

2011-194610

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Edward B. Cottingham, Circuit Court Judge

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JUN 30 2011

S.C. Supreme Court

Opinion No. 2011-UP-121 (S.C. Ct. App. filed 3/24/2011)
08-CP-26-3108

IN THE MATTER OF THE CARE AND
TREATMENT OF THOMAS SIMMONS,

PETITIONER

APPENDIX

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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

In the Matter of the Care and
Treatment of Thomas
Simmons, Appellant.

Appeal From Horry County
Edward B. Cottingham, Circuit Court Judge

Unpublished Opinion No. 2011-UP-121
Submitted March 1, 2011 – Filed March 24, 2011

AFFIRMED

Appellate Defender LaNelle C. DuRant, of
Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy
Attorney General John W. McIntosh, Assistant
Attorney General Deborah R.J. Shupe, Senior
Assistant Attorney General James G. Bogle, Jr., and
Assistant Attorney General William M. Blich, Jr., all
of Columbia, for Respondent.

PER CURIAM: Thomas Simmons appeals his commitment to the South Carolina Department of Mental Health as a sexually violent predator. On appeal, Simmons contends the trial court erred in denying his motion for a directed verdict because the State failed to prove an element of the Sexually Violent Predator Act (the Act) and in allowing the opinion testimony of a non-expert into evidence. We affirm.¹

1. The trial court did not err in denying Simmons's motion for a directed verdict.

A sexually violent predator is defined in the Act as "a person who (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1) (Supp. 2010). "Mental abnormality" is defined as "a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses." S.C. Code Ann. § 44-48-30(3) (Supp. 2010). The phrase "likely to engage in acts of sexual violence" is defined as a "propensity to commit acts of sexual violence . . . of such a degree as to pose a menace to the health and safety of others." S.C. Code Ann. § 44-48-30(9) (Supp. 2010). "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." *State v. Weston*, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a denial of a directed verdict, an appellate court views the evidence and all reasonable inferences in the light most favorable to the State. *Id.*

The State produced evidence that Simmons met both elements of "sexually violent predator" as defined in the Act. Simmons met the first element of the Act because he was adjudicated delinquent as a result of the commission of first-degree criminal sexual conduct with a minor after he committed sexual battery on his step-nephew. Simmons met the second

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

element of "sexually violent predator" under the Act because the chief psychologist at the South Carolina Violent Predator Program testified Simmons suffers from a mental abnormality called sexual sadism, which he opined was a chronic condition. The State presented evidence sufficient for a jury to find Simmons was likely to "engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment," including: Simmons continued to have vivid sexual fantasies involving rape, force and sadistic behavior while committed; Simmons lapsed in his sex-offender treatment; while committed, Simmons downloaded pornographic cartoons depicting rape and violence; Simmons accumulated thirty disciplinary infractions while committed, including fashioning a weapon and displaying signs of aggression toward other juveniles and staff members; Simmons refused to pay restitution to his victim, blamed the victim for his commitment, and believed the victim should have to "pay for me"; and Simmons stated he "was always listening to the wrong voice." Thus, viewing the evidence in the light most favorable to the State, the evidence supports submitting the case to the jury.

2. The trial court did not err in allowing the social worker to testify about her personal observations of Simmons.

Lay witnesses are permitted to offer "testimony in the form of opinions or inferences" if the opinions or inferences "(a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness'[s] testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience, or training." Rule 701, SCRE. "Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury." State v. Williams, 321 S.C. 455, 463, S.E.2d 49, 54 (1996).

The State presented evidence the social worker's testimony was based on her perception. The question that was objected to, which she answered, asked whether she had personally observed Simmons display certain features. Her answer was helpful to the determination of the fact in issue of whether Simmons was likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. Lastly, her personal observations did not require special knowledge, skill, experience, or training.

Accordingly, the trial court did not err in allowing the social worker to testify.

AFFIRMED.

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

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

IN THE MATTER OF THE CARE AND
TREATMENT OF THOMAS SIMMONS,

APPELLANT

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

Opinion No. 2011-UP-121

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's commitment to the Department of Mental Health as a sexually violent predator (SVP) on March 24, 2011. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Simmons argued two issues on appeal where he believed the trial court erred: (1) in denying his motion for a directed verdict when the state did not prove an element of the Sexually Violent Predator Act; and (2) allowing the social worker to give her opinion on whether Simmons displayed symptoms of the diagnosis given him by the expert when the social worker was not an expert.

The Court of Appeals affirmed the trial court on both issues. The Court held on the first issue that Simmons met both elements of the Sexually Violent Predator Act because he had been convicted of a sexually violent offense and he had a mental abnormality of sexual sadism. On Issue

Two, the Court held that the social worker's opinion met the requirements of lay witness opinion pursuant to Rule 701, SCRE.

The Court of Appeals misapprehended Issue One because the second element of the SVP Act, S. C. Code Section 44-48-30, requires that the person "suffers from a mental abnormality that **makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care, and treatment.**" [Emphasis added]. The expert testified that Simmons did not meet the definition because he was not likely to engage in future sexual offenses.

The Court of Appeals misapprehended Issue Two because Rule 701(c) , SCRE, provides that the lay witness can offer testimony in the form of an opinion if the opinions do not require special knowledge, skill, experience or training. The social worker's opinion required special knowledge and training because she was describing Simmons' behavior in terms of the symptoms of the diagnosis provided by the expert, Dr. Neller. She did not have the expertise to offer that information.

On **Issue One**, Dr. Daniel Neller testified as the state's only expert witness. He was the Chief Psychologist for the South Carolina Sexually Violent Predator Program. ROA. 26, ll. 1 – 11. He was admitted by the trial court as an expert in Forensic Psychology. ROA. 26, ll. 12 – 25; ROA. 27, ll. 1 – 25; ROA. 28, ll. 1 – 25; ROA. 29, ll. 1- 17.

Judge Michael Baxley ordered, after the probable cause hearing, that Thomas undergo a psychiatric evaluation to determine if he met the criteria under the SVP Act to be a sexually violent predator. He approved Dr. Daniel Neller to do the evaluation. See Order for Evaluation dated May 21, 2008. Dr. Neller testified that he evaluated Thomas and a file of information about him. He met with Thomas for about seven hours and reviewed files from the Department of Mental Health

(DMH), Department of Juvenile Justice (DJJ), parole reports, petitions, orders, and statement written by Thomas. ROA. 30, ll. 9 – 25; ROA. 31, ll. 1 – 25; ROA. 32, ll. 1 – 25.

Dr. Neller said that Thomas had not been convicted of any other sexual offenses. ROA. 36, ll. 1 – 11. He said that Thomas wrote an empathy letter to the victim as part of his sex offender treatment program in DJJ. Thomas did complete the sex offender treatment administered by DJJ during his incarceration. Dr. Neller testified that Thomas was conflicted because he would hear voices telling him to do it and then would hear voices telling him not to do it. However, Dr. Neller said that Thomas did not have a psychotic disorder. ROA. 36, ll. 13 – 25; ROA. 37, ll. 1 – 25; ROA. 38, ll. 1 – 25; ROA. 39, ll. 1 – 25.

Dr. Neller testified that he diagnosed Thomas as having sexual sadism which he defined as a person who becomes aroused by the harm he is inflicting on another person and enjoys humiliating the person. He said it is a chronic condition but could be treated. ROA. 44, ll. 15 – 25; ROA. 45, ll. 1 – 25.

Although Dr. Neller saw sexual sadism as a mental abnormality, he did not think it meant that Thomas would re-offend again. ROA. 46, ll. 1 – 12.

AG: Based upon this sexual sadism, is that a hint to you he might be likely to re-offend if he suffers from this?

Dr. Neller: In my opinion, it's a mental abnormality in that we're looking at mental disorder, but as far as actually making him likely to engage in acts of sexual recidivism, no, I disagree with that.

ROA. 46, ll. 6 – 11.

He said that juvenile sex offenders re-offend at a rate of around five to ten percent. While adult sex offenders re-offend at a rate around fifteen percent. ROA. 46, ll. 9 – 25; ROA. 47, ll. 1 – 4; ROA. 50, ll. 17 – 25. Dr. Neller acknowledged that Thomas still had some difficulty controlling his

behavior and that he had continued to offend while he was at DJJ. ROA. 48, ll. 12 – 23. He said that even though Thomas was still having some sexual rape fantasies, Dr. Neller said his final decision was that Thomas did NOT meet the criteria to be a sexually violent predator. ROA. 63, ll. 5 – 24; ROA. 64, ll. 1 – 24; ROA. 66, ll. 1 – 15.

Dr. Neller stated that the purpose of the SVP law was to identify an extremely dangerous group of sexual offenders. He did not believe that any expert would support committing Thomas to the program. ROA. 69, ll. 1 – 6. He responded on cross examination that the average people in the SVP Program were middle-aged men. Thomas would be housed with them maybe for the rest of his life. ROA. 69, ll. 7 – 19; ROA. 68, ll. 6 – 21.

Dr. Neller repeated on cross examination again that he did not think that Thomas met the criteria of the SVP statute to be a sexually violent predator. ROA. 69, ll. 20 – 25; ROA. 70, ll. 1 – 4. He said that although in his opinion that Thomas had sexual sadism, he did not think that Thomas was likely to engage in future sexual offenses. He said his expert opinion was that Thomas should not be placed in the SVP Program. ROA. 71, ll. 1 – 25; ROA. 72, ll. 1 – 22.

Dr. Neller: The purpose of the statute as I've read it is to identify an extremely dangerous group of sexual offenders who are likely to engage in future acts of sexual violence because of their mental abnormality. And although it's my opinion that Mr. Simmons has sexual sadism, it's also my opinion that he's not likely to engage in future sexual offenses.
ROA. 71, ll. 18 – 25.

Linda Price, who worked for the South Carolina Board of Juvenile Parole, testified that the Board made a decision in February 2008 to release Thomas. However, release papers were not issued because he had to go through the screening process for the SVP Act. ROA. 77, ll. 17 – 25; ROA. 78, ll. 1 – 25; ROA. 79, ll. 1 – 25.

Ms. Price met with the juveniles who were being released to discuss their release papers. Thomas was brought for her to discuss his release since he was scheduled to be released. ROA. 80, ll. 1 – 25; ROA. 81, ll. 1 – 6; ROA. 82, ll. 1 – 25; ROA. 83, ll. 1 – 25. When she told Thomas he would have to pay restitution to the victim, she testified that Thomas became extremely upset and slammed the table with his fists saying he should not have to pay for anything. At her insistence, he finally sat down but refused to talk anymore. ROA. 84, ll. 1 – 25; ROA. 85, ll. 1 – 19; ROA. 86, ll. 1 – 10.

Ms. Price reported all of this to Gayle Shellenberg, Thomas's supervisor at DJJ, and to Ms. Shellenberg's supervisor. She also prepared a report for them. She also spoke to the Multidisciplinary Team the following week and informed them. ROA. 86, ll. 11 – 25; ROA. 87, ll. 1 – 25.

On cross examination, Ms. Price admitted that she was not qualified as an expert to say whether Thomas met the criteria to be a sexually violent predator. ROA. 96, ll. 1 – 13.

Ms. Gayle Shellenberg was employed by DJJ as a social worker and said she was licensed as a social worker. ROA. 101, ll. 15 – 25; ROA. 102, ll. 1 – 23. She worked with Thomas at DJJ. She admitted that she was a certified sex offender treatment specialist, but she was not qualified to diagnose as Dr. Neller was. ROA. 117, ll. 4 – 25. She admitted that she could not give an opinion on whether Thomas met the criteria of the SVP Act to be a sexually violent predator. ROA. 118, ll. 1 – 24.

At the close of the state's case, appellant's counsel made a motion for a directed verdict on the basis that the state did not prove beyond a reasonable doubt the requirements of the Sexually Violent Predator Act. The state argued that "it was not so much about what the court-appointed expert, Dr. Neller, said as what he didn't say and what he didn't do." ROA. 120, ll. 11 – 25; ROA.

121, ll. 1 – 25. The judge denied the motion although he said the evidence was “rather weak”. ROA. 122, ll. 2 – 25; ROA. 123, ll. 1 – 10.

A trial court has a duty to submit a case to the jury where the evidence is circumstantial if there is substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). A trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id.; State v. Brannon, 379 S.C. 487, 666 S.E.2d 272 (Ct. App. 2008).

In Thomas’s case, the state did not meet the elements of the SVP Act. The SVP Act found at S.C. Code Section 44-48-30 provides that a person is a sexually violent predator if (1) he has been convicted of a sexually violent offense; **AND** [emphasis added] (2) suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment.

The only expert, Dr. Neller, testified that Thomas had a mental disorder but that he did not think he would re-offend. Dr. Neller’s expert opinion was that Thomas should NOT be committed to the SVP Program. Therefore, there was not SUFFICIENT evidence to submit the case to the jury. The other two witnesses did not testify as experts.

The state argued that Dr. Neller did not have the latest information about Thomas’s problems. However, Dr. Neller knew when he wrote his report that Thomas still was having sexual rape fantasies and, he testified that he knew that Thomas still had some trouble with control. Therefore, the new information from Ms. Price and Ms. Shellenberg concerning Thomas’s behavior would have made no difference in Dr. Neller’s report.

The state did not offer sufficient evidence that Simmons was likely to re-offend and that he required long term care, control, and treatment. The first sentence of Section 44-48-20 of the SVP

Act provides: The General Assembly finds that a mentally abnormal and extremely dangerous group of sexually violent predators exists who require civil commitment in a secure facility for long term control, care, and treatment.” Dr. Neller identified this as the purpose of the SVP Act.

On **Issue Two**, Ms. Gayle Shellenberg testified that she worked at DJJ as a social worker for eight years, and she worked with Thomas. She said she had a Masters’ Degree in social work and was licensed by the state of South Carolina as a social worker. ROA. 101, ll. 13 – 25; ROA. 102, ll. 1 – 25; ROA. 103, ll. 1 – 9.

When asked if she had examined the expert’s, Dr. Daniel Neller’s, report on Thomas, she responded that she had. The state’s attorney handed her a copy. ROA. 106, ll. 10 – 13. The state said that Dr. Neller’s report indicated that “Thomas’s responses were consistent with anti-social, narcissistic, and paranoid features.” ROA. 107, ll. 12 – 25. The state’s attorney asked her if Thomas appeared to display these symptoms. Thomas’s attorney objected on the grounds that she was not the expert on that. The judge overruled the objection and said that she was not an expert but was allowed to give her opinion. ROA. 108, ll. 1 – 11.

Ms. Shellenberg went on to testify that she had seen Thomas display symptoms of those three features. She said his triggers were entitlement and power and control. She testified that sexual offenders have a cycle where certain things trigger them to go into their offense cycle. She also stated that Thomas had a sense of grandiosity. ROA. 108, ll. 12 – 25.

The state’s attorney then asked:

So, when Dr. Neller refers to Thomas having a grandiose sense of self-importance and expects to be recognized as a superior, is that what you’re talking about...
She responded; “Yes, I am”.

ROA. 108, ll. 23-25; ROA. 109, ll. 1 – 3.

Ms. Shellenberg admitted to the state and to Thomas's attorney on cross examination that she was not an expert in this case. She said that Dr. Neller was the only expert testifying. ROA. 107, ll. 18 – 19; ROA. 118, ll. 1 – 25.

Rule 701, SCRE, provides that opinion testimony by a lay witness must be limited to opinions or inferences which (a) are rationally based on the perception of the witness; (b) are helpful to a clear understanding of the witness' testimony; (c) do not require special knowledge, skill, experience or training.

In State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), the South Carolina Supreme Court held that the police officer who was qualified as an expert in crime scene processing and fingerprint identification exceeded scope of his expertise in testifying in murder prosecution to his conclusion, drawn from crime scene measurements and observations, that victim had been riding a bicycle at time he was shot; in effect, officer was allowed to give an unqualified opinion on the ultimate issue of whether defendant had been acting in self-defense when he shot and killed victim.

In State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973), the Supreme Court ruled that the opinion of a lay witness must be based upon the personal observations of the witness and not merely upon the statements of another witness.

Gayle Shellenberg was allowed to give her opinion on what the symptoms of the diagnosis given by the expert, Dr. Neller, were. The opinion of what these symptoms were required special knowledge and should have been provided by the expert who wrote the report. Ms. Shellenberg's opinion exceeded the scope of her area of specialty.

Ms. Shellenberg's testimony on her observations of Thomas's behavior should have been limited to the facts. She was not qualified to relate these behaviors to the diagnosis given by the expert. The proper procedure would have been for the expert to describe the symptoms of the

diagnosis and then have Ms. Shellenberg describe Thomas's behavior. The conclusion should have been left to the jury.

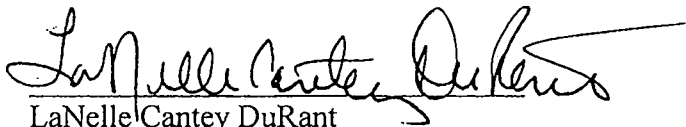
Ms. Shellenberg was allowed to comment on the expert's report when she was not a qualified expert. She was licensed in a different area than the expert psychologist, Dr. Neller.

The trial court should have not allowed Ms. Shellenberg to relate Thomas's behaviors to the diagnosis of the report.

The Court of Appeals misapprehended the issue as the social worker's testimony did not conform to Rule 701 (c) , SCRE.

THEREFORE, we respectfully ask the Court of Appeals to reconsider its rulings.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

This 8th day of April, 2011.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

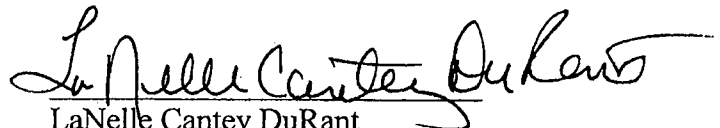
Edward B. Cottingham, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF THOMAS SIMMONS,

APPELLANT

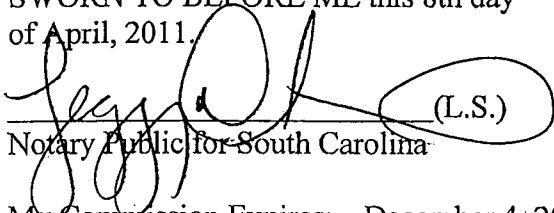
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon William M. Blich, Jr., Esquire, this 8th day of April, 2011.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 8th day
of April, 2011.


Notary Public for South Carolina

(L.S.)

My Commission Expires: December 4, 2017.

The South Carolina Court of Appeals

In The Matter Of The Care And
Treatment Of Thomas Simmons,

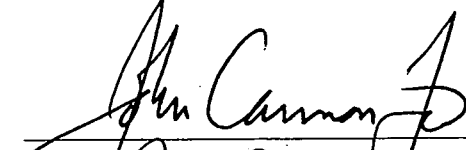
Appellant.

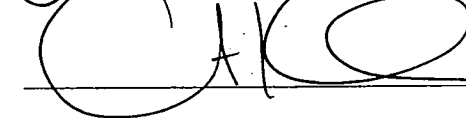
The Honorable Edward B. Cottingham
Horry County
Trial Court Case No. 2008-CP-26-03108

ORDER

After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

IT IS SO ORDERED.


C.J.

J.

J.

Columbia, South Carolina

FILED
MAY 31 2011

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Edward B. Cottingham, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF THOMAS SIMMONS,

APPELLANT

RECORD ON APPEAL

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JUN 30 2011

S.C. Supreme Court

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) CASE NO. 08-CP-26-3108

THE STATE OF SOUTH CAROLINA,)

PETITIONER,)

IN THE INTEREST OF:)

THOMAS SIMMONS,)

RESPONDENT,)

TRANSCRIPT OF RECORD

Monday, December 1, 2008
Conway, S.C.

B E F O R E:

HONORABLE EDWARD B. COTTINGHAM, JUDGE, AND A JURY

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LINDA W. MCCALL
OFFICIAL REPORTER

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RESPONDENT

NONE

COURT

NONE

REMARKS OF THE COURT

5

MONDAY, DECEMBER 1, 2008

THE COURT: Good afternoon, ladies and gentlemen. Please be seated.

Alright.

For the Attorney General, are you now ready to select a jury?

MR. BOGLE: Yes, Your Honor, we are.

THE COURT: And for the defendant - -

MR. ARCHER: Yes, sir.

THE COURT: - - Mr. Archer, are you now prepared to select a jury?

REMARKS OF THE COURT

Ladies and gentlemen of the jury panel, I wish to first welcome all of you again here to this a term of civil court in Horry County, and by way of introduction tell you that I'm Judge Cottingham from Bennettsville, South Carolina. Under our system of rotation, it's my privilege and honor to be assigned this week as one of your several presiding judges.

The case that you are to hear is an unusual case in a civil court because it deals with a sexual violent predators law of South Carolina, and under our procedure, let me explain to you.

The State of South Carolina has brought this case under the Sexual Violate Predator Law of South Carolina. In this case the State of South Carolina seeks the involuntary civil commitment of the respondent, Thomas Simmons, for long term control, care and treatment in a secure facility.

1 This is not a criminal prosecution seeking incarceration but
2 rather a proceeding seeking civil commitment.

3 The State of South Carolina alleges or claims that the
4 respondent Thomas Simmons is a sexually violent predator under the
5 law.

6 The respondent specifically denies that he is a sexual violent
7 predator, and the burden of proof is, therefore, on the State of
8 South Carolina to prove by evidence sufficient to satisfy each of
9 you beyond a reasonable doubt that the respondent is a sexual
10 violent predator.

11 If the State is unable to meet that burden of proof as to one
12 or more of the elements of this claim, the respondent is entitled
13 to a finding that he is - - that he is not a violent predator.

14 Now, as I've indicated earlier, this is a civil case where,
15 ordinarily, the burden of proof is by the greater weight or the
16 preponderance of the evidence. However, the statute in this case
17 though it be a civil case requires that the State of South Carolina
18 prove that this individual is a violent sexual predator beyond a
19 reasonable doubt.

20 I'm going to ask of you, now, certain questions, some of
21 which, quite frankly, may be of a private nature.

22 Ma'am?

23 MR. ARCHER: Your Honor, may I approach for a moment?

24 THE COURT: Yes. Pardon me?

25 Yes, sir.

REMARKS OF THE COURT

7

1 (Bench conference held off the record in the presence of the
2 jury panel but outside the hearing of the jury panel.)

3 THE COURT: Mr. Attorney General, where is the defendant in
4 this case?

5 MR. BOGLE: Juvenile Justice should have had him by 11:00.
6 I told them Judge Cottingham's courtroom. I'm not sure where they
7 put - - he'd be in lock-up somewhere. I'm not sure.

8 THE COURT: Go get him and bring him up here.

9 (The Court awaits the respondent being brought to the
10 courtroom.)

11 THE COURT: Ladies and gentlemen, so that you'll know. Our
12 schedule is such that from your number shortly we're going to have
13 twenty names. Each side will strike four. The remaining twelve
14 will constitute the jury.

15 In addition to that we will have selected one alternate. Of
16 course, as to each one of you, there will be one strike each as to
17 the alternate.

18 My intention is is for those thirteen folks to return at 2:30
19 to begin the trial of this case. I'm told by counsel for the
20 State and the defendant that this will be a relatively short case
21 by way of witnesses. That doesn't mean it's not serious. It's
22 serious for the State of South Carolina. It's equally serious for
23 this defendant.

24 I tell you that for scheduling purposes. We fully think that
25 we can conclude this case this afternoon. If not, we will

VOIR DIRE

8

1 certainly conclude all of the testimony this afternoon. Come back
2 in the morning for deliberations.

3 If it gets around four or four-thirty, we'll stop and come
4 back in the morning.

5 Now, this - - it's my understanding, this is the only civil
6 case for trial. Are there some criminal cases for trial?

7 CLERK OF COURT: Yes, Your Honor.

8 So, those who are not selected, what instructions will you
9 give them?

10 CLERK OF COURT: Call back after 6:00.

11 (The respondent enters the courtroom and sits at table with
12 counsel.)

13 THE COURT: Alright. Are we now ready to proceed?

14 MR. ARCHER: Yes, sir.

15 MR. BOGLE: Yes, Your Honor.

16 VOIR DIRE

17 THE COURT: First, I would ask that, ah, Mr. Thomas
18 Simmons, the respondent, please stand and face the jury panel.

19 Stand for me, Mr. Simmons.

20 (The respondent stands before the jury panel.)

21 THE COURT: Are any of you related by blood or connected by
22 marriage with the respondent Thomas Simmons who stands in your
23 presence?

24 Any of you have any close personal connections with the family
25 of Thomas Simmons?

1 How many of you know the respondent Thomas Simmons in any
2 capacity whatsoever or his family? Church members, co-workers,
3 neighbors, whatnot?

4 Nobody responds.

5 You may be seated, Mr. Simmons.

6 (The respondent resumes sit at table.)

7 THE COURT: Has any member of this jury or any of your
8 close friends or relatives been charge with, convicted of or have
9 been a victim of a sexual offense - - and if so, would that
10 experience - - - please stand?

11 Okay.

12 First, I would - - may I have your name?

13 MS. DALBY: Pamela Dalby.

14 THE COURT: Okay. I don't want and need to go into the
15 details of what it is but I would ask you this, please, ma'am.

16 If so, would that experience affect your ability to render a
17 fair and just verdict in this case?

18 MS. DALBY: Yes.

19 THE COURT: It would?

20 MS. DALBY: Yes.

21 THE COURT: I will excuse you from this case. I thank you.

22 The question is whether or not the State has proven beyond a
23 reasonable doubt - - don't leave - - ma'am, please call in tonight
24 for further instructions to report, please.

25 Ma'am? Pardon me?

VOIR DIRE

1 MS. DALBY: After 6:00 p.m.?

2 THE COURT: Yes, ma'am.

3 MS. DALBY: Okay.

4 THE COURT: Thank you.

5 Your name, ma'am, on the right-hand side?

6 MS. BETRO: Raffaola Betro.

7 THE COURT: Okay.

8 Would your experience render you incapable of being a fair and

9 impartial juror in this case?

10 MS. BETRO: My personal and professional, both of them.

11 THE COURT: It would be? I will excuse you from this

12 case. Please - - just remain seated until we leave.

13 MR. BOGLE: What was her name?

14 MS. BETRO: Raffaola Betro.

15 MR. BOGLE: Number 23?

16 MS. BETRO: Correct.

17 THE COURT: And, yes, ma'am, your name?

18 MS. EVANS: Glema Evans.

19 THE COURT: And would that experience prohibit you from

20 being a fair and impartial juror? Ma'am?

21 MS. EVANS: Yes, sir.

22 THE COURT: I will excuse you.

23 MS. BOGLE: Ma'am, what was your name again?

24 THE COURT: Ma'am, remain in the courtroom. Please remain

25 until I let the jury go, please.

1 That juror is excused.

2 MR. BOGLE: Number 110.

3 THE COURT: Does any member of the jury panel have any
4 training, experience or currently work in the field of psychiatry,
5 psychology or law? If so, please stand.

6 Does any member of this jury know or any member of the jury
7 panel ever been involved in a case that was represented by Mr. Paul
8 Archer?

9 About same thing with Attorney General? Anybody recently
10 have any connection with the Attorney General, Jim Bogle.

11 There are some following witnesses here who may be called.

12 Dr. Daniel Neller, any of you have any association or been a
13 client of Dr. Neller?

14 Any of you know Linda Price? Gayle Shellenberg?

15 Has any member of the jury been involved in prison ministry of
16 any kind, outreach program, anything?

17 Ladies and gentlemen, let me say in a simplified way here.
18 The State of South Carolina represented by the - - this Deputy
19 Attorney General Mr. Bogle and the respondent in this case
20 represented by Mr. Archer desire from your number twelve folks with
21 no friends to reward, no enemies to punish, twelve people who have
22 no biases or prejudices and can say, "I, if selected, will base my
23 verdict on the law and the evidence in this courtroom and from no
24 other place."

25 Let me explain to you what we mean by biases and prejudices.

1 You know, in life based on our experiences where we like it or
2 not we develop biases and prejudices.

3 Some years ago in another courtroom in another county I was
4 preparing to try a young man for DUI felony, it having been alleged
5 by the State that while drunk driving he caused the death of a
6 young lady, and I asked that jury there, "Any of you have such
7 biases or prejudices that you could not give both of them a fair
8 trial?"

9 A lady got up in the back and said, "Judge, I can't be fair to
10 this young man. My daughter was killed by a drunk driver last
11 year, and I - - I - - I - - I can't be fair to him."

12 In that same panel, interestingly enough, a gentleman got up
13 and said, "Judge, I can't be fair to the State of South Carolina in
14 this case."

15 And I said, "Why?"

16 He said, "They tried my son three separate times for an
17 identical driving under influence felony until he was acquitted,
18 and they should have never brought the case against him. I can't
19 be fair to the State of South Carolina."

20 I use that as an example only. This does not - - but this
21 involves an action by the State of South Carolina to confine this
22 respondent as a sexual predator for further treatment and
23 incarceration.

24 Now, the State's got that burden beyond a reasonable doubt,
25 and we're going to ask twelve of you to ask whether or not they

1 State has met that burden.

2 Now, given the facts alleged in this type of case, I ask you
3 again. Do any of you have any biases or prejudices that would
4 conclude that you could not be fair both for the State of South
5 Carolina and this defendant? If so, please stand and I'll excuse
6 you from this trial.

7 Alright.

8 Mr. Bogle, any further inquiry by the State?

9 MR. BOGLE: No, Your Honor.

10 THE COURT: And, Mr. Archer?

11 MR. ARCHER: No, sir.

12 THE COURT: Alright, sir.

13 Gentlemen, are you prepared to strike? Do you need a few
14 minutes?

15 MR. BOGLE: Do we have to change the numbers because I
16 think one person - - one person on the list got excused?

17 THE COURT: The first - - the first number on the bottom
18 will go up - - will move - - -

19 Put number twenty-one in that place, and then the remaining
20 twenty-two, twenty-three and twenty-four will be the alternate
21 process.

22 Alright. When you're ready to proceed, just let me know.

23 JURY SELECTION

24 MR. BOGLE: We're ready to proceed, Your Honor.

25 THE COURT: Alright, sir. You may proceed, Mr. Bogle.

JURY SELECTION

14

1 MR. BOGLE: The State would strike juror #10.
2 CLERK OF COURT: State, #10.
3 MR. BOGLE: I'm going by the numbers on the far left-hand
4 side.
5 THE COURT: Yes, sir.
6 MR. ARCHER: Strike #18, please.
7 CLERK OF COURT: Defendant, #18.
8 MR. BOGLE: #12.
9 CLERK OF COURT: State, #12.
10 MR. ARCHER: #40.
11 CLERK OF COURT: On the numbers - - what number did you
12 say?
13 MR. ARCHER: #40 on the left. There's no 40 on here? Min
14 has a #40.
15 CLERK OF COURT: There's 1 through 21.
16 MR. ARCHER: I'm looking at the wrong sheet. I'm sorry.
17 It would be #9.
18 CLERK OF COURT: Defendant, #9.
19 MR. BOGLE: #15.
20 CLERK OF COURT: State, #15.
21 MR. ARCHER: #19.
22 CLERK OF COURT: Defendant, #19.
23 MR. BOGLE: #16.
24 CLERK OF COURT: State, #16.
25 MR. ARCHER: #27.

JURY SELECTION

15

1 CLERK OF COURT: No, sir.
2 1 through 21 on the left-hand side.
3 MR. ARCHER: Oh, I'm sorry. I flipped over.
4 #14.
5 CLERK OF COURT: Defendant, #14.
6 Alternate, please.
7 MR. BOGLE: Alternate, #23.
8 CLERK OF COURT: State, #23.
9 MR. ARCHER: #22.
10 CLERK OF COURT: Defendant, #22.
11 May we review your strikes, please?
12 State strikes #10, #12, #15, #16, #23.
13 MR. BOGLE: Yes, ma'am.
14 CLERK OF COURT: Defendant strikes #9, #14, #18, #19, #22.
15 MR. ARCHER: Yes, ma'am.
16 CLERK OF COURT: As I call your name and jury number,
17 please have a seat over in the jury box.
18 #419, Don Weaver.
19 THE COURT: I'm going to ask you since you were the first
20 selected to be my Foreman of this jury.
21 Have him seated as Foreman, please.
22 CLERK OF COURT: #216, Ruth Kitchen.
23 THE COURT: Thank you, sir.
24 CLERK OF COURT: #244, Marian Martin; #313, Garry Rackley;
25 #185, Donald Hutsko; #81, Kathleen Davis; #155, Gloria Hanna; #362,

JURY SELECTION

16

1 Richard Skipper; #329, Donna Ross; #192, Deanne Jennings; #43
2 Barbara Bryant; #170, Patricia Hilliard, #222, Laurie Lacombe.

3 THE COURT: Is that the alternate?

4 CLERK OF COURT: Yes, sir.

5 THE COURT: Any motions concerning the composition of the
6 jury?

7 MR. BOGLE: None from the State, Your Honor.

8 MR. ARCHER: No, sir.

9 THE COURT: Alright, sir.

10 Mr. Foreman, I would ask that you occupy that chair at all
11 times, please, and the alternate will occupy that chair. The rest
12 of you may - - may seat as you choose.

13 During the course of this trial you will not discuss it with
14 each other, permit no one to discuss it with you. Don't even have
15 a conversation among yourselves until I have given you the case for
16 your deliberation.

17 Obviously, you would make no independent inquiry outside of
18 this courtroom. Whatever your verdict is, it must be based on the
19 law and evidence in this courtroom and from no other source.

20 It's now about 1:00. I would ask, please, first, Bailiff,
21 take them to the jury room so that they will know where to report
22 back.

23 Please report back promptly at 1:30 in the jury - - in your
24 jury room so that we can get started in the trial of this case.

25 MR. ARCHER: Your Honor, 2:30.

1 THE COURT: I'm sorry, 2:30, please. Be back at 2:30, and
2 we'll proceed at that time.

3 You are now excused.

4 Show them - - take them to the jury room so they'll know where
5 to report.

6 (The jury departs the courtroom for lunch to return at 2:30
7 p.m.)

8 THE COURT: The rest of you who have not been selected are
9 to call in after 6:00 tonight for further instructions.

10 You are now excused. Thank you.

11 (The remaining jury panel departs the courtroom with
12 instructions to call in after 6:00 p.m. tonight.)

13 THE COURT: Is anything further before we break for lunch?

14 MR. ARCHER: No, sir.

15 MR. BOGLE: No, Your Honor.

16 THE COURT: Alright. See you back at 2:30.

17 (The Court recesses the trial of this case for lunch at 12:46
18 p.m. and resumes the trial of this case at 2:40 p.m.)

19 THE COURT: Good afternoon, ladies and gentlemen. Please
20 be seated.

21 Alright. We ready to proceed?

22 MR. BOGLE: Yes, sir.

23 MR. ARCHER: Yes, Your Honor.

24 THE COURT: Bring the jury in, please.

25 (The jury returns to the courtroom at 2:42 p.m.)

REMARKS OF THE COURT

18

1 THE COURT: Swear the jury, please, ma'am.

2 CLERK OF COURT: Yes, Your Honor.

3 (The Clerk of Court swears the jury.)

4 REMARKS OF THE COURT

5 THE COURT: Ladies and gentlemen, recognizing that for many
6 of you this is the first opportunity you've had to participate in
7 a civil case and especially in a case of this kind, let me tell you
8 how we will proceed.

9 The Attorney General in this case has the burden of proof in
10 this case, and his burden is beyond a reasonable doubt. He will
11 start off by giving you what his case is about, kind of a guideline
12 to help you follow the introduction of the evidence.

13 Mr. Archer representing the defendant will make a statement to
14 you regarding his position.

15 Following that, we'll take testimony of various witnesses who
16 may be called, and at the conclusion of that testimony, we'll have
17 final arguments and I will tell you the law with regard to the
18 issues in this case.

19 And, thereafter, I'll ask that you retire to the jury room and
20 render a verdict. Whatever your verdict is, it must be the
21 unanimous verdict of all twelve of you. It cannot be a verdict of
22 the majority. Obviously, it would not be one from the minority.

23 You will be called upon to answer this question, and this will
24 be the jury verdict, one of two things.

25 We, the jury, unanimously answer the question as follows:

1 Yes, Thomas Simmons is a sexually violent predator; or

2 No, Thomas Simmons is not a sexually violent predator.

3 The State has the burden of proof beyond a reasonable doubt in
4 this case of proving to your satisfaction that this respondent is
5 a sexually violent predator, and he must prove it beyond a
6 reasonable doubt.

7 You may proceed.

8 OPENING STATEMENT BY MR. BOGLE

9 MR. BOGLE: Thank you, Your Honor. May it please the
10 Court? Mr. Archer.

11 Ladies and gentlemen of the jury, Mr. Foreman, my name is Jim
12 Bogle. I'm a lawyer with the Attorney General's Office.

13 This is, ah, not your ordinary type of case. We've all heard
14 about criminal cases. We've seen them on tv. We read about them
15 in the paper.

16 You may have served as a juror on one before or may testified
17 in one at some time.

18 And we know about civil cases. You have a car wreck or maybe
19 are injured by a - - by a doctor during surgery or something like
20 that, and a lawsuit is brought.

21 Well, this is kind of in between. It has a little bit of the
22 flavor of both of types of cases.

23 What the General Assembly has done, they passed a law about a
24 decade ago called the Sexually Violate Predator Act, and what it
25 says is this. If a person has a mental abnormality or a

1 personality disorder such that it would make this person likely to
2 re-offend in a sexually violent nature if they're released without
3 treatment, then the State has to go to a jury or go to a court and
4 ask that that person be committed to a secure program where they
5 get mental health counseling.

6 Now, we have to prove that to you, like the Judge said, beyond
7 a reasonable doubt, not by the lesser burden of clear and
8 convincing evidence that you might see if this was a case involving
9 medical malpractice or an automobile wreck. It has to be beyond
10 a reasonable doubt.

11 Because let's face it. If this person, if Mr. Simmons, Thomas
12 Simmons is found to be a predator by you and committed to the
13 mental health program, his freedom will be limited. He will be in
14 a secure facility. And I'll be honest with you. It's located on
15 the grounds of one of the prisons in Columbia.

16 It's not a jail. It's not a prison in the sense that no one
17 who is there and being treated for sexually violent offenses is in
18 anyway allowed to intermingle with or see the inmates in the
19 regular prison who are doing time for violations of the criminal
20 law.

21 So, don't feel like you're throwing him into a prison if
22 that's where you think he should go.

23 So, that's what we have to show.

24 Now, we've got the following witnesses you'll be hearing from
25 today.

1 First, will be the court-appointed expert, Dr. Daniel Neller.
2 He's sitting in the back of the courtroom with a - - with a suit on
3 right back there. You'll hear from him because he examined
4 Thomas Simmons, and his opinion was that Thomas did not fit the
5 criteria of a sexually violate predator, and we're going ask him
6 questions about that. We need to explore those with Dr. Neller.

7 We also have Gayle Shellenberg and Linda Price from the
8 Department of Juvenile Justice. The reason they are from there is
9 because Thomas Simmons when he got convicted of the crime that
10 brought him before this program, brought him before you, he was a
11 juvenile. It is a Family Court conviction.

12 He was found guilty in the Family Court of two things. One
13 was disturbing schools. Had to do with violating probation by
14 disturbing the school, an incident where he threatened to bring a
15 handgun to a school and do something with the handgun to a person.

16 The other was a conviction for criminal sexual conduct with a
17 minor, first degree. In that the minor was under certain age, he
18 committed a criminal sexual conduct, a rape, if you will, on this
19 young man.

20 So, that got him on our radar.

21 What happens next is he's identified by a Multi-Disciplinary
22 Team at the prison or the Department of Juvenile Justice, where
23 ever the person is serving time. An adult, it would be at a
24 prison. In this case it was at the Department of Juvenile Justice.

25 If they think he fits the criteria or there might be a

1 problem, they refer him. He's interviewed by another committee and
2 then goes to court, and that's where we are here today.

3 A judge has already ordered that he be evaluated, and that's
4 been done by Dr. Neller. You'll hear from Dr. Neller in a few
5 minutes.

6 Here's what you got to do. Bear in mind, it's a civil case.
7 We'll proceed under the Civil Rules of Evidence but at the same
8 time, it has a little bit of a criminal overtone because the burden
9 of proof is beyond a reasonable doubt.

10 So, that's what I've got to prove to you. The State has to
11 prove to you that Thomas Simmons fits the criteria as a sexually
12 violent predator, and I've got to prove that beyond a reasonable
13 doubt.

14 The judge will explain to you what the law is. So, if I say
15 something or Mr. Archer says something a little bit different from
16 what the judge says when he defines the law, the judge is the last
17 word on that. We might have made a mistake in our presentations.

18 The judge will explain the law to you, and you apply the law
19 to the facts you've heard from the witness stand over here. That's
20 what the case is about.

21 All I ask that you do is keep an open mind. Listen to
22 everything you hear and then go back in that jury room and think of
23 yourselves as the conscious of Horry County. You've got to make a
24 decision as to whether or not this young man should be free or
25 whether or not this young man has a problem that makes him in need

1 of secure treatment at a mental health facility in Columbia.

2 Thank you very much.

3 OPENING STATEMENT BY MR. ARCHER

4 MR. ARCHER: May it please the Court?

5 Good afternoon. I hope you enjoyed your lunch.

6 My name is Paul Archer, and I'll be representing Thomas
7 Simmons.

8 The laws are made two ways.

9 One, you can have a law made by a case law, and what the case
10 law is. It's the Appellate Court comes down with a decision and
11 that makes law.

12 The other law is a statutory law, and what that is is that's
13 a legislature law, and that law is the legislatures make a law, and
14 then it goes into the books as a statute, and that's why we're here
15 today. It's called the Sexually Violent Predator Statute.

16 Now, a statute is exactly what a statute is. It says
17 something, and that's what it is. If there's a statute that says
18 in the country you can drive fifty miles an hour - - fifty-five
19 miles an hour, you can't drive fifty-six and you can't fifty-four
20 or whatever. The statute says fifty-five, it means fifty-five,
21 not fifty-six.

22 What happened here is that he served his sentence. He did
23 his crime. He served his sentence, and then the committee said he
24 - - he could go before under the Act of Sexually Violent Predator.

25 The next thing was a probable cause hearing whereby the

1 State's own psychologist was appointed, and that's Dr. Neller.

2 Dr. Neller thoroughly examined this young man, and his report
3 came to me and showed that he was not a predator. If it did not
4 show that, I would have an opportunity to have my client examined
5 by my own psychiatrist, and, of course, if my own psychiatrist said
6 that he should not be committed and then the State's psychiatrist
7 said that he should be committed, then there would be something for
8 you to decide but that's not what happened here.

9 What happened here is that the State's own psychologist who is
10 the head of the Sexual Predator Program - - the Head Psychologist
11 of the Sexual Predator Program said he shouldn't be committed.

12 The other witnesses you're going to hear from are a social
13 worker and someone from the Parole Board.

14 Now, I'm going to get out in my cross examination that they're
15 not qualified to make that decision because the statute's very
16 clear. He has to suffer from a mental abnormality, and the only
17 person whose qualified to give that is the - - is the State's own
18 psychologist.

19 What this case reminds me, it reminds me of a murder case
20 where they put the police officer on the stand for the State who
21 witnessed the murder, and the cop takes the stand and he says, "He
22 didn't do it."

23 He says, "He didn't do it."

24 And all of a sudden, everybody's mouth drops. He says, "I
25 saw it but it wasn't him."

1 This is what this case is about. The State's own
2 psychiatrist says, "He didn't do it. He shouldn't be committed."

3 What the statute is for, it's not what he did in the past.
4 It's what he might do in the future, and I think you can all
5 appreciate that.

6 This statute is for the worst of the worst, and testimony will
7 come out that if you find that he should be committed, he goes to
8 the old death house in Columbia. Unfortunately, that's where
9 South Carolina puts these people. There's approximately a hundred
10 people in the old death house, and they stay there until they
11 decide to release them.

12 My point in my opening argument is is that when Dr. Neller
13 testifies, he is going to testify that in his opinion - - now, he
14 represents the State - - Thomas Simmons should not be committed.

15 And I say to you if you listen to the testimony and if you
16 hear the statute, the only conclusion that you can come to is that
17 he should not be committed.

18 Thank you.

19 THE COURT: Thank you, Mr. Archer.

20 You may call your first witness.

21 MR. BOGLE: Thank you, Your Honor.

22 We would call Dr. Daniel Neller.

23 (The witness takes the witness stand.)
24
25

DR. DANIEL NELLER, being duly sworn,
testifies as follows:

CLERK OF COURT: Please state your name for the record.

DR. NELLER: Daniel Neller. That's spelled N-e-l-l-e-r,

DIRECT EXAMINATION BY MR. BOGLE:

Q. Dr. Neller, just for opening, let's find out who you are a bit.

You've given your name. What's your current employment? Who do you work for right now?

A. I'm a Chief Psychologist with the South Carolina Sexually Violent Predator Program.

Q. Okay, and what - - just to know who you are in detail, what educational degrees do you possess?

A. I have a Bachelors Degree with a double major in Political Science and Psychology. I have a Masters Degree in Clinical Psychology, and I have a Doctoral Degree in Clinical Psychology with an emphasis in Forensic Psychology.

Q. And are you the court-appointed expert in this case to examine Thomas Simmons?

A. That's right.

Q. And the Court appointed you by a previous order some time ago?

A. That's right.

Q. And you examined him pursuant to the authority given in that order. Is that right?

A. That's correct.

1 Q. Okay.

2 Have you had specialized training?

3 A. I have.

4 Q. In what field?

5 A. Forensic Psychology.

6 Q. Okay.

7 Are you - - is there such a thing as Board Certified for
8 psychologists?

9 A. There is.

10 Q. And are you?

11 A. I am.

12 Q. And what does Board Certified mean?

13 A. Board certification is simply a process by which psychologists
14 are examined by other experts to see if they, themselves, have
15 expertise in a given area.

16 In my case I was examined by Board Certified Forensic Experts.

17 Q. Have - - have you been Board Certified just in South Carolina
18 or in any other states?

19 A. It's a national board certification.

20 Q. It is? Okay.

21 Now, where are you licensed to practice psychology?

22 A. Minnesota, Georgia and South Carolina.

23 Q. And how long have you been licensed - - your - - psychology
24 your total career?

25 A. Just about three years.

1 Q. And then in South Carolina?

2 A. Um, nine months.

3 Q. Okay.

4 A. Six to nine months, sorry about that.

5 Q. In - - in - - I guess this is a hard question to ask but I got
6 to ask it anyway.

7 What is the study of psychology? What are you trying to do
8 when you meet with someone like Mr. Simmons or just psychology in
9 general? What is the idea?

10 A. Psychology in general is just the study of the mind and
11 behavior.

12 Q. Okay.

13 And, so, I guess, you try and look at behavior and try to
14 study how that relates to what a person did and develop an opinion
15 as to their mental attitude or their mental situation?

16 A. Clinical psychology and psychologists who are trained in
17 clinical psychology are typically trained in assessment. So
18 they're looking at systemic ways of examining a person. They also
19 look at mental disorder, and then we're also trained in statistics
20 and research methods.

21 Q. Okay.

22 And have you previously been recognized as an expert and
23 testified as an expert in courts of this state?

24 A. I have.

25 Q. About how many times?

1 A. I believe this is my fourth.

2 Q. Okay.

3 MR. BOGLE: Your Honor, at this time the State moves to
4 have Dr. Neller admitted as an expert in Forensic Psychology.

5 MR. ARCHER: No objection.

6 THE COURT: Okay.

7 He - - this witness has testified in many courts of this state
8 including my court and I'm glad to have him.

9 Ladies and gentlemen, let me explain to you.

10 Witnesses who by training, education or experience are
11 considered experts in a particular field, and they may give their
12 opinions as to the facts of the matter based on that field.

13 Their conclusions and opinions constitutes evidence to be
14 considered by you along with all the other evidence and testimony
15 in this case. You in your discretion may accept or reject an
16 expert's opinion.

17 You may proceed.

18 MR. BOGLE: Thank you, Your Honor.

19 Q. Now, does your job allow you to evaluate people under South
20 Carolina's Sexually Violent Predator Act?

21 A. Yes.

22 Q. And about how many individuals have you evaluated under that
23 law in your job so far?

24 A. I evaluated approximately fifteen of them for the purposes of
25 the commitment such as the one today.

1 Q. Okay.

2 And about how many have you found not to be - - not to have
3 the criteria to be determined sexually violent predators?

4 A. About half.

5 Q. Okay.

6 So, it's about fifty percent, roughly?

7 A. Yes.

8 Q. Okay.

9 Did you valueate Mr. Simmons, Thomas Simmons?

10 A. I did.

11 Q. Is he present in the courtroom today?

12 A. Yes, sir.

13 Q. Would you identify him for the record? Sitting next to Mr.
14 Archer?

15 A. Yes.

16 Q. Okay.

17 MR. BOGLE: Let the record reflect he identified Mr.
18 Simmons.

19 Q. In the course of evaluating him, did you meet with and
20 interview him?

21 A. I interviewed him and tested him for about seven hours.

22 Q. Okay.

23 Ah, did you receive a file of information about Mr. Simmons?

24 A. I did.

25 Q. Did you also request - - did you request information or di

1 they give it all to you at one time or was it a combination of
2 both?

3 A. Typically, it's a combination of both. I don't remember in
4 this case, ah, if I had requested additional information or not
5 from you.

6 Q. And, typically, or just in general information, what type of
7 information is in the file that you got on Mr. Simmons?

8 A. There are legal records such as orders and petitions, ah,
9 victim notification requests, Department of Juvenile Justice
10 records. There's a Department of Mental Health form. There was
11 a handwritten letter that he, ah, that he drafted. There are
12 parole reports. That pretty much sums it up.

13 Q. Now, just to be clear, this is not a Circuit Court conviction,
14 correct? We're talking about a guy who was found guilty in the
15 Family Court.

16 A. He was adjudicated delinquent.

17 Q. Right. So, that's like saying found guilty, adjudicated
18 delinquent of a crime in the Family Court here in Horry County. Is
19 that right?

20 A. Yes.

21 Q. So, when you say Department of Juvenile Justice, that would be
22 the agency charged with administering whatever incarceration you
23 have to serve, parole, probation, things like that for a person who
24 is under seventeen when they - - when they - - when they commit the
25 crime. Is that right?

1 A. I'm not sure of all DJJ's function.

2 Q. Uh-huh.

3 A. I assume that that's correct.

4 Q. Okay.

5 But in this case that's who you dealt with. You didn't deal
6 with the Department of Corrections, for example?

7 A. Right. I didn't have any records from the Department of
8 Corrections.

9 Q. Okay.

10 Now, if the type information that you looked at that given to
11 you to look at about this man, this Mr. Simmons, is this the stuff
12 that's typically relied upon by experts in your field?

13 A. It is.

14 Q. And did you consider and rely upon that information in the
15 file and upon your interview with Mr. Simmons in making the
16 evaluation you eventually made regarding this case?

17 A. I did.

18 Q. Ah, based upon your interviews with him, your review of the
19 file, was he convicted of a sexually violent offense?

20 A. He was.

21 Q. Okay.

22 Let me hand up some documents I showed you before we started.

23 MR. BOGLE: Your Honor, these are certified copies of the
24 Family Court here in this building.

25 Q. I hand you first the Order adjudicating him guilty. Is tha

1 a document you reviewed with me and also in making your report?

2 A. Yes, I did.

3 Q. Okay.

4 And you notice it lists two different charges, does it not?

5 A. One sexual offense, yes, sir.

6 Q. And what are the two charges listed?

7 A. The two charges are violation of probation for disturbing
8 schools and criminal sexual conduct with a minor, first degree.

9 Q. And is this a certified copy of the petition which would be
10 the charging document of the Family Court of the charge of criminal
11 sexual conduct with a minor?

12 A. It appears so, yes.

13 Q. Okay.

14 And would this be a certified copy of the petition, again, the
15 charging document on this disturbing schools charge?

16 A. It appears so, yes.

17 Q. Okay.

18 MR. BOGLE: Your Honor, we would move to introduce these
19 three documents into evidence, the certified copies of the Family
20 Court records from Horry County.

21 THE COURT: I will permit it.

22 MR. BOGLE: Thank you, Your Honor.

23 MR. ARCHER: I'd like to see them, Judge. I don't know if
24 I have them.

25 MR. BOGLE: I gave you a copy.

1 THE COURT: Y'all have not shared these documents?

2 MR. ARCHER: Okay.

3 (The Court Reporter marks the documents and accepts into
4 evidence as Petitioners Exhibits the Order, Petitioner's Exhibit
5 #1; Petition - Disturbing Schools, Petitioner's Exhibit #2 and
6 Petition - CSC, Petitioner's Exhibit #3.)

7 COURT REPORTER: Your Honor, that would be Petitioner's
8 Exhibits #1, #2 and #3.

9 THE COURT: Yes, ma'am.

10 Q. So, going back to where I was before, was he convicted of a
11 sexually violent offense as defined in the statute?

12 A. He was, criminal sexual conduct with a minor.

13 Q. In the first degree, right?

14 A. In the first degree.

15 Q. Okay.

16 And could you describe the facts of that offense as you
17 determined them to be based on the records you looked at?

18 A. Based on the records that I reviewed over a period of three
19 years engaged in oral, anal, ah, and some fondling with his - - he
20 was a relative. I think it was a step-nephew. It went over the
21 course of three years. It happened approximately five times, based
22 on the records available to me. He was between ages ten and
23 thirteen when it occurred.

24 Q. And how old would the victim have been when this occurred?

25 A. From ages six to nine.

1 Q. Okay.

2 So much younger than Thomas?

3 A. I wouldn't say much younger but younger, yes.

4 Q. Okay.

5 And there's also a conviction for disturbing schools. Was
6 there an incident you reviewed and I believe it's in your report
7 where he was charged with threatening to bring a gun to school to
8 shove up a person's butt?

9 A. Yes.

10 Q. Is that - - that's the disturbing schools conviction we're
11 talking about here?

12 A. That's my understanding, yes.

13 Q. Okay.

14 Um, did that offense, the idea that he threatened to bring a
15 gun to school and go a step further and shove it up someone's rear
16 end, does that appear to be of a sexual connotation to you?

17 A. It doesn't sound like it to me, no.

18 Q. Why not?

19 A. I - - I can't see how it does.

20 Q. Okay.

21 A. It sounds to me like a violent threat.

22 Q. Okay, but it does sound violent to you?

23 A. It sounds violent to me.

24 Q. Not sexually violent but violent?

25 A. That's right.

1 Q. Okay.

2 Um, was the conduct of the offense, the three year period
3 involving the anal and oral crimes against this younger step-
4 nephew, were these significant to you in reaching your opinion?

5 A. The offenses against his step-nephew - -

6 Q. Right.

7 A. - - were significant in reaching my opinion, yes.

8 Q. And were they part of the basis for your opinion?

9 A. They were.

10 Q. Was he convicted of any other sexual offenses?

11 A. No.

12 Q. Okay.

13 In the course of your review, did you also review a written
14 statement? I hand you a copy now and ask you if this is a
15 document that you also looked at in the course of your review?

16 A. I did.

17 Q. And how is - - did you sit - - did you - - when you
18 interviewed Mr. Simmons himself, did you go over that statement
19 with him or show it to him?

20 A. I don't remember talking about this with him, no.

21 Q. Okay.

22 And in this statement, this - - why was this statement
23 described to you? What did you partake - - understand it to be?

24 A. My understanding is that this is a victim empathy statement,
25 um, or a victim advocate letter.

1 Often times in juvenile sex offender treatment programs
2 juvenile sexual offenders are asked to write empathy letters,
3 letters to their victims in which they describe what they did, and
4 often times, they apologize for what they did.

5 Q. Okay.

6 So, Thomas wrote that? Is that what we're coming down to?

7 A. Well - - -

8 Q. Is that your understanding?

9 A. It's my understanding that he wrote it. It isn't signed by
10 him. It isn't dated.

11 Q. It was presented to you as a document written by Thomas as an
12 empathy letter to the victim or the victim's family.

13 A. It's my understanding that's an empathy letter.

14 Q. Okay.

15 MR. BOGLE: Your Honor, I'd like to move to introduce this
16 document into evidence at this time.

17 THE COURT: Have you seen this document?

18 MR. ARCHER: No, sir.

19 I may have in the file. Just let me see.

20 I'll admit it subject to cross examination.

21 (The Court Reporter accepts Petitioner's Exhibit #4 into
22 evidence.)

23 Q. Let me hold - - show you State's Exhibit #4. That's the
24 statement we just talked about.

25 In the, ah, first - - well, it's one big paragraph - - about

1 eight lines down, does he say, and I quote, "I was always listening
2 to the wrong voice. One would say, 'Do it', while the other would
3 say, 'Don't do it'."

4 You see where I'm reading?

5 A. Yes.

6 Q. Okay.

7 And then on the second page at the end of the page the last
8 two sentences.

9 "I also held his mouth so he couldn't scream. He cried
10 sometimes. I raped him because he wasn't willing to do what I
11 wanted him to do."

12 Is that what it says there in the statement?

13 A. Yes.

14 Q. Were these significant admissions by Mr. Simmons that you felt
15 you had to interview him about?

16 A. No, they're not.

17 Q. Why not? They seem kind of violent to me. I'm just
18 wondering what - - why not.

19 A. I had records from Mr. Simmons that were relatively
20 comprehensive.

21 Q. Okay.

22 A. And asking him questions such as why he wrote this especially
23 if it was an assignment which it probably was, I didn't find it
24 necessary.

25 Q. Okay.

1 Well, you - - would you agree with me that holding someone's
2 mouth so he can't scream, ah, would suggest a fairly violent act?

3 A. I would.

4 Q. And was there some concern about hearing voices, like one
5 voice saying, "Don't do it," one voice saying, "Do it."

6 A. This isn't described as some kind of mental illness such as
7 you'd find in a psychotic disorder.

8 Q. Okay.

9 If a person's hearing voices and they tell him to do something
10 or don't do something, is that consistent with a psychotic
11 disorder?

12 A. If a person is hearing voices that are actually telling him to
13 do something, then yes.

14 Q. Okay.

15 And he says that in his statement. He's hearing voices.

16 A. It's written in this statement.

17 Q. Right. Okay.

18 Um, has he had any sex offender treatment?

19 A. Yes.

20 Q. Okay.

21 And did he - - did he complete the sex offender treatment?

22 A. He did.

23 Q. And where was it administered?

24 A. In DJJ.

25 Q. Okay.

1 Ah, do you know how long ago it was just off the top of your
2 head?

3 A. As far as I know, it's been ongoing for the past four years.

4 Q. Okay.

5 Has he completed as far as you know all of the treatment be it
6 sex offender treatment or mental health treatment that DJJ can
7 afford him?

8 A. As far as I know.

9 Q. So, everything that they've got to offer him, he's done?

10 A. As far as I know.

11 Q. Okay.

12 Has he had any testing by you?

13 A. I tested him, yes.

14 Q. What type of testing did you give him?

15 A. I gave him an NMMPIA. It's just a self-report inventory of
16 personality characteristics and emotional disturbance.

17 I also used a structured interview guide to look for
18 personality disorder.

19 Q. And were there any other tests that he was given?

20 A. Those are the two tests.

21 Q. Okay.

22 Now, is he shown any remorse for his offenses, feel sorry for
23 what he did?

24 A. There's mixed evidence in the records as to whether or not
25 he's shown remorse for his offenses.

1 Q. Okay.

2 Give me an example - -

3 A. But what - - -

4 Q. - - where he does or doesn't.

5 A. I'm just going to turn to my report here.

6 Q. Yeah. Is that a copy of your report you're looking at?

7 A. This is a copy of my report.

8 Q. That's fine.

9 Okay. Go ahead.

10 A. I asked him why he had improved behavior over the past year
11 and he stated, "Every morning I wake up and I see the victim's
12 face, and I realize what I did. I destroyed a life and hurt his
13 family.

14 I took a look at myself and I said, 'I'm still in my cycle
15 because I'm offending others', maybe not sexually, but I was doing
16 it verbally, fighting, spitting on people. I knew I had to make a
17 change because I felt like I at least owed society that much
18 because I don't want to re-offend again.

19 I wish there was something to alleviate the victim's and the
20 victim's family's pain someday."

21 Q. Uh-huh.

22 Now, in that statement he made to you, he referred to other
23 type of non-sexual conduct: spitting on people, hitting people,
24 things like that?

25 A. That's right.

1 Q. Has that been a problem with Mr. Simmons while he was at DJJ?

2 A. Yes, he has a history of violent behavior.

3 Q. And does that problem even pre-exist his being committed to
4 DJJ, Department of Juvenile Justice?

5 A. It did.

6 Q. Okay.

7 Um, violence toward animals, violence toward people.

8 A. That's right.

9 Q. Okay.

10 A. It's just consistent with a conduct disorder. He hasn't shown
11 that kind of behavior in the six months I interviewed him, and,
12 therefore, a diagnosis of conduct disorder wasn't offered but he
13 does have a history of it.

14 Q. Is remorse significant in your evaluation?

15 A. It can only be significant when looking at mental abnormality
16 if you're looking, say, to diagnose somebody with an anti-social
17 personality but as far as predicting recidivism, remorse is
18 irrelevant. It's actually a red herring.

19 Q. So, remorse has nothing to do with - - with - - -

20 A. Whether or not a person will do it again. It's unrelated.

21 Q. Okay.

22 What about taking responsibility for his actions? Is that a
23 significant factor in determining whether or not they have a
24 problem that might make them likely to re-offend?

25 A. It - - it's the same thing.

1 It appears from a layperson's perspective or from a common
2 sense approach, it seems like it would be something that would be
3 important, and many of us believe that but if you review the
4 literature and read the research on it, it shows pretty
5 convincingly that that factor is unrelated to sexual recidivism.

6 Q. What about showing appreciation for the harm that he's
7 inflicted on his victim? Now, certainly, in that statement you
8 just read, he seemed to tell you - - -

9 MR. ARCHER: I would object, Your Honor.

10 He's not asking a question. He's - - -

11 MR. BOGLE: Alright. Let me ask it in the form of a
12 question.

13 Q. Is - - has he shown any appreciation for the harm he caused
14 the victim?

15 A. I think to some extent this does, the statement that I just
16 made where he talks about having destroyed a person's life and
17 hurting his family.

18 I can look for other examples in the report if you'd like me
19 to.

20 Q. Were you made aware of at least one incident in the
21 conversation with the parole board examiner where he showed a total
22 lack of remorse or responsibility for his victim, even got angry
23 toward his victim?

24 A. There's - - some of the records indicate that he, ah, has been
25 inconsistent in his expressions of remorse, that it appears - -

1 some people think it appears genuine and then at other times it
2 doesn't appear genuine.

3 Q. Okay.

4 Is appreciation for the harm you caused, is that a significant
5 factor in the evaluation you did?

6 A. It's unrelated to sexual recidivism risk.

7 Q. It's unrelated to sexual recidivism. By recidivism, you mean
8 the likelihood that he'll commit it again?

9 A. That's right.

10 Q. So, appreciating what you've done is not related to the
11 likelihood that you might do it again?

12 A. That's right.

13 Like I said, from a common sense perspective it seems like it
14 would be but the research pretty consistently shows that it isn't.

15 Q. Did you have a diagnosis for him?

16 A. I did.

17 Q. What was that?

18 A. Sexual sadism.

19 Q. Sexual sadism. Could you define that for us?

20 A. This is a - - sexual sadism essentially describes a person
21 who, ah, enjoys humiliating, a person who enjoys harming a person
22 and becomes sexually aroused by the harm he's inflicting on a
23 person.

24 Q. Okay.

25 And by the harm inflicting, we're talking - - we're talking

1 sexual harm? Like rape or, ah, oral sex or something like that?

2 A. Typically, yes.

3 Q. Okay, and was that the situation here as far as the nature of
4 the crime he was found guilty of?

5 A. That's right. He was found guilty of a sexual crime.

6 Q. So, the sexual crime involved anal rape, did it not?

7 A. It did.

8 Q. And, also, forced oral sex?

9 A. That's right.

10 Q. Okay.

11 And is sadism something that - - how long does having that
12 characteristic last?

13 A. It's typically considered chronic. So we wouldn't expect it
14 to simply go away.

15 Q. Okay.

16 Can it be treated?

17 A. It can.

18 Q. Okay.

19 Um, can it be cured like - - like a cold or like, ah, a fever?

20 A. I don't think that that really can be answered.

21 Q. Okay.

22 But sexual sadism, was that how did you describe it?

23 A. Sexual sadism.

24 Q. Sexual sadism, okay.

25 Do you have an opinion? Did you develop an opinion based upon

1 your research, again, to a reasonable degree of psychological
2 certainty as to whether or not this sexual sadism he suffers from
3 constitutes a mental abnormality or a personality disorder under
4 the Sexually Violent Predator Act?

5 A. In my opinion, it constitutes mental abnormality.

6 Q. Okay.

7 Ah, based upon this sexual sadism, is that a hint to you that
8 he might be likely to re-offend if he suffers from this?

9 A. In my opinion, it's a mental abnormality in that we're looking
10 at mental disorder but as far as actually making him likely to
11 engage in acts of sexual recidivism, no, I disagree with that.

12 Q. Okay.

13 Well, what, in your opinion, makes it likely that he will not
14 do this again if he's not - - doesn't receive the proper treatment?

15 A. When evaluating a person, ah, a person's risk for sexual
16 recidivism, we're looking at certain risk factors, and if we were
17 to assume that I were as accurate as a mathematical equation at
18 deciding on whether or not he is going to re-offend, in other
19 words, in saying that he's going to re-offend and I were that good,
20 given the low base rate of recidivism among juvenile sex offenders,
21 I couldn't say that his likelihood of recidivism was greater than
22 fifteen percent.

23 Q. Now, you talk about low rate of recidivism for juvenile
24 offenders, is that based on your analysis or on studies that have
25 been done out there in the field?

1 A. Research pretty consistently shows that juvenile sex offenders
2 who are treated re-offend at a rate of around five to maybe ten
3 percent as a group.

4 Q. Uh-huh.

5 Aren't a lot of sexual crimes, particularly those among
6 juveniles, unreported or not reported?

7 A. Define a lot.

8 Q. I don't know. Let me ask you in a different way.

9 Is there a significant number of sexual offenses committed by
10 juveniles or even by adults that are unreported or are not
11 reported.

12 MR. ARCHER: I'll object to that, Your Honor.

13 I don't know how he would know that.

14 THE COURT: I sustain that objection.

15 Q. Is under-reporting of sex offenses a factor to consider when
16 evaluating somebody - - -

17 MR. ARCHER: Objection, Your Honor. It's the same thing.

18 THE COURT: I don't see how he can make a decision on
19 unreported incidents. If they're unreported, he hasn't had an
20 opportunity to examine them to start with. I sustain that.

21 MR. BOGLE: Well, let me - - let me try one more time in a
22 different manner, if I may, Your Honor?

23 THE COURT: Alright, sir.

24 Q. Is it true that a lot of sexual offenses are not reported?

25 MR. ARCHER: Objection, Your Honor.

1 THE COURT: I'll let him answer that if he knows - - if
2 knows, he can say, "yes" or "no" or "I don't know".

3 I don't know what he knows.

4 A. It's generally accepted in the field that sexual offenses go
5 unreported just as some people who are convicted of sexual offenses
6 are falsely convicted.

7 Q. Does the fact that sex offenses go unreported, does that
8 factor in upon your opinion regarding Mr. Simmons - - the - - the -
9 - the idea that he might re-offend?

10 A. It's something that I considered but I rejected as irrelevant.

11 Q. Okay.

12 Now, did you develop an opinion as to whether or not this
13 sexual sadism affects Mr. Simmons' emotional or volitional ability
14 so that he is predisposed to do this type of crime again?

15 A. There is some evidence of trouble controlling his behavior,
16 his sexual behavior. There is some evidence of that.

17 He offended against somebody that he knew which suggests that
18 he could be easily be detected when he's doing that kind of an
19 offense.

20 Ah, he also continued to offend even while he was under the
21 auspices of DJJ or mental health treatment. I don't remember which
22 one it was.

23 Q. Okay.

24 In what manner did he re-offend while he was confined there?

25 A. He persisted - - he persisted in the offending, um, with hi

1 step-nephew, um, even after he had been detected.

2 Q. Okay.

3 A. Eventually leading to the charge.

4 Q. Okay. Okay.

5 Ah, now, if this jury were to find that he is a sexually
6 violent predator, where do people when that's found, where do they
7 go for treatment?

8 A. There's a Department of Mental Health staffs what is a former
9 wing - - is a wing of Broad River Correctional Facility. It's
10 staffed entirely by the Department of Mental Health. Um, it's the
11 old Death Row. It's in Columbia.

12 Q. Isn't the Department of Corrections the landlord for the
13 Department of Mental Health Unit that does this treatment?

14 A. It's my understanding that that's correct but I'm not - - I
15 haven't looked at any documents.

16 Q. And like you said, the part that they're using is the old
17 Death Row?

18 A. That's right.

19 Q. Death Row has now been moved somewhere else?

20 A. That's right.

21 Q. Okay.

22 Um, if he's treated there, would he have access to people the
23 same age as his victim, same age and sex as his victim?

24 A. No.

25 Q. There are no children out there?

1 A. There are no children there.

2 Q. Okay.

3 If he's not treated at all - - or not treated there - - let me
4 back up.

5 If he's not treated at the mental health unit at the
6 Department of Corrections at the Manning which is where it is in
7 Columbia, the Manning Correctional Institution, if he's not treated
8 there, would people be at risk?

9 A. Define that for me.

10 Q. Well, would - - would there be victims at risk if he doesn't
11 go out there - - -

12 MR. ARCHER: Objection, Your Honor. That - - that's just
13 such a wide open question.

14 THE COURT: No, sir. I'll let - - permit that question.

15 Q. Would people be at risk from him? Would victims be at risk if
16 he's not treated?

17 A. As I mentioned earlier, there would be some risk just as there
18 would be a risk with any sexual offender who is released from
19 incarceration.

20 The usual rate of recidivism among sex offenders who are
21 adults is around fifteen percent, and as I said, his don't appear
22 to exceed that based on my analysis.

23 Q. So, his would be - - is no more than fifteen percent based on
24 your analysis?

25 A. Is no more than the typical sexual offender, yes.

1 Q. Okay.

2 If he's not found to be a sexually violent predator by this
3 jury, can he be required to get mental health treatment somewhere?

4 A. It's my understanding that he'll be under DJJ's supervision
5 for an additional two years.

6 Q. Okay.

7 A. I don't know what they could require or not.

8 Q. If he's released to family members, and, say, out-of-state
9 like North Carolina, could he be required to undergo mental health
10 treatment up there or do you know?

11 A. I don't know what their laws are.

12 Q. Okay.

13 A. I think it's safe to speculate that he wouldn't be able to - -
14 that he wouldn't be required to.

15 Q. If he does receive treatment at the mental health facility in
16 Columbia that you've been talking about for a few minutes now, will
17 that reduce the likelihood of re-offending sexually?

18 A. It might.

19 Q. Okay.

20 Would you look at your report for a minute?

21 And turn to page three of your report. I think the page
22 number is down at the bottom.

23 Oh, before I ask you that, in the course of your evaluation of
24 Mr. Simmons did you interview the victim or the victim's family
25 about this incident?

1 A. No, I didn't.

2 Q. Okay.

3 Turn to page three. Now, about two paragraphs down from the
4 top there's an indented paragraph beginning with the words "has a
5 grandiose sense of self-importance". Do you see that?

6 A. I do.

7 Q. Okay.

8 And there's several clauses there separated by some dots in
9 between.

10 A. That's right.

11 Q. Okay.

12 And at the end there's a footnote, number 15, and I believe
13 the footnote 15 is to a report by a Gayle Shellenberg, a social
14 worker at DJJ, dated February 12, 2008. Is that right?

15 A. That's right.

16 Q. Okay.

17 Let me show you a copy of Dr. Shellenberg - - excuse me, Ms.
18 Shellenberg's memorandum, and I have underlined in dark blue the
19 lines in this paragraph we're referring to right here. You see
20 where I've underlined?

21 A. I do.

22 Q. Does my underlining seem to be accurate versus what's in this
23 paragraph in this report?

24 A. It will just take me a moment to review these - -

25 Q. Yeah, please.

1 A. - - Your Honor.

2 Yes.

3 Q. Okay.

4 So, in this paragraph of your report, when you say, "has a
5 grandiose sense of self-importance and expects to be recognized as
6 superior."

7 In the next sentence - - clause says, "has fantasies of
8 limited success and power."

9 Now, those two clauses separated by - - by several lines of
10 text in that report that you footnoted, are they not?

11 A. That's right.

12 Q. Okay.

13 Would you read the highlighted information in between those
14 two clauses?

15 A. I will.

16 Q. Reading from Ms. Shellenberg's report.

17 A. I will, and we can find this in other areas of my report - -

18 Q. Okay.

19 A. - - if you'd rather point it out there.

20 It says, "lapses in treatment or inappropriate behavior.
21 Thomas will attempt to make demands. He will become upset when he
22 is not in control. Experience deviate fantasies involving force
23 and sadistic behavior and does not use his thought stopping but
24 engages in masturbation even though he is aware that this is a
25 lapse in treatment.

1 He chooses to apply his treatment only when he wants to in a
2 lot of passive-aggressive behavior in an attempt to provoke a power
3 struggle.

4 In September he was involved in an incident involving - - -"

5 Q. Back up a second.

6 That's - - the next underlined line, "He's had fantasies of
7 unlimited success and power."

8 Right?

9 A. That's right.

10 Q. And that's line from this paragraph in your report?

11 A. That's right.

12 Q. And then in between that and the next line in your report
13 which says, "prides himself in being smarter than staff," there
14 some stuff in between, is there not?

15 A. That's right.

16 Q. Would you read to the jury the stuff in between?

17 A. Sure.

18 And, again, this is also addressed in other aspects of my
19 report, just not in this particular paragraph.

20 Q. Okay.

21 A. "In September he was involved in an incident involving the
22 downloading of pornographic cartoons. Thomas bragged about
23 knowing more about the computers than his teachers. He was able to
24 bring the materials in and out of the unit without being caught."

25 Q. Okay.

1 And then we have the phrase - - the clause, "prides himself on
2 being smarter than staff".

3 Did you contact the Department of Juvenile Justice to look at
4 the pornographic cartoons that he downloaded?

5 A. No, I didn't.

6 Q. Okay.

7 If they were really violent in nature, would that be relevant
8 in your assessment?

9 A. It's my understanding that the pornographic cartoon that he
10 was looking at depicted a rape scene.

11 Q. Okay.

12 Well, would it be necessary to - - I mean, there's rape scene
13 that are, I'm sure, that are a lot worse than other rape scenes.
14 Wouldn't it be necessary to look at it and see exactly what type of
15 rape scene and whether or not one party is - - -

16 MR. ARCHER: Objection, Your Honor. That's not a question.

17 Q. Alright.

18 THE COURT: Sustained.

19 Q. Well, was it necessary to look at the specific pornographic
20 cartoon that he downloaded?

21 A. No, it's not necessary.

22 Q. Okay.

23 Are you aware that there are very violent pornographic
24 cartoons out there?

25 A. I am.

1 Q. Now, this sentence "prides himself on being smarter than
2 staff", the next sentence after that in your report, paragraph,
3 says, "aligns himself with the program coordinators and refers to
4 them on a first name basis."

5 Do you see that?

6 A. I do.

7 Q. What's the highlighted language in between the two?

8 A. "First to acknowledge his wrong."

9 Q. Uh-huh. Okay.

10 And after that paragraph about first name basis, the next line
11 you have in your paragraph says "exhibits a sense of entitlement".

12 Would you read the highlighted language in between the two of
13 those?

14 A. Yeah, I will.

15 "Will take advantage of other juveniles and staff if he feels
16 that it will benefit him. He will steal from staff and peers when
17 he thinks that he won't get caught.

18 Caught, he twists the facts using thinking errors and projects
19 blame onto others. Accepts responsibility until he realizes no
20 control in the situation and has to incur the negative
21 consequences."

22 Q. And then the next line that's in the report is this one clause
23 "exhibits a sense of entitlement".

24 You see that on page three of your report?

25 A. Yes.

1 Q. And then after that, it says "can become haughty and
2 arrogant".

3 A. Right.

4 Q. What's the highlighted language in between those two?

5 A. "Thomas assumes the victim stance and displayed no empathy for
6 his victim, when she discussed his restitution.

7 After a follow-up conversation this proved to be true.
8 Society - - he felt society owed him because he was the one
9 incarcerated, again, reflecting his sense of entitlement."

10 Q. Okay.

11 Um, Doctor, I'm concerned that your paragraph here seems to
12 cherry-pick some clauses and leave out some stuff.

13 MR. ARCHER: Objection, Your Honor. It's not a question.

14 MR. BOGLE: Let me ask it in the form of a question.

15 THE COURT: I sustain that, now.

16 Q. Does your paragraph in the report we're reading about where
17 I've highlighted certain clauses and where you've read all this
18 stuff in between, are you cherry-picking certain phrases out of a
19 much larger and more detailed report?

20 MR. ARCHER: Objection, Your Honor. That's not a question.

21 A. No, I'm not.

22 THE COURT: No, no - - -

23 MR. BOGLE: That's a question.

24 THE COURT: I'm not sure of cherry-picking is appropriate.
25 He's asking.

1 Q. Are you being selective in pulling certain language out of
2 much longer, more detailed report?

3 A. No, as I mentioned in a previous hearing, this information is
4 listed in other areas of the report. The part that you're picking
5 out is the social aspect of the report describing how he interacts
6 with others and what his personality is like.

7 So, I only described information relative to his personality
8 in that section of the report.

9 "Grandiose sense of self-importance."

10 "Expects to be recognized as superior."

11 "Fantasies of unlimited success and power," and so on.

12 He's described a potentially emerging personality.

13 The other information that Mr. Bogle has pointed out is
14 information that is addressed elsewhere in my report under a more
15 appropriate heading such as a history of violent behavior and so
16 on.

17 Q. Well, looking at your report again, you look at the bottom of
18 page three. Is there a reference there to Thomas being believed to
19 be a psychopath, someone who inflicts pain intentionally because it
20 gets them high?

21 A. Yes. That was a self-reported statement from Mr. Simmons.

22 Q. Okay. Okay.

23 Is that of significance to you, someone who gets - - gets a
24 sexual high off of inflicting pain on people?

25 A. I think we're - - we're reaching a point of redundancy here.

1 As I mentioned, he's diagnosed for sexual sadism.

2 Q. Okay.

3 A. This is exactly what we're talking about.

4 Q. That's what that is, then?

5 A. This is referring to it.

6 He called it a psychopath but he's simply mis-stating it.
7 He's an adolescent.

8 Q. Okay.

9 On page four of your report, the third paragraph from the top
10 where it says, "non-sexual legal", is there a reference to throwing
11 a cat around whenever he was angry?

12 A. There is.

13 Q. Is cruelty toward pets a factor to be considered when
14 evaluating, ah, an offender, either juvenile or adult?

15 A. It's relevant in that it could - - for a juvenile it could
16 contribute to a diagnosis of conduct disorder, cruelty toward
17 animals. So, in that sense it's relevant.

18 If you're looking at an adult, it could contribute to a
19 diagnosis of anti-social personality disorder.

20 So, in that sense it is relevant, yes.

21 Q. Did it contribute to your diagnosis here, the fact that he
22 would do something to a pet, a harmless pet?

23 A. It helped me understand how he was diagnosed with conduct
24 disorder previously.

25 Q. Okay.

1 So, what you - - are you then trying to evaluate or understand
2 a previous diagnosis by somebody else?

3 A. What I'm doing is I'm showing, essentially, showing my work.
4 I'm showing how certain diagnoses were arrived at when that
5 information is available in the records.

6 Q. Okay.

7 Two paragraphs below that in your report there's a paragraph
8 beginning with words, "four months later".

9 Now, that paragraph says, "sentenced to probation for
10 disturbing schools after he had threatened to bring a handgun to
11 school and shoot someone and stick the gun up his butt".

12 A. That's right.

13 Q. And my question, again, was, "The phrase sticking the gun up
14 the butt, taking that along with the crime he was convicted of, the
15 criminal sexual conduct with a minor, is that a sexual reference?"

16 A. That's not my interpretation, no. There was no indication
17 that he was sexually aroused by this.

18 Q. Okay. Okay.

19 And then in the next paragraph, there's a reference to being
20 institutionalized for attempting to kill his parents.

21 A. That's right.

22 Q. Although some data indicate he poured veterinary medicine in
23 their tea in an attempt to kill them. Other data indicated he just
24 wanted to see what would happen.

25 Was that a fairly violent act to you in your consideration of

1 his prior behavior?

2 A. Again, this would look toward a diagnosis of conduct disorder
3 which I think I've already mentioned.

4 Q. Okay.

5 In the very bottom paragraph, you referenced thirty
6 disciplinary infractions during his DJJ commitment period.

7 A. That's right.

8 Q. And one of them was a weapon, I believe, that he had fashioned
9 and aggressiveness toward other juveniles and staff members.

10 A. That's right.

11 Q. Okay.

12 On page five of eleven about three or four paragraphs down,
13 you talk there about the history of sadistic sexual fantasies and
14 fantasies about bondage. Is that correct?

15 A. That's right. And this would support the diagnosis of sexual
16 sadism.

17 Q. Would you read just out loud the paragraph, the word - -
18 sentence after that beginning with the words "for instance"?

19 A. "For instance, he fantasized about finding a young girl,
20 transporting her to a wooded area and beating, raping and murdering
21 her."

22 Q. And the sentence after that?

23 A. "He also fantasized about kidnapping a adolescent female
24 relative. He fantasized that in order for the family to get the
25 child back, anyone who loved the little girl would have to perform

1 oral sex on him."

2 Q. Okay.

3 And did - - was this type of fantasies that this young man is
4 having, is that significant in evaluating him?

5 A. It's relevant to the diagnosis of sexual sadism.

6 Q. Okay.

7 On the very next page, page six of eleven, third paragraph
8 down, at the end of that paragraph there's something about
9 "imagined his nephew was female during the offenses".

10 Would you read that to us out loud?

11 A. Yes.

12 It says he imagined his female - - he imagined his nephew was
13 female during the offenses so that it wouldn't seem gay.

14 Q. Okay. The next one.

15 A. I should - - I'm sorry. I should add these are quotes
16 directly out of the records that I'm looking at or that he's
17 telling me.

18 Q. Okay. Okay.

19 And the next paragraph after that where the victim cried,
20 choked him, that comes out of that witness statement we already put
21 in evidence a minute ago.

22 A. There's a lot of information that we've been discussing is
23 information that we've already discussed.

24 Q. Okay.

25 And that paragraph refers to, he also said, "Sometimes

1 choked him until he passed out so he wouldn't fight back."

2 A. Well, this was part of the sexual offense that he was
3 convicted of.

4 Q. Okay.

5 And on page seven of your report, three paragraphs from the
6 bottom, do you reference fantasies about *** (unintelligible)
7 there?

8 A. Yes.

9 Q. And does that paragraph also indicate that he's started - -
10 experienced these thoughts more recently?

11 A. It sounds like he's still having some of these sexual
12 fantasies, yes, at least at the time that I interviewed him.

13 Q. Uh-huh.

14 Well, then, there's sexual fantasies and there's sexual rape
15 fantasies. Aren't they two different types of things?

16 A. Well, of - - of course.

17 Q. Okay.

18 And in that paragraph after the word "November of 2007", the
19 next sentence he described a recent rape fantasy. Would you read
20 that sentence into the record?

21 A. Yes.

22 "Mr. Simmons later stated he experienced such thoughts more
23 recently."

24 Such thoughts I'm referring to the fantasies about rape.

25 Q. Right, and what's the sentence after that?

1 A. "He described a recent rape fantasy in which he waited for
2 dancer to leave a strip club and approached her from behind. In the
3 fantasy he brandished a knife. She gasped, and he asked her if she
4 wanted to engage in sexual activity. Out of fear, she went along
5 with it. He forced her to the car where he penetrated her from
6 behind."

7 Q. And was he experiencing these fantasies more recent in time
8 during the time you were interviewing him?

9 A. I have to look at my records, ah, my notes to see how recent
10 it was.

11 He said at the time that I interviewed him he was fantasizing
12 about rape and bondage on a weekly basis.

13 Q. Okay.

14 So, this is the interview that led to your report and your
15 conclusion. Is that right?

16 A. That's right.'

17 Q. There are no other interviews with Thomas - - -

18 A. I - - I interviewed him twice.

19 Q. Okay.

20 Was this the first or second interview?

21 A. Ah, this would have been the - - let me - - -

22 This is during the second interview.

23 Q. Okay.

24 A. This was on July 9th.

25 Q. So the - - and your report was dated July 16 of '08. Is that

1 right?

2 A. That's right.

3 Q. So, the most recent interview in time was the one where he
4 talked about experiencing sexual fantasies about bondage and rape?

5 A. Yes.

6 Q. Okay.

7 And does this - - I know that - - does this factor into your
8 recommendation, your evaluation of him, though?

9 A. I considered it, of course.

10 Q. Okay.

11 And your evaluation was that he - - does he fit the cri - -
12 does he have a mental abnormality or a personality disorder?

13 A. In my opinion, he has sexual sadism.

14 As I mentioned, this is somebody who is aroused by harming and
15 humiliating people. He becomes sexually aroused by that kind of
16 activity.

17 Q. And like you said earlier, is - - this is the kind of thing
18 that can be treated but not cured. Is that right?

19 A. I said this can be treated. I don't know if it can be cured.

20 Q. Okay.

21 Thank you, Doctor.

22 THE COURT: Mr. Archer.

23 MR. ARCHER: Your Honor, may it please the Court?

24 CROSS EXAMINATION BY MR. ARCHER:

25 Q. Doctor, how are you today?

1 A. Fine, thank you. How are you?

2 Q. Thanks for coming.

3 About to forget my glasses.

4 Doctor, everything that you've heard about Thomas Simmons today
5 from the Attorney General, about all of his bad acts, you've heard
6 all this, correct?

7 A. I wrote about it in the report, yes.

8 Q. So, you knew all about this?

9 A. That's right.

10 Q. And your final decision was that he doesn't meet the criteria
11 to be a sexually violent predator, correct?

12 A. That's right.

13 Q. That's the bottom line of why we're here, aren't we?

14 A. It is.

15 Q. Okay.

16 Let me ask you this.

17 You said that Thomas Simmons was in the fifteen percentile?

18 A. No. What I said was if I were as precise as a mathematical
19 equation for coming up with sexual recidivism risk that I couldn't
20 say that his risk was any greater than fifteen percent. That's
21 what I said.

22 Q. Alright.

23 What would be the percent of the average person who is
24 committed to the program?

25 A. Typically, the rest of recidivism approaches fifty percent.

1 So, this is about one-third of that risk.

2 Q. So, he's not even close to the fifty percent?

3 A. Not even close.

4 Q. Not even close.

5 As far as the crime that he committed, he's been punished for
6 that, correct? I mean, he was in prison. He paid his dues to
7 society for that. Correct?

8 A. Yes. He was at the Department of Juvenile Justice for
9 several years.

10 Q. And the Sexually Violent Predator Act, it's not used to punish
11 somebody just because they think they're a bad person and put them
12 away for the rest of their life, correct?

13 A. That's right.

14 Q. Now, if he's committed to the Sexually Violent Predator
15 Program, there's no max-out date, is there?

16 A. That's right. It's an indeterminate sentence.

17 Q. Right.

18 Let me ask a hypothetical question.

19 A. I'm sorry. I mis-spoke. I apologize.

20 It's an indeterminate commitment.

21 Q. If a person has a prison sentence no matter what he does in
22 prison, he has a max-out date, doesn't he?

23 A. That's right.

24 MR. BOGLE: Objection, Your Honor. Line of questioning.

25 This is a civil process about treatments, not about prison and

1 max-out.

2 THE COURT: I understand.

3 This question is appropriate in the context of these
4 proceedings.

5 MR. ARCHER: Thank you.

6 Q. If he has a max-out date he can sleep in his cell all day
7 long, don't do what he's told, whatever. One day he's going to get
8 out because he has a max-out date, correct?

9 A. In a prison sentence.

10 Q. Yes.

11 A. Yes.

12 Q. But if Thomas Simmons is committed to this program, there is
13 no max-out date.

14 A. That's right.

15 Q. He's seventeen right now, correct?

16 A. That's right.

17 Q. He could spend the rest of his life in the old death house in
18 Columbia, correct?

19 A. It's possible.

20 Q. A simple question. Do you think this statute was enacted for
21 people like Thomas Simmons?

22 MR. BOGLE: Inappropriate, Your Honor. That's a question
23 for the jury.

24 THE COURT: No, sir. He's an expert. He's familiar with
25 the proceedings, and he's familiar with the statute. I permit him

1 to give his opinion.

2 A. The purpose of these laws is to identify, essentially, an
3 extremely dangerous group of sexual offenders, not the typical
4 recidivists.

5 As in this case, I don't see how most any expert could support
6 commitment.

7 Q. I - - how many people are in this program approximately?

8 A. Just over a hundred.

9 Q. And that's almost capacity, isn't it?

10 A. It is.

11 Q. Alright.

12 What would be the average ages of those people in that
13 program?

14 A. Mostly middle-age men.

15 Q. So, he'd be actually the kid in that program, wouldn't he?

16 A. He would be.

17 Q. And he'd be housed with all these sexual predators, wouldn't
18 he?

19 A. He would be.

20 Q. Let me read the statute to you.

21 "Respondent suffers from a mental abnormality or personality
22 disorder that makes him likely to engage in acts of sexual violence
23 if not confined in a secure facility for long-term care and
24 treatment."

25 That's the statute.

1 Is it your expert opinion as an expert in personality
2 disorders, that's what you do and you're forensic, do you feel that
3 he meets that criteria?

4 A. No, I don't.

5 Q. Now, let's talk about crimes. The Attorney General mentioned
6 something about sexual crimes that are not reported.

7 Isn't it true? There's a lot of crimes that are not
8 reported, correct?

9 A. It's my understanding that there are, yes, sir.

10 Q. Right.

11 This - - his prior charge was actually one sex crime in your
12 opinion?

13 A. That's right.

14 Q. Even though he said two, you don't believe the other one was
15 a sex crime, correct?

16 A. No, and I believe that the sexual convictions are statutorily
17 defined, and disturbing schools isn't listed.

18 Q. And that was when he was approximately twelve or thirteen
19 years old, correct?

20 A. It was, based on my review of the records, between ages ten
21 and thirteen.

22 Q. Right.

23 Of that fifty percent of the people that are committed to the
24 program, isn't it true that they committed a lot more than one sex
25 crime?

1 A. Yes. Typically, people who are committed to this program have
2 not only multiple sex offenses in their history, they also have a
3 number of risk factors for doing it again.

4 In the case of Mr. Simmons, from the few risk factors that
5 have been typically associated with sexual recidivism of let's say
6 there are six of them, only one of them is met by him and it's this
7 diagnosis of paraphilia, sexual sadism.

8 Q. Let me ask you this. There's a lot of people in prison,
9 obviously, there's thousands of them, and they all get out one day
10 including murderers get out one day. Is that what this statute is
11 about?

12 A. Could you rephrase the question for me?

13 Q. There's thousands and thousands of bad people get out of
14 prison. They've served their term. They get out prison.
15 Murderers who serve thirty years get out in twenty-five years. Is
16 that what the Sexual Predator Act is all about, to put these people
17 away for the rest of their life?

18 It's not about bad behavior, is it?

19 A. The purpose of the statute as I've read it is to identify an
20 extremely dangerous group of sexual offenders who are likely to
21 engage in future acts of sexual violence because of their mental
22 abnormality.

23 And although it's my opinion that Mr. Simmons has sexual
24 sadism, it's also my opinion that he's not likely to engage in
25 future sexual offenses.

1 Q. The Attorney General made some notes - - made an issue of this
2 letter and also something about him being psychotic. Did you find
3 when you examined him to be psychotic?

4 A. He's not psychotic.

5 Q. And it was also some mention about him downloading some
6 pornography. Would that be a reason to commit him to this program
7 because he downloaded pornography once?

8 A. No, that wouldn't be a reason to commit somebody to the
9 program, no.

10 Q. Wouldn't it be fair to say that, if available, a lot of
11 seventeen year olds might download pornography once? Correct?

12 A. That's entirely possible, yes.

13 Q. This statute's really about the worst of the worst, isn't it?

14 A. That's - - that's my interpretation of the statute, yes.

15 Q. And you're telling me that this facility is also maxed-out?
16 In other words, they have as many people as they can handle?

17 A. I don't know that it has as many as it can handle but it
18 certainly is approaching full capacity.

19 Q. And it is - - is it your expert opinion as the Head
20 Psychologist of the Sexually Violent Predator Program that Thomas
21 Simmons should be placed in that facility?

22 A. It's my opinion that he should not.

23 Q. The judge read a verdict to the jury, and I believe it said,
24 one, do you feel that the Thomas Simmons is a sexual violent
25 predator, yes or no. What is your expert opinion? Do you think

1 that Thomas Simmons meets the criteria under the statute as an
2 expert to be committed as a sexual violent predator?

3 A. In my opinion, no.

4 Q. Thank you.

5 MR. ARCHER: Thank you. I have no further questions.

6 MR. BOGLE: If I may, very briefly, Your Honor?

7 THE COURT: You may.

8 REDIRECT EXAMINATION BY MR. BOGLE:

9 Q. Are there systems in place at the mental health unit in
10 Columbia, the one where Mr. Simmons could be committed, are there
11 systems in place there to guarantee that a person receives an
12 annual review of their progress?

13 A. Yes. If Mr. Simmons is committed, he'll have an annual
14 review. Essentially, a psychiatrist or psychologist would examine
15 him on a yearly basis to determine if his mental condition has
16 changed to the point that he would then be safe to be at-large.

17 Q. And when that annual review is done, does the unit, the mental
18 health unit send a letter to the judge in the county where ever a
19 person comes from telling him what happened at that annual review?

20 A. It's my understanding that that happens, yes. I don't do
21 those evaluations.

22 Q. And does the person being reviewed who is at the mental health
23 unit, does that person have the right to disagree with that annual
24 review and petition to be released?

25 A. Yes, he has a right to petition for release.

1 Q. And if he does so, would that lead to a hearing in front of
2 judge just like this circuit judge right here?

3 A. Yes.

4 Q. And could that circuit judge direct that the person get an
5 independent psychologist or psychiatrist to examine him at public
6 expense to see if there might be a differing opinion out there that
7 maybe they should be released?

8 A. That's my reading of the law, yes.

9 Q. So, there are safeguards built in, are there not?

10 A. Yes, sir.

11 Q. Um, and is there any age limit at the mental health unit as
12 far as how old you have to be to be committed to the mental health
13 unit?

14 A. I'm not sure if some of the accrediting bodies would require
15 us to have eighteen year olds and older. It's possible that the
16 accrediting bodies would govern that but I'm not sure about the
17 rules.

18 Q. Is there any age limit in affect right now?

19 A. I'm not aware that any exist or don't exist.

20 Q. Okay.

21 Who did you interview besides Mr. Thomas?

22 A. Just Mr. Simmons.

23 Q. I mean Mr. Simmons?

24 A. Alright. Thomas Simmons.

25 Q. So, the people at DJJ who wrote these reports, these memos an

1 things like, were they interviewed by you?

2 A. No, I didn't interview them.

3 Q. Okay.

4 You mentioned paraphilia a moment ago. Now, in your testimony
5 earlier, when we talked sexual sadism - - -

6 MR. ARCHER: Your Honor, I'm going to object.

7 THE COURT: You're going beyond - - -

8 MR. ARCHER: He's going way beyond my examination.

9 MR. BOGLE: He brought out paraphilia during cross
10 examination. It's the first time we've heard it, Your Honor.

11 MR. ARCHER: Paraphilia, I never mentioned that.

12 MR. BOGLE: Well, the doctor did. Somebody mentioned the
13 word paraphilia.

14 THE COURT: I'll let you go limited. Now, you understand
15 the rule.

16 MR. BOGLE: Yes, sir.

17 THE COURT: You can only cross examine again as to matters
18 brought up on cross examination.

19 MR. BOGLE: Well, let me help you out.

20 Q. During Mr. Archer's cross examination did the word paraphilia
21 come out?

22 A. Yes. Sexual sadism is just one form of paraphilia which
23 simply is just a description of sexually deviant arousal,
24 fantasies, behaviors and so on.

25 Q. Okay.

1 A. In this case, the specific paraphilia is sexual sadism.

2 Q. Okay. Thank you.

3 MR. BOGLE: Thank you, Your Honor.

4 THE COURT: Alright. Any other questions?

5 MR. ARCHER: I have a few questions. Yes.

6 RE-CROSS EXAMINATION BY MR. ARCHER:

7 Q. What the Attorney General just asked you, would that change
8 your opinion in any way as regard - - as far as your final decision
9 that he should not be referred to the program?

10 A. Which question?

11 Q. Anything that he just said?

12 A. No, there was nothing.

13 Q. Let me ask you another thing.

14 Isn't it true that the average stay there is three and a half
15 years? That's the average?

16 A. It's my understanding that it's between four to six years.

17 Q. Four to six years. That's the average?

18 A. That's my understanding.

19 Q. Alright.

20 So, have you ever heard of anybody that gets out in a year?

21 A. I've not heard of it.

22 Q. Alright.

23 So, it's not true what he's trying to intimate that in one
24 year Thomas Simmons if he's committed, he'll be out? He'd
25 probably be there for at least six years, correct?

1 A. Well, I don't know how long he'd be there.

2 Q. But the average is about four to six years?

3 A. The average, it's my understanding, is four to six years.

4 Q. Alright.

5 Thank you.

6 THE COURT: Alright, sir. You may come down.

7 May this witness be excused?

8 MR. BOGLE: We'd ask that he be excused, Your Honor.

9 THE COURT: Alright, sir.

10 Doctor, you are excused, and we appreciate your appearance
11 here today.

12 DR. NELLER: Thank you, sir.

13 (The witness leaves the witness stand.)

14 MR. BOGLE: You want to stand down for a second or shall I
15 go to the next witness?

16 THE COURT: Next witness.

17 MR. BOGLE: Ah, the next witness - - Linda Price.

18 (The witness takes the witness stand.)

19 LINDA PRICE, being duly sworn, testifies
20 as follows:

21 CLERK OF COURT: State your name for the Court, please,
22 ma'am.

23 MS. PRICE: My name is Linda Price.

24 DIRECT EXAMINATION BY MR. BOGLE:

25 Q. Ms. Price, who do you work for right now?

1 A. I work for the South Carolina Board of Juvenile Parole.

2 Q. And how long have you been employed - - is that part of
3 Juvenile of Justice or separate?

4 A. Separate.

5 Q. Okay.

6 How long have you worked for the Juvenile Parole Board?

7 A. Since 1987.

8 Q. And prior to that, who did you work for?

9 A. The State of Virginia in Juvenile Justice and Corrections.

10 Q. Okay.

11 How long have you been involved in Juvenile Justice and
12 Corrections both in Virginia and in your South Carolina job, total
13 number of years?

14 A. Thirty-two plus years.

15 Q. Okay. Now.

16 What is your relationship to the Juvenile Parole Board?

17 A. I'm a Parole Examiner.

18 Q. What do you do?

19 A. My basic job is to act as a clearing house, um, between three
20 disciplines that provide information in regards to juveniles who
21 are in the system so that a decision can be made by the Board as to
22 whether or not a juvenile is ready for release into the community.

23 Q. Okay.

24 Do you look at things like schooling for the juvenile, his
25 education?

1 A. School is one of the disciplines. The contact person with the
2 school would be the guidance counselor.

3 Q. And what are the other two?

4 A. Community is the second one.

5 Q. Okay.

6 A. Ah, the person in the community that is the contact person
7 would be the individual who is going to supervise the case once the
8 release does take place.

9 They are to let us know what kind of plans are being made in
10 the community in terms of ongoing services and where the juvenile
11 will reside. They are also suppose to check out the facility or
12 home to determine suitability.

13 And then the third one, of course, is the DJJ treatment
14 people, and that would be the social worker.

15 Q. Was part of your job to collect information for the Parole
16 Board about Thomas Simmons?

17 A. Absolutely, yes.

18 Q. What is Thomas Simmons' status right now with the Department
19 of Juvenile Justice?

20 A. Thomas is in a very unusual status right now. As of February
21 of this year, the Juvenile Parole Board did make a determination to
22 release Thomas.

23 However, based on the Sexually Violent Predator Act, release
24 papers were not issued because he would need to go through a
25 screening process.

1 First of all, he had to go before a Multi-Disciplinary Team
2 that is actually appointed by the Governor's Office. I think there
3 was some indication given earlier that the Juvenile Justice
4 Department, um, did this sort of thing but the Governor's Office
5 actually is the one that appoints the Multi-Disciplinary Team for
6 the Sexually Violent Predator Act.

7 Thomas was subject to this by virtue of the type of charge for
8 which he was committed which was the criminal sexual conduct, first
9 degree.

10 Q. Okay.

11 A. So, essentially, it was a matter of preparing reports to
12 provide to the Multi-Disciplinary Team before Thomas could go
13 anywhere.

14 THE COURT: Let me ask you this.

15 Does your Parole Board in considering whether or not he would
16 be released, they knew what he was in there for, did they not?

17 MS. PRICE: They did.

18 THE COURT: And am I hearing you say that, ah, they
19 recommended that he be released on that?

20 MS. PRICE: They did based on the reports that we received
21 at that time. However, things changed that very week.

22 Um, when I went - - -

23 THE COURT: What changed?

24 MS. PRICE: Ah, essentially, I went to the institution on
25 Wednesday of that week, actually, it was Thursday of that week, um,

1 to talk to the juveniles who were actually being released and to
2 give them information about their particular release papers and the
3 conditions that were in their release papers, and Thomas was
4 actually brought to talk to me about his release papers that day
5 because he was one of the ones who were scheduled to be released as
6 soon as placement was actually found for him.

7 But anyway, upon his arrival, things changed, and I sent this
8 letter to the Attorney General's Office and made this information
9 aware - - made - - made this information available, excuse me, to
10 the Multi-Disciplinary - - -

11 THE COURT: Well, your - - you - - you were working for the
12 - - working for the Parole Board? You took a position contra to
13 their release? Is that what I hear?

14 MS. PRICE: No, sir. No, sir. I'm saying things changed.

15 THE COURT: How did they change?

16 MS. PRICE: The situation changed with Thomas and his
17 behavior.

18 THE COURT: How?

19 MS. PRICE: There was information that became available at
20 that point based on my observation when he came to do these release
21 papers - - -

22 THE COURT: Am I hearing you say in spite of what the
23 Parole Board want - - said to be released, you made the
24 determination to hold this man?

25 MS. PRICE: No, sir. No, sir.

1 THE COURT: Go ahead.

2 MS. PRICE: I made contact - - I made contact with the
3 Board about - - -

4 THE COURT: That's what I hear you say that you were - - -

5 MR. BOGLE: No, Your Honor.

6 MS. PRICE: I'm not sure how to word this.

7 THE COURT: The Parole Board released him, and they sent
8 him to her for final release papers. As a result of that
9 conversation she contacted the Attorney General.

10 MR. BOGLE: No, sir.

11 THE COURT: And that's why he's here.

12 MS. PRICE: No, sir.

13 MR. BOGLE: Let me get to it.

14 THE COURT: You better get it clear because - - -

15 MS. PRICE: Based on what happened - - -

16 MR. BOGLE: Let's back up a second.

17 MS. PRICE: I - - I was sent.

18 MR. BOGLE: Ms. Price, Ms. Price, let's back up a second.

19 Q. Did the Parole Board recommend his release?

20 A. The Court - - the Board does not recommend release. The Board
21 makes a decision after they are given recommendations.

22 Q. Okay.

23 Did they make a decision for release?

24 A. They did make a decision to release.

25 Q. As a result of that decision, did you then meet with Thomas t

1 go over with Thomas Simmons his release papers?

2 A. Yes, I did.

3 Q. And at that meeting, did that happen early in February of this
4 year?

5 A. Yes, it did.

6 Q. Okay.

7 Now, I'm going to ask you what happened at that meeting in
8 just a second but as a result of that meeting did this give you new
9 information you thought was relevant to the Parole Board?

10 A. Yes, I did.

11 Q. And did you provide the information to the Parole Board?

12 A. At that point in time the information was made available to
13 the treatment people at DJJ and to the Parole Board, my director.

14 Q. Okay.

15 And later on when I found out about it, at my request did you
16 write me a letter telling me what had happened?

17 A. Yes, I did.

18 Q. Okay.

19 So, let's pull back to what happened that day.

20 The Parole Board has approved his release.

21 A. Correct.

22 Q. You're going to meet with him in the normal course of business

23 - - -

24 MR. ARCHER: Your Honor, I'll object. These are not
25 questions.

1 MR. BOGLE: Alright.

2 THE COURT: Sir?

3 MR. ARCHER: These are not questions.

4 MR. BOGLE: Let me rephrase it.

5 Q. Had the Parole Board approved his release?

6 A. Yes, they did.

7 Q. Was the purpose - - what was the purpose of meeting with
8 Thomas then?

9 A. To go over these release papers.

10 Q. Is that the standard procedure?

11 A. That is standard procedure.

12 Q. What happened - - where did that meeting take place?

13 A. That meeting met - - on DJJ campus.

14 Q. Okay.

15 A. It's called the Community Life Center.

16 Q. Who was present at that meeting?

17 A. Other juveniles and several JPO's.

18 At the point where I spoke with Thomas, he and I were in an
19 area at a table that was somewhat separate from the rest of the
20 individuals that were waiting to go over their release papers.

21 Q. Tell the jury about that conversation with Mr. Simmons.

22 A. Okay.

23 Can I read from my letter to you?

24 Q. Was that letter written to me as an accounting of what
25 happened?

1 A. Yes, it was.

2 Q. Do you need to refer to that to refresh your memory?

3 A. I need to refer to this to keep me from rambling.

4 Q. Okay.

5 A. It will help me stay on track and not waste the Court's time.

6 Q. Okay.

7 What happened at that meeting with Thomas?

8 A. Upon his arrival and while general information was being
9 discussed, Thomas appeared calm and relaxed. However, when Thomas
10 learned the Juvenile Parole Board ordered restitution for the
11 victim, his behavior changed rapidly.

12 Thomas got very loud and red-faced. He yelled, slammed the
13 table with his fists and then got out of his chair and started
14 pacing around in a circle while stating his opinion that he should
15 not have to pay for anything.

16 He talked rapidly and yelled as he questioned why he had to
17 pay restitution. Thomas continued to use a loud tone and got
18 louder as he blurted more words blaming the victim for his
19 commitment.

20 He also stated, "They should have to pay for me. Whose going
21 to have to pay for me?"

22 I explained that the State had been paying for his treatment
23 and care during his commitment and for the damages caused by his
24 crime.

25 Thomas was fully advised that the restitution was ordered to

1 reimburse payments made by the State to help cover the victim's
2 out-of-pocket expenses for counseling and medical bills.

3 I gave repeated instructions for Thomas to hush and to sit
4 down and to think about what he was saying. Before Thomas
5 responded to any instructions, he appeared to make a lunge in my
6 direction with his body, then stopped and caught himself and sat
7 down.

8 When he finally sat back down in the chair, he refused to say
9 anything more and wrapped his arms tightly around himself in a
10 hugging motion.

11 I then asked the Juvenile Correction Officer to remove him.

12 Q. Did you report - - now, all this stuff you just talked about,
13 did you report that to the Parole Board?

14 A. I reported it to my director.

15 Q. Your director.

16 A. My director called board members. Essentially, the decision
17 was made to go through the regular procedure. I contacted the
18 treatment folks over at SCDC - - not SCDC, I'm sorry, DJJ - -
19 getting so mixed up with these two different, um, setups, anyway.

20 Q. Did you inform them about it?

21 Who else did you inform about what had happened?

22 A. Gayle Shellenberg, his supervisor, and her supervisor, Jan
23 Geison.

24 Q. Okay.

25 A. And a report was made to them. She indicated to me that she

1 was going to be talking with him right away, and there was some
2 additional contact between her, me, my boss and her supervisor
3 about whether or not recidivism, ah, a rescission would be - - I'm
4 getting my words mixed up terribly, I'm sorry. Whether or not a
5 rescission would take place. And, essentially - - -

6 Q. A rescission by whom?

7 A. A rescission by DJJ.

8 Q. Okay.

9 A. A request to have him brought back and rather than release,
10 they would ask for a rescission, and it would be their procedure to
11 ask for a rescission of our Board. That's the procedure that would
12 have to take place.

13 Q. Did the things that happened at that meeting with you and
14 Thomas which you just described - - you reported to Gayle
15 Shellenberg. You mentioned that?

16 A. Correct.

17 Q. Did you also inform the Treatment Team at the Sexually Violent
18 Predator Unit about that incident?

19 A. The next week was when the Multi-Disciplinary Team met. Ms.
20 Shellenberg and I both appeared at that meeting and spoke, and this
21 was brought up, yes.

22 Q. Okay.

23 A. And they made a decision to refer the case on, to waive it on
24 to you.

25 Q. And that's how we got here today?

1 A. And that's how we got here today.

2 Q. Did you also report this incident to the Sexually Violent
3 Predator Unit, people who work there?

4 A. That is done when a different process takes place. It's part
5 of the ongoing.

6 Q. Okay.

7 A. They were sent a copy of all the reports when the decision was
8 made that mental evaluation would need to be done.

9 Q. Was Dr. - - did Dr. Neller interview you about this incident
10 with Thomas?

11 A. No, never, never.

12 Q. Okay.

13 Did this incident with Thomas cause any change in the
14 recommendation by the Parole Board?

15 A. At the point where this happened that would not be something
16 that would happen unless DJJ requested a rescission.

17 Q. Okay.

18 So, this - - let me close with this.

19 Why is he still at DJJ?

20 A. Two reasons. He's going through the SVPA process.

21 Q. This program - - this trial here?

22 A. Correct.

23 Q. Okay.

24 A. The second reason is mixed up in that. He does not have a
25 place to go yet, and they will not look for a place for him to go

1 until this process is finished - - and unless it is determined that
2 he is not a sexually violent predator, no placement will take him.

3 Q. So, one of the things y'all have to look for even if we
4 weren't doing this trial today when you're going to parole a
5 juvenile, you've got to find a place for him to stay, correct?

6 A. Correct.

7 Q. And there's been a breakdown in that as far as right now goes
8 or as today goes?

9 A. Correct.

10 Q. Was there a breakdown in the location that you at one time had
11 selected for him?

12 A. Several different breakdowns have occurred.

13 Q. Okay.

14 A. There has been approval several different times through
15 interstate contact with family members, and those have fallen
16 through several times.

17 Q. Are these family members in North Carolina?

18 A. Yes, they are.

19 Q. Was at one point - - when he was - - when parole was approved
20 for him, was at that time the idea that he be placed in North
21 Carolina with relatives up there?

22 A. Yes.

23 Q. Okay.

24 Do you know anything about whether or not North Carolina has
25 a sexual registration or do you know?

1 A. They do not.

2 Q. They do not?

3 A. They have a closed registration that's in - - in that state
4 only that would not be subject to, um, any kind of cooperative
5 effort for the type of registration that we have here in South
6 Carolina.

7 Q. And if he was paroled and sent to live with relatives in North
8 Carolina assuming that you had someone up there, is there anyway
9 the parole - - would he remain on parole for a certain number of
10 years?

11 A. He would remain on parole for two years.

12 Q. But what could the Parole Board do with him, though, if he's
13 in another state?

14 A. Essentially, in order for him - - -

15 MR. ARCHER: Objection, Your Honor.

16 THE COURT: I sustain that. She's not qualified to speak
17 to that issue.

18 Q. Are you - - you have - - -

19 THE COURT: That's a legal issue, now, as to whether the
20 Parole Board would bring him back or not. I - - I - - I sustain
21 it.

22 MR. BOGLE: Alright.

23 Q. Let me ask one little question a different way.

24 Can the Parole Board - - are you familiar with their powers
25 and abilities?

1 A. Yes, I am.

2 Q. Do they have the power to require him to go to a sex offender
3 treatment if he's in another state?

4 A. Yes, they do.

5 Q. Okay.

6 How can they enforce it if he doesn't?

7 A. Essentially - - -

8 MR. ARCHER: Objection, Your Honor.

9 THE COURT: I sustain that.

10 No, sir. She's answered your question fairly, now.

11 MR. BOGLE: Alright.

12 THE COURT: We're not going to require her to get into the
13 details of it.

14 MR. BOGLE: Alright.

15 Nothing further then.

16 A. I'm involved in the process of making arrangements between
17 states.

18 Q. Is there an interstate compact?

19 A. There is an interstate compact, and that's basically what you
20 were trying to - - -

21 Q. Okay.

22 How does it work?

23 A. The interstate compact, we have - - our state makes a request
24 to - - -

25 MR. ARCHER: I - - I'll object to this, Your Honor. I don't

1 know what this has to do with anything.

2 A. To the other state's position.

3 THE COURT: I think she answered your initial question.
4 There's no need going into the intricate workings of the interstate
5 compact.

6 MR. BOGLE: Alright.

7 Q. Now, just one last question.

8 Ms. Price, in your capacity, what is your - - what is your
9 education level? What's your education level?

10 A. Bachelors plus.

11 Q. What's plus mean?

12 A. I have 120 Masters hours.

13 Q. Okay.

14 And what is your field? What are those hours in, your major
15 in?

16 A. In psychology, family counseling.

17 Q. Okay.

18 And have testified as an expert witness in other matters?

19 A. Yes, I have.

20 Q. Not what you're here about today but in other matters
21 regarding juvenile placement?

22 A. Yes, I have.

23 Q. In what states?

24 A. Virginia and South Carolina.

25 THE COURT: What area do qualify or propose - - -

1 MR. BOGLE: I'm not qualifying. I'm just trying to point
2 her education level to the jury. I'm not trying to qualify her as
3 an expert for this hearing.

4 THE COURT: Alright.

5 MR. BOGLE: Thank you, ma'am.

6 THE COURT: Mr. Archer.

7 CROSS EXAMINATION BY MR. ARCHER:

8 Q. Good afternoon.

9 I think we're confusing the jury here a little bit.

10 As far as this team that you consider, that's the - - that's
11 something that - - that's why we're here today. We started with
12 this Disciplinary Team. Is that correct?

13 In other words, in order to get to where we are, there's a
14 team meets, and then they vote.

15 A. Correct.

16 Q. That's all gone in the past, isn't it? Has nothing to do
17 with why we're here today. We know he - - he - - he was
18 recommended to the program, correct? That's all that is.

19 A. The Multi-Disciplinary Team is separate from DJJ or from
20 Parole, and they made a decision as to whether or not they feel
21 that the case needs to be referred to the Attorney General's
22 Office.

23 Q. Yes.

24 Well, it was.

25 A. It was.

1 Q. I mean, that's why we're here today.

2 That's no big surprise. I mean, that's why we're here. It
3 was referred.

4 A. Yes.

5 Q. As far as all this bad stuff that Dr. Neller put in his
6 report, all these bad things about Thomas Simmons, everything,
7 isn't it true that he was paroled?

8 A. That's true.

9 Q. So, they knew all about this bad stuff that came out at this
10 trial, and they still paroled him?

11 A. Yes.

12 Q. And he's still subject to parole, isn't he?

13 A. Yes.

14 Q. So, if he's released, he will be under strict supervision,
15 correct?

16 A. Yes.

17 Q. Alright.

18 And if he violates any of the provisions of the parole, he
19 goes right back to prison, correct?

20 A. The Board would have to make a decision as to - -

21 Q. Right.

22 A. - - whether or not he is suspended.

23 Q. But he'd be subject to violating to parole, and he goes right
24 back to prison.

25 A. Correct.

1 Q. He's not just going to be let out on the street. He's going
2 to be on the parole?

3 A. Correct.

4 Q. Let me read you something. This is the statute. This is the
5 Sexually Violent Predator Statute.

6 Well, let me ask you another question first.

7 You mentioned this letter about how he acted.

8 A. Correct.

9 Q. What there anything in that letter regarding sexual?

10 A. No.

11 Q. Isn't that why we're here today? This is a Sexual Predator
12 Act, isn't it? Yes or no?

13 A. Ah, would you repeat the question, please?

14 Q. I asked you is there anything he did in that letter that was
15 sexual in nature?

16 A. No, no.

17 Q. And that's why we're here today. This is Sexually Violent
18 Predator Act, correct?

19 A. Correct.

20 Q. So, that letter is, basically, irrelevant to any of this
21 proceeding, correct?

22 A. It's not irrelevant in my opinion.

23 Q. In your opinion. Alright.

24 Let me read you something. This is the statute.

25 "The Respondent suffers from a mental abnormality or

1 personality disorder that makes him likely to engage in acts c
2 sexual violence if not confined in a secure facility for long-term
3 care and treatment."

4 That's the statute, correct?

5 A. Correct.

6 Q. Isn't it true that you are not qualified to answer that one
7 way or the other? Isn't that correct?

8 A. For the purposes of this court, no.

9 Q. Who is qualified? Dr. Neller, correct?

10 A. Dr. Neller.

11 Q. And he gave his opinion that Thomas Simmons should not be
12 committed to the program, correct?

13 A. Correct.

14 Q. Thank you. I have no further questions.

15 THE COURT: Let me ask you one question.

16 As I understand from your testimony, he came to you to get his
17 release papers. The Board had concluded that he was entitled to be
18 paroled. Is that right?

19 MS. PRICE: We were to talk about his release. I could not
20 release - - -

21 THE COURT: I thought the Board - - I thought the Board had
22 said he was - - -

23 MS. PRICE: He didn't - - he didn't have a place to go yet.
24 but I as a courtesy was going to go ahead and discuss what his
25 papers content involved.

1 THE COURT: But he was to be released?

2 No question about that. The Board had said that?

3 MS. PRICE: The Board had said that, and it was also a
4 matter of discussing with him the fact that the next step was for
5 him to go before the Multi-Disciplinary Team and for them to make
6 a decision.

7 I could not issue his release papers until that team made a
8 determination.

9 THE COURT: What's giving me concern is that he - - he
10 complained and become unruly when the question of restitution was
11 involved and from that you concluded that he ought to be a - - -

12 MS. PRICE: No.

13 THE COURT: Well, you the one - - -

14 MS. PRICE: No, sir.

15 THE COURT: Didn't you get this process started because you
16 didn't like the way he acted?

17 REDIRECT EXAMINATION BY MR. BOGLE:

18 MR. BOGLE: Your Honor.

19 MS. PRICE: No, sir. No, sir.

20 THE COURT: I needed to ask that question. Who started
21 this process? And I'm asking her, and I think she's the one that
22 did it. Isn't she? I just want to know who started it.

23 MR. BOGLE: I think she was very - - if I may, Your Honor?

24 I think during her direct examination, she explained that her job
25 was to explain his release papers to him, conditions of release

1 once the Parole Board recommended that he be released.

2 THE COURT: Yes, sir.

3 MR. BOGLE: That's when he had this outburst.

4 THE COURT: Yes, sir.

5 MR. BOGLE: Totally independent of her, Mr. Simmons had
6 been flagged by this Multi-Disciplinary Team appointed by the
7 Governor to review him to see if he qualified to be a sexually
8 violent predator.

9 THE COURT: What I'm trying to find out for my edification.
10 Was that process done before she brought it to somebody's attention
11 based on his conduct with her? That's all I wanted to know.

12 Q. If I may?

13 A. With or without this incident, Thomas was required to go to
14 the Multi-Disciplinary Team. That's part of the law that goes with
15 the SVPA process.

16 THE COURT: That's what I want - - that answer is
17 appropriate.

18 Thank you so much.

19 Q. And is that based on the type of crime he was convicted of?

20 A. Yes, it is.

21 Q. It had nothing to do with the outburst in front of you.

22 THE COURT: Just wanted that clarified, and I appreciate
23 your doing that.

24 MR. BOGLE: I'm sorry, Your Honor.

25 Q. If I could ask one last question, then.

1 What was the significance to you of this outburst?

2 A. The lack of empathy for the victim which is a very strong
3 criteria that the Board makes a ruling on. They look for victim
4 empathy when they make their decisions for release.

5 In this particular incident, Thomas' words, Thomas' attitude
6 and his violent behavior indicated as lack of empathy for the
7 victim and was critical in terms of that being an issue that may
8 require some reconsideration.

9 Q. Thank you.

10 RE-CROSS EXAMINATION BY MR. ARCHER:

11 Q. If the Board didn't rule that he should be subject to the
12 Sexually Violent Predator Act, we wouldn't be here today, correct?

13 A. The Board didn't rule that. That's the statute.

14 Q. Yeah, but they - - they - - there's four of them on this
15 board. That's how you start this proceeding.

16 A. My board didn't - - I'm sorry. I misunderstood you. You - -
17 my board is the Parole Board. The Sexually Violent Predator Multi-
18 Disciplinary Team is totally separate from my board.

19 Q. Okay.

20 So, I don't want the jury to be confused about that. That's
21 got nothing to do with the Sexual Predator Act. It's just a Parole
22 Board.

23 A. The Board does not make the decision for the SVPA process.

24 Q. But when you mention the Board, you're talking about the
25 Parole Board?

1 A. Right.

2 Q. Okay.

3 And the Parole Board voted to parole him, correct?

4 A. Right.

5 Q. Thank you.

6 THE COURT: Anything further?

7 MR. BOGLE: No further questions.

8 THE COURT: Sir?

9 MR. BOGLE: No further questions.

10 THE COURT: You may come down. Thank you.

11 MS. PRICE: Thank you.

12 (The witness leaves the witness stand.)

13 MR. BOGLE: Could I ask that she be released. I think she
14 and my next one that drove up here in the same car.

15 THE COURT: Yes, she's released but certainly welcome to
16 remain in the courtroom.

17 MR. BOGLE: Alright.

18 We would call Gayle Shellenberg.

19 Did you want to take a break now or go on?

20 THE COURT: Let's take a short break. The jury has been
21 here very patiently. Let's take about a fifteen minute break and
22 come on back.

23 Thank you.

24 (The jury retires to the jury room at 4:13 p.m.)

25 THE COURT: Jim.

1 MR. BOGLE: Yes, sir.

2 (Bench conference held off the record and outside the presence
3 of the jury panel.)

4 THE COURT: We are in recess.

5 (The Court recesses the trial of this case for a short break
6 and thereafter reconvenes the trial of this case and the jury
7 returns to the courtroom at 4:23 p.m.)

8 THE COURT: Alright, sir.

9 MR. BOGLE: Thank you, Your Honor. May it please the
10 Court?

11 We call Gayle Shellenberg.

12 (The witness takes the witness stand.)

13 GAYLE SHELLENBERG, being duly sworn,
14 testifies as follows:

15 CLERK OF COURT: State your name for the Court, please,
16 ma'am.

17 MS. SHELLENBERG: Gayle Shellenberg.

18 DIRECT EXAMINATION BY MR. BOGLE:

19 Q. Ms. Shellenberg, who are you employed by at the present time?

20 A. South Carolina Department of Juvenile Justice.

21 Q. And what is your job there right now?

22 A. I am a social worker.

23 Q. How long have you been employed by them in that capacity?

24 A. Approximately eight years.

25 Q. And prior to that, did you work for them in another capacity

1 or work for somebody else?

2 A. I worked for somebody else.

3 Q. What's your employment history prior to Juvenile Justice.

4 A. Um, I worked at South Carolina Department of Corrections for
5 two years as an addictions counselor, and prior to that I worked at
6 DAODAS. It's a wilderness camp, assessment liaison doing
7 evaluations for addiction.

8 Q. What's the name of the wilderness camp again?

9 A. Well, it's Department of Alcohol and Other Drug Abuse
10 Services.

11 Q. Alright. Department of Alcohol and Other Drug Abuse
12 Services.

13 A. Department of Alcohol - - wait, DAODAS - - Department of
14 Alcohol and Other Drug Abuse Services.

15 Q. Is that the acronym for that?

16 A. Yeah.

17 Q. Alright.

18 Now, as a - - are you licensed as a social worker?

19 A. Yes, I am.

20 Q. Who licenses you?

21 A. Um, the National Association of Social Workers.

22 Q. Are you also licensed by the State of South Carolina?

23 A. Yes.

24 Q. And how long have you held that license by the State of South
25 Carolina?

1 A. Seven years.

2 Q. What is your educational background to get there?

3 A. I have a Masters in social work.

4 Q. Okay.

5 Have you been assigned to work with Thomas Simmons - -

6 A. Yes.

7 Q. - - while he was at the Department of Juvenile Justice?

8 A. Yes, I have.

9 Q. Okay.

10 Now, what is Thomas' status right now within the department?

11 A. Okay.

12 Pending the results of this hearing, he would be released - -
13 if he is not deemed committed to a mental health facility he would
14 be released pending the completion of an interstate compact.

15 Q. Okay.

16 So, if the jury - - just so I'm clear on this. If the jury
17 finds that he is a predator, he goes to the mental health program?

18 A. Yes.

19 Q. If they find that he's not, then he's been paroled?

20 A. Uh-huh.

21 Q. You've still got to work out a place for him to live?

22 A. Yes.

23 Q. Okay.

24 Is that kind of up in the air, where he's going to live?

25 A. Presently, he's planning to go to live with his mother. Um,

1 they would have to restart the interstate compact and do a home
2 study to determine if that placement was suitable.

3 Q. At a previous time back in February of this year was there - -
4 at the time he was first declared parolable - - -

5 MR. ARCHER: I'll object, Your Honor. This is - - this is
6 so prejudicial. This has nothing to do with where he's going to
7 go. This is about whether he's a sexual predator or not.

8 THE COURT: I'm going to take the testimony. It may have
9 some bearing on some issue in this case. I'm not sure where he's
10 going with it.

11 MR. BOGLE: Thank you, Your Honor.

12 Q. Back in February when he was paroled by - - by - - by your
13 agency, was there placement lined up back then?

14 A. Um, we - - they were going to do a home study to determine if
15 they could find the placement with his mother.

16 Q. And what about his mother and father? Were they living
17 together?

18 A. Well, at that time his mother and father were together, and
19 then they separated.

20 Q. Okay.

21 A. And so that's why they had to re-initiate once this is
22 completed to determine if it's a suitable placement.

23 Q. Now, have you - - are you - - are you assigned a number of
24 juveniles other than Thomas?

25 A. Yes.

1 Q. Okay.

2 Is there any other social workers been assigned to Thomas for
3 the last few years?

4 A. No, there is not.

5 Q. Okay.

6 Do you work with him pretty closely?

7 A. Yes, I do.

8 Q. Does that include interviews?

9 A. I meet with him on a weekly basis, usually, and then, um,
10 right now, we've got more - - we're sacked with more kids but,
11 usually, two groups a week.

12 Q. Do you also consult with other places he might be like school
13 or staff or something, whatever he's doing?

14 A. Yes, we do.

15 Q. Scouting, whatever he's doing.

16 Okay.

17 And were you every contacted by Dr. Neller or anybody at the
18 SVP, Sexually Violent Predator Program to ask you for what
19 information you had about Mr. Simmons?

20 A. No, I was not.

21 Q. You heard Ms. Price testify about the incident where Thomas
22 blew up at her over the restitution and things like that. Was that
23 reported to you?

24 A. Yes, it was.

25 Q. And was that information made available to Dr. Neller as far

1 as you know?

2 A. Yes, it was. The excerpt, um, that he talked about from a
3 letter that I had written, it was contained in that letter as well.

4 Q. Okay.

5 But you never were contacted?

6 A. No, I was not.

7 Q. Was anybody at your agency contacted by Dr. Neller about
8 Thomas Simmons' progress or lack of progress, whichever applies?

9 A. No, they were not.

10 Q. Now, have you had a chance to examine Dr. Neller's report?

11 A. Yes, I have.

12 Q. Do you have a copy in front of you?

13 A. Yes, I do.

14 Q. On page two, I'm referring to the page number at the bottom of
15 the bottom right-hand corner. On page two of Dr. Neller's report,
16 he states that Thomas' biological mother has visited him monthly
17 during Thomas' confinement. Is that true?

18 A. No. His mother visited him on November 11, 2006, and June
19 22, 2007, and his mother and father both visited together in July,
20 2007, but those were the only visits.

21 Q. Okay.

22 If you return to page three, now, you were in the courtroom,
23 were you not, a few minutes ago when Dr. Neller was on the stand
24 and testified about that indented paragraph there. Is that right?

25 A. Yes, I was.

1 Q. Okay.

2 Were you the author of the memorandum from which those
3 selected - - from which those lines were taken?

4 A. Yes, I was.

5 Q. And you heard Dr. Neller read into the record all the
6 intervening language between those lines.

7 A. Yes, I did.

8 Q. Was all that intervening language significant to you in
9 presenting a picture of Thomas to the - - to Dr. Neller or to
10 anybody else?

11 A. Um, yes, it was.

12 Later in the report Dr. Neller indicates that based upon
13 assessment tools that he used, there were, I think it's on page
14 eight, he indicates that - - let me find it - - that Mr. Simmons'
15 responses were consistent with anti-social narcissistic and
16 paranoid features. The report that I wrote documented those
17 features as well.

18 Q. Now, you're not an expert witness in this courtroom, are you?

19 A. No, I'm not.

20 Q. Have you worked, though, with kids over the years that have
21 those features?

22 A. Yes, I have.

23 Q. Have you seen them diagnosed by people and had kids display
24 those characteristics?

25 A. Yes, I have.

1 Q. Okay.

2 Are you familiar with Thomas on a regular basis?

3 A. Yes, I am.

4 Q. Does he seem to display - - -

5 MR. ARCHER: Objection, Your Honor. She said she's not an
6 expert in this.

7 THE COURT: Well, no - - in her area of involvement, I'll
8 let her answer. The jury understands she's not an expert but she
9 has certain competence in her field, and she's entitled to give her
10 opinion.

11 Go ahead.

12 Q. Have you seen Thomas display those very features you referred
13 to a minute ago in Dr. Neller's report: Anti-social narcissistic
14 and paranoid features?

15 A. Yes, and his triggers are entitlement and power and control.

16 Q. What do you mean by triggers?

17 A. Um, with sexual offenders there is an offense cycle, and
18 triggers are the things that could send them into their offense
19 cycle and cause them to possibly re-offend.

20 Q. Well, what would Thomas' triggers be?

21 A. Um, entitlement and power and control.

22 Q. And by entitlement, what do you mean?

23 A. The sense of grandiosity and - - basically, ah, having more
24 knowledge than, probably, another person, more superior traits.

25 Q. So, when Dr. Neller refers to Thomas having a grandiose sense

1 of self-importance and expects to be recognized as a superior, is
2 that what you're talking about - -

3 A. Yes, I am.

4 Q. - - by entitlement?

5 A. Yes.

6 Q. And what was the second thing?

7 A. Um, power and control.

8 Q. Power and control, and how would you describe that?

9 A. That would be associated with his offense in which the other -
10 - the child that he victimized was getting more attention, and
11 Thomas felt powerless, and that is the trigger that caused him to
12 offend.

13 Q. Would Thomas' reaction to Linda's discussion with him about
14 planned restitution and the statements he made that Linda has
15 testified about earlier which you heard?

16 A. Yes.

17 Q. Is that consistent with this control feature that you're
18 describing right now?

19 A. Yes, it is.

20 Q. On page three of Dr. Neller's report at the middle of the page
21 where it starts saying, "Mr. Simmons earned a GED in May of '07".
22 At the end of that paragraph it says he has received no recent
23 disciplinary reports in school. Is that true?

24 A. No. There were two other school disciplinary reports for
25 refusing to obey verbal instructions and disorderly conduct.

1 Q. Did those happen after Dr. Neller's report or before or do you
2 know?

3 A. After.

4 Q. Okay.

5 Were those made available to this sexually violent predator
6 people - - study?

7 A. No. They were never requested.

8 Q. They were never requested?

9 A. No.

10 Q. Okay.

11 So, as of the date of this report, July 16 of '08, was any
12 requests made after the ones that are reported here to find out if
13 there are any other disciplinary infractions?

14 A. No, there was not.

15 Q. Okay.

16 And was the information readily available to Dr. Neller or
17 anybody as the SVP Program?

18 A. If they had requested.

19 Q. By SVP, I mean Sexually Violent Predator. I assume you knew.

20 A. Yes. That was provided to the SVPA.

21 Q. Okay.

22 Ah, turn to page four. The second paragraph at the top
23 describes Mr. Simmons telling Dr. Neller of the medications he's
24 taking - Adderall and tenex (spelled phonetically).

25 MR. ARCHER: Your Honor, this is all hearsay. I mean, thi

1 is coming from his report.

2 THE COURT: Well, she has knowledge of it given her
3 profile. I'll permit it.

4 Q. Do you have knowledge of the medications Mr. Simmons was
5 taking?

6 A. Yes, I do.

7 Q. Was he taking those two?

8 A. It states that he was taking Adderall, Wellbutrin and tenex.
9 (spelled phonetically). The tenex (spelled phonetically) was
10 discontinued in January 23, 2007, and there's no record of Adderall
11 or Wellbutrin since that time.

12 His current medications are Geodon, 20 mg at night.

13 Q. Oh.

14 This referencing him currently taking Adderall and tenex
15 (spelled phonetically), is that an inaccurate statement?

16 A. Yes, it is.

17 Q. Okay.

18 At the bottom of the same page, page four, the very last two
19 lines where Mr. Simmons - - Dr. Neller says, "Mr. Simmons states he
20 received no level drops, lockups or major write-ups in the past
21 year."

22 Is that a true statement?

23 A. No, it is not.

24 Q. What is a level drop?

25 A. A level drop is, basically, there's certain, um, requirements

1 that they have to comply with or they are written up for minor
2 violations.

3 In this instance there were eleven level drops for and the
4 reasoning behind them were disorderly conduct, refusing to obey
5 verbal instructions, disrespect and threatening conduct.

6 Q. And was that information available to the Sexually Violent
7 Predator people that were looking at Mr. Simmons?

8 A. Yes, it was.

9 Q. Was it asked for by your agency?

10 Did someone ask for it?

11 A. No, it was never requested.

12 Q. Okay.

13 Turn to page - - on page six of the report there's a reference
14 to downloading pornography. Have you - - in this paragraph Dr.
15 Neller quotes Mr. Simmons as saying that he denied doing it, that
16 someone else had given it to him and he just - - he just viewed it
17 one time.

18 Was an investigation conducted of Mr. Simmons regarding the
19 issue of downloading pornography?

20 A. Yes, it was.

21 Q. And what was the outcome - - what did y'all find out?

22 A. The, ah, the objects that he alluded to he had seen were
23 contained on his computer in the classroom.

24 Q. Does he admit to downloading them?

25 A. He admitted that he was given the disc and put the material

1 on the computer.

2 Q. Okay.

3 Did you ever have a chance to see the cartoon pornography
4 we're talking about?

5 A. Yes, I did.

6 Q. How would you describe it, ma'am?

7 A. It was violent and sadistic. Basically, ah, some bondage,
8 you know, and rape.

9 Q. Okay.

10 A. Forcible rape.

11 Q. Okay.

12 Was it boy on girl, boy on boy, girl on girl?

13 A. As I recall, it was boy on girl.

14 Q. Okay.

15 Why parole him if he - - if this guy has all these problems?

16 A. You do. They - - -

17 MR. ARCHER: Objection, Your Honor. She's not part of the
18 Parole Board. She's a - - she's a social worker.

19 Q. Do you make recommendations to the Parole Board?

20 A. Yes, we do.

21 Q. Okay.

22 In your opinion, was it appropriate to - - -

23 THE COURT: Wait a minute, now. She can't second guess
24 the Parole Board.

25 Q. Do you make recommendations to the Parole Board?

1 A. Yes, we do make recommendations.

2 Q. And we've already heard testimony that they decided to parole
3 him, Okay?

4 Is DJJ - - is there anything else DJJ could do for this young
5 man as far as mental health treatment for his issues - - his
6 problems?

7 A. He has completed sex offender treatment, and we've done as
8 much as we could do. That's why he was recommended for release.

9 Ah, basically, we knew that he would be going before SVPA to
10 be possibly reviewed and waived up.

11 Had he not been released, he, um, he, you know, he would have
12 been detained at DJJ and the recommendation would have been
13 rescinded.

14 Q. By SVPA, you mean the Sexually Violent Predator Act?

15 A. Yes.

16 Q. Y'all knew that that Multi-Disciplinary Team was going to
17 review him and his records?

18 A. Yes, sir.

19 Q. Is that because of the type of crime he committed?

20 A. Yes.

21 Q. As his social worker, do you feel that your agency has
22 provided all the mental health treatment they can to Mr. Simmons?

23 A. Yes, I do.

24 Q. Do you feel that - - as his social worker, do you feel that
25 more is needed?

1 A. I have concerns but I'm going to leave it up to the jury to
2 make that recommendation.

3 Q. Okay.

4 Are you are of the mental health program that the Sexually
5 Violent Predator Act operates?

6 A. Yes.

7 Q. Do they offer treatment that you think would benefit him?

8 A. Yes, it's more extensive.

9 Q. Okay.

10 Is there anything else you'd like to tell the jury that I have
11 not gone over in our brief time together?

12 A. Not that I can recall.

13 Q. Thank you.

14 Please answer any questions that Mr. Archer may have or the
15 judge may have.

16 CROSS EXAMINATION BY MR. ARCHER:

17 Q. Good afternoon.

18 A. Good afternoon.

19 Q. You just testified that there were some disciplinary problems,
20 minor disciplinary problems, etc. None of those were sexual,
21 though, were they?

22 A. He did - - no, they were not.

23 Q. Alright.

24 Yes or no?

25 A. I was looking. I did have a major written up for September 5,

1 2007, for possession of contraband, safety hazzard and sexual
2 misconduct.

3 Q. Okay.

4 But - - but those minor disciplinary problems that you had
5 mentioned, there was nothing sexual about that?

6 A. No, they were not.

7 Q. Okay.

8 As far as the pornography is concerned, you heard me ask Dr.
9 Neller would that change his opinion - -

10 A. Uh-uh.

11 Q. - - and he said no, correct?

12 A. Yes, he did.

13 Q. Alright.

14 Actually, all the things that the Attorney General just
15 brought regarding the report - -

16 A. Uh-huh.

17 Q. - - you read from the report.

18 A. Yes, I did.

19 Q. That's Dr. Neller's report, isn't it?

20 A. Yes, it is.

21 Q. That's not your report.

22 A. That's - -

23 Q. It's signed by Dr. Neller.

24 A. That's correct.

25 Q. And Dr. Neller is - - is a - - a psychologist who is trained

1 in this. Isn't that correct?

2 A. Yes, he is.

3 Q. And isn't it true, you are not?

4 A. I am a certified sex offender treatment specialist but I'm not
5 qualified to diagnosis as Dr. Neller is.

6 Q. Alright.

7 And let me ask you this.

8 The reason we're here today is to see whether or not the jury
9 is going to commit him to the Sexually Violent Predator Program.
10 Isn't that correct?

11 A. That is correct.

12 Q. So, we're not here concerned about whether he has parents that
13 are going to take him or parents are not going to take him?

14 A. Uh-huh.

15 Q. So, you've testified that his parents visited him twice or
16 something?

17 A. Uh-huh, that is correct.

18 Q. So, in other words, what you're saying is that would be a
19 reason that he should be committed to a sexually violent predator?

20 A. No. My concerns are of a sexual nature.

21 Q. Well, you were talking about his parents. You said his
22 parents didn't visit him.

23 A. No.

24 Q. That didn't have anything to do with anything, does it?

25 A. No. That was just a discrepancy in the report.

1 Q. Oh, okay.

2 Alright. Let me read you this.

3 And you will admit that Dr. Neller is the only who has
4 testified so far that is an expert?

5 A. That's correct.

6 Q. To see whether or not, and again, this is the statute. You
7 know what a statute is, correct?

8 A. Yes, I do.

9 Q. And I'm going to read you the words of the statute.

10 "That the respondent suffers from a mental abnormality or
11 personality disorder that makes him likely to engage in acts of
12 sexual violence if not confined in a secure facility for long-term
13 control, care and treatment."

14 That's the statute.

15 A. Yes.

16 Q. And you can not give an opinion as far as an expert on this
17 statute, can you?

18 A. No, I can not.

19 Q. But Dr. Neller can, can't he?

20 A. That is correct.

21 Q. And he said that Thomas Simmons does not meet that criteria,
22 correct?

23 A. Yes, he did.

24 Q. Alright.

25 Thank you.

1 REDIRECT EXAMINATION BY MR. BOGLE:

2 Q. Did Dr. Neller or anybody assisting him ever ask to see the
3 violent cartoon pornography you just - - you mentioned?

4 A. No, they did not.

5 Q. Okay.

6 Thank you.

7 THE COURT: Anything further?

8 MR. ARCHER: No.

9 THE COURT: You may come down, and thank you.

10 (The witness leaves the witness stand.)

11 THE COURT: Alright. Is there any further witnesses for
12 the State?

13 MR. BOGLE: Nothing further for the State, Your Honor.

14 The State rests.

15 THE PETITIONER/STATE RESTS

16 THE COURT: Any further - - any witnesses for the defense?

17 MR. ARCHER: No. No, sir.

18 THE RESPONDENT RESTS

19 THE COURT: Ladies and gentlemen, that will conclude all of
20 the testimony in the trial of this case. It's now 5:00. It's too
21 late for final summations and charge to the jury. We're going to
22 take a break now. I'll ask you if you'll be back in your jury room
23 in the morning promptly at 10:00, and at that time, we will have
24 final arguments of counsel. I will give you instructions in the
25 law, and you'll have the case for your deliberation.

1 Obviously, if we started now, we'd be here to 7:00 or longer,
2 and I know all of you have responsibilities at home. So, have a
3 nice evening.

4 Please remember my admonition. Don't discuss it with
5 anybody. Please do not discuss it even among yourselves until I've
6 given you the case for your deliberation.

7 Have a good evening.

8 See you in the jury room at 10:00.

9 (The jury is released for the day at 4:43 p.m. to return at
10 10:00 a.m. Tuesday.)

MOTION BY RESPONDENT FOR DIRECTED VERDICT

11 THE COURT: Alright.

12 Any motions?

13 MR. ARCHER: Yes, sir.

14 At this time I'd make a motion for a directed verdict.

15 THE COURT: Excuse me.

16 The State, you got any motions?

17 MR. BOGLE: No, I'd just going to say before we got into
18 that, I'd ask permission to release Ms. Shellenberg as well.

19 THE COURT: Yes, I will. They may want to remain here for
20 this part. They will be released.

21 MR. BOGLE: Before they left, I wanted to be sure.

22 THE COURT: Yeah.

23 MR. ARCHER: Yeah, my motion would be for a directed verdict
24 for the respondent. I don't see how there is any evidence as far
25

1 as the Sexual Predator Act. I don't think they've proved beyond a
2 reasonable doubt. I think their proof is way below that, and I see
3 no issues for the jury to consider at this - - at this point.

4 So, I would ask the Court to give a directed verdict for the
5 respondent and that the petition be dismissed.

6 THE COURT: I understand.

7 Counsel.

8 MR. BOGLE: Your Honor, may it please the Court?

9 In response, we would say this case is not so much about what
10 the court-appointed expert, Dr. Neller, says. It's what he didn't
11 say and what he didn't do. I think that's part of the problem.

12 The diagnosis of sexual sadism I would submit to Your Honor is
13 a mental disorder or personality disorder. I think there is
14 sufficient evidence here for there to be a dispute about this,
15 questions of fact to go to the jury. Whether or not we'll prevail
16 or not, I don't know but in a directed verdict context right,
17 there's a dispute of fact as to what this young man suffers from
18 and as to how much information Dr. Neller had before he issued his
19 report and in conjunction consistent with the jury's instructions -
20 - your instructions to the jury, they can apply as much credibility
21 to Dr. Neller's testimony as they want to just as they can Ms.
22 Shellenberg and Ms. Price.

23 We would ask that based on what we have right now, we submit
24 there's enough to go to a jury and ask that the directed motion
25 verdict be denied.

1 RULING OF THE COURT

2 THE COURT: On motion for of verdict, the trial judge is
3 concerned with the existence or non-existence of evidence.
4 I'm not concerned with it's weight.

5 Obviously, I heard the testimony of the doctor who said that
6 he does not meet the criteria of a sexual predator but we - - and
7 our charge to the jury regarding experts we say that they can bring
8 in their common sense to bear on the problem, accept some of it,
9 any of it or none of it, and this jury well may based on the
10 totality of the record disagree with that doctor's opinions, and
11 they're entitled to that under the charge.

12 The last two witnesses given together compiled in my view some
13 evidence for the jury to consider that this respondent is a sexual
14 predator. I think the evidence is, basically, rather weak simply
15 because they very candidly said and I congratulate them for it that
16 they are not experts in this field but to the extent that they are
17 conversant with this field, they have testified as to what their
18 opinion is, and the jury may well conclude, one, that based on his
19 prior act for which he was found guilty is one of the elements they
20 must find. There's no question he's got the prior act.

21 And the second element that they must find, that the
22 respondent suffers from a mental abnormality or personality
23 disorder that makes the respondent likely to engage in sexual
24 conduct.

25 There is testimony by both of these last two witnesses that he

1 has some mental abnormality or personality problem.

2 The jury well may conclude as finders of the facts that
3 coupled with the act for which he's been in jail with the testimony
4 of these last two witnesses and disregard the testimony of the sole
5 expert, they could find that he is, in fact, qualified under the
6 statute to be determined a sexual predator.

7 And, so, it is for that reason that I respectfully, ah,
8 decline to accept your motion for a directed verdict, and I will
9 leave it for the jury's consideration under an appropriate charge.

10 I have the charge given to me by the State. Of course, I will
11 enlarge it as to reasonable doubt and the fact that they are the
12 finders of the facts.

13 Other than that, is there any additional charge requested by
14 the defense?

15 MR. ARCHER: No.

16 THE COURT: Alright, sir.

17 Then we are in recess until 10:00 in the morning.

18 You ladies are now discharged from your subpoena but are
19 welcome to return tomorrow if you care to and thank you so much.

20 MR. BOGLE: Thank you, Your Honor.

21 (The Court adjourns the trial of this case for the day at 4:50
22 p.m. to resume trial at 10:00 a.m. on Tuesday.)

23 - - - END OF TRANSCRIPT - - -

24 COURT REPORTER'S NOTE: Another Court Reporter took the remainder
25 of this trial.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)
STATE OF SOUTH CAROLINA)
PETITIONER)
IN THE INTEREST OF:)
THOMAS SIMMONS)

IN THE FAMILY COURT
FIFTEENTH JUDICIAL CIRCUIT
2004-JU-26-999
2002-JU26-1645

ORDER

HEARING/TRIAL JUDGE:
HEARING/TRIAL DATE:
ATTORNEY FOR STATE:
ATTORNEY FOR JUVENILE:
GUARDIAN AD LITEM:
COURT REPORTER:
PARENT PRESENT:

HONORABLE WYLIE CALDWELL, JR.
DECEMBER 13, 2004
CAROLINE FOX
PAUL RATHBUN
N/A
LINDA MCCALL
THOMAS AND PATRICIA SIMMONS

FILED
JUDICIAL CIRCUIT
2004 DEC 14 AM 10:21

THIS JUVENILE MATTER COMES BEFORE THE COURT FOR A HEARING FOR ONE OR MORE OF THE FOLLOWING PURPOSES:

DISPOSITION following:
RESIDENTIAL EVALUATION on the following charge(s):
2004-JU26-999 CRIMINAL SEXUAL CONDUCT WITH A MINOR FIRST DEGREE
2002-JU26-1645 VIOLATION OF PROBATION FOR DISTURBING SCHOOLS

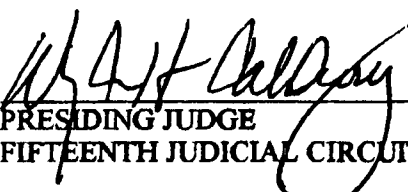
THEREFORE, IT IS ORDERED, that the juvenile be:

COMMITTED to the Department of Juvenile Justice for an **INDETERMINATE PERIOD** of time not to exceed his twenty-first birthday.

The juvenile needs to undergo an eye examination.

AND IT IS SO ORDERED.

DECEMBER 13, 2004
CONWAY SOUTH CAROLINA


PRESIDING JUDGE
FIFTEENTH JUDICIAL CIRCUIT

CERTIFIED COPY
2004 DEC -1 AM 9:06

STATE OF SOUTH CAROLINA)

IN THE FAMILY COURT

COUNTY OF HORRY)

2002-JU-26-1445

IN THE INTEREST OF:)

THOMAS SIMMONS, JR)

DOB: 3/29/91)

PARENTS/GUARDIAN:)

THOMAS SIMMONS SR)

CONWAY, SC 29526)

PETITION
DISTURBING SCHOOLS

Comp.# 15-26-1608-02

J. Gregory Hembree, the petitioner, having sufficient knowledge to believe that a case has arisen which invokes the juvenile jurisdiction of the court, alleges:

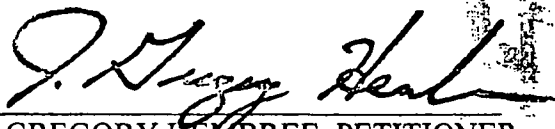
1. That the below-named juvenile resides in or was found in Horry County, and was less than seventeen (17) years of age when the below-mentioned act occurred.

2. That the above-named juvenile did in Horry County on or about October 18, 2002, willfully or unnecessarily interfere with or disturb in any way the students or teachers at a school and/or act in an obnoxious manner, in violation of Section 16-17-420, S. C. Code of Laws, (1976) as amended. Thereby, said juvenile did commit the offense of DISTURBING SCHOOLS.

WHEREFORE, the Petitioner prays that the court determine whether these allegations are true and whether the juvenile is in need of the care, protection or discipline of the State.

Conway, South Carolina

Dated: December 6, 2002


J. GREGORY HEMBREE, PETITIONER

2008 DEC -1 AM 9:06

CERTIFIED COPY

STATE OF SOUTH CAROLINA

)

VERIFICATION

COUNTY OF HORRY

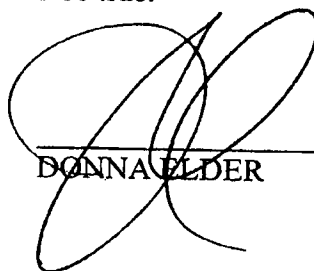
)

)

Donna Elder, Petitioner's Agent, being duly sworn, says that she has read the foregoing Petition and knows same to be true, except such matters as are alleged on information and belief, and as to those she believes same to be true.

SWORN to before me this 16th
day of December, 2002.

Lisa A. Aidhan (L.S.)
Notary Public for South Carolina
My Commission Expires: 02/13/2012



DONNA ELDER

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

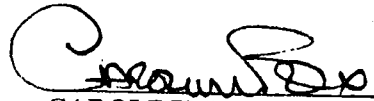
VERIFICATION

Caroline F. Fox, Petitioner's Agent, being duly sworn, says that she has read the foregoing Petition and knows same to be true, except such matters as are alleged on information and belief, and as to those she believes same to be true.

SWORN to before me October 26, 2004.

Heather D. Prince
Notary Public for South Carolina

My Commission Expires: 8-12-14


CAROLINE F. FOX

When you were over to see me I would
 rub my butt. Then I started feeling
 in other areas in ways I shouldn't have.
 It went on for about three years.
 I was thinking about how it would
 feel if I done these things. In my
 mind I knew it was wrong. I was
 always listening to the wrong voice.
 One would say do it while the other
 would say don't do it. I thought it
 would make me feel big, bad, and
 tough, but it didn't. I would start
 as soon as you were gone and I would
 stop as soon as I heard you coming.
 What I done to do that I knew
 was making him uncomfortable. So
 sometimes I was in do it and then
 some times I did. I knew I needed
 help then, but I never asked for it.
 I thought everyone would dislike me
 and wouldn't want to be around me
 if I told. I knew one day it would
 come out. I also tried to make him
 grab my "thing". I also tried to make him
 touch my butt. I did a lot of it after you

something to him. I done things to
him butt I shouldn't I have did
I also tried to force him to do
things I shouldn't have. I held
him ~~down~~ ⁱⁿ ~~his~~ ^{mouth} ~~mouth~~ ^{mouth} ~~mouth~~
things. I also held his mouth so
he couldn't scream. He cried sometimes
I raped him because he wasn't willing
to do what I wanted him to do.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY) CASE NO. 08-CP-26-3108

)
IN THE MATTER OF THE CARE)
AND TREATMENT OF)
THOMAS SIMMONS,)
RESPONDENT.)

**ORDER FOR EVALUATION PURSUANT TO
THE SEXUALLY VIOLENT PREDATOR ACT**

HORRY COUNTY
CLERK OF COURT
MAY 21 10:42
AM 2008

This matter comes before me on petition of the State of South Carolina for an order requiring the Respondent, Thomas Simmons, to submit to a psychiatric examination and to be detained in appropriate secure facility pending a trial pursuant the Sexually Violent Predator Act (South Carolina Code Sections 44-48-10 et seq.).

I have considered the showing made in respect to this matter and am of the opinion that probable cause exists to find that the Respondent is a sexually violent predator as defined by South Carolina Code Section 44-48-30.

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED

That the Respondent shall be:

- (a) Confined upon his max-out date from the South Carolina Department of Corrections in the Horry County Detention Center until a final disposition of this action; and
- (b) Examined and observed at the appropriate facility of the South Carolina Department of Mental Health to determine whether the Respondent suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment.

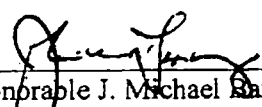
The ordered examination shall be requested by the Office of the Attorney General of South Carolina and scheduled by the examining facility as soon as possible. The Respondent is to arrive at the examining facility at the time established by confirmed appointment with the staff of the examining facility. The Respondent continues under jurisdiction of this Court.

The Court approves Daniel Neller, Forensic Psychologist, Ph.D., to examine the Respondent.

Within five days of the receipt of the written report of the examination by the Office of the Attorney General of South Carolina, said office shall make a copy of such examination available to the Respondent's attorney.

IT IS SO ORDERED.

May 21, 2008
Conway, South Carolina


The Honorable J. Michael Baxley,
Chief Administrative Judge for the
Fifteenth Circuit Court of Common Pleas

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CASE NO. 08-CP-26-3108
	)	
IN THE MATTER OF THE CARE	)	
AND TREATMENT OF	)	ORDER OF COMMITMENT
THOMAS SIMMONS,	)	
RESPONDENT.	)	

FILED
HORRY COUNTY
2008 DEC -2 PM 1:05
MELANIE HUGGINS
CLERK OF COURT

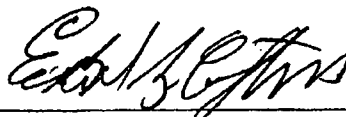
The trial of this case was held in the County of Horry in the Court of Common Pleas beginning December 1, 2008. A jury of citizens from Horry County heard this case pursuant to a request for a jury trial filed by the State. Senior Assistant Attorney General James G. Bogle, Jr. represented the State. Paul Archer, Esquire, represented the Respondent. The jury having heard the presentation of the evidence made the following findings of fact pursuant to South Carolina Code Section(s) 44-48-90 and 44-48-100:

The State has proven beyond a reasonable doubt that Respondent, Thomas Simmons, is a sexually violent predator as that term is defined in South Carolina Code Section 44-48-30;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT

- (a) Respondent is committed to the Department of Mental Health for his long-term control, care and treatment;
- (b) Respondent is to be detained by the Department of Juvenile Justice and transported, as soon as possible, by the Department of Juvenile Justice to a secure facility of the Department of Mental Health.

AND IT IS SO ORDERED.



The Honorable Edward B. Cottingham
Judge for the 15th Judicial Circuit
Court of Common Pleas

Dec 2, 2008
Conway, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF THOMAS SIMMONS,

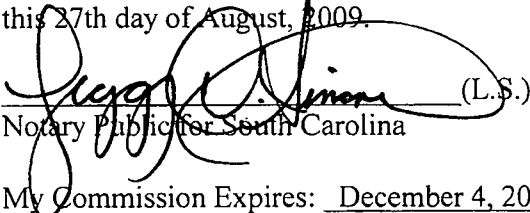
APPELLANT

CERTIFICATE OF SERVICE

I certify that a true copy of the Record on Appeal in the above referenced case has been served upon William M. Blich, Jr., Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 27th day of August, 2009.

Warren T. Ferguson
Administrative Assistant

SUBSCRIBED AND SWORN TO before me
this 27th day of August, 2009.

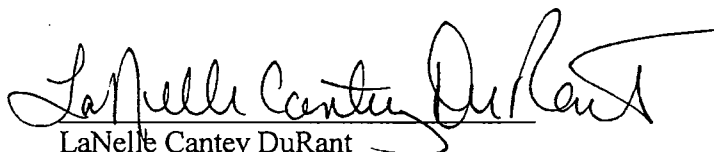
 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

August 27th, 2009



LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF THOMAS SIMMONS,

APPELLANT

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in not granting a directed verdict when the state did not provide evidence on the element of the Sexually Violent Predator Act that appellant was likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment?
2. Did the trial court err in allowing the social worker to give her opinion on whether appellant displayed symptoms of the diagnosis given him by the expert when the social worker was not qualified as an expert and was giving an opinion on the report of the expert?

STATEMENT OF THE CASE

On December 13, 2004, the Family Court of Horry County issued an order committing Thomas Simmons to the Department of Juvenile Justice for an indeterminate time not to exceed his twenty-first birthday for the charges of criminal sexual conduct with a minor first degree (2004-JU26-999) and violation of probation for disturbing schools (2002-JU26-1645). See order dated December 13, 2004. On February 21, 2008, the Multidisciplinary Team reviewed Simmons' file and found probable cause that he was a sexually violent predator. On April 21, 2008, the state filed a petition alleging that Simmons was a sexually violent predator according to S.C. Code Ann. Section 44-48-30(1) (Supp 1998).

A probable cause hearing was held before the Honorable J. Michael Baxley on May 21, 2008 where Judge Baxley found there was probable cause that Simmons was a sexually violent predator under the statute. On December 1 – 2, 2008, Simmons proceeded to trial before the Honorable Edward B. Cottingham and a jury. Simmons was represented by Paul Archer, Esquire. The jury found that Simmons was a sexually violent predator under the South Carolina Sexually Violent Predator Act SVP Act). Judge Cottingham issued an order on December 2, 2008 committing Simmons to the Department of Mental Health for long term control, care and treatment. Simmons' attorney filed a notice of appeal. This appeal follows.

ARGUMENT

1.

The trial court erred in not granting a directed verdict when the state did not provide evidence on the element of the Sexually Violent Predator Act that appellant was likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment.

Thomas Simmons was convicted in Family Court when he was thirteen of criminal sexual conduct with a minor first degree (CSC) and violation of probation for disturbing schools. The CSC incident occurred over a period of three years when Thomas was between the ages of ten and thirteen. Thomas forced his step-nephew to engage in oral, anal and fondling over this time period. The step-nephew was between the ages of six and nine at the time. ROA. 32, ll. 18 – 25; ROA. 33, ll. 1 – 25. ROA. 34, ll. 1 – 25.

Thomas's conviction for disturbing schools was the result of his threatening to take a gun to school to "shove up someone's butt". ROA. 35, ll. 1 – 25.

Dr. Daniel Neller testified as the state's only expert witness. He was the Chief Psychologist for the South Carolina Sexually Violent Predator Program. ROA. 26, ll. 1 – 11. He was admitted by the trial court as an expert in Forensic Psychology. ROA. 26, ll. 12 – 25; ROA. 27, ll. 1 – 25; ROA. 28, ll. 1 – 25; ROA. 29, ll. 1- 17.

Judge Michael Baxley ordered, after the probable cause hearing, that Thomas undergo a psychiatric evaluation to determine if he met the criteria under the SVP Act to be a sexually violent predator. He approved Dr. Daniel Neller to do the evaluation. See Order for Evaluation dated May 21, 2008. Dr. Neller testified that he evaluated Thomas and a file of information about him. He met with Thomas for about seven hours and reviewed files

from the Department of Mental Health (DMH), Department of Juvenile Justice (DJJ), parole reports, petitions, orders, and statement written by Thomas. ROA. 30, ll. 9 – 25; ROA. 31, ll. 1 – 25; ROA. 32, ll. 1 – 25.

Dr. Neller said that Thomas had not been convicted of any other sexual offenses. ROA. 36, ll. 1 – 11. He said that Thomas wrote an empathy letter to the victim as part of his sex offender treatment program in DJJ. Thomas did complete the sex offender treatment administered by DJJ during his incarceration. Dr. Neller testified that Thomas was conflicted because he would hear voices telling him to do it and then would hear voices telling him not to do it. However, Dr. Neller said that Thomas did not have a psychotic disorder. ROA. 36, ll. 13 – 25; ROA. 37, ll. 1 – 25; ROA. 38, ll. 1 – 25; ROA. 39, ll. 1 – 25.

Dr. Neller testified that he diagnosed Thomas as having sexual sadism which he defined as a person who becomes aroused by the harm he is inflicting on another person and enjoys humiliating the person. He said it is a chronic condition but could be treated. ROA. 44, ll. 15 – 25; ROA. 45, ll. 1 – 25.

Although Dr. Neller saw sexual sadism as a mental abnormality, he did not think it meant that Thomas would re-offend again. ROA. 46, ll. 1 – 12. He said that juvenile sex offenders re-offend at a rate of around five to ten percent. While adult sex offenders re-offend at a rate around fifteen percent. ROA. 46, ll. 9 – 25; ROA. 47, ll. 1 – 4; ROA. 50, ll. 17 – 25. Dr. Neller acknowledged that Thomas still had some difficulty controlling his behavior and that he had continued to offend while he was at DJJ. ROA. 48, ll. 12 – 23. He said that even though Thomas was still having some sexual rape fantasies, Dr. Neller said his final decision was that Thomas did NOT meet the criteria to be a sexually violent predator. ROA. 63, ll. 5 – 24; ROA. 64, ll. 1 – 24; ROA. 66, ll. 1 – 15.

Dr. Neller stated that the purpose of the SVP law was to identify an extremely dangerous group of sexual offenders. He did not believe that any expert would support committing Thomas to the program. ROA. 69, ll. 1 – 6. He responded on cross that the average people in the SVP Program were middle-aged men. Thomas would be housed with them maybe for the rest of his life. ROA. 69, ll. 7 – 19; ROA. 68, ll. 6 – 21.

Dr. Neller stated on cross examination again that he did not think that Thomas met the criteria of the SVP statute to be a sexually violent predator. ROA. 69, ll. 20 – 25; ROA. 70, ll. 1 – 4. He said that although in his opinion that Thomas had sexual sadism, he did not think that Thomas was likely to engage in future sexual offenses. He said his expert opinion was that Thomas should not be placed in the SVP Program. ROA. 71, ll. 1 – 25; ROA. 72, ll. 1 – 22. Linda Price, who worked for the South Carolina Board of Juvenile Parole, testified that the Board made a decision in February 2008 to release Thomas. However, release papers were not issued because he had to go through the screening process for the SVP Act. ROA. 77, ll. 17 – 25; ROA. 78, ll. 1 – 25; ROA. 79, ll. 1 – 25.

She met with the juveniles who were being released to discuss their release papers. Thomas was brought for her to discuss his release since he was scheduled to be released. ROA. 80, ll. 1 – 25; ROA. 81, ll. 1 – 6; ROA. 82, ll. 1 – 25; ROA. 83, ll. 1 – 25. When she told Thomas he would have to pay restitution to the victim, she testified that Thomas became extremely upset and slammed the table with his fists saying he should not have to pay for anything. At her insistence, he finally sat down but refused to talk anymore. ROA. 84, ll. 1 – 25; ROA. 85, ll. 1 – 19; ROA. 86, ll. 1 – 10.

Ms Price reported all of this to Gayle Shellenberg, Thomas's supervisor at DJJ, and to Ms. Shellenberg's supervisor. She also prepared a report for them. She also spoke to the

Multidisciplinary Team the following week and informed them. ROA. 86, ll. 11 – 25; ROA. 87, ll. 1 – 25.

On cross examination, Ms. Price admitted that she was not qualified as an expert to say whether Thomas met the criteria to be a sexually violent predator. ROA. 96, ll. 1 – 13.

Ms. Gayle Shellenberg was employed by DJJ as a social worker and said she was licensed as a social worker. ROA. 101, ll. 15 – 25; ROA. 102, ll. 1 – 23. She worked with Thomas at DJJ. She admitted that she was a certified sex offender treatment specialist, but she was not qualified to diagnose as Dr. Neller was. ROA. 117, ll. 4 – 25. She admitted that she could not give an opinion on whether Thomas met the criteria of the SVP Act to be a sexually violent predator. ROA. 118, ll. 1 – 24.

At the close of the state's case, appellant's counsel made a motion for a directed verdict on the basis that the state did not prove beyond a reasonable doubt the requirements of the Sexually Violent Predator Act. The state argued that "it was not so much about what the court-appointed expert, Dr. Neller, said as what he didn't say and what he didn't do." ROA. 120, ll. 11 – 25; ROA. 121, ll. 1 – 25. The judge denied the motion although he said the evidence was "rather weak". ROA. 122, ll. 2 – 25; ROA. 123, ll. 1 – 10.

A trial court has a duty to submit a case to the jury where the evidence is circumstantial if there is substantial circumstantial evidence that reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). A trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id.; State v. Brannon, 379 S.C. 487, 666 S.E.2d 272 (Ct. App. 2008).

In Thomas's case, the state did not meet the elements of the SVP Act. The SVP Act found at S.C. Code Section 44-48-30 provides that a person is a sexually violent predator if (1) he has been convicted of a sexually violent offense; and (2) suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment.

The only expert, Dr. Neller, testified that Thomas had a mental disorder but that he did not think he would re-offend. Dr. Neller's expert opinion was that Thomas should NOT be committed to the SVP Program. Therefore, there was not SUFFICIENT evidence to submit the case to the jury. The other two witnesses did not testify as experts.

The state argued that Dr. Neller did not have the latest information about Thomas's problems. However, Dr. Neller knew when he wrote his report that Thomas still was having sexual rape fantasies and, he testified that he knew that Thomas still had some trouble with control. Therefore, the new information from Ms. Price and Ms. Shellenberg concerning Thomas's behavior would have made no difference in Dr. Neller's report.

The trial court erred in allowing the social worker to give her opinion on whether appellant displayed symptoms of the diagnosis given him by the expert when the social worker was not qualified as an expert and was giving an opinion on the report of the expert.

Ms. Gayle Shellenberg testified that she worked at DJJ as a social worker for eight years, and she worked with Thomas. She said she had a Masters' Degree in social work and was licensed by the state of South Carolina as a social worker. ROA. 101, ll. 13 – 25; ROA. 102, ll. 1 – 25; ROA. 103, ll. 1 – 9.

When asked if she had examined the expert's, Dr. Daniel Neller's, report on Thomas, she responded that she had. The state's attorney handed her a copy. ROA. 106, ll. 10 – 13. The state said that Dr. Neller's report indicated that "Thomas's responses were consistent with anti-social, narcissistic, and paranoid features." ROA. 107, ll. 12 – 25. The state's attorney asked her if Thomas appeared to display these symptoms. Thomas's attorney objected on the grounds that she was not the expert on that. The judge overruled the objection and said that she was not an expert but was allowed to give her opinion. ROA. 108, ll. 1 – 11.

Ms. Shellenberg went on to testify that she had seen Thomas display symptoms of those three features. She said his triggers were entitlement and power and control. She testified that sexual offenders have a cycle where certain things trigger them to go into their offense cycle. She also stated that Thomas had a sense of grandiosity. ROA. 108, ll. 12 – 25.

The state's attorney then asked:

So, when Dr. Neller refers to Thomas having a grandiose sense of self-importance and expects to be recognized as a superior, is that what you're talking about...

She responded; "Yes, I am".

ROA. 108, II. 23-25; ROA. 109, II. 1 – 3.

Ms. Shellenberg admitted to the state and to Thomas's attorney on cross examination that she was not an expert in this case. She said that Dr. Neller was the only expert testifying. ROA. 107, II. 18 – 19; ROA. 118, II. 1 – 25.

Rule 701, SCRE, provides that opinion testimony by a lay witness must be limited to opinions or inferences which (a) are rationally based on the perception of the witness; (b) are helpful to a clear understanding of the witness' testimony; (c) do not require special knowledge, skill, experience or training.

In State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001), the South Carolina Supreme Court held that the police officer who was qualified as an expert in crime scene processing and fingerprint identification exceeded scope of his expertise in testifying in murder prosecution to his conclusion, drawn from crime scene measurements and observations, that victim had been riding a bicycle at time he was shot; in effect, officer was allowed to give an unqualified opinion on the ultimate issue of whether defendant had been acting in self-defense when he shot and killed victim.

In State v. Bottoms, 260 S.C. 187, 195 S.E.2d 116 (1973), the Supreme Court ruled that the opinion of a lay witness must be based upon the personal observations of the witness and not merely upon the statements of another witness.

Gayle Shellenberg was allowed to give her opinion on what the symptoms of the diagnosis given by the expert, Dr. Neller, were. The opinion of what these symptoms were required special knowledge and should have been provided by the expert who wrote the report. Ms. Shellenberg's opinion exceeded the scope of her area of specialty.

Ms. Shellenberg's testimony on her observations of Thomas's behavior should have been limited to the facts. She was not qualified to relate these behaviors to the diagnosis given by the expert. The proper procedure would have been for the expert to describe the symptoms of the diagnosis and then have Ms. Shellenberg describe Thomas's behavior. The conclusion should have been left to the jury.

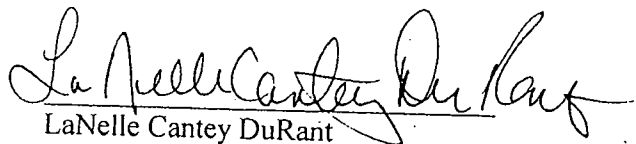
Ms. Shellenberg was allowed to comment on the expert's report when she was not a qualified expert. She was licensed in a different area than the expert psychologist, Dr. Neller.

The trial court should have not allowed Ms. Shellenberg to relate Thomas's behaviors to the diagnosis of the report.

CONCLUSION

Based on the above reasons, the order of the trial court should be reversed, and Thomas Simmons should be released.

Respectfully submitted,

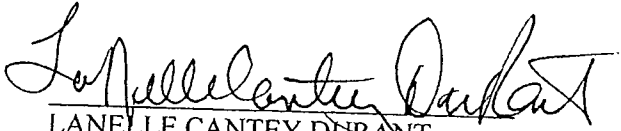

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of September, 2009.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."


LANELLE CANTEY DURANT
Appellate Defender

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

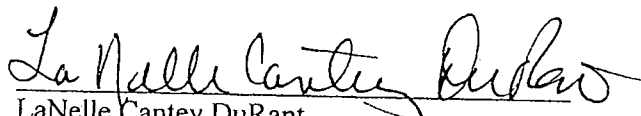
Edward B. Cottingham, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF THOMAS SIMMONS,

APPELLANT

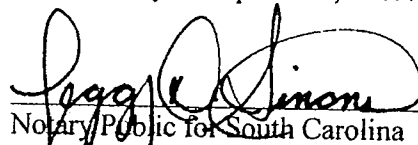
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon William M. Blich, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of September, 2009.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of September, 2009.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

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STATEMENT OF ISSUES ON APPEAL

- I. The trial court properly denied Appellant's motion for a directed verdict. Further, it is questionable whether this issue is properly preserved for review on appeal.
- II. The trial court properly allowed the social worker's testimony because she did not express an opinion, but merely relayed her own personal observations regarding Appellant. Further, it is questionable whether Appellant's argument is preserved for review on appeal.

STATEMENT OF THE CASE

The State agrees with Appellant's procedural Statement of the Case.

ARGUMENT

I. The trial court properly denied Appellant's motion for a directed verdict. Further, it is questionable whether this issue is properly preserved for review on appeal.

Appellant contends the trial court erred in denying his motion for a directed verdict because the State failed to prove Appellant was likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment. First, this issue was not presented to the trial court and is not properly preserved for review on appeal. Additionally, there is ample testimony in the record to support the trial court's decision to send the case to the jury. Finally, Appellant seems to argue expert opinion is required in order to find evidence supporting Appellant is a sexually violent predator; however, this issue was not raised to the trial court and the jury is free to consider or reject the sole expert's testimony.

First, the issue is not properly before the Court on Appeal. The motion for directed verdict made by Appellant at trial did not provide any specific grounds, but merely indicated he believed there was no evidence as far as the sexually violent predator act and the State failed to prove beyond a reasonable doubt. This is similar to the motion made in In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001), which the South Carolina Supreme Court found was insufficient to preserve the issue for review on appeal. Id. at 92-93, 551 S.E.2d at 238 (citing Connolly v. People's Life Ins. Co., 299 S.C. 348, 384 S.E.2d 738 (1989)). Because Appellant failed to provide any specific grounds for his motion for directed verdict, the issue is not preserved for review on appeal.

Additionally, the specific ground as stated in Appellant's Statement of Issues on Appeal that the State failed to "provide evidence on the element of the Sexually Violent Predator Act that appellant was likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care and treatment" was never raised to the trial court and is not properly preserved for review on appeal. In addition, the argument that expert testimony is necessary to support sending an SVP case to the jury was never raised to the trial court for his consideration and is not properly preserved for review on appeal. Id.; see also, Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (finding issue cannot be raised for the first time on appeal and must have been made with specificity before the trial court).

On the merits, there was ample evidence and testimony in the record to support the trial court's decision to allow the case to proceed to the jury. "On an appeal from the trial court's denial of a motion for a directed verdict, the appellate court may only reverse the trial court if there is no evidence to support the trial court's ruling." In re Matthews, 345 S.C. 638, 646-647, 550 S.E.2d 311, 315 (2001) (citing Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999)). In ruling on a motion for directed verdict, the appellate court, like the trial court, is concerned with the existence of evidence, not its weight. Id. (citing State v. Cooper, 334 S.C. 540, 551-552, 514 S.E.2d 584, 590 (1999)).

A sexually violent predator is a person who "(a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." S.C. Code Ann. § 44-48-30(1) (Supp. 2007). It is indisputable that Appellant meets the requirement of section 44-48-30(1)(a) as he was adjudicated delinquent for criminal sexual conduct with a minor, first degree. See S.C. Code

Ann. §§ 44-48-30(2)(d) & 44-48-30(6)(b) (Supp. 2007). Appellant appears to concede that he has a mental abnormality, and the State provided evidence of his mental abnormality through Dr. Neller diagnosing Appellant with sexual sadism. (App.Br.6-7; 9; T.44-45; R.44-45). Therefore, Appellant's only contention is that the State failed to provide evidence he was "likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."

Section 44-48-30 provides "[l]ikely to engage in acts of sexual violence' means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." S.C. Code Ann. § 44-48-30(9) (Supp. 2007). The State provided evidence demonstrating Appellant's propensity to commit future acts of sexual violence.

Dr. Neller testified as an expert for the court. He testified Appellant suffered from sexual sadism which "describes a person who, enjoys humiliating, a person who enjoys harming a person and becomes sexually aroused by the harm he's inflicting on a person." (T.44-46; R. 44-46). While Dr. Neller indicated he could not find Appellant was likely to engage in acts of sexual violence, he admitted he did not speak to several people with significant information available related to Appellant. (T.74-75; R. 74-45).

The facts presented at the hearing clearly disputed Dr. Neller's belief that Appellant would not commit acts of sexual violence and were clearly believed by the jury more than Dr. Neller's conclusion. Over a period of three years, Appellant engaged in anal rape, forcible oral sex, and fondling of a step-nephew who was between the ages of six to nine at the time. (T.34; R. 34). Appellant's own written statement of the events indicate he "was always listening to the wrong voice. One would say 'do it,' while the other would say 'don't

do it.”” (T.38, State’s Exhibit 4; R. 38; 129-130). Further, he indicated “I raped him [his step-nephew] because he wasn’t willing to do what I wanted him to do.” (T. 38; State’s Exhibit 4; R. 38; 129-130).

Appellant’s other charge was for disturbing schools. While it is not a sexually based crime, the undertones of Appellant’s offense are sufficient to give one pause. Specifically, Appellant threatened to bring a gun to school to shoot someone and to “shove [the gun] up a person’s butt.” (T.35; 60; R. 35; 60).

In addition to the two charges, Appellant had a history of violent and aggressive behavior. Appellant acknowledged harming the family cat when he was upset or angry. (T.59; R. 59). Further, he was committed for treatment after he attempted to poison his parents by pouring veterinary medicine into their tea. (T.60; R. 60). While committed, Appellant had thirty disciplinary infractions, including fashioning a weapon and aggressiveness toward other juveniles and staff members. (T.61; R. 61).

Some of the information presented by witnesses with first-hand knowledge of Appellant was contradictory to the information Dr. Neller received from Appellant and apparently relied upon in reaching his conclusion. First, Dr. Neller reported Appellant was taking several medications including Adderall, Wellbutrin, and Tenex. Gayle Shellenberg, Appellant’s social worker with the South Carolina Department of Juvenile Justice, testified he was not taking those medications and had not been on them for almost a year and a half prior to the time of his interview with Dr. Neller. (T.111; R. 111). Further, Dr. Neller indicated Appellant had not received any level drops, lockups, or major write-ups in the past year. Ms. Shellenberg, however, testified Appellant had eleven level drops for various

reasons including disorderly conduct, refusing to obey instructions, disrespect, and threatening conduct. (T.111-112; R. 111-112).

Appellant was described by several witnesses as having "a grandiose sense of self-importance and expects to be recognized as superior." (T.53; R. 53). Further, "prides himself on being smarter than staff and aligns himself with the program coordinators and refers to them on a first name basis." (T.56; R. 56). Appellant demonstrates "a sense of entitlement" and will "take advantage of other juveniles and staff if he feels that it will benefit him." (T.56-57; R. 56-57).

Appellant has shown no empathy for the violent sexual acts he committed against his step-nephew. Linda Price, a parole examiner for the South Carolina Juvenile Parole Board, testified about an incident involving Appellant when she discussed the terms of his possible release from DJJ. She stated he arrived calm and relaxed. When Appellant learned the Juvenile Parole Board ordered restitution for the victim, Appellant's behavior completely changed. She testified:

[Appellant] got very loud and red-faced. He yelled, slammed the table with his fists and then got out of his chair and started pacing around in a circle while stating his opinion that he should not have to pay for anything.

He talked rapidly and yelled as he questioned why he had to pay restitution. [Appellant] continued to use a loud tone and got louder as he blurted more words blaming the victim for his commitment.

He also stated, "They should have to pay for me. Whose going to have to pay for me?"

(T.85; R. 85). This exchange demonstrates Appellant refuses to accept responsibility for what he did to his step-nephew and shows his sense of entitlement as well as his belief he is the victim in this case.

Most significant, Appellant continues to have very vivid, deviate, violent sexual fantasies. Appellant also has lapses in the sex offender treatment he has received when he experiences the fantasies involving force and sadistic behavior because he chooses not to use "his thought stopping but engages in masturbation even though he is aware that this is a lapse in treatment." (T.53; R. 53).

Appellant "fantasized about finding a young girl, transporting her to a wooded area and beating, raping, and murdering her." (T.61; R. 61). "He also fantasized about kidnapping a adolescent female relative. He fantasized that in order for the family to get the child back, anyone who loved the little girl would have to perform oral sex on him." (T.61-62; R. 61-62). One of Appellant's most recent fantasies, of the type he was having weekly when interviewed by Dr. Neller, was described:

He described a recent rape fantasy in which he waited for a dancer to leave a strip club and approached her from behind. In the fantasy he brandished a knife. She gasped, and he asked her if she wanted to engage in sexual activity. Out of fear, she went along with it. He forced her to the car where he penetrated her from behind.

(T.64; R. 64). In order to make his mental fantasies more concrete while committed to DJJ, Appellant downloaded pornographic cartoons from the internet. One cartoon depicted a sadistic, violent rape of a girl. (T.112-113; R. 112-113).

The details of Appellant's history as well as his recent behavior and fantasies demonstrate a clear propensity for him to commit acts of sexual violence such that he poses a menace to the health and safety of others. His recent weekly fantasies, vividly describing violent sexual attacks of women and girls are sufficient evidence to support the trial court's denial of Appellant's motion for directed verdict and sending the case to the jury. The

testimony of Appellant's fantasies of bondage, power, and rape, coupled with the examples and descriptions of Appellant's past behavior and attitude toward others, paint a vivid picture of someone who is clearly a member of the mentally abnormal and extremely dangerous group of sexually violent predators for whom the SVP Act was created in order to provide for their involuntary civil commitment in a secure facility for long-term control, care, and treatment.

Further, the testimony of an expert is not necessary to establish the likelihood that Appellant would engage in future acts of sexual violence and the jury was free to accept or reject any portion of the testimony presented by any of the witnesses at trial, including Dr. Neller. "As a general rule, the jury is free to accept or reject in whole or in part the testimony of any witness, including an expert witness." Sauers v. Poulin Bros. Homes, Inc., 328 S.C. 601, 605, 493 S.E.2d 503, 504 (Ct. App. 1997) (citing State v. Milian-Hernandez, 287 S.C. 183, 186, 336 S.E.2d 476, 478 (1985) (The jury may properly disregard expert testimony.); State v. Campen, 321 S.C. 505, 510, 469 S.E.2d 619, 622 (Ct. App. 1996) (Although the only expert testimony established that the defendant had the ability to conform his conduct to standards of right and wrong, the expert's testimony was not "dispositive, inasmuch as the jury could have elected to disregard [the expert's opinion]."); State v. Smith, 304 S.C. 129, 131, 403 S.E.2d 162, 163 (Ct. App. 1991) (The jury is free to believe one portion of a witness's testimony and disbelieve another.); accord, Smith v. Safeco Life Ins. Co., 303 S.C. 131, 399 S.E.2d 427 (Ct. App. 1990)).

Additionally, the State was not required to present expert testimony of its own in order to directly refute the testimony of Dr. Neller, the court appointed evaluator. See e.g., Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991); see also, Sauers

v. Poulin Bros. Homes, Inc., 328 S.C. at 606, 493 S.E.2d at 504-05. The testimony by lay witnesses may be believed by the jury over the testimony of the expert witness, and the jury is free to accept or reject any portion of the testimony of the expert and other witnesses.

Accordingly, even assuming the issue is properly preserved for review on appeal, the trial court did not err in denying Appellant's motion for a directed verdict. Ample evidence supported the finding Appellant is a sexually violent predator. Expert testimony was not necessary in order for the jury to be able to conclude Appellant has been convicted of a sexually violent offense and suffers from a mental abnormality or personality disorder that makes him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. Therefore, the trial court did not err in denying Appellant's motion for directed verdict.

II. The trial court properly allowed the social worker's testimony because she did not express an opinion, but merely relayed her own personal observations regarding Appellant. Further, it is questionable whether Appellant's argument is preserved for review on appeal.

Appellant contends the trial court erred in allowing Gayle Shellenberg, a social worker with the Department of Juvenile Justice, to testify regarding whether Appellant displayed symptoms consistent with Dr. Neller's diagnosis. Shellenberg did not render an opinion regarding Appellant's diagnosis, but merely articulated Appellant's behaviors she had personally witnessed. Also, this issue is not properly preserved for review on appeal.

First, the issue is not properly preserved for review on appeal. Appellant objected in the middle of when Shellenberg was asked: "Does he seem to display - - - ." The objection was "she's not an expert in this." The question was clearly seeking her personal observations and was not a comment on Dr. Neller's report. Importantly, Appellant did not object when Shellenberg was offering her descriptions of Appellant's behaviors as detailed by the diagnosis offered by Dr. Neller, nor when she was explaining the triggers for Appellant's behaviors. Therefore, the issue as raised by Appellant is not preserved for review on appeal and Appellant failed to make a contemporaneous objection when Shellenberg's testimony was introduced. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

On the merits, Shellenberg's testimony was appropriate and properly admitted because it was based on her personal observations and did not require specialized knowledge or expertise. "Lay witnesses are permitted to offer testimony in the form of opinions or inferences if the opinions or inferences are rationally based on the witness' perception, and will aid the jury in understanding testimony, and do not require special knowledge. State v. Douglas, 380 S.C. 499, 502, 671 S.E.2d 606, 608 (2009) (citing Rule 701, SCORE; State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996)). As stated in Williams:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding the witness has personal knowledge of the matter. The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge. Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury. The terms "fact" and "opinion" denote merely a difference of degree of concreteness of description. Some statements are not mere opinions but are impressions drawn from collected, observed facts. A natural inference based on stated facts is not opinion evidence. Where the distinction between fact and opinion is blurred, it is often best to leave the matter to the discretion of the trial judge.

State v. Williams, 321 S.C. 455, 463-464, 469 S.E.2d 49, 54 (1996) (internal citations omitted); see also, Small v. Pioneer Machinery, Inc., 329 S.C. 448, 468, 494 S.E.2d 835, 845 (Ct. App. 1997) (finding opinion of lay witness who operated a log skidder was admissible because it was based on personal observations, "special knowledge and experience in the daily operation of the machine, as well as the environment in which it was used.").

Shellenberg testified she was familiar with Appellant and his behaviors and had witnessed his behavior. Further, she testified she heard Dr. Neller discuss his report, including his reliance on a memorandum written by Shellenberg detailing Appellant's

behaviors. (T.106-107; R. 106-107). She testified she was familiar with kids displaying anti-social, narcissistic, and paranoid features and had worked with Appellant when he displayed those features. (T.107-108; R. 107-108). Shellenberg testified about Appellant's behavior and how she saw triggers causing his behaviors. She testified regarding his belief that he was more superior than others and how he did things because others were getting more attention or he felt like the victim. (T.108-109; R. 108-109).

Shellenberg's testimony was not expert opinion rendering a diagnosis, but was merely reciting behaviors she had witnessed or had personal knowledge of which were consistent with the diagnosis previously testified to by Dr. Neller. Her testimony was designed to aid the jury in understanding Appellant's behaviors and what is likely to cause him to reoffend, which is one of the main considerations of the SVP Act. See In re Care and Treatment of Corley, 353 S.C. 202, 207, 577 S.E.2d 451, 454 (2003) (finding "a person's dangerous propensities are the focus of the SVP Act."). Further, given her experience as Appellant's social worker while in DJJ, and her history of dealing with children with similar behaviors, her testimony was particularly relevant in aiding the jury to reach a conclusion regarding Appellant's propensity to reoffend. As a result, the trial court did not err in allowing the testimony into evidence.

CONCLUSION

Based on the foregoing, Respondent State of South Carolina respectfully submits the circuit court properly denied Appellant's motion for directed verdict and allowed Shellenberg's lay witness testimony because it was based on her personal observations and experience. As a result, the jury's finding that Appellant is a sexually violent predator and the trial court's commitment order should be affirmed.

Respectfully submitted,

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September 16, 2009

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Horry County
Hon. Edward B. Cottingham, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT
OF THOMAS SIMMONS,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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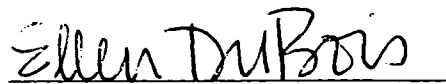
PROOF OF SERVICE

I, Ellen DuBois, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 16th day of September, 2009.


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