2000, being older than the victim, wilfully and unlawfully commit criminal sexual conduct with a minor in the second degree, to wit: that the said defendant did engage in sexual battery upon a person who is at least the age of fourteen (14) years but less than the age of sixteen (16) years, to wit: one [REDACTED] in violation of Section 16-3-655 of the South Carolina Code of Laws, 1976, as

WITNESSES

Marion T. Johnson, Jr.

WARRANT NUMBERS

H-159832 H-159833 H-159834

Haward Tate

Foreman of the Grand Jury

Date: 10/27/03

VERDICT

True Bill

Foreman

Haward Tate

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

COURT OF GENERAL SESSIONS

October Term, 2003

Indictment # 03GS01- 296

THE STATE

vs.

MARK RICHARD BOLTE

INDICTMENT FOR

- 1) INCEST
- 2) CRIMINAL SEXUAL CONDUCT WITH A MINOR
- 3) CRIMINAL SEXUAL CONDUCT WITH A MINOR
- 4) COMMITTING OR ATTEMPTING LEWD ACT UPON A CHILD UNDER SIXTEEN YEARS OF AGE
- 5) VIOLATION SECTION 16-3-652

I, MARK RICHARD BOLTE, THE DEFENDANT, IN MY C
THE BAR OF THIS COURT, WAIVE GRAND JURY ACTI
VOLUNTARILY PLEAD _____ GUILTY TO

THIS _____ DAY OF _____

ATTES.

DEFENDANT'S SIGNATURE

CLERK

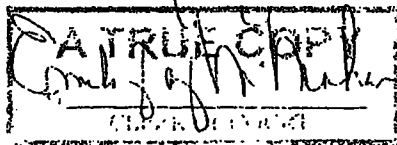
COUNT FOUR

That MARK RICHARD BOLTE did in Abbeville County, state aforesaid, between the 1st day of January, 1998, and the 29th day of January, 2000, being over the age of fourteen (14) years, the said defendant did unlawfully, wilfully and lewdly commit or attempt to commit a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, to wit: [REDACTED] with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the said defendant, or of the said child, [REDACTED] in violation of Section 16-15-140 of the South Carolina Code of Laws, 1976, as amended

COUNT FIVE

That MARK RICHARD BOLTE did in Abbeville County, state aforesaid, between the 30th day of January, 2000, and the 1st day of June, 2000, wilfully and unlawfully commit criminal sexual conduct in the first degree by wilfully and unlawfully using aggravated force to engage in sexual battery with [REDACTED] or the said victim did submit to sexual battery by the said defendant under circumstances where [REDACTED] was also the victim of forcible confinement, kidnaping, robbery, extortion, burglary, housebreaking, or any other similar offense or act, in violation of Section 16-3-652 of the South Carolina Code of Laws, 1976, as amended

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.



W. Thomas Jones
Solicitor